Slobodan karic v. Major Auto. Cos.

United States District Court for the Eastern District of New York

December 22, 2015, Decided; December 22, 2015, Filed

09 CV 5708 (ENV)

Reporter
2015 U.S. Dist. LEXIS 171730

SLOBODANKARIC, et al., Plaintiffs, - against - THE MAJOR AUTOMOTIVE COMPANIES, INC., et al., Defendants.

Core Terms

settlement, plaintiffs', class member, parties, notice, settlement agreement, proposed settlement, class action, certification, damages, preliminary approval, recommends, settlement fund, discovery, defendants', days, named plaintiff, negotiations, Appointment, Citations, issues, fail to pay, conditional, settling, mailed, summary judgment motion, notice of settlement, rule requirements, individuals, predominate

Counsel: **[*1]** For Slobodan Karic, Claribel Garcia, Steven Jones, Ljubomir Zivanovic, Daniel Colon, William Chatman, on behalf of themselves and all others similarly situated, Goran Stanic, Plaintiffs: Brian Scott Schaffer, Eric Joshua Gitig, Frank Joseph Mazzaferro, Joseph A. Fitapelli, Fitapelli & Schaffer LLP, New York, NY.

For The Major Automotive Companies, Inc., Major Universe, Inc., doing business as, Major World Ford Lincoln Mercury, Major Chevrolet Geo, Major Chevrolet, Inc., Major Chrysler Jeep Dodge, Inc, Major Motors of Long Island City, Inc, doing business as, Major Kia, Major Motors of the Five Towns, Inc., Major Automotive Realty Corp., Harold Bendell, Bruce Bendall, Defendants: Lee Squitieri, Squitieri & Fearon, LLP, New York, NY; Steven J. Harfenist, HARFENIST KRAUT & PERLSTEIN, LLP, Lake Success, NY.

For Chris Orsaris, Individually, Defendant: Christopher E. Chang, Law Offices of Christopher E. Chang, New York, NY.

Judges: Cheryl L. Pollak, United States Magistrate Judge.

Opinion by: Cheryl L. Pollak

Opinion

REPORT & RECOMMENDATION

On December 30, 2009, plaintiffs Slobodan Karic, Claribel Garcia, Steven Jones, Goran Stanic, Ljubomir Zivanovic, Daniel Colon, and William Chatman (collectively, "plaintiffs" and "named **[*2]** plaintiffs") commenced this action against The Major Automotive Companies, Inc.[1] ("Major World") and three individual defendants, Bruce Bendell, Harold Bendell, and Christopher Orsaris (collectively with Major World, "defendants"), alleging violations of the Fair Labor Standards Act ("FLSA"), *29 U.S.C. §§ 201* et seq., and the New York Labor Law ("NYLL"), based on defendants' failure to pay plaintiffs and similarly situated sales representatives proper minimum wages. (Am. Compl.[2] PP 1, 22-23).

On July 13, 2015, plaintiffs notified the undersigned that the case had settled and that the parties were finalizing the settlement agreement. The next day, on July 14, 2015, the undersigned Ordered the parties to submit a motion for settlement approval. **[*3]** In accordance with this Order, on August 21, 2015, plaintiffs, with the consent of defendants, made a motion for preliminary approval of the settlement. Thereafter, on September 1, 2015, the Honorable Eric N. Vitaliano referred the motion to the undersigned for a Report and Recommendation.

Presently before this Court is plaintiffs' motion, requesting: (1) an Order for preliminary approval of the Joint Settlement Agreement and Release (the "Settlement Agreement"); (2) conditional certification of the Settlement Class for purposes of effectuating the settlement; (3) appointment of plaintiffs' counsel, Fitapelli & Schaffer, LLP as Class Counsel; (4) approval of plaintiffs' proposed Notice of Proposed

[1] Defendants include the Major Automotive Companies, Inc., Major Universe, Inc., Major Universe, Inc., d/b/a Major Ford Lincoln Mercury, Major Chevrolet GEO, Major Chevrolet, Inc., Major Chrysler Jeep Dodge, Inc., Major Motors of Long Island City, Inc., d/b/a Major Kia, Major Motors of the Five Towns, Inc., and Major Automotive Realty Corp. (collectively, "Major World").

[2] Citations to "Am. Compl." refer to plaintiffs' First Amended Complaint, filed on February 3, 2011.

Settlement (the "Notice") that will be mailed to Class Members; and (5) approval of plaintiffs' proposed schedule for final settlement approval. (Pls.' Mem.[3] at 1).

BACKGROUND

Plaintiffs bring this action on behalf of 89 individuals who opted into the instant matter (the "Class Members"), including the named plaintiffs, who were employed by Major World car dealerships as sales representatives at any time between December 30, 2003 through November 24, 2014 (the "Class" and the "Class Period"). (Settlement Agreement[4] § 1.6). Plaintiffs state that Major World, which operates nine automobile retailers in the New York City Metropolitan Area[5] (see Am. Compl. P3), hired plaintiffs and others as new and used vehicles sales representatives. (Pls' Mem. at 1; Fitapelli Dec.[6] P 5). Plaintiffs allege that defendants failed pay employees the correct minimum wage rate, failed to pay plaintiffs the commissions earned accordance with the agreed upon terms of their employment, made unlawful deductions from plaintiffs' wages, failed to pay employees overtime compensation for hours worked in excess of 40 hours per week, and failed to pay spread-of-hours wages in violation of the FLSA and NYLL. (Am. Compl. P 1; Pls.' Mem. at 1, 3; Fitapelli Decl. P 5). As a result of defendants' failure to pay plaintiffs their earned commissions, plaintiffs also bring claims of breach **[*5]** of contract, quantum meruit, unjust enrichment, and conversion against defendants. (See id.)

