SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 3

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EWERN CHANEY, WINIFRED HU, GEORGE STIROS, GREGORY GRIMES, ELINOR URBAN, ALEXANDRIA BUDSLICK, and LUCHIYA VAVOULIOTIS, individually and on behalf of all others similarly situated,

Plaintiffs,

-against- Index No. 651279/2016

HERMES OF PARIS, INC., ROBERT B. CHAVEZ, MAUREEN BALTAZAR, BARBRA KATZ, SUSAN DICECCO, KELLY SCHOELER ELLIOT, DIANE KRUGER and PANA DIAMANTOPOULOS,

Defendants.

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Bransten, J.

Defendants Hermes of Paris, Inc. (Hermes), Robert B. Chavez, Maureen Baltazar, Barbra Katz, Susan Dicecco, Kelly Schoeler Elliot, Diane Kruger, and Pana Diamantopoulos move, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the first through fifth and seventh causes of action in their entireties and the first through seventh causes of action against the individual defendants asserted in first amended class action complaint (amended complaint).

I. BACKGROUND

Plaintiffs Ewern Chaney, Winifred Hu, George Stiros, Gregory Grimes, Elinor Urban, Alexandria Budslick, and Luchiya Vavouliotis, individually and on behalf of all others similarly situated, are former commissioned salespersons, or, sales specialists, who, since March 2010, worked at Hermes stores located in New York City. *See Comp.* ¶*9-15*.

The individual defendants are each a current or former Hermes officer or employee. Chavez is president and chief executive officer, Baltazar is a senior vice president, Katz is a former head of Human Resources, Dicecco is head of Payroll, Elliot is manager of Human Resources, Kruger is a managing director, and Diamantopoulos is a managing store director. *See id at ¶¶27-48.*

In the amended complaint, plaintiffs allege that defendants breached their agreements to pay plaintiffs wages in the form of hourly wages, commissions, nondiscretionary bonuses, and stock option incentives. Specifically, in 2010, 2011, and 2012, commissions earned and paid were governed by a "Retail Incentive and Commission Program" and a "691 Madison Avenue Commission Plan." *See Amen. Comp. ¶61.* Defendants have produced copies of written Retail Incentive and the Commission Program agreements (commission plans) for 2011, 2012, and 2013 and Commission and Incentive Program 691 Madison Avenue Boutique agreements (also, commission plans) for 2014 and 2015.

Defendants are also alleged to have unlawfully deducted wages from plaintiffs' commissions for unidentified overpayments, failed to pay promised commissions, improperly calculated certain commissions, and required employees to work off the time clock without compensation. *See Amen Comp. ¶¶86, 93, 110, 118, 127, 142-144, 148-149, 154-160.*

To effectuate this scheme, the defendants allegedly failed to provide commissioned employees with accurate wage statements identifying the basis for wages, bonuses, and commissions paid or withheld, in violation of the Labor Law, and by retaliating against the employees who requested detailed wage information by firing them and withholding earned bonuses from them. *See id* at ¶¶65-72; 100-105 (describing alleged retaliation against Chaney); 112 (noting Plaintiff Grimes was terminated in retaliation for signing a 2014 letter); 132-133

(noting Plaintiff Stiros' was terminated after questioning the compensation structure); 141-145 (noting Plaintiff Urban resigned as a result of withheld compensation); 148 (noting Plaintiff Budslick was required to sign a document returning purportedly overpaid commissions); 163-164 (noting Plaintiff Vavouliotis was terminated after questioning the compensation structure)

On those allegations, plaintiffs assert claims in the amended complaint against defendants for multiple violations of Labor Law §§ 190, 191, 193, 195(3), 198, and 650[1] and supporting Department of Labor regulations by: failing to pay earned wages and commissions; failing to provide wage statements; failing to pay earned overtime; and taking unlawful wage deductions. In addition, some plaintiffs assert individual claims for retaliation and defamation per se.

II. ANALYSIS

Defendants seek to dismiss the Labor Law claims, pursuant to CPLR 3211(a)(7), with the exception of the claim for retaliation in violation of the Labor Law and the defamation per se claim, and to dismiss all claims asserted against the individual defendants.

A. LEGAL STANDARDS

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party. *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). "We . . .

[1]Plaintiffs have withdrawn the third cause of action to recover costs incurred in connection with the cleaning and maintenance of required work uniforms. *See* Plaintiffs' Memorandum of Law in Opposition at 6, fn 1; *see also Amen. Comp.* ¶¶*189-193*.

determine only whether the facts as alleged fit within any cognizable legal theory". *See id.*

However, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and [are not] accorded every favorable inference". *See Biondi v Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dept 1999), *aff'd* 94 N.Y.2d 659 (2000); *David v Hack*, 97 A.D.3d 437, 438 (1st Dept 2012); *see* CPLR 3211 (a)(1). "[A]llegations . . . in conclusory form, based upon information and belief, do not establish a sufficient factual showing, evidentiary in nature" to support a claim. *See Lewis v Riklis*, 82 A.D.2d 789, 789 (1st Dept 1981).

