STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

EVELYN O'BRIEN, JAMIE LYNN PATCHETT, CHRIS FORTNER, MICHAEL PETTA, JESSICA TAYLOR-MACKRODT, and HEATHER MARTIN on behalf of themselves and others similarly situated,

Plaintiffs,

-against-

SAGBOLT, LLC, OCEAN PROPERTIES, LTD, PORTSMOUTH CORPORATE FINANCIAL SERVICES, INC., PATRICK WALSH, and THOMAS GUAY,

Defendants.

DECISION AND ORDER

Index No. EF2018-65232
RJI No. 56-1-2018-0183

Appearances:

Chaudhuri Law, PLLC, New York City (*Ananda N. Chaudhuri* of counsel), *Law Office of Joseph T. Moen*, Saratoga Springs, and *Fleischman, Bonner & Rocco, LLP*, White Plains (*Joshua D. Glatter* and *Tyler E. Van Put* of counsel), for plaintiffs.

Greenberg Traurig, LLP, New York City (*Michael J. Slocum* and *Catherine H. Molloy* of the Florida bar, admitted pro hac vice, of counsel), for Sagbolt, LLC, Ocean Properties, Ltd., Patrick Walsh and Thomas Guay, defendants.

Bond Schoeneck & King, PLLC, Saratoga Springs (*Michael D. Billok* of counsel), for Portsmouth Corporate Financial Services, Inc., defendant.

AUFFREDOU, J.

Plaintiffs have moved for an order certifying their proposed class, appointing class representatives, and appointing class counsel pursuant to CPLR 901 and 902, which motion defendants oppose. In deciding the motion, the court has reviewed and considered the following: the affirmation of Ananda N. Chaudhuri, Esq., dated December 4, 2020, with exhibits; the affirmation of Joseph T. Moen, Esq., dated December 4, 2020; the affirmation of Keith M. Fleischman, Esq., dated December 4, 2020, with exhibits; plaintiffs' undated memorandum of law

in support of the motion; the affirmation of Catherine H. Molloy, Esq., dated January 15, 2021, with exhibits; and, plaintiffs' undated reply memorandum of law in further support of the motion.

Plaintiffs were waitstaff employed at the Sagamore Hotel & Resort ("Sagamore"). Plaintiffs' second amended complaint states three claims against defendants, their alleged joint employers.[1] Plaintiffs allege that defendants violated Labor Law § 196-d in their first claim ("Count I"), complaining that defendants misappropriated tips by failing to adequately disclose to patrons that a contractual service charge would not be remitted to servers. For their second claim ("Count II"), plaintiffs allege that defendants violated Labor Law § 196-d by permitting unauthorized employees to retain gratuities meant for waitstaff and by improperly retaining tip credits between 2012 and 2016. Plaintiffs' third claim ("Count III") alleges that, though defendants compensated plaintiffs at the appropriate overtime tipped minimum wage rate, they failed to pay overtime compensation on collected gratuities between 2012 and 2016 in violation of Labor Law art 19 and 12 NYCRR 142-2.2.[2] To prosecute these claims, plaintiffs propose a class of similarly situated waitstaff and servers who have worked at the Sagamore from April 13, 2012, to the present ("the class period"), with plaintiffs as the class representatives and the Law Office of Ananda Chaudhuri, Fleischman Bonner & Rocco LLP, and the Law Office of Joseph T. Moen as colead counsel for the class.

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[1] Defendants Sagbolt, LLC ("Sagbolt"), Portsmouth Corporate Financial Services, Inc. ("Portsmouth"), and Ocean Properties, Ltd ("Ocean Properties"), operate the Sagamore. Defendant Patrick Walsh owns an interest in Sagbolt and controls Ocean Properties with his family. Portsmouth handles human resources, technology, and accounting for Sagbolt, and Defendant Thomas Guay is a Sagbolt executive. These defendants are hereinafter referred to collectively as "defendants."

[2] Plaintiffs' specific claim is that defendants' compensation system, called "GRATS," allocated only 42.7% of the service charge to waitstaff and then distributed such service charge on a pro-rata basis to waitstaff and not at the appropriate overtime rate.