Since filing the Complaint and Amended **[*6]** Complaint, the parties have engaged in a "highly adversarial litigation," largely because the business practices at issue in the case were considered "industry standard" at the time. (See Pls.' Mem. at 3; Fitapelli Decl. P 8). The parties have performed extensive discovery, including the production of thousands of documents, an onsite review of defendants' documents, and several depositions. (Pls.' Mem. at 3; Fitapelli Decl. PP 9-10). The parties have also engaged in significant motion practice, including several discovery disputes involving the insufficiency of defendants' document productions and their responses to plaintiffs' document requests, plaintiffs' motion for conditional certification, plaintiffs' motion for summary judgment, and defendants' motion to strike plaintiffs' class action allegations from the Amended Complaint. (Fitapelli Decl. PP 14, 34, 57, 61).

On August 30, 2011, this Court granted plaintiffs' motion for conditional certification and approved plaintiffs' proposed collective notice, which was sent to potential collective members on September 12, 2011. (Pls.' Mem. at 4; Fitapelli Decl. P 35). On May 29, 2012, the parties requested that the Court issue a 60 day **[*7]** stay in order to allow the parties to discuss a possible settlement. (Pls.' Mem. at 5; Fitapelli Decl. P 50). The next day, the Court granted this request. However, the parties were unable to reach a settlement during the stay, and on December 14, 2012, plaintiffs requested a pre-motion conference before Judge Vitaliano to discuss their proposed motion for summary judgment. (Pls.' Mem. at 5; Fitapelli Decl. P 55). On March 6, 2013, Judge Vitaliano granted plaintiffs' request to move for summary judgment and by September 11, 2013, the motion was fully briefed. (Fitapelli Decl. PP 59-60).

During the pendency of plaintiffs' motion for summary judgment, defendants served an offer of judgment, pursuant to *Fed. R. Civ. P. 68*, to the named plaintiffs' and opt-in plaintiffs' FLSA minimum wage claims. (Id. P 63). Defendants' offer accounted for full damages pursuant to the FLSA, including liquidated damages for all 89 opt-in plaintiffs in the amount of $423,569.92. (See id.) Plaintiffs accepted this offer on March 12, 2014. (See id. P 64) Thereafter, after considering plaintiffs' acceptance of defendants' *Rule 68* offer, Judge Vitaliano granted plaintiffs' motion for summary judgment as to the NYLL violations on April 16, 2014. (See **[*8]** id. P 65). Judge Vitaliano held that defendants willfully: (1) violated the NYLL's minimum wage and overtime provisions; (2) violated plaintiffs' commission agreements; and (3) made unlawful deductions from plaintiffs' wages. (See Order[7] at 13; Fitapelli Decl. P 65). Judge

[3] Citations to "Pls.' Mem." refer to plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of the Settlement Class, Appointment of Plaintiffs' Counsel as Class Counsel, and Approval of Plaintiffs' Proposed Notice of Settlement, filed August 21, **[*4]** 2015.

[4] Citations to "Settlement Agreement" refer to the Settlement Agreement filed as Exhibit A to Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of the Settlement Class, Appointment of Plaintiffs' Counsel as Class Counsel, and Approval of Plaintiffs' Proposed Notice of Settlement, dated August 21, 2015.

[5] Major World, which also operates Major Fleet and Leasing, the leading supplier of taxis and police cars in New York, is a lessor of trucks, and distributes General Motors vehicles in the former Soviet Union. In addition to selling vehicles, Major World sells replacement parts and provides repair service and maintenance. (Am. Compl. P 3).

[6] Citations to "Fitapelli Decl." refer to the Declaration of Joseph A. Fitapelli in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of the Settlement Class, Appointment of Plaintiffs' Counsel as Class Counsel, and Approval of Plaintiffs' Proposed Notice of Settlement and Class Action Settlement Procedure, dated August 21, 2015.

[7] Citations to "Order" refer to Judge Vitaliano's Memorandum and Order granting plaintiffs' Motion for Summary Judgment, dated

Vitaliano also found that defendants Bruce Bendell and Harold Bendell were individually liable for Major World's NYLL violations. (Order at 12; Fitapelli Decl. P 65).

Even though plaintiffs succeeded on their motion for summary judgment, defendants continued to litigate the case, and after several conferences before the undersigned, followed by several meet and confers, the parties agreed to proceed with a private mediation. (Fitapelli Decl. P 66-67). On November 24, 2014, the second full day of mediation, the parties were able to reach a settlement in principle and executed a memorandum of understanding ("MOU"), which placed strict requirements on the parties with respect to the form, distribution, and calculation of individual settlement amounts. (Id. PP 72, 73). In accordance with the MOU, on March **[*9]** 20, 2015, defendant issued checks to all plaintiffs in the total amount of $423,569.92, for the offer of judgment on plaintiffs' FLSA claims. (Id. P 77). The parties continued to negotiate the terms of the settlement and by August 2015, the parties signed the Settlement Agreement. (Id. P 78).

Accordingly, plaintiffs request that, for settlement purposes only, the Court conditionally certify the "NYLL" class under *Federal Rule of Civil Procedure 23(e)*, which covers all persons who were employed by defendants as new and used vehicles sales representatives at any time between December 30, 2003 through November 24, 2014. (Settlement Agreement §§ 1.6-1.7).