B. Whether the Parties Agreed to Arbitrate Employment Disputes

Defendants argue that Hermes employees began to enter dispute resolution agreements on or around 2015 which governed disputes arising under the terms of their employment. As a result, the Defendant argues the claims should be dismissed in favor of arbitration.

New York courts have adopted a strong presumption in favor of arbitration. *See Matter of Weinrott [Carp]*, 32 N.Y.2d 190, 198 (1973); *see also* CPLR 7503(a). The role of the court is to "determine whether [the] parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement". *See Sisters of St. John the Baptist, Providence Rest Convent v. Geraghty Constructor*, 67 N.Y.2d 997, 998 (1986). Where the arbitration provision is valid, any dispute regarding the validity of the contract as a whole passes to the arbitrators. S*ee Matter of Prinze [Jonas]*, 38 N.Y.2d 570, 577 (1976).

Here, however, each of the named Plaintiffs commenced their employment with Hermes before 2015, when the arbitration provision was first implemented in Hermes' employment contracts. *See Amen. Comp.* ¶¶*88, 106, 120, 137, 147, 153, 169.* Thus, not all of the putative class members executed such an agreement and the court finds unpersuasive the fact that Hermes began to include arbitration provisions in employment contracts after 2015. Hermes has not submitted any proof indicating that the potential class Plaintiffs agreed to arbitration.

The court notes that the single arbitration agreement produced by defendants in support of its arbitration argument is not signed by any sales specialist and is dated November 18, 2016, well after the commencement of this action by the filing of the summons and complaint on March 10, 2016. Such purported evidence is entirely unpersuasive to show that any of the Plaintiffs agreed to arbitrate their claims.

C. Whether the Class Action Claims are Barred by CPLR §901(b)

CPLR 901(b) bars plaintiffs from maintaining class action claims in which they seek to recover class-wide penalties, such as liquidated and punitive damages, unless such damages are authorized by statute. *See Ballard v. Community Home Care Referral Serv.*, 264 A.D.2d 747, 748 (2d Dept 1999); CPLR 901(b). However, "[a]lthough CPLR 901(b) bars a class action to recover a penalty or minimum damages imposed by statute, where, as here, the statute does not explicitly authorize a class recovery thereof, the named plaintiff in a class action may waive that relief and bring an action for actual damages only". *See Super Glue Corp. v. Avis Rent A Car Sys.*, 132 A.D.2d 604, 606 (2d Dept 1987). "Should any class member wish to pursue his or her statutory

right to minimum and treble damages, he or she may opt out of the class and bring an individual action therefor". *See id.* Such waiver may occur either in the complaint itself or in the motion for class certification. *See e.g. Borden v 400 E. 55th St. Assoc., L.P.*, 34 Misc. 3d 1202[A], 2011 NY Slip Op 52322[U], *5 (Sup Ct, NY Cnty. 2011) (Gische, J).

Plaintiffs assert both individual and class action claims and seek to recover damages according to the proof, together with punitive damages and liquidated damages. Contrary to defendants' contention, however, seeking to recover under either an individual or class action theory does not require dismissal of the class action claims at this early stage of the litigation. *See Super Glue Corp.*, 132 A.D.2d at 606. Once Plaintiffs have had an opportunity to conduct discovery and develop a factual record, they may then decide whether to pursue class certification and waive certain remedies or to pursue those remedies. *See id; see also* CPLR 902(a). Dismissal is not warranted at this time.

D. Whether a Legally Cognizable Class has been Defined

A class action may be maintained "only after the following five prerequisites of CPLR 901(a) have been met: (1) the class is so numerous that joinder of all members is impracticable: (2) common questions of law or fact predominate over any questions affecting only individual members; (3) the claims of the representative parties are typical of the class as a whole; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the class action is superior to other available methods for the fair and efficient adjudication of the controversy." *See Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 191 (1st Dep't 1998).

