At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 25th day of March 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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ALFONSO VARGAS,
on behalf of himself and the Class,

Plaintiff,

-against-

HUNGRY BURRITO I INC.,
ABC RESTAURANTS 1-3,
ARMANDO DE LA CRUZ, and
GREGORIO DE LA CRUZ,

Defendants.

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ORDER
Index No. 511535/22

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	102
Opposing Affidavits (Affirmations)	119-121
Affidavits/ Affirmations in Reply	
Other Papers: Affidavits/Affirmations in Support	105, 107, 125

Upon the foregoing papers, plaintiff Antonio Vargas moves (Motion Seq. 5) for an order, pursuant to CPLR 901 and 902, certifying this action as a class action.

Plaintiff commenced this action on behalf of himself and similarly situated tipped front-of-house employees of three eateries operating under the name "Hungry Burrito," owned and operated by defendants Hungry Burrito I Inc., ABC Restaurants 1-3, Armando De La Cruz and Gregorio De La Cruz, who plaintiff asserts violated provisions of the New York State Labor Law pertaining to the payment of proper wages. In his amended complaint, plaintiff alleges that he was employed as a server at the Hungry Burrito restaurant located at 811 Seneca Avenue, Ridgewood, New York (Ridgewood) beginning around February 2020 until in or about November 2021, generally working four (4) days per week for a total of thirty (30) hours per week. Plaintiff alleges that in addition to Ridgewood, defendants operated two other "Hungry Burrito" restaurants, located at 510 Morgan Avenue in Brooklyn (Morgan Ave) and at 1079 Manhattan Avenue in Brooklyn (Manhattan Ave). Plaintiff asserts that Ridgewood, Morgan Ave and Manhattan Ave (collectively, the Restaurants) were operated by defendants as a single integrated

enterprise conducting related activities, and sharing common ownership and business purposes with supplies, employees and managers interchangeable between the Restaurants.

Plaintiff maintains that during the duration of his employment, he was paid an hourly rate below the minimum wage, as were the proposed class members, defined in the amended complaint as all current and former front-of-house tipped employees employed by defendants at the Restaurants during the six-year period prior to the commencement of this action. Specifically, plaintiff alleges that he and the class members were paid below the minimum wage due to an invalid "tip credit" taken by defendants toward payment of their wages in contravention of the Labor Law. Plaintiff contends that defendants (i) failed to properly provide plaintiff and the proposed class members with a tip credit notice; (ii) failed to inform them that the tip credit cannot exceed the amount of tips actually received by them; (iii) failed to inform them that all tips received were to be retained by them except pursuant to a valid tip pooling arrangement; (iv) failed to inform them that the tip credit would not apply unless they have been informed of the foregoing tip credit notice requirement; (v) improperly claimed a tip credit for all hours worked despite the tipped employees being compelled to perform non-tipped duties for hours exceeding 20% of the total hours worked each workweek; (vi) failed to accurately track all daily tips earned or maintain records thereof; (vii) failed to properly provide a tip credit notice at hiring and annually thereafter; and (viii) failed to provide proper wage statements informing tipped employees of the amount of tip credit deducted for each payment period.

Plaintiff further maintains that defendants implemented a tip policy to which plaintiff and the proposed class members did not agree, and that through this tip pooling policy, managers, who were non-tipped employees, received a portion of the tips to which they were not entitled. In addition, plaintiff alleges that he and the proposed class members were required to work shifts lasting longer than ten (10) hours in duration but were never compensated with the spread of hours premium for working such shifts, and that defendants withheld payment for short breaks lasting fewer than twenty (20) minutes, which short breaks are deemed compensable work time under the Labor Law.

In the instant motion for class certification and proposed order thereon, plaintiff seeks approval of a broader class, defined as all current and former back-of-house employees that were employed by defendants from April 21, 2016 (six years prior to the commencement of this action) to the present and a subclass defined as all current and former tipped employees employed by defendants from April 21, 2016 to the present. The expanded proposed class members consisting of non-tipped front-of-house and back-of-house employees are alleged to have not been compensated a spread of hours premium or compensated for short breaks by defendants.

CPLR 901 (a) provides:

"a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

"1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

"2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

"3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

"4. the representative parties will fairly and adequately protect the interests of the class; and

"5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The above factors "are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority" (*City of New York v Maul*, 14 NY3d 499, 508 [2010]).