As part of the Settlement Agreement, the parties will create a settlement fund of $5,500,000 (the "Settlement Fund") to resolve the remaining NYLL claims and cover court-approved attorneys' fees and costs, service awards to plaintiffs, Claims Administrator's fees, payroll taxes, and any costs and/or expenses arising out of or related to the litigation. (See Fitapelli Decl. PP 79, 83; Settlement Agreement § 1.23). The Settlement Fund is exclusive of the $423,569.92 previously paid for the FLSA damages. The Angeion Group will serve as Claims Administrator and be responsible for calculating the amount to be **[*10]** paid to each class member. (Pls.' Mem. at 9; Fitapelli Decl. PP 75-76). The Settlement allocation to Class Members will be on a pro-rata basis based upon the number of vehicles sold by a Class Member during the Class Period. (Pls.' Mem. at 9; Fitapelli Decl. P 83; Settlement Agreement § 3.4). In that regard, defendants have provided plaintiffs' counsel with the number of vehicles sold by each Class Member, which numbers have been independently verified by an accountant. (Pls.' Mem. at 9; Fitapelli Decl. PP 75-76).

At a later date, the seven named plaintiffs will apply for service awards of $20,000 each, in recognition of the services they rendered on behalf of the class over the past five and one half years. ("Service Awards"). (See Pls.' Mem. at 9; Settlement Agreement § 3.3). Similarly, plaintiffs' counsel will also apply for up to one third of the Settlement Fund in attorneys' fees ($1,833,333.33), and expenses and costs of up to $39,000, subject to approval by the Court.[8] (See Pls.' Mem. at 9; Settlement Agreement §§ 3.1(A), 3.2(A)). Finally, the Claims Administrator will be paid up to $17,000 in fees out of the Settlement Fund. (Pls.' Mem. at 10; Settlement Agreement § 1.5).

As to the class action settlement procedure, plaintiffs have outlined three district steps: (1) preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval; (2) dissemination of notice of settlement to all class members; and (3) a final settlement approval hearing before the Court. (Pls.' Mem. at 10). At this time, plaintiffs request that the Court take the first step now, by preliminarily approving the proposed settlement, conditionally certifying the settlement class, approving plaintiffs' proposed notice, and authorizing plaintiffs to send notices. (See id.) The parties have submitted the following proposed schedule:

1) Notices will be mailed within 30 days after the Court grants plaintiffs' motion for preliminary approval of settlement. (Settlement Agreement §§ 2.5(A)-(B)). Notices will be mailed by the Claims Administrator to the last known address of each Class Member. The Claims Administrator will take reasonable steps to obtain the correct addresses of any Class Member whose notice is returned as undeliverable and will attempt re-mailing. (Pls.' **[*12]** Mem. at 26).

2) Class Members will have 60 days after the Notice is mailed to return a claim form, opt out of the settlement or object to it ("Notice Period"). (Settlement Agreement §§ 2.6(A), 2.7(A), 2.8(A)). Class Members who do not timely opt out will release defendants from all wage and hour claims under the NYLL. (Id. § 3.6; Pls.' Mem. at 9).

3) A final fairness hearing will be held before the Court and plaintiffs will file a motion for final approval of settlement no later than 15 days before the fairness hearing.

4) If the settlement is approved by the Court, the Court will issue a Final Order and Judgment. The Effective Date of the settlement will be 30 days after the Court enters its Final Order and Judgment. (Settlement Agreement § 1.13(A), (B)).

5) The Settlement Claims Administrator will disburse the settlement checks to the Class Members, as well as Class

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April 16, 2014.

[8] Plaintiffs do not request that the **[*11]** Court address their proposed attorneys' fees awards or service awards at this time.

Counsel's attorneys' fees and costs, within 10 days after the Effective Date. (Id. § 3.1(C)).

Plaintiffs, with the consent of defendants, move for an Order preliminarily approving the proposed settlement embodied in the Settlement Agreement and the Notice to the Class members. (Pls.' Mem. at 10-11).

DISCUSSION

I. *Rule 23* Class Certification

Rule 23(a) of the Federal Rules of Civil Procedure governs class certification, providing: **[*13]**

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

In addition to satisfying these prerequisites, plaintiffs must also satisfy one of the three subdivisions of *Rule 23(b)*: (1) that separate actions pose a risk of inconsistent adjudications or would substantially impair the ability of other individuals to protect their interests; (2) injunctive or declaratory relief is sought concerning the class as a whole; or (3) common questions of law or fact predominate over individual questions and a class action is superior to other methods for bringing suit. *Fed. R. Civ. P. 23(b)*. See generally *Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997)*. It is plaintiffs' burden to establish compliance with the requirements of *Rule 23*, but in analyzing the issue of certification, the court accepts as true the allegations in the complaint regarding the merits of the claim. See *D'Alauro v. GC Servs. Ltd. P'ship 168 F.R.D. 451, 454 (E.D.N. Y. 1996)* (citation omitted). **[*14]** Pursuant to *Rule 23(c)(1) of the Federal Rules of Civil Procedure*, "the court can make a conditional determination of whether an action should be maintained as a class action, subject to final approval at a later date." *Collier v. Montgomery Cnty. Hous. Auth., 192 F.R.D. 176, 181 (E.D. Pa. 2000)*.

For purposes of settlement only, defendants do not oppose conditional certification. (See Pls.' Mem. at 19 (citing Newberg on Class Actions § 11.27 (4th ed. 2002) (stating that "when the court has not yet entered a formal order determining that the action may be maintained as a class action, the parties may stipulate that it be maintained as a class action for the purpose of settlement only"); *County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989)* (holding that "[i]t is appropriate for the parties to a class action suit to negotiate a proposed settlement of the action prior to certification of the class"), aff'd in part, rev'd in part on other grounds, *907 F.2d 1295 (2d Cir. 1990)))*.