The proponents of class certification must prove compliance with the five statutory prerequisites to a class action:

> "that 'the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable'; that questions of law or fact exist that are common to the entire class and predominate over any questions that affect only individual members; that the claims or defenses of the representative plaintiffs typify those of the entire class; that the nominative plaintiffs will fairly and adequately protect the interests of the entire class; and that alternatives are not available that are superior to a class action in terms of insuring a 'fair and efficient adjudication of the controversy'" (*Alix v Wal-Mart Stores, Inc.*, 57 AD3d 1044, 1045 [3d Dept 2008], quoting CPLR 901).

The determination of whether the proponents meet this burden is within the discretion of the trial court (*see Alix,* 57 AD3d at 1045). "Significantly, these criteria must be liberally construed and 'any error, if there is to be one, should be . . . in favor of allowing the class action'" (*Hurrell-Harring v State*, 81 AD3d 69, 72 [3d Dept 2011], quoting *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 21 [1st Dept 1991]). Plaintiffs have established that there are sufficient members of the proposed class for certification, that the proposed representative plaintiffs have claims typical to the class, and that a class action is the superior mechanism to resolve this dispute. As to numerosity, defendants caused the Sagamore to hire hundreds of waitstaff and servers during the class period such that joinder of each individual server would be impracticable. The proposed class members' identities, though numerous, are ascertainable through defendants' employment records. Additionally, the representative plaintiffs' claims are typical to those of the proposed class members. Though each of their claims are not identical,

> "claims of putative class members are best considered as being overlapping, with some members being potentially entitled to receive their share of a gratuity or purported gratuity generated by an event at which they worked, with somewhat different groups of class members being entitled to shares in a gratuities or purported gratuities flowing from other events at which they worked" (*Krebs v Canyon Club, Inc.*, 22 Misc 3d 1125[A], 2009 NY Slip Op 50291[U], *12 [Sup Ct, Westchester County 2009]).

The named plaintiffs worked at Sagamore events and each have "claims which are typical of the putative class of [servers] and [they are] situated similarly to this group of [servers]" (*id.* at *12). Regarding superiority, "a class action is the 'superior vehicle' for resolving wage disputes 'since the damages suffered by an individual class member are likely to be insignificant, and the cost of prosecuting individual actions would result in the class members having no realistic day in court'" (*Stecko v RLI Ins. Co.*, 121 AD3d 542, 543 [1st Dept 2014], quoting *Nawrocki v Proto Const. & Dev. Corp.*, 82 AD3d 534, 536 [1st Dept 2011]); *see Ferrari v Natl. Football League*, 153 AD3d 1589, 1593 [4th Dept 2017]). Moreover, "the claims of all servers who worked during a particular banquet will stand or fall together" (*Adams v Bigsbee Enters., Inc.*, 53 Misc 3d 1210[A], 2015 NY Slip Op 52008[U], *7 [Sup Ct, Albany County 2015]; *see Spicer v Pier Sixty LLC*, 269 FRD 321, 339 [SD NY 2010]). Those three statutory requirements met, plaintiffs must establish predominance of common questions of law and fact for the class and adequacy of the proposed representative plaintiffs to achieve class certification. The parties here dispute whether plaintiffs have met the commonality and adequacy requirements.

Plaintiffs assert that the proposed class meets the commonality requirement because there are common questions of law and fact for the entire class as to each of their three claims against defendants. Defendants disagree. For Count I, plaintiffs argue that the common questions of law and fact are whether defendants imposed charges that patrons would consider to be gratuities, whether defendants had an obligation to pay these charges to waitstaff, and whether the class members are entitled to compensation. Plaintiffs acknowledge that defendants used different service charge disclosures during the class period but explain that the disclosures were substantially similar such that whether the disclosures violated Labor Law § 196-d is a common question. The final common questions for Count I, according to plaintiffs, are whether each

defendant is an employer under Labor Law § 196-d, and which employees are entitled to share in distributions, the amount of which can be calculated through a common formula based on employment records. In opposition, defendants assert that the proposed class is unworkable for Count I because liability requires analysis of the three different time periods of the class period during which different disclosures were used, those time periods being 2012 to March 2016, March 2016 to 2019, and 2019 to the present. Moreover, defendants claim that there were individual communications with patrons regarding the nature of the service fee and disclosures, which would require individual analysis rather than common analysis for the entire class.