CPLR 901 (a) (1) does not specify a minimum number of class members needed to satisfy the numerosity requirement, and there is no mechanical test to determine whether the members of a putative class are sufficiently numerous (*see Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137-138; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96). "Each case depends upon the particular circumstances surrounding the proposed class and the court should consider the reasonable inferences and common sense assumptions from the facts before it" (*Friar*, 78 AD2d at 96). There is also no requirement that the exact number of class members be immediately known (*see Smith v Atlas International Tours*, 80 AD2d 762 [1st Dept 1981]). It has been held that "'the threshold for impracticability of joinder seems to be around forty'" (*Galdamez v Biordi Constr. Corp.*, 13 Misc 3d 1224[A], 2006 NY Slip Op 51969[U] [Supreme Court, New York County 2006], *2, quoting *Dornberger v Metropolitan Life Ins. Co.*, 182 FRD 72, 77 [SDNY 1999]; *see also Klakis v Nationwide Leisure Corp.*, 73 AD2d 521, 522 [1st Dept 1979] [class certification properly denied where putative class consisted of only 21 individuals]; *Caesar v Chemical Bank*, 118 Misc 2d 118, 119 [Sup Ct, New York County 1983] [certifying class consisting of 39 bank employees]; *Cannon v Equitable Life Assur. Soc. of U. S.*, 106 Misc 2d 1060, 1065 [Sup Ct, Queens County 1980], *revd on other gds.* 87 AD2d 403 [2d Dept 1983] [there has been a trend "to regard classes of approximately 30 or less as not being sufficiently numerous, although there are exceptions"] [citations and internal quotations omitted]).

A party seeking class certification must establish more than that issues exist which are common to the entire class and that they are substantial and significant; the party must show that these common

issues predominate over unique circumstances that may pertain to each individual's situation (*Alix v Wal–Mart Stores, Inc.*, 57 AD3d 1044 [3d Dept 2008]). "[W]hether there are common predominating questions of fact or law so as to support a class action should not be determined by any mechanical test, but rather, whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" (*Friar*, 78 AD2d at 97] [internal quotation marks and citations omitted]). "[T]he fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action. Rather, it is predominance, not identity or unanimity, that is the linchpin of commonality" (*City of New York*, 14 NY3d at 514 [citations and internal quotation marks omitted]).

"Typical claims are those that arise from the same facts and circumstances as the claims of the class members" (*Globe Surgical Supply*, 59 AD3d at 143; *Ackerman v Price Waterhouse*, 252 AD2d 179, 201 [1st Dept 1998] [since claims "arose out of the same course of conduct and are based on the same theories as the other class members, they are plainly typical of the entire class"]; *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22 [1st Dept 1991]). To be typical, "it is not necessary that the claims of the named plaintiff be identical to those of the class" (*Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 607 [2d Dept 1987]). The requirement is satisfied even if the class representative cannot personally assert all the claims made on behalf of the class (*Weinberg v Hertz Corp.*, 116 AD2d 1, 7 [1st Dept 1986]). Since the typicality requirement relates to the nature of the claims and the underlying transaction, not the amount or measure of damages, that plaintiff's damages may differ from those of other members of the class is not a proper basis to deny class certification (*Vickers v Home Fed. Sav. & Loan Assn. of East Rochester*, 56 AD2d 62, 65 [4th Dept 1977]).

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 (*see Cooper v Sleepy's, LLC*, 120 AD3d 742, 743–744 [2d Dept 2014]; *Ackerman*, 252 AD2d at 179; *Pruitt*, 167 AD2d at 25–26). In order to be found adequate in representing the interests of the class, class counsel should have some experience in prosecuting class actions (*see Globe Surgical Supply*, 59 AD3d at 144).

A class action is a device which would allow "one action to do the job, or a good part of it, that would otherwise have to be done by many" (*Friar*, 78 AD2d 83, 98). The superiority requirement, meaning that a class action is superior to other methods available to prosecute the claims asserted, is satisfied when the damages sustained by each member of the putative class are so modest that it is unlikely that the members would institute separate actions (*see Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 [1st Dept 2011] ["Rather, 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 the class members having no realistic day in court, we find that a class action is the superior vehicle for resolving this wage dispute"]).

CPLR 902 provides:

"Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

"1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

"2. The impracticability or inefficiency of prosecuting or defending separate actions;

"3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

"4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;

"5. The difficulties likely to be encountered in the management of a class action."

"Whether the facts presented on a motion for class certification satisfy the statutory criteria is within the sound discretion of the trial court" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]). "[I]nquiry on a motion for class action certification vis-a-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" (*Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]). Although the statute must be liberally construed (*see Globe Surgical Supply*, 59 AD3d at 135; *Beller v William Penn Life Ins. Co. of N.Y.*, 37 AD3d 747, 748 [2d Dept 2007]), "[t]he 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]). The statutory requirements must be established "by the tender of evidence in admissible form" (*Pludeman*, 74 AD3d at 422 [citations omitted]). "General or conclusory allegations in the pleadings or affidavits are insufficient to sustain this burden" (*Rallis*, 3 AD3d at 526; *see Yonkers Contr. Co. v Romano Enters. of N.Y.*, 304 AD2d 657, 658-659 [2d Dept 2003]; *Weitzenberg v Nassau County Dept. of Recreation & Parks*, 249 AD2d 538, 539 [2d Dept 1998]).