A. The Requirements of *Rule 23(a)*

1. Numerosity

In this case, there appears to be no dispute that the numerosity requirement of *Rule 23(a)* has been satisfied. As noted, there are 89 Class Members (see Pls.' Mem. at 20), and factors such as the inconvenience of trying individual actions, as well as the financial resources of potential class members, weigh heavily in favor of a class action in this case. See *Saving v. Comput. Credit, Inc., 173 F.R.D. 346, 351 (E.D.N. Y. 1997)*, aff'd, *164 F.3d 81 (2d Cir. 1998)*. Moreover, the Second Circuit has noted **[*15]** that "numerosity is presumed at a level of 40 members." *Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir.)*, cert denied, *115 U.S. 2277 (1995)*; see also *Alleyne v. Time Moving & Storage Inc., 264 F.R.D. 41, 48 (E.D.N.Y. 2010)*. Accordingly, the Court finds that the requirement of numerosity has been satisfied.

2. Common Questions of Fact or Law

In determining whether plaintiffs can show that the claims of the potential Class Members share common questions of law or fact, the Rule does not require that "'all questions of law or fact raised be common.'" *Savino v. Comput. Credit, Inc., 173 F.R.D. at 352* (quoting *Halford v. Goodyear Tire & Rubber Co., 161 F.R.D. 13,18 (W.D.N.Y. 1995T)*: *Frank v. Eastman Kodak Co., 228 F.R.D. 174, 181 (W.D.N.Y. 2005)* (holding that the claims need not be identical to satisfy the commonality requirement, but that they must share common questions of law or fact). There must be a "unifying thread" among the claims to warrant class certification. *Kamean v. Local 363. Int'l Bhd. of Teamsters, 109 F.R.D. 391, 394 (S.D.N. Y. 1986)*. As long as "common questions .. . predominate," any differences in the circumstances raised by individual members will not defeat the requirement of commonality. *In re Sadia. S.A. Sec. Litig., 269 F.R.D. 298, 304 (S.D.N.Y. 2010)*. In other words, "there need only be a single issue common to all members of the class," as the "critical inquiry is whether the common questions lay at the 'core' of the cause of action alleged." *Savino v. Comput. Credit. Inc., 173 F.R.D. at 352*.

Here, there are several common legal and factual issues in this case. Specifically, named plaintiffs and the Class Members all bring identical claims, alleging that defendants: (1) failed **[*16]** to pay plaintiffs and the Class Members in

accordance with their commission agreements; (2) made unlawful deductions from plaintiffs' and Class Members' wages; and (3) failed to maintain required records and pay proper wages. (Pls.' Mem. at 21). As such, the Court finds that there are common issues sufficient to satisfy the requirements of *Rule 23(a)(2)*.

3. Typicality

Rule 23(a)(3) requires that plaintiffs' claims be typical of the claims of the Class. Typicality has been found "when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." Robidoux v. Celani, 987 F.2d at 936. Typicality is "usually met irrespective of varying fact patterns which underlie individual claims" so long as the claims of the class representative are typical of the class members' claims. *Bourlas v. Davis Law Assocs., 237 F.R.D. 345, 351 (E.D.N.Y. 2006)* (quoting *D'Alauro v. GC Servs. Ltd. P'ship, 168 F.R.D. at 456-57*).

Here, plaintiffs' claims arise from the same factual and legal circumstances that form the bases of the Class Members' claims. (Pls.' Mem. at 22). First, plaintiffs and the Class Members all allege that defendants failed to pay them in accordance with the NYLL. (Id.) Second, they allege that the manner by which defendants failed to pay plaintiffs and the Class Members demonstrated **[*17]** a company policy and pattern. (Id.) Third, plaintiffs claim that they suffered the same injuries suggested by the other Class Members. Irrespective of any differences in the amounts of overtime, wages or maintenance allowances owed, plaintiffs' claims and the claims of the Class Members all stem from defendants' alleged uniformly wrongful conduct; plaintiffs' claims are therefore sufficiently typical to warrant certification.

4. Adequacy of Representation

In order to satisfy *Rule 23(a)(4)*, which requires the interests of the class to be adequately represented, the Second Circuit has established a two-prong test. *In re Drexel Burnham Lambert Grp., 960 F.2d 285, 291 (2d Cir. 1992)*. First, there must be a showing that class counsel is "'qualified, experienced and generally able' to conduct the litigation." *Halford v. Goodyear Tire & Rubber Co., 161 F.R.D. at 19* (quoting *Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968)*, vacated on other grounds, *417 U.S. 156 (1974)*). Second, the class members' interests may not be "'antagonistic'" to one another. *County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1413 (E.D.N.Y. 1989)*, aff'd, *907 F.2d 1295 (2d Cir. 1990)*.

Here, plaintiffs' counsel claim to have extensive experience in prosecuting wage and hour class actions, and have been appointed and certified as counsel in several certified collective actions. (Fitapelli Decl. PP 87-89). Indeed, plaintiffs' counsel claim that they have demonstrated their ability to prosecute this case diligently and **[*18]** to represent the interests of the potential Class Members in that they have done substantial work identifying, investigating, prosecuting, and settling the claims over the past four years. (Pls.' Mem. at 25).