Plaintiffs allege that the putative class consists of individuals "who were employed by Defendants as Commissioned Salespersons at the NYC Locations within six years prior to this action's filing date through the date of the final disposition of this action". *See* Amen. Comp. ¶51. The plaintiffs also allege underlying facts sufficient to satisfy the ascertainable class, numerosity, typicality, adequacy, superiority, and a predominance of common questions of fact and law elements required by statute. *See* Amen. Comp. ¶¶52-58; CPLR 901[a]. Class action claims arising from allegations of unlawful deductions from sales commissions have been held well-suited for class-wide determination. *See e.g. Wilder v May Dept. Stores Co.*, 23 A.D.3d 646, 647 (2d Dept 2005). Therefore, the proposed class definition is sufficient at this early stage. Dismissal of these class claims is premature until the Plaintiff moves for class certification. *See e.g. O'Hara v. Del Bello*, 47 N.Y.2d 363, 372 (1979) (requiring the person who commences a class action to move for permission to maintain the action as a class action within 60 days after the time for service of a responsive pleading has expired.)

E. Whether Plaintiff has Stated a Claim Pursuant to Labor Law §193.

Labor Law §193 prevents employers from making deductions from an employee's wages except under certain enumerated circumstances. *See Labor §193.* To state a legally cognizable claim pursuant to Labor Law § 193, a plaintiff must allege a specific deduction from earned wages. *See Pachter v. Bernard Hodes Group, Inc.*, 10 N.Y.3d 609, 616-618 (2008). An employer and an employee may agree on the point in time when a commission is deemed earned and, therefore, becomes a wage subject to Labor Law § 193. *See id.* Specifically, "they may

provide that the computation of a commission will include certain downward adjustments from gross sales, billings or receivables". *See id.*

"Once the commission is earned, it cannot be forfeited. There is a long-standing policy against the forfeiture of earned wages, and this applies to earned, uncollected commissions as well". *See Arbeeny v Kennedy Exec. Search, Inc.*, 71 A.D.3d 177, 182 (1st Dept 2010). No mutual consent to a downward adjustment will be found where the plaintiff has no way of knowing when the commission was earned or had vested. *See Orgill v Ingersoll-Rand Co.*, 110 A.D.3d 573, 573-574 (1st Dept 2013). A wage deduction taken after calculation of commissions may be held to constitute an unlawful deduction. *See e.g. id.*

Here, the commission plans provide, in relevant part, that "[c]ommissions will continue to be calculated on a monthly basis and paid as soon as reasonably feasible after the commissions for a given month are determined" (2011 and 2014 commission plans at 3; 2012, 2013 and 2015 commission plans at 2). They further provide that "[c]ommissions are not considered accrued or earned until all necessary adjustments are made, including but not limited to corrections for prior over-payments, consistent with applicable law" (2011 and 2014 commission plans at 3; 2012, 2013, and 2015 commission plans at 2).

The commission plans also provide that, "in the event of a return . . . no commission has been earned. Any commission already paid will be considered as unearned and as an advance on commissions to be earned in the future, and the advance will be debited against later commissions, whether individual or boutique" (2011 and 2014 commission plans at 3; 2012, 2013, and 2015 commission plans at 2).

Plaintiffs allege that Grimes, Stiros, Budslick, and Vavouliotis earned, and were paid, commissions that defendants unilaterally deducted from later paychecks, merely informing these plaintiffs that they were overpaid by amounts ranging from $12,000 to $23,000, without providing any details. See Amen. Comp. ¶¶ 110, 122, 148, 154. Plaintiffs further allege that defendants failed, despite plaintiffs' due demands, to furnish plaintiffs with detailed wage statements, in violation of Labor Law §§ 191(1)(c) and 195. *See id.* ¶¶ 111, 124, 150, 156. Plaintiffs have, therefore, sufficiently pleaded claims for violations of Labor Law § 193.

F. Whether Plaintiff has a Claim for Unpaid Wages

Defendants argue the plaintiffs failed to state any facts in support of their broad allegations that they were not paid such amounts in accordance with the governing commission plans. To wit the Court must reiterate that on a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party. *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

Plaintiffs have alleged that defendants engaged in a multi-pronged strategy to avoid paying the full amount of commissions and non-discretionary bonuses, that commissions actually paid did not comport with the sales figures maintained by each plaintiff, that defendants retained up to 40% of the commission pool where sales departments were not fully staffed, and that defendants deducted refunds from the sales figures and wages of the commissioned sales specialist who issued the refund, regardless of who received credit for the sale initially, making it

less likely that the sales specialist would reach his or her yearly goal and receive correct wages. *See* Amen. Comp. ¶¶ 87, 92, 115, 117, 127-128, 160. In light of New York's liberal pleading standards, these facts are sufficient to state a claim for unpaid wages. *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

G. Whether Plaintiff has Stated a Claim for Unpaid Discretionary Incentives

Plaintiff seek damages for loss of discretionary incentives and bonuses. A bonus, however, does not fall within the meaning of wages, as defined by the Labor Law because it is a

> "[d]iscretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneurship whereas the wording of the statute, in expressly linking earnings to an employee's labor or services personally rendered, contemplat[ed] a more direct relationship between an employee's own performance and the compensation to which that employee [was] entitled." *Ryan v Kellogg Partners Inst. Servs.*, 19 N.Y.3d 1, 11 (2012); *see also Truelove v. Ne. Capital & Advisory, Inc.*, 95 N.Y.2d 220, 225 (2000); Labor Law §§ 190, 193.

