UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLYVE SHAW and KENARDRO PRESS, on behalf of themselves and those similarly situated,

Plaintiffs,

v.

HORNBLOWER CRUISES & EVENTS LLC,

Defendant.

Case No. 21 Civ. 10408 (VM)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, APPOINTMENT AS CLASS COUNSEL, APPOINTMENT OF A SETTLEMENT CLAIMS ADMINISTRATOR, AND APPROVAL OF PROPOSED NOTICE OF SETTLEMENT

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PRELIMINARY STATEMENT

Plaintiffs Clyve Shaw and Kenardro Press ("Named Plaintiffs"), on behalf of all others similarly situated, respectfully submit for the Court's preliminary approval, a proposed settlement with Defendant Hornblower Cruises & Events LLC ("Hornblower" or "Defendant") which resolves claims brought by Named Plaintiffs pursuant to the Workers Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 et seq. (the "WARN Act"), the New York State Worker Adjustment and Retraining Notification Act, and the Illinois WARN Act, 820 Ill. Comp. Stat. Ann. 65/1, *et seq.*, (collectively the "WARN Acts") for failure to provide required notices before implementing a "mass layoff", as defined by the WARN Acts. As discussed below, the settlement was reached after extensive investigation, discovery, and negotiations. The proposed Settlement Agreement and Release ("Settlement Agreement"), which is attached as Exhibit 1 to the Declaration of Brendan Sweeney ("Sweeney Dec."), is the product of more than five months of arm's length, good faith negotiations, which were conducted with the assistance of mediator Martin F. Scheinman. This settlement resolves all of the claims in the lawsuit and satisfies all of the criteria for preliminary approval.

Named Plaintiffs therefore respectfully request that the Court: (i) grant preliminary approval of the Settlement; (ii) provisionally certify the proposed settlement class pursuant to Fed. R. Civ. P. 23; (iii) appoint The Law Office of Christopher Q. Davis, PLLC as Class Counsel; (iv) approve the proposed Notices of Class Action Settlement, and (v) schedule a final approval hearing.

FACTUAL AND PROCEDURAL BACKGROUND

I. Plaintiffs' Allegations

Hornblower is a marine hospitality provider that offers services including cruises, on-board dining experiences, sightseeing, and ferry and water transportation services and operating in multiple work sites including New York, New York (Pier 62); Chicago, Illinois (Navy Pier); and San Francisco, California (the "Relevant Work Sites"). In March 2020, Hornblower temporarily furloughed significant numbers of employees at the Relevant Work Sites. Plaintiffs did not claim that Hornblower was liable for failing to provide notices at the time of the initial furloughs. Instead, Plaintiffs claimed that Hornblower is liable for failing to provide WARN notices to its employees at the time it became reasonably foreseeable that the March furloughs would last longer than 180 days (an "employment loss" under the WARN Acts); or for permanently laying off employees without notice in the Summer of 2020. Hornblower provided WARN notices to employees at the Relevant Work Sites in August and September of 2020.

II. Procedural History

This litigation was filed on December 6, 2021. The original Complaint alleged that Named Plaintiff Shaw and a class of New York employees experienced an "employment loss" during 2020 and they were not provided the notice required by the WARN Acts. 8. On March 4, 2022, the Named Plaintiffs filed an Amended Complaint that added claims under the Illinois WARN Act and alleged that Hornblower was liable for implementing mass layoffs without required notice in New York, Chicago, San Francisco and other locations.

In response to proposed Motions to Dismiss, Plaintiffs filed two Amended Complaints. On April 22, 2022, Defendant sought partial dismissal of the Second Amended Complaint or preemptive denial of class certification. Defendant's argument for dismissal was that certain

claims were pleaded in conclusory fashion and its argument regarding certification was that the Named Plaintiffs could not represent class members at worksites where they did not work. Plaintiffs opposed this Motion. The Court granted Defendant's Motion for partial dismissal and denied Defendant's Motion with respect to preemptive denial of class certification in an Order dated November 7, 2022. Plaintiffs filed a Third Amended Complaint on November 14, 2022. On November 28, 2022, Defendant moved for partial dismissal of the Third Amended Complaint, which Plaintiffs opposed. This Motion was denied in an Order dated May 31, 2023.

The parties engaged in a significant amount of investigation and discovery. The parties negotiated a protocol to locate relevant Electronically Stored Information ("ESI"). Hornblower produced more than 12,000 pages of documents and ESI. Hornblower also provided a thorough privilege log and several sets of detailed data. In the months leading up to the first mediation, Plaintiffs' counsel analyzed the documents, privilege log and data produced by Hornblower to assess liability and construct a model of potential damages.

III. Negotiations

The parties agreed to mediation with Martin F. Scheinman. Prior to the initial mediation session, the parties prepared detailed mediation briefs and exchanged substantial portions of those briefs with each other. The initial mediation session, on March 27, did not result in a settlement. After the first session, the parties agreed to exchange additional information and continue to negotiate. The parties participated in two additional full day mediation sessions, on May 15 and July 20, 2023, which resulted in the proposed settlement.

THE PROPOSED SETTLEMENT TERMS

The fully executed Settlement Agreement is attached to the Sweeney Declaration as Exhibit 1. Hornblower agreed to pay up to a maximum of $2,400,000.00 (the "Maximum

Settlement Amount") to resolve all claims in the litigation. The Maximum Settlement Amount will be used to provide settlement payments to the members of two proposed Subclasses, Service Awards to the Named Plaintiffs, settlement administration costs, and attorneys' fees and costs. For the reasons discussed below, the parties agreed to a different approach for individuals who had been employed in New York and individuals employed in either Chicago or San Francisco.[1]

I. The New York Settlement

Plaintiffs allege that Hornblower terminated the employment of 462 individuals who worked in New York without providing at least 60 days' notice, as required by the federal WARN Act, or at least 90 days' notice as required by the New York State WARN Act. The Settlement Agreement proposes certification of a "NY Subclass."[2] Hornblower agreed to pay a maximum of $2,000,000.00 to settle the claims of the NY Subclass. Class Counsel's attorney's fees, costs, and expenses; the costs and fees associated with the Settlement Claims Administrator; and the Service Awards will be deducted from this amount to arrive at the Net NY Settlement Amount. Shares of the Net NY Settlement Amount will be allocated to each NY Subclass member

[1] Based on notices that Hornblower filed with government authorities Plaintiffs alleged that Hornblower committed WARN Act violations with respect to employees in Marina del Rey, Newport Beach, and San Diego, California. Hornblower asserted that it did not trigger the WARN Acts at these sites because it did not terminate a sufficient number of full-time employees in any ninety-day period. After reviewing data provided by Hornblower, Plaintiffs conceded to Hornblower's position.

[2] Capitalized terms are defined in the Settlement Agreement. The NY Subclass is defined as "all current or former Hornblower employees who performed work at Defendant's New York City locations, experienced an employment loss between June 12, 2020, and September 9, 2020, and were not given a minimum of 90 days' written notice of termination."

proportional to the amount they earned in the twenty-four-week period that ended on March 27, 2020.[3]

The Settlement Administrator will mail (by both U.S. First Class Mail and e-mail) the Court-Approved Notice (Sweeney Dec., Attachment 2) and Claim Form (Sweeney Dec., Attachment 3) to members of the NY Subclass. Members of the NY Subclass will have sixty days to submit a claim form. If Members of the NY Subclass do not submit a claim form for their share of the Net NY Settlement Amount, Hornblower will not be required to pay those amounts.

II. The Chicago/San Francisco Settlement

Plaintiffs allege that Hornblower terminated the employment of 445 individuals who worked in either Chicago or San Francisco without providing 60 days' notice, as required by the WARN Acts. The Settlement Agreement proposes certification of a "CHI-SF Subclass."[4] Hornblower agreed to pay $400,000.00 to settle the claims of the CHI-SF Subclass. Class Counsel's attorney's fees, costs, and expenses; the costs and fees associated with the Settlement Claims Administrator; and the Service Awards will be deducted from this amount to arrive at the Net CHI-SF Settlement Amount. Shares of the Net CHI-SF Settlement Amount will be allocated

[3] The formula for allocating the Net NY Settlement Amount is detailed in Section 3.6 of the Settlement Agreement. For any NY Subclass member who only worked after March 27, 2020, their allocation is based on their earnings between March 27, 2020, and their relevant termination date.

[4] The CHI-SF Subclass is defined as "all current or former Hornblower employees who either (a) performed work at Defendant's Chicago locations and experienced an employment loss between June 28, 2020, and September 25, 2020, and were not given a minimum of 60 days' written notice of termination; or (b) performed work at Defendant's San Francisco locations and experienced an employment loss between May 29, 2020, and August 26, 2020, and were not given a minimum of 60 days' written notice of termination."

to each CHI-SF Subclass member proportional to the amount they earned in the twenty-four-week period that ended on March 27, 2020.[5]

The Settlement Administrator will mail (by both U.S. First Class Mail and e-mail) the Court-Approved Notice (Sweeney Dec., Attachment 4) to members of the CHI-SF Subclass. Members of the CHI-SF Subclass are not required to submit a claim form. Members of the CHI-SF Subclass who do not opt-out of the proposed settlement will receive a check for their share of the Net CHI-SF Settlement Amount and they will have sixty days from mailing of the checks to cash their settlement check.

III. Service Awards

In addition to their individual allocations under the Settlement Agreement, Named Plaintiffs are also requesting service payments ("Service Award") for their efforts rendered on behalf of the class. Named Plaintiff Shaw will apply to receive a Service Award of $25,000 and Named Plaintiff Press will apply to receive a Service Award of $5,000. In addition to shouldering the risks of being a named plaintiff in an employment action, Named Plaintiffs served the class by retaining counsel, assisting with the preparation of the complaints, discovery requests, as well as providing material information necessary for the successful resolution of the claims. Named Plaintiff Shaw originally brought the facts to the attention of counsel, provided counsel with relevant documents, and participated in the drafting of the initial complaint, and he attended all

[5] The formula for allocating the Net CHI-SF Settlement Amount is detailed in Section 4.8 of the Settlement Agreement. For any CHI-SF Subclass member who only worked after March 27, 2020, their allocation is based on their earnings between March 27, 2020, and their relevant termination date.

three mediation sessions. Plaintiffs will move for approval of the Service Awards as part of Plaintiffs' Motion for Final Approval of the Settlement.

IV. Attorneys' Fees and Costs

As part of its application for final approval, Plaintiffs' counsel will request one-third (1/3) of the Maximum Settlement Amount for attorneys' fees and litigation expenses. In addition, Plaintiffs will petition the Court to approve up to $22,556 for the Settlement Administrator's fees for reimbursement of actual costs and expenses to be paid from the Gross Settlement Amount.

CLASS ACTION SETTLEMENT PROCEDURE

The well-defined class action settlement procedure includes three distinct steps:

(1) Preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval and conditional certification of the settlement class;

(2) Dissemination of mailed and/or published notice of settlement to all affected class members; and

(3) A final settlement approval hearing at which class members may be heard regarding the settlement, and at which argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented, and the Court may finally certify the settlement class.

See, Fed. R. Civ. P. 23(e); *see also* Herbert B. Newberg & Alba Conte, Newberg on Class Actions ("Newberg"), §§ 11.22, et seq. (4th ed. 2002). This process safeguards Class Members' procedural due process rights and enables the Court to fulfill its role as the guardian of class interests.

With this motion, Plaintiffs request that the Court take the first step of granting preliminary approval of the Settlement Agreement, approving Plaintiffs' Proposed Notices, and authorizing Plaintiffs to send Notice to eligible Class Members.

ARGUMENT

I. Preliminary Approval of the Settlement Is Appropriate

The law favors compromise and settlement of class action suits. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context") (internal quotations omitted). The approval of a proposed class action settlement is a matter within the discretion of the trial court. *See Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013) ("A district court's approval of a class action settlement is reviewed for exceeding its discretion. … In class settlement cases, we accord the trial judge's views 'great weight' because of her position 'on the firing line, 'where she is' exposed to the litigants, and their strategies, positions and proofs") (internal citations omitted); *Kelen v. World Fin. Network Nat. Bank*, 302 F.R.D. 56, 68 (S.D.N.Y. 2014) ("It is within a trial court's discretion to approve a proposed class action settlement.") In exercising this discretion, courts should give "proper deference to the private consensual decision of the parties," and keep in mind "the unique ability of class and defense counsel to assess the potential risks and rewards of litigation." *Id.* (internal quotation marks omitted).

Preliminary approval, which is what Plaintiffs seek here, 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. *Id.* To grant preliminary approval, the court need only find that there is "probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980);

Newberg § 11.25 ("[C]ourts will grant preliminary approval where the proposed settlement 'is neither illegal nor collusive and is within the range of possible approval.'") "Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.,* 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores,* 396 F.3d at 116 (internal quotations omitted); *Lynn's Food Stores, Inc. v. United States,* 679 F.2d 1350, 1354 (11th Cir. 1982). If the settlement was achieved through experienced counsels' arm's-length negotiations, "[a]bsent fraud or collusion," "[courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Calls. Holding Corp. Sec. Litig.,* No. 05 Civ. 10240, 2007 U.S. Dist. LEXIS 57918, at *12 (S.D.N.Y. July 27, 2007).

A. The Settlement Is Fair, Reasonable and Adequate

In deciding whether to preliminarily approve a class action settlement, courts in the Second Circuit generally weigh the nine "*Grinnell* factors" set forth in the case *City of Detroit v. Grinnel Corp.*, 495 F.2d 448, 463 (2d. Cir. 1974). The Grinnell factors are (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 defendant 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. *Grinnell*, 495 F.2d at 463. Here, all of the *Grinnell* factors weigh in favor of approval of

the Settlement Agreement (except for neutral factors), and certainly in favor of preliminary approval.

The parties' negotiations led to a different approach to settlement of the claims of the NY Subclass and the claims of the CHI-SF subclass. As discussed below, the risk that Defendant would prevail on the claims of the CHI-SF subclass were materially greater than the risk that Defendant would prevail on the claims of the NY Subclass. With respect to San Francisco, while Plaintiffs believe the federal WARN Act was triggered, there is a risk that Defendant would prevail on an argument that the WARN Act was not triggered because fewer than fifty full-time employees experienced an employment loss in any 90-day period. With respect to Chicago, there is a risk that Defendant would prevail on an argument that WARN was not triggered because the full-time employees terminated did not represent 33% of the full-time workforce, and that Defendant is not liable because the mass layoff was caused by a government shutdown of the Pier from which Defendant operated. As a result of these risks (and others), the settlement for the CHI-SF subclass is more modest than the settlement for the NY Subclass.

While the defenses above were not applicable to New York employees, there was still a significant risk that Defendant's liability to New York employees would be eliminated or reduced by either the Natural Disaster or the Unforeseeable Business Circumstances defense. The parties agreed to compromise these claims using a "claims made" approach. Individuals who elect to make claims will receive a substantial recovery relative to the maximum compensation they could have received under the federal or NY WARN Act.

1. Grinnell Factor No. 1: Litigation Through Trial Would be Complex, Costly, and Long

By reaching a favorable settlement before Rule 23 class certification, dispositive motions or trial, Plaintiffs seek to avoid significant expense and delay, and instead ensure recovery for the class. "Most class actions are inherently complex and settlement avoids the costs, delays and [the] multitude of other problems associated with them." *Surdu v. Madison Global, LLC*, 15 Civ, 6567, 2017 WL 3842859, at *10 (S.D.N.Y. Sept. 1, 2017); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000). This case is no exception.

Even though the parties have already spent considerable time, effort, and expense in litigating this matter, continued litigation, without settlement, would result in additional unnecessary expense and delay. Significant discovery would be required to establish liability and damages, and a trial would feature extensive testimony by Defendant, Plaintiffs, and numerous class members. Compiling evidence to support or refute complex factual and legal issues at such a trial would consume tremendous amounts of time and resources for both sides, as well as requiring substantial judicial resources to adjudicate the parties' disputes. A trial to establish and set damages, even on a representative basis, would be costly and would further delay closure. Any judgment would likely be appealed, thereby extending the duration of the litigation. This settlement, on the other hand, makes monetary relief available to class members in a prompt and efficient manger. Therefore, the first *Grinnell* factor weighs in favor of preliminary approval.

2. Grinnell Factor No. 2: The Reaction of the Class Has Been Positive

Even though notice of the settlement and its details has not yet issued to the class, the Named Plaintiffs have expressed their support for the settlement by affixing their signatures on the Settlement Agreement. Nonetheless, the Court should more fully analyze this factor after Class

Members have been given the opportunity to opt out or object. At this early stage in the process, given that the Named Plaintiffs have agreed to the terms of the settlement, this factor weighs in favor of preliminary approval.

3. Grinnell Factor No. 3: Discovery Had Advanced Far Enough to Allow the Parties to Resolve the Case Responsibly

Even though preparing this case through trial would require significant additional discovery for both sides, and the filing and adjudication of a motion for class certification and respective summary judgment motions, the Parties have completed enough discovery to recommend settlement. The proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 475 (S.D.N.Y. 2013). The pretrial negotiations and discovery must be sufficiently adversarial that they are "not designed to justify a settlement, [but rather represent] an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian,* 80 F. Supp. 2d at 176; *aff'd sub nom. D'Amato v. Deutsche Bank,* 236 F.3d 78 (2d Cir. 2001) (internal citations omitted).

The Parties' discovery here meets this standard. Plaintiffs' counsel had multiple in-depth discussions with Plaintiffs and reviewed documents produced by them to secure information relevant to their claims and the claims of Class Members. Plaintiffs' counsel further obtained and reviewed thousands of documents, email messages, a privilege log, and a substantial amount of data from Defendant with respect to all potential Class Members. Given the WARN Act's formulaic method of setting damages, the documents and data provided by Defendant, in addition to the information obtained by Plaintiffs, is more than sufficient to determine that the settlement reached is fair and reasonable. Therefore, this factor favors preliminary approval.

4. Grinnell Factor Nos. 4 and 5: Plaintiffs Would Face Real Risks if the Case Proceeded

Though Plaintiffs believe their case is strong, there is still considerable risk. In weighing the risks of establishing liability and damages, the court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian,* 80 F. Supp. 2d at 177 (internal quotations omitted). A trial on the merits would involve significant risks to Plaintiffs.

First, Defendant would have attempted to establish two affirmative defenses to WARN Act liability at all of the Relevant Work Sites. The WARN Acts provide that an employer is completely relieved of its obligation to provide WARN notice where a mass layoff is caused by "any form of natural disaster." *See* 29 U.S.C. § 2102(b)(2)(B); N.Y. Lab. Law § 860-c. Courts have reached conflicting conclusions as to whether the "natural disaster" defense is applicable to layoffs related to COVID-19. *Compare*, *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 507 F. Supp. 3d 490, 501 n.7 (S.D.N.Y. 2020) ("It cannot be seriously disputed that the COVID-19 pandemic is a natural disaster."); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 370 (Pa. 2020) ("We have no hesitation in concluding that the ongoing COVID-19 pandemic equates to a natural disaster."); *with Easom v. US Well Servs., Inc.*, 37 F.4th 238, 244 (5th Cir. 2022) (rejecting application of natural disaster defense where layoffs resulted from COVID-19 pandemic); *In re Start Man Furniture, LLC*, 647 B.R. 116, 127–28 (D. Del. 2022) (same).

Defendant would have also asserted that its liability would have been eliminated or limited by the Unforeseeable Business Circumstances Defense. Where a mass layoff event is caused by business circumstances that were not reasonably foreseeable at the time notice would have been required, employers are only required to give as much notice as is practicable under the circumstances under the federal, New York, and Illinois WARN Acts. *See* 29 U.S.C. §

2102(b)(2)(A); N.Y. Lab. Law § 860-c; 820 Ill. Comp. Stat. 65/15(a)(2); 20 C.F.R. § 639.9(b). In light of the unique challenges presented by the COVID-19 pandemic, whether lengthy layoffs were foreseeable in the Summer of 2020, and whether the notices that Hornblower provided amounted to "as much notice as [was] practicable under the circumstances," would have been hotly disputed issues.

Second, Defendant would have asserted defenses specific to their San Francisco and Chicago work sites. With respect to San Francisco, Defendant disputed whether it terminated the employment of at least fifty full-time employees during any ninety-day period. Defendant took the position that only forty-six full-time employees were impacted. Plaintiffs took the position that fifty-eight employees were impacted, including sixteen that were impacted by a reduction in hours over a six-month period. Whether these groups could be aggregated was a disputed issue.

With respect to Chicago, Defendant disputed that WARN was triggered because they argued that less than 33% of the full-time employees at the site experienced an employment loss during any 90-day period. Defendant also took the position that they were not liable because the layoffs resulted from the closing of Navy Pier by the government of the City of Chicago. *Hotel Employees Local 54 v. Elsinore Shore*, 173 F.3d 175, 187 (3d Cir. 1999). Defendant would argue that they are not liable because the closure was out of their control. Plaintiffs took the position that Defendant's obligation to provide WARN notices to Chicago employees was triggered before the government closure because the layoffs were foreseeable.

While Plaintiffs disagree with the applicability of these defenses, they posed significant risk and uncertainty. This factor therefore weighs heavily in favor of preliminary approval.

5. Grinnell Factor No. 6: Establishing a Class and Maintaining it Through Trial Would Not Be Simple

The risk of maintaining the class status through trial is also present. The Court has not yet certified the Rule 23 class, and the parties anticipate that such a determination would be reached only after further discovery and intense, exhaustive briefing by both parties. Furthermore, there is a significant dispute over the scope of the class, which would further require additional discovery and motion practice. Throughout the litigation, Defendant asserted that certification of a class that included any California locations was not possible because the Named Plaintiffs did not work in California. This factor favors preliminary approval.

6. Grinnell Factor No. 7: Defendant's Ability to Withstand a Greater Judgment

Defendant does not claim that they could not withstand a greater judgment. However, even if Defendant were able to withstand a greater judgment, their ability to do so, "standing alone, does not suggest that the settlement is unfair." *Beckman*, 293 F.R.D. at 476 (internal citation marks omitted). This factor is neutral.

7. Grinnell Factor Nos. 8 and 9: The Settlement Amount is Substantial Even in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The determination of whether a settlement amount is reasonable "does not involve use of a 'mathematical equation yielding a particularized sum.'" *Frank,* 228 F.R.D. at 186 (quoting *In re Austrian,* 80 F. Supp. 2d at 178). "Instead, 'there is a range of reasonableness with respect to a settlement - a range which recognized the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.* (quoting *Newman v. Stein,* 464 F.2d 689,693 (2d Cir. 1972)). Defendant has agreed to settle the class claims for the Maximum amount of $2,400,000.00.

Defendant agreed to pay a maximum of $2,000,000.00 to settle the claims of the NY Subclass. If Hornblower was found liable for failing to provide notice to the NY Subclass and owed damages for the maximum sixty-day period, Plaintiffs estimated liability, before interest and attorneys' fees, would have been $1,415,948. The proposed Settlement will make approximately $1,275,000 available for the NY Subclass to claim (after attorneys' fees and costs).

Defendant agreed to pay $400,000.00 to settle the claims of the CHI-SF Subclass. If Hornblower was found liable for failing to provide notice to the CHI-SF Subclass and owed damages for the maximum sixty-day period, Plaintiffs estimated liability, before interest and attorneys' fees, would have been $1,380,200.00. The proposed Settlement will pay approximately $242,000 to members of the CHI-SF Subclass (after attorneys' fees and costs).

B. Conditional Certification of the Rule 23 Class is Appropriate

For settlement purposes, Plaintiffs seek to certify a class under Federal Rule of Civil Procedure 23. The Court should make a determination that the proposed settlement class satisfies Rule 23(a)'s requirements of numerosity, commonality, typicality and adequacy of representation, and at least one of the subsections of Rule 23(b), *see Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997); Newberg§ 11:27 (citing *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.,* 55 F.3d 768 (3d Cir. 1995)), provisionally certify the settlement class, and appoint Plaintiffs' counsel as Class Counsel and the Named Plaintiffs as class representatives.

As set forth below, all of the certification requirements for settlement purposes are met for this proposed settlement class. While Defendant disputes that the claims alleged in the action are proper for certification under Rule 23 on behalf of the purported class, they have agreed, for the purposes of settlement only, not to contest class certification. *See County of Suffolk v. Long Island*

Lighting Co., 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989) ("It is appropriate for the parties to a class action suit to negotiate a proposed settlement of the action prior to certification of the class.").

Conditional Rule 23 class certification for settlement purposes and appointment of class counsel have several practical purposes, including avoiding the costs of litigating class status while facilitating a global settlement, ensuring notification of all class members of the terms of the proposed settlement agreement, and setting the date and time of the final approval hearing. *Grant v. Warner Music Grp. Corp.*, No. 13-CV-4449 (PGG), 2015 WL 10846300, at *1 (S.D.N.Y. Aug. 21, 2015) (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 790-92 (3rd Cir. 1995)).

Under Rule 23(a), a class action may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the class;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (d) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Rule 23(b)(3) requires the court to find that:

> questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Id. In the Second Circuit, "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" in evaluating class certification. *Reade-Alvarez*

Eltman, Eltman & Cooper, P.C., 237 F.R.D. 26, 31 (E.D.N.Y. 2006) (quoting *Marisol A. v. Giuliani,* 126 F.3d 372, 377 (2d Cir. 1997)).

1. Numerosity

The proposed class satisfies the numerosity requirement because there are more than 40 members in the proposed class and each of the proposed subclasses. (Sweeney Dec. ¶¶ 17-18). "[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473,483 (2d Cir. 1995).

2. Commonality

The commonality requirement exists to test "whether the named Plaintiffs' claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen Tel. Co. of Sw v. Falcon*, 457 U.S. 147, 157 n. 13 (1982). The issues in dispute in this case include whether and when Defendant was required to provide WARN notices to individuals who experienced an employment loss because of mass layoffs in the Summer of 2020. Subclass Members experienced employment losses in the same ninety-day period and received WARN notices at approximately the same time. *See Pinsker v. Borders, Inc. (In re BGI, Inc.),* 465 B.R. 365, 375 (Bankr. S.D.N.Y. Feb. 17, 2012). Whether the Natural Disaster defense is applicable, whether lengthy layoffs were foreseeable in the Summer of 2020, and whether the notices that Defendant provided amounted to "as much notice as [was] practicable under the circumstances," are common issues for all Class Members. In the absence of class certification and settlement, each individual class member would be forced to litigate each common issue of fact and law.

3. Typicality

Rule 23 requires that the claims of the representative party be typical of the claims of the class. "Like the commonality requirement, typicality does not require the representative party's claims to be identical to those of all class members." *Frank,* 228 F.R.D. at 182. Typicality is satisfied "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." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (internal quotations omitted). "Minor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendant directs "the same unlawful conduct" at the named plaintiffs and the class. *Robidoux v. Celani,* 987 F.2d 931, 936-37 (2d Cir. 1993). Courts evaluate typicality "with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *Trinidad v. Breakaway Courier Sys., Inc.,* 2007 U.S. Dist. LEXIS 2914, at *15 (S.D.N.Y. Jan. 12, 2007) (quoting *Wagner v. NutraSweet Co.,* 95 F.3d 527, 534 (7th Cir. 1996)). Here, Named Plaintiffs claim the same injuries as Class Members, that Defendant failed to provide them with proper notice as required under the applicable WARN Acts. As such, the typicality requirement is met.

4. Adequacy of the Class Representatives

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy requirement exists to ensure that the class representatives will 'have an interest in vigorously pursuing the claims of the class, and ... have no interests antagonistic to the interests of other class members.'" *Toure v. Cent. Parking Sys.,* 2007 U.S. Dist. LEXIS 74056, at **18-19 (S.D.N.Y. Sep. 28, 2007) (*quoting Denney v. Deutsche Bank AG,* 443 F.3d 253, 268 (2d Cir. 2006)). "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Martens*

v. Smith Barney Inc., 181 F.R.D. 243,259 (S.D.N.Y. Jun. 23, 1998). Regarding the adequacy of the Named Plaintiffs as Class Representatives, there is no evidence or indicia that they have interests that are antagonistic or at odds with Class Members.

C. Certification Is Proper Under Rule 23(b)(3)

Rule 23(b)(3) requires that common questions of law or fact "predominate over any questions affecting only individual members, and that a class action is superior to any other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Common Questions Predominate

Plaintiffs must demonstrate that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof." *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107-8 (2d Cir. 2007) (internal quotations marks omitted). The inquiry is thus whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Espinoza v. 953 Assocs. LLC*, 280 F.R.D. 113, 125 (S.D.N.Y. 2011) (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001)). The predominance requirement, which is meant to test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation," is "a more demanding criterion than the commonality inquiry under Rule 23(a)" and is designed to determine whether 'proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Lizondro-Garcia v. KEFI LLC*, 300 F.R.D. 169, 176 (S.D.N.Y. 2014) (quoting *Amchem*, 521 U.S. at 623-24).

Plaintiffs assert that Class Members' common factual allegations and common legal theory, that Defendant failed to provide proper notice under the applicable WARN Acts, predominates

over any factual or legal variations among Class Members. Therefore, predominance is satisfied for purposes of certifying a settlement class.

2. A Class Action is a Superior Mechanism

The second part of the Rule 23(b)(3) analysis is a relative comparison examining whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968); *Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."). Rule 23(b)(3) sets forth a non-exclusive list of factors pertinent to judicial inquiry into the superiority of a class action, including: whether individual class members wish to bring, or have already brought, individual actions; and the desirability of concentrating the litigation of the claims in the particular forum. Fed. R. Civ. P. 23(b)(3).

Here, Class Members have limited financial resources with which to prosecute individual actions, and Plaintiffs are unaware of any pending individual lawsuits filed by any Class Member arising out of the same allegations. Furthermore, concentrating litigation in this Court is preferred because of all the alleged conduct occurred within the jurisdiction of this Court.[6] Therefore, a class action is a superior mechanism for resolving this dispute.

II. Plaintiffs' Counsel Should be Appointed Class Counsel

The lawyers representing the Named Plaintiffs, The Law Office of Christopher Q. Davis, PLLC, should be appointed as Class Counsel. Rule 23(g), which governs the standards and

[6] Congress explicitly gave WARN Act plaintiffs the right to bring representative actions: "A person seeking to enforce such liability ... may sue either for such person or for other persons similarly situated, or both, in any district court of the United States...." 29 U.S.C. § 2104(a)(5).

framework for appointing class counsel for a certified class, sets forth four criteria the district court must consider in evaluating the adequacy of proposed counsel: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(l)(C)(i). The court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(l)(C)(ii). The Advisory Committee has noted that "[n]o single factor should necessarily be determinative in a given case." Fed. R. Civ. P. 23(g) advisory committee's note.

The proposed Class attorneys satisfy all of these criteria. As set forth in the Declaration of Brendan Sweeney, The Law Office of Christopher Q. Davis, PLLC, has done substantial work identifying, investigating, prosecuting, and settling the Class Members' claims; the attorneys at The Law Office of Christopher Q. Davis, PLLC, have significant experience prosecuting and settling employment class actions; and the attorneys who worked on this matter are well-versed in the WARN Act and in class action law and are well-qualified to represent the interests of the class. (Sweeney Dec. ¶¶ 73-100). The attorneys at The Law Office of Christopher Q. Davis, PLLC, have worked on hundreds of complex employment class and collective action cases. The Law Office of Christopher Q. Davis, PLLC, should therefore be appointed as Class Counsel.

III. The Proposed Notice and Claim Form Is Appropriate

The content of the Proposed Settlement Notices fully complies with the requirements under Federal Rule of Civil Procedure 23. Pursuant to Rule 23(c)(2)(B), the notice must provide:

> the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the

> action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3).

The Proposed Settlement Notices here satisfies each of these requirements. The Notices describe the terms of the settlement, informs the Subclass Members about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing. Accordingly, the detailed information in the Proposed Settlement Notices to Subclass Members is more than adequate to put Subclass Members on notice of the proposed settlement and is well within the requirements of Rule 23(c)(2)(B). Courts have approved class notices even when they provided only general information about a settlement. *See, e.g.*, *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (class notice "need only describe the terms of the settlement generally"). The Proposed Settlement Notices in this case far exceed this bare minimum and fully complies with the requirements of Rule 23(c)(2)(B).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court enter the attached Proposed Order and: (1) grant preliminary approval of the Settlement Agreement, (2) conditionally certify the settlement class under Federal Rule of Civil Procedure 23(b)(3), (3) approve the Proposed Notices, (4) set a date for the final approval hearing and related dates, and (5) appoint Plaintiffs' Counsel as Class Counsel.

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Dated: October 3, 2023

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