Plaintiffs' counsel also represent that neither the plaintiffs nor plaintiffs' counsel have any conflict of interest with the Class Members. (Pls.' Mem. at 23). In order for a potential or actual conflict to defeat certification, it "must be fundamental." *In re Flag Telecom Holdings, Ltd. Sees. Litig., 574 F.3d 29, 36 (2d Cir. 2009)* (internal quotation marks and citations omitted). Based on the nature of the plaintiffs' claims and on the representation that no conflict of interest exists, the Court finds that plaintiffs' claims are so interrelated with those of the Class Members that plaintiffs will serve as adequate Class representatives.

B. The Requirements of *Rule 23(W3)*

1. Common Questions Predominate Over Individual Issues

Plaintiff must also establish that the proposed Class meets the requirements of *Fed. R. Civ. P. 23(b)(3)*. Under *Rule 23(b)(3)*, a proposed class must be sufficiently cohesive and common issues must predominate in order to warrant adjudication as a class. *Amchem Prods. Inc. v. Windsor, 521 U.S. at 623*. Courts focus on whether there are common questions related to liability. See *Smilow v. Southwest Bell Mobile Svs. Inc., 323 F.3d 32, 40 (1st Cir. 2003)*; *Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 372-73 (S.D.N.Y. 2007)*. Even if there are defenses that affect class members **[*19]** differently, that alone "does not compel a finding that individual issues predominate over common ones." *In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 138 (2d Cir. 2001)* (quoting *Waste Memt. Holdings. Inc. v. Mowbray. 208 F.3d 288, 296 (1st Cir. 2000))*, overruled on other grounds, *In re IPO Sees. Litig., 471 F.3d 24 (2d Cir. 2006)*.

In this case, plaintiffs allege that the Class Members were governed by the same pay policies and procedures, and that these common issues predominate over those affecting any one individual. (Pls.' Mem. at 24). Thus, the Court finds that common questions predominate in this case.

2. Class Action as Superior Method of Resolution

Additionally, to satisfy *Rule 23(b)(3)*, plaintiffs must demonstrate that "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Brown v. Kelly, 609 F.3d 467, 483 (2d Cir. 2010)* (citation and internal quotation marks omitted). The Rule requires the Court to consider:

> [(1)] the class members' interests in individually controlling the prosecution or defense of separate actions; [(2)] the extent and nature of any litigation concerning the controversy already begun by or against class members; [(3)] the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and [(4)] the **[*20]** likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

In this case, plaintiffs claim that because defendants' headquarters are based within this jurisdiction and the majority of the allegedly wrongful conduct also occurred within this district, litigating the action as a class action in this district is desirable. (Pls.' Mem. at 24). Moreover, proceeding as a class action will achieve economies of scale for the Class Members and preserve judicial resources by consolidating common issues of fact and law, with the result of preserving public confidence in the system by avoiding inconsistent adjudications. (Id (citing cases)). Furthermore, in this case, there is no indication that the Class Members desire to control their own cases.

As a result, the Court accepts that a class action is the superior method of resolution in this case.

3. Class Certification

In light of the foregoing, the Court respectfully recommends that the Court find that plaintiffs have satisfied the requirements of *Rule 23(b)(3)*. Pursuant to that provision, the Court recommends that the Class Members be certified as a class for settlement purposes only, consisting of all persons who were employed by Major World car dealerships as sales **[*21]** representatives at any time between December 30, 2003 through November 24, 2014.

II. Appointment of the Class Counsel

The Court also respectfully recommends that plaintiffs' attorneys from Fitapelli & Schaffer LLP ("F&S") be appointed as Class Counsel. In evaluating the adequacy of class counsel, *Rule 23(g)* requires the Court to consider: (1) the work done by counsel in investigating the potential claims in the case; (2) counsel's experience in handling similar class actions and other complicated litigation; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will expend to represent the class. *Fed. R. Civ. P. 23(g)*. In this case, F&S has extensive experience litigating and settling wage and hour cases and other employment cases, and thus they are well-versed in the applicable law. (Pls.' Mem. at 24-25; Fitapelli Decl. PP 86-89). Moreover, F&S has performed substantial work in this litigation, identifying, investigating, prosecuting, and settling the claims on behalf of the affected individuals. (Id.)

Accordingly, the Court finds that proposed Class Counsel satisfy the criteria of *Rule 23(g)*, and respectfully recommends their appointment to represent the Class Members in this matter.

III. Preliminary **[*22]** Approval of the Class Settlement

The parties seek preliminary approval of the proposed settlement, as memorialized in the Settlement Agreement. The settlement is intended to encompass the NYLL claims of the named plaintiffs and the Class Members. (See Pls.' Mem. at 8; see also Settlement Agreement § 3.1(A)). The settlement does not include plaintiffs' FLSA claims, which have been separately resolved through an offer of judgment totaling $423,569.92. (Id.)

A. Standards

To grant preliminary approval of a class settlement under *Rule 23(e)*, the Court must determine that the proposed settlement is "fair, adequate, and reasonable, and not the product of collusion." *Joel A. v. Giuliani, 218 F.3d 132, 138 (2d Cir. 2000)* (citations omitted); see *Fed. R. Civ. P. 23(e)*. Judicial policy favors the settlement and compromise of class actions. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 116-17 (2d Cir. 2005)*; see also *In re Warfarin Sodium Antitrust Litis., 391 F.3d 516, 535 (3d Cir. 2004)*. Whether a settlement is fair is a determination within the sound discretion of the court. *Levitt v. Rodgers, 257 F. App'x 450, 453 (2d Cir. 2007)* (citing *In re Ivan F. Boesky Sec. Litis., 948 F.2d 1358, 1368 (2d Cir. 1991)*).

Generally, approval of a class action settlement involves a two-step process. First, the court preliminarily approves the proposed settlement by evaluating the written submissions and informal presentation of the settling parties and the negotiating process leading to the settlement, *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d at 116*. Second, the court holds a fairness hearing to "determine **[*23]** whether the settlement's terms are fair, adequate, and reasonable . . . ." *Capsolas v. Pasta Res., Inc., No. 10 CV 5595, 2012 WL 4760910, at *4 (E.D.N.Y. Oct. 5, 2012)*. In evaluating a proposed settlement in order to grant preliminary approval, the court need only find that there is "probable cause" to submit the settlement to the class members and to hold a fairness hearing. *Hernandez v. Merrill Lynch & Co., No. 11 CV 8471, 2012 WL 5862749, at *1 (S.D.N.Y. Nov. 15, 2012)* (quoting *In re Traffic Exec. Ass'n E. R.Rs., 627 F.2d 631, 634 (2d Cir. 1980)*).

The Second Circuit has enumerated nine factors to guide courts in evaluating the substantive fairness of a proposed settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation[.]

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (internal citations omitted), abrogated on other grounds, *Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000)*; see also *D'Amato v. Deutsche Bank, 236 F.3d 78, 86 (2d Cir. 2001)*; *Garcia v. Pancho Villa's of Huntington Village, No. 09 CV 486, 2012 WL 5305694, at *4 (E.D.N.Y. Oct. 4, 2012)*.

The court must also determine if the settlement was "achieved through arms-length **[*24]** negotiations by counsel with the experience and ability to effectively represent the class's interests." *Becher v. Lone Island Lighting Co., 64 F. Supp. 2d 174, 178 (E.D.N. Y. 1999)* (citing *Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982)*); see also *D'Amato v. Deutsche Bank, 236 F.3d at 85* (noting that the district court must "determine[] a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms"); *In re Nissan Radiator/Transmission Cooler Litig., No. 10 CV 7493, 2013 WL 4080946, at *4 (S.D.N.Y. May 30, 2013)*. In reviewing a proposed settlement, the court has the "'fiduciary responsibility of ensuring that the settlement is . . . not a product of collusion, and that the class members' interests [were] represented adequately.'" *Clement v. Am. Honda Fin. Corp., 176 F.R.D. 15, 29 (D. Conn. 1997)* (internal citation omitted) (quoting *In re Warner Commc'ns Secs. Litis., 798 F.2d 35, 37 (2d Cir. 1986)*).

Although the Court is not required to make a finding of fairness as to the underlying settlement at this time, the Grinnell factors are instructive. See Torres v. Gristede's Operating Corp., Nos. 04 CV 3316, 08 CV 8531, 08 CV 9627, *2010 WL 2572937, at *2 (S.D.N.Y. June 1, 2010)* (noting that "[p]reliminary approval of a settlement agreement requires only an initial evaluation of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties") (internal quotation marks and citations omitted).

B. Analysis of Procedural Fairness

The parties represent that the proposed settlement was entered into after extensive arms-length **[*25]** negotiations between counsel, following the exchange of discovery, including the production of thousands of pages of documents, numerous depositions, and an onsite review of documents at defendants' offices. (Pls.' Mem. at 3; Fitapelli Decl. PP 9-10). According to the parties, the settlement negotiations began in May 2012 when the parties requested that the Court issue a 60-day stay in order to allow the parties to discuss a possible settlement. (Pls.' Mem. at 5; Fitapelli Decl. P 50). After the parties failed to reach a settlement during the stay, the parties continued to engage in motion practice and discovery, resulting in plaintiffs succeeding on their motion for summary judgment. (Fitapelli Decl. PP 66-67). Defendants continued litigating the case, and after several meet and confers, the parties agreed to proceed with a private mediation. (Id.) The parties attended two full days of private mediation, one on August 5, 2014, and one on November 24, 2014, at which time the parties reached a settlement in principle. (*Id. PP 69, 72)*. Additionally, since the settlement was agreed to in principle, the parties continued to engage in extensive negotiations on its terms, finalizing the agreement in August **[*26]** 2015. (*Id. P 78*). Given the presumption of fairness when a class settlement has been reached after "arm's-length negotiations between experienced, capable counsel after meaningful discovery," see *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d at 116*, the Court finds that there was procedural fairness in reaching the proposed settlement.

C. Analysis of Substantive Fairness

1. Complexity, Expense, and Likely Duration of the Litigation

Turning to the Grinnell factors, the parties have already expended money and time in litigating this action for over 5 years, engaging in extensive discovery and motion practice. (Pls.' Mem. at 13). Although plaintiffs have successfully established certain liability, the parties maintain that continuing the litigation further would cause the parties to expend substantial expenses and delay in an effort to prove damages. (See *id. at 14*). This suggests that a trial in this case would be contested and would potentially be long and complicated.

Moreover, class actions, especially in the context of FLSA claims, are inherently complex. See Tiro v. Public House Invs., Nos. 11 CV 7679, 11 CV 8249, *2013 WL 4830949, at *6 (S.D.N.Y. Sept. 10, 2013)* (detailing the complexity and expenses involved in fully litigating FLSA class claims, and noting that the complexity is a factor in favor **[*27]** of settlement); see also *In re Austrian & German Bank Holocaust Litis., 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000)*, aff'd, *236 F.3d 78 (2d Cir. 2001)*. In the absence of a settlement, further litigation in this case would cause

additional expense and delay and could lead to a fact-intensive trial. (Pls.' Mem. at 14). A trial of this nature would be lengthy and consume tremendous time and resources since the 89 Class Members were responsible for over 12,000 commissioned transactions during the Class Period. (See id.) Further, to establish damages at trial, the parties would have to determine what commission violations occurred and which vehicles that plaintiffs sold were covered by the collective bargaining agreement. (See id.) Given the lack of historical data maintained by defendants, this process would have been costly and expensive. (Id.) The proposed settlement, however, makes monetary relief available to Class Members in a prompt and efficient manner. Thus, this factor of potential protracted litigation favors settlement.

2. Reaction of Class to Settlement

The reaction of the class to the settlement is an issue that can be addressed only after notice of the proposed Settlement Agreement has been sent to the class and the time for objections has passed. Since notice of the Settlement Agreement **[*28]** has not yet been distributed to the Class Members, the Court need not address this issue at this time. However, four of the named plaintiff have expressed their approval of the settlement by executing the Settlement Agreement. (Pls.' Mem. at 14-15).

3. Stage of Proceedings and Amount of Discovery Completed

At this point, the parties have conducted discovery for over five years and engaged in two mediation sessions, which has allowed the parties to assess the fairness and reasonableness of the proposed settlement in light of the relevant provisions of the FLSA and NYLL. (Pls.' Mem. at 15). Furthermore, plaintiffs have obtained thousands of pages of records from defendants, including deal folders, commission plans, collective bargaining agreements, auction receipts, class-wide wage and hour records, and commission data. (Id.') Plaintiffs have also created a detailed and complex damages model, which was based on the result of reviewing a substantial amount of data related to the named plaintiffs' deals. (*Id at 14-15*). When discovery has been extensive, and counsel has sufficient information to appreciate the merits of the case, then settlement is favored. *Tiro v. Public House Invs., 2013 WL 4830949, at *7*; *In re Warfarin Sodium Antitrust Litig., 391 F.3d at 537*. Given the extent of discovery conducted **[*29]** in this case, the Court finds that this factor favors approval of the proposed settlement.

4. Establishing Liability and Damages and Maintaining the Action Through Trial

The risk of establishing liability also favors settling this dispute. Although plaintiffs were granted summary judgment on many of plaintiffs' claims, a trial on the remaining merits would involve significant risks for plaintiffs as to damages. (Pls.' Mem. at 16). See also *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d at 119* (finding that plaintiffs would have faced "significant challenges in proving damages," a factor favoring settlement); *In re Ira Haupt & Co., 304 F. Supp. 917, 934 (S.D.N. Y. 1969)* (holding that "[i]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome"). Moreover, plaintiffs would have to establish "the very specific" commission violations committed by defendants on a deal-by-deal basis. (Pls.' Mem. at 17). Given the facts as developed in this case and taking into account that certain data is simply not available from defendants, establishing damages on every deal would be extremely difficult. (See id.) Thus, the proposed settlement alleviates many of these issues as the Class Members will receive compensation for every vehicle they sold.

In light of **[*30]** the foregoing, considering the risks of appeal and the prolonged nature of the litigation, the Court finds that this factor favors approval of the proposed settlement.

5. Ability of Defendants to Withstand Greater Judgment

According to plaintiffs, "it is not clear whether Defendants could withstand a greater judgment." (Pls.' Mem. at 17). Thus, even if defendants could withstand a greater judgment than the total amount for which the case is settling (see id.), plaintiffs argue that pursuant to the settlement, defendants have committed to fund the settlement amount, eliminating the difficulties and risk of collection in the future. Accordingly, the Court finds that this factor also weighs in favor approval of the proposed settlement, despite the uncertainty as to whether defendants could withstand a greater judgment.

6. Range of Reasonableness of Settlement Fund

Moreover, there is no way to determine with certainty what amount of damages would be awarded in the event of a successful prosecution of the litigation. See *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig., 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989)* (quoting In re "Agent Orange" *Prod. Liab. Litis., 597 F.Supp. 740, 762 (E.D.N.Y. 1984)* (noting that "[d]ollar amounts are judged . . . in light of the strengths and weaknesses of plaintiffs' case"); *Republic Nat'l Life Ins. Co. v. Beasley, 73 F.R.D. 658, 668 (S.D.N.Y. 1977)* (citing *Milstein v. Werner, 57 F.R.D. 515, 524 (S.D.N.Y. 1972))*.

Where the settlement provides **[*31]** "a meaningful benefit" to the class, settlements have been found reasonable. *In re Metlife Demutualization Litis., 689 F. Supp. 2d 297, 340 (E.D.N.Y. 2010)*. "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair." *Johnson v. Brennan, No. 10 CV 4712, 2011 WL 4357376, at *11*

(S.D.N.Y. Sept. 16, 2011) (quoting *Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 628 (9th Cir. 1982)*). When the proposed settlement provides a meaningful benefit to the Class when considered against the obstacles to proving plaintiffs claims with respect to damages in particular, the agreement is reasonable. See *In re Metlife Demutualization Litis., 689 F. Supp. 2d at 340*.

Even absent the risk of establishing damages at trial, the value of the Settlement Fund justifies settling this case. Under the Settlement Agreement, Class Members will each receive their proportionate share of what remains after deducting from the $5,500,000 total award an award for attorneys' fees and costs, service awards to the named plaintiffs, Claims Administrator's fees, and payroll taxes. (See Fitapelli Decl. PP 79, 83; Settlement Agreement § 1.23). The Settlement Fund is exclusive of the $423,569.92 previously paid to all Class Members for their FLSA claims against defendants. (Pls.' Mem. at 8). Given the number of Class Members who may choose to accept the settlement amount and the difficulty in establishing damages for **[*32]** every deal, as discussed above (see discussion *supra, at 21*), the Court finds that the total award appears to be reasonable. Similarly, the amounts to be awarded to the seven named plaintiffs appear to be reasonable. (Pls.' Mem. at 9).[9]

On the basis of the foregoing discussion of the Grinnell factors, the Court respectfully recommends that the proposed settlement be deemed fair and reasonable under the circumstances present in this case.