The court finds that plaintiffs have satisfied the commonality requirement for Count I. The statute requires that "questions of law or fact common to the class . . . predominate over any questions affecting the individual members" (CPLR 901 [a] [2]). "The statute clearly envisions authorization of class actions even where there are subsidiary questions of law or fact not common to the class" (*Weinberg v Hertz Corp.*, 116 AD2d 1, 6 [1st Dept 1986]). The three different disclosures regarding the service charge at issue do not defeat commonality. Pertinent to this finding is the relevant legal standard in such cases under Labor Law § 196-d, which is whether a reasonable patron would believe such charges were a gratuity, which requires an event-by-event analysis (*see Krebs*, 2009 NY Slip Op 50291[U], *6). Thus, "liability is dependent upon the interaction between [defendants] and its customers. While it is true that [defendants'] conduct was not uniform in dealing with its patrons, its interaction with any single event patron itself presents a common strand upon which liability to at least some [class] members may rest" (*id.* at *10-11). Despite defendants' assertions to the contrary, each of the proposed class members had indistinguishable experiences:

> "they worked at a special event, without any apparent knowledge, or involvement with, the financial arrangements made between the sponsor of the event and

> [defendants]. The only differences between the waitstaff are that they did not all work at all the same events. The real variants are not in the knowledge or conduct of the waitstaff, but in the financial arrangements between [defendants] and the various [patrons]" (*id.* at *13).

As to defendants' individual disclosures regarding the service fee, the court notes that defendants' papers refer to only two such instances. "[I]t does not appear from the present record that the service charge was the subject of individualized communications on a regular or routine basis" (*Adams*, 2015 NY Slip Op 52008[U], *5-6). Nevertheless, any "individualized issues of damages [related to different events] do not defeat class certification where, as here, damages are easily measured, computed, and allocated" (*id.* at *6). Because "[t]here are no individual questions presented that are unique to any particular [proposed class] member[,]" there are common questions of law and fact sufficient to certify the class for Count I (*Krebs*, 2009 NY Slip Op 50291[U], *9-10). If it becomes necessary in the future of the litigation, the court can designate sub-classes based on the different disclosure forms (*see* CPLR 906; *Maddicks v Big City Props., LLC*, 34 NY3d 116, 126 [2019]).

Regarding Count II, plaintiffs argue that the common questions are whether defendants permitted captains to retain tips and whether Labor Law § 196-d requires defendants to remit the retained tip credit. Plaintiffs also explain that the amount of any such retained discretionary tips can be calculated and distributed pro-rata based on employment records. As to Count III, plaintiffs state that a common question is whether defendants' GRATS formula is a bona fide commission, the rate of which defendants calculated similarly for all class members. Defendants oppose class certification for Counts II and III, arguing that they are contrary to the proposed class period. Defendants contend that, because plaintiffs do not assert these claims past March 2016 but the class period is from April 2012 through the present, they are not common to the entire class. Defendants also assert that Counts II and III are time-barred before December 31, 2012, because

plaintiffs did not assert them until filing the first amended complaint on December 31, 2018. They further argue that the proposed class cannot rely on the original complaint filing on April 13, 2018, to toll the statute of limitations for Counts II and III because Plaintiff Evelyn O'Brien, the sole plaintiff at that time, did not work for defendants until April 2016 and could not have personally asserted them. Finally, as to Count II, defendants claim that not all captains and supervisors retained gratuities at every event, thereby defeating the commonality requirement for the class.

The court finds that plaintiffs have met the commonality requirement with respect to Counts II and III. Defendants' concerns related to Count II, whether certain captains and supervisors actually retained gratuities intended for servers, can be addressed when calculating any damages and do not contravene commonality. The timing of events supporting Counts II and III and the timing of their assertion of those claims against defendants also do not render commonality unworkable for the class. Defendants have not pointed to any support for their contention that every claim asserted be based on events that span the entire class period. Moreover, a timely commenced putative class action tolls the statute of limitations for proposed class members (*see American Pipe & Constr. Co. v Utah*, 414 US 538, 551-554 [1974]; *Clifton Knolls Sewerage Disposal Co. v Aulenbach*, 88 AD2d 1024, 1024-1025 [3d Dept 1982]; *Adams*, 2015 NY Slip Op 52008[U], *3). The proposed class members "would have had no reason to commence their own action until class certification was denied, and a rule requiring them to commence duplicative litigation simply to preserve the statute of limitations would frustrate the objectives of efficiency and economy underlying CPLR article 9" (*Adams*, 215 NY Slip Op 52008[U], *4). Certainly, any individual proposed class members whose claims are barred by expiration of the statute of limitations cannot recover, but "a timeliness problem with respect to some class members 'does not establish that individual issues predominate'" (*Maddicks*, 34 NY3d at 128, quoting *In re*

Monumental Life Ins. Co., 365 F3d 408, 421 [5th Cir 2004]). Nor does the statute of limitations bar Counts II and III for the entire proposed class because Plaintiff O'Brien cannot personally assert them. Nominative plaintiffs are not required to bring claims identical to the remainder of the class for certification purposes (*see Krebs*, 2009 NY Slip Op 5291[U], *12). The same analysis applies to the extent defendants assert that plaintiffs have not established typicality because each proposed class nominee did not work at the Sagamore for the entire proposed class period.

The court now turns to whether the named plaintiffs can "fairly and adequately protect the interests of the class" as required by CPLR 901 (a) (4). The named plaintiffs must "act affirmatively to secure the class members' rights as well as to oppose the adverse interests asserted by others" (*City of Rochester v Chiarella*, 65 NY2d 92, 100 [1985]). When assessing the adequacy of the class representatives, the court can consider any conflicts of interest between the representatives and class members; the representatives' backgrounds, character, and familiarity with the case; the competence of the chosen attorneys; and "the financial resources available to prosecute the action" (*Krebs*, 2009 NY Slip Op 50291[U], *13). According to defendants, the named plaintiffs are not adequate representatives because they do not understand their role as representatives of the class, they are not sufficiently familiar with the lawsuit, they have not spent their own funds on the lawsuit, and they delayed in seeking certification. The court disagrees with defendants. The record shows that the named plaintiffs understand their claims and their roles as representing the entire class. There are no conflicts alleged between any named plaintiffs and proposed class members. They have chosen attorneys familiar with this type of litigation, who have extensive experience representing plaintiffs in similar cases and have taken this case on a contingency basis. There is not a requirement that plaintiffs expend their own funds to certify a class. As to the delay in seeking certification, defendants have not alleged any prejudice as a result

and, moreover, it seems the delay was caused at least in part by discovery disputes between the parties.

Because plaintiffs have satisfied CPLR 901's requirements, the court considers the required CPLR 902 factors: "the interest of members of the class in individually controlling the prosecution . . . of separate actions"; "the impracticability or inefficiency" of separate actions; "the extent and nature of any litigation concerning the controversy already commenced by" proposed class members; "the desirability or undesirability of concentrating the litigation of the claim in the particular forum"; and, any potential difficulties in managing the class action (CPLR 902). "The Court is satisfied that the foregoing factors weigh in favor of class certification" (*Adams*, 2015 NY Slip Op 52008[U], *7). Each individual member of the class has sustained nominal damages in comparison to the cost of litigating their own case, so it is unlikely that proposed members are interested in controlling their own prosecution of the controversies here. Additionally, given the number of likely class members, prosecution of separate cases would be inefficient. Furthermore, the court is unaware of any actions already commenced by any proposed class members related to the controversies. Warren County is an appropriate forum for the action, given that it is the location of the Sagamore and where the claims arose. As to managing the class, the court cannot perceive of any difficulties and the proposed members can be easily ascertained through employment records.

The court has considered the parties' remaining arguments and considers them to be without merit.

Accordingly, based on the foregoing, it is hereby

ORDERED that plaintiffs' motion is granted in its entirety.

The within constitutes the Decision and Order of this court.

Signed this 19th day of August 2021, at Lake George, New York.

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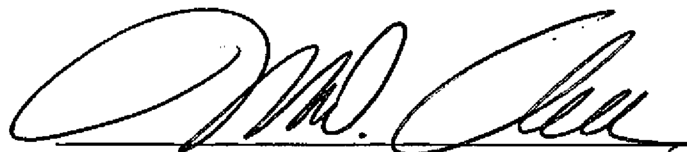

HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

08/19/2021

The court is uploading the Decision and Order to the New York State Courts Electronic Filing System (NYSCEF). Such uploading does not constitute service with notice of entry (*see* 22 NYCRR 202.5-b [h] [2]).

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