Given the claims arise out of sales made as a group, rather than by an individual salesperson, the claims for unpaid bonuses are fatally defective. *See id.* The motion to dismiss is therefore granted as to these claims.

H. Whether the Plaintiffs Can Recover Unpaid Overtime and Off-the-Clock Pay

The Court notes that some, but not all, of the Plaintiffs have adequately alleged facts which support a finding that they worked, on average, more than 40 hours per week. Specifically,

Plaintiff Vavouliotis alleges she worked, on average, 44 hours per week. *See Amen. Comp. 168.* Plaintiff Hu alleges she worked, on average, 42 hours a week and that Hermes would routinely shave time off her reported hours. *See* Amen. Comp. ¶¶172. According these Plaintiffs the benefit of all possible favorable inferences, they have sufficiently stated a claim for unpaid overtime earnings. *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

Plaintiffs Chaney, Stiros, Grimes, Urban, and Budslick, however, have failed to allege any facts as to whether they worked more than 40 hours in a given week and were not paid overtime. *See* Amen. Comp. ¶¶74-75, 86, 196. Rather, the allegations of these Plaintiffs center around their earned commissions. Therefore, the motion to dismiss the Labor Law claims to recover overtime and off-the-clock pay is granted without prejudice only as to the claims asserted by Chaney, Stiros, Grimes, Urban, and Budslick; the motion is denied as to those claims asserted by Vavouliotis and Hu.

I. Whether the Plaintiffs Have Stated a Claim for Wage Statement Inaccuracies

Under the Labor Law and employer is required to furnish an employee with "a statement of earnings paid or due and unpaid that included a description of how wages, salary, drawing account, commissions and all other monies earned and payable shall be calculated." *See Kasoff v. KVL Audio Visual Servs., Inc.*, 87 A.D.3d 944, 945 (1st Dep't 2011). Plaintiffs sufficiently allege that Hermes failed to provide wage statements that set forth the information required under the such as information regarding the commission rate or the basis of the commissions despite plaintiffs' repeated oral and written requests. *See* Amen. Comp. ¶¶64-66, 69, 89-90, 92, 111,

125, 151, 158. The motion to dismiss on this ground is therefore, denied.

J. Whether Claims Against the Individual Defendants Should Be Dismissed

Plaintiffs make vague and conclusory allegations that the individual Defendants qualify as "employers" under the labor law. This however is belied by the fact that there is no civil right to bring a cause of action for unpaid wages against a corporation's officers and agents pursuant to Labor Law §198. *See Stoganovic v. Dinolfo*, 92 A.D.2d 729, 729-730 (4th Dept 1983), *affd* 61 N.Y.2d 812 (1984). As a result, the individual Defendants are dismissed.

III. DECISION AND ORDER

As a result of the foregoing, it is

ORDERED that the motion to dismiss is granted to the limited extent that dismissal of the Labor Law violations claims to recover overtime and off-the-clock pay is granted only as to those claims asserted by plaintiffs Ewern Chaney, George Stiros, Gregory Grimes, Elinor Urban, and Alexandria Budslick and those claims are dismissed; the branches of the Labor Law claims to recover unpaid discretionary incentives and bonuses; the branches of the Labor Law § 195 (3) claims for wage statement inaccuracies asserted by plaintiffs Ewern Chaney, George Stiros, Gregory Grimes, Elinor Urban, and Alexandria Budslick, to the extent that the claims are derivative of overtime and off-the-clock pay claims and those claims are dismissed; further

ORDERED all claims asserted against defendants Robert B. Chavez, Maureen Baltazar, Barbra Katz, Susan Dicecco, Kelly Schoeler Elliot, Diane Kruger, and Pana Diamantopoulos are dismissed, with costs and disbursements to each individual defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of each individual defendant; and is otherwise denied; and it is further

ORDERED that the action is severed and continued against defendant Hermes of Paris, Inc.; and it is further

ORDERED that defendant Hermes of Paris, Inc. is directed to serve an answer to the first amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the Court's website at the address, www.nycourts.gov/supctmanh); and it is further

ORDERED that counsel are directed to contact the Part 3 clerk with regard to scheduling a Preliminary Conference within 20 days of Notice of Entry of this Order.

Dated: December 14, 2018

ENTER:

HON. EILEEN BRANSTEN
J.S.C.