IV. Adequacy of Notice

Pursuant to the Federal Rules of Civil Procedure, the "court must direct notice in a reasonable manner to all class members who would be bound by the proposal." *Fed. R. Civ. P. 23(e)(1)*. Under *Rule 23(e)(1)*, the "'[c]ourt has virtually complete discretion as to the manner of giving notice to class members.'" *In re MetLife Demutualization Litig., 689 F. Supp. 2d at 345* (quoting *Handschu v. Special Servs. Div., 787 F.2d 828, 833 (2d Cir. 1986)*). In a *Rule 23(b)(3)* class action such as this, "the best notice that is practicable under the circumstances, including individual notice to all members **[*33]** who can be identified through reasonable effort" must be provided to the class. *Fed. R. Civ. P. 23(c)(2)(B)*.[10] In Eisen v. Carlisle & Jacquelin, the Supreme Court held that individual notice, as opposed to general published notice, is required by *Rule 23(c)(2)* for class members who are identifiable through reasonable effort. *417 U.S. at 173-76* (holding that "individual notice to identifiable class members is not a discretionary consideration" but rather, is an "unambiguous requirement of *Rule 23*"); *Becher v. Long Island Lighting Co., 64 F. Supp. 2d at 177*. Notice is adequate if it "'fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d at 114* (quoting *Weinberger v. Kenrick, 698 F.2d at 70*).

Here, the proposed Notice **[*34]** of Class Action Settlement provides the following information: (1) an explanation of who is entitled to a settlement award; (2) a brief contextual background to this lawsuit; (3) a summary of legal rights and options; (4) an explanation of the purpose of the Notice; (5) identifying information for Class Counsel; (6) an explanation of the benefits of settlement; (7) an overview of how each members' settlement amount will be calculated; (8) an overview of the process for obtaining a copy of the Settlement Agreement, which contains the allocation formula and other important information; (9) an overview of attorneys' fees, expenses, and the award that will be paid to the class representatives; (10) the result if the Court approves or does not approve the Settlement Agreement; (11) an explanation of the Fairness Hearing and the date, time, and place of the Hearing; (12) an overview of an individual's options regarding the Settlement Agreement; and (13) additional contact information should a recipient of the notice have any questions. (See Fitapelli Decl., Ex. A).

In this case, the Settlement Agreement provides that the Claims Administrator will mail the Notice to the last known address **[*35]** of each Class Member within 30 days of the Court's Order granting preliminary approval. (Pls.' Mem. at 26). The Class Administrator will take reasonable steps to obtain the correct address of any Class Members for whom notices are returned as undeliverable. (Id.) Class Members will have 60 days from the date of mailing the Notices to

[9] Although the Court need not consider this factor at this time, counsel is requesting fees in the amount of 33% of the Settlement Fund. (Pls.' Mem. at 9). This percentage has been approved in prior cases. See, e.g., *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2008)*; In re Blech Secs. Litis., No. 94 CV 7696, 2002 WL 31720381, at *1 (S.D.N.Y. Dec. 4, 2002); Adair v. Bristol Tech. Sys. Inc., No. 97 CV 5874, 1999 WL 1037878 (S.D.N.Y. Nov. 16, 1999). The named plaintiffs are to receive $20,000 each for initiating the action on behalf of the class. (See Pls.' Mem. at 9).

[10] The Rule further provides that, for any class certified under *Rule 23(b)(3)*, the notice must "concisely and clearly state . . . (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under *Rule 23(c)(3)*." *Fed. R. Civ. P. 23(c)(2)(B)*.

submit claim forms, opt-out requests, or to comment on, or object to the settlement. (Id.) Once the settlement becomes effective, defendants will send the settlement checks to Class members within 10 days. (Settlement § 3).

The Court finds the proposed Notice and this means of notification to be sufficient. The proposed Notice itself is sufficiently detailed so as to inform the Class members of their rights and obligations, and the method of notice is practical and likely effective in reaching the affected individuals. See *Weinberger v. Kendrick, 698 F.2d at 72* (stating that mailing individual notices to class members at their last known addresses was a sufficient means of notification under the circumstances). As such, the Court also respectfully recommends that the Court approve the proposed Notice of Settlement and Class Action Procedure and the Consent to Become a Party Plaintiff Form. (See **[*36]** Fitapelli Decl., Ex. A).

CONCLUSION

Accordingly, for the reasons stated above, the Court respectfully recommends that plaintiffs' motion for preliminary approval of the proposed settlement be granted in its entirety. Specifically, the Court recommends that the Class be certified for purposes of settlement only; the proposed settlement, as articulated in the Settlement Agreement, be preliminarily approved; Fitapelli and Schaffer, LLP be appointed as Class Counsel; and the proposed Notice of Settlement and Class Action Procedure be approved.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within fourteen (14) days of receipt of this Report. Failure to file objections within the specified time waives the right to appeal the District Court's Order. See *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 6(a)*, *6(e)*, *72*; *Caidor v. Onondaga Cnty., 517 F.3d 601, 604 (2d Cir. 2008)*.

The Clerk is directed to send copies of this Report and Recommendation to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

SO ORDERED.

Dated: Brooklyn, New York

December 22, 2015

/s/ Cheryl L. Pollak

Cheryl L. Pollak

United States Magistrate Judge

Eastern District of New York

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