The sole affidavit submitted in support of the motion for class certification was executed by plaintiff. In his affidavit, plaintiff avers in paragraph 3 that he "regularly spoke with [his] fellow non-managerial co-workers regarding [their] wages," and that "[s]uch co-workers include, but are not limited to:" Alex "Last Name Unknown" (LNU)- Waiter Ridgewood; Miguel Angel (LNU)- Bartender, Ridgewood; Fernando (LNU)- Bartender, Ridgewood; Simon (LNU)- Bartender/Waiter, Ridgewood and Morgan Ave; Luis 1 (LNU)- Cook, Ridgewood and Morgan Ave; Luis 2 (LNU)- Cook, Ridgewood and Manhattan Ave; and Gabriel (LNU)- Cook, Ridgewood and Manhattan Ave.

In his affidavit, plaintiff further states:

> "Based on my work experience and my personal observations and conversations with co-workers, I know that all employees of Defendants were subject to the same wage and hour policies. I regularly spoke with my co-workers during breaks, while working, and by phone conversations during my free time, and it was common knowledge that Defendants engaged in the practices described below. My co-workers were required to work at all Restaurants locations on an as needed basis.
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> "During my employment with Defendants, at least 20% of the time, I was engaged in non-tipped activities. Similarly, based on my observations and conversations with my colleagues (including, but not limited to, individuals listed in ¶ 3 herein) other tipped employees had to spend at l[e]ast 20% of their time performing non-tipped work. I remember discussing with Alex, Fernando, and Miguel Angel about performing non-tipped activities while cleaning and arranging furniture. Generally, front of house tipped employees were all assigned several hours of side work.
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> "Once, while we were storing the outdoor furniture, Alex, Fernando, and Miguel Angel complained about how unfair was that the Defendant's daughter was taking our tips. From various conversations I had with Simon, Luis 1 [LNU], Luis 2 [LNU], and Gabriel, during various meals together, I was told that Defendants Armando and Gregorio de la Cruz similarly took tips from their employees at the Restaurant locations in Brooklyn as well.
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> * * *

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"Based on my personal observations and conversations with co-workers, other employees (including, but not limited to, individuals listed in ¶ 3 herein) were similarly not compensated for 'short breaks.'

* * *

"Throughout my employment with Defendants, I worked shifts lasting over ten (10) hours on a regular basis. Defendants never provided me with my spread of hours premium for these shifts. Based on my personal observations and conversations with co-workers, other employees (including, but not limited to, individuals listed in ¶ 3 herein) were similarly not paid spread of hours premium when working shifts exceeding ten (10) hours in duration.

* * *

"I remember talking with Luis 2 [LNU] over meals and discussing about work and our wages. Luis 2 told me that employees at other locations had 'pay issues'. When I asked what he was referring to, he said that it was the same wage and tips problems and irregularities at all Restaurants. I confirmed this statement with Gabriel once he was in the kitchen arranging containers and I was taking care of the garbage. Gabriel told me that the complaints that I had were similar to the waiters' complaints at other locations: everyone was shorted on their tips and paid below the minimum wage.

* * *

"Based on my personal observations and conversations, no other employee (including, but not limited to, individuals listed in ¶3 herein) ever received notice informing them about the tip pool nor whether Defendants were claiming a tip credit.

* * *

"Based on my work experience and personal observations, I know that Defendants currently employ around ten (10) to twelve (12) employees per Restaurant, which includes waiters, bartenders, delivery persons, cooks, porters, dishwashers, and hostesses, among others. During my brief conversations with coworkers, (including, but not limited to, individuals listed in ¶ 3 herein) I learned that Defendants have a high turnover at their Restaurants. Employees do not last more than

two (2) months. Because of the high turnover, Defendants employ in a year over twenty (20) tipped employees per Restaurant"

While plaintiff submits for the first time in reply a verified list of 97 potential class members who worked at the Restaurants during the relevant period as proof toward the numerosity requirement, because plaintiff's affidavit is grounded predominantly upon conclusory assertions and admissible hearsay conversations plaintiff allegedly had with his coworkers regarding the wage practices of defendants, the court finds plaintiff's affidavit does not constitute the admissible proof necessary to establish the commonality and typicality elements required for class certification. Plaintiff does not state that he worked at any Hungry Burrito location other than Ridgewood, and although plaintiff avers that he personally observed the alleged unlawful wage practices of defendants applied to other employees at the Restaurants, plaintiff does not provide sufficient detail about what these "personal observations" entailed, or allege facts upon which his personal knowledge of the alleged common and typical wage practices vis-à-vis other Hungry Burrito employees are predicated.

Accordingly, it is hereby,

ORDERED, that plaintiff's motion to certify this action as a class action is denied at this juncture, without prejudice (*see Aldape v Ocinomled, Ltd.*, 79 Misc 3d 1235[A], 2023 NY Slip Op 50811[U] [Sup Ct, NY County 2023]; *Sanchez v JMP Ventures, LLC*, 2014 WL 465542 at *2 [SDNY 2014] [holding that the plaintiff's affidavit, the sole affidavit submitted in support of the certification motion, was insufficient to grant class certification where said affidavit did not provide *any* details as to a *single* such observation or conversation as to the "common" unlawful employment practices at the defendant's third restaurant (emphasis in original)]).

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice