SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALEX SHANKLIN, et al, Individually and as Class Representatives, Plaintiffs, v. WILHELMINA MODELS, INC., et al Defendants.	Index No. 653702/2013 Sherwood, J. **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the Decision and Order of the Honorable O. Peter Sherwood dated May 8, 2020 (NYSCEF No. 998), a true copy of which is annexed hereto, was duly filed and entered in the office of the Clerk of the Supreme Court, New York County, on May 11, 2020.

DATED: New York, New York
May 13, 2020

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

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ALEX SHANKLIN, et al.,
Individually and as Class Representatives,

Plaintiffs,

-against-

WILHELMINA MODELS, INC., et al.,

Defendants.

----------X

INDEX No.: 653702/2013

MOT. SEQ. No.: 035

Upon the foregoing papers, it is **ORDERED** that this motion for class certification (Motion Sequence 035) is decided in accordance with the accompanying decision and order.

O. P. Sherwood

5/8/2020
DATE

O. PETER SHERWOOD, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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ALEX SHANKLIN, *et al.*,
Individually and as Class Representatives,

Plaintiffs,

-against-

WILHELMINA MODELS, INC., *et al.*,

Defendants.

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SHAWN PRESSLEY, *et al.*,
Individually and as Class Representatives,

Plaintiffs,

-against-

FORD MODELS, INC., *et al.*,

Defendants.

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LOUISA RASKE,
Individually and as Class Representatives,

Plaintiffs,

-against-

MAJOR MODEL MANAGEMENT, INC.,

Defendant.

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DECISION AND ORDER

Index No.: 653702/2013
Motion Seq. No.: 035

Index No.: 653001/2016
Motion Seq. No.: 008

Index No.: 653534/2018
Motion Seq. No.: 004

O. PETER SHERWOOD, J.:

These motions to certify classes in three related cases are decided together. Plaintiffs are or were fashion models who allege they worked as employees at one or more of the defendant modeling agencies ("Agencies" or "Defendants") but were mischaracterized as independent contractors in violation of the New York Labor Law ("Labor Law") and had deductions taken from

their paychecks illegally. They also allege they were deprived of compensation owed for use or re-use of their image in breach of individual form contracts they entered into with the Agencies. The claims as alleged are described in a Decision and Order e-filed in the *Shanklin* case on May 26, 2017 (Doc. No. 563)[1] and affirmed with some modifications (Doc. No. 744, 161 AD3d 610 [1st Dept 2018]) and will not be recounted here except as necessary.

I. CLASS CERTIFICATION MOTION

Motion Sequence Number 035 relates to *Shanklin v Wilhelmina Models, Inc*., Index No. 653702/2013. Here, plaintiffs and putative class representatives Alex Shanklin, Marcelle Almonte, Grecia Palomares, Carina Vretman, Michelle Griffin Trotter, Vanessa Perron, and Roberta Little (the "Shanklin Plaintiffs") seek to certify three separate plaintiff classes against defendants Wilhelmina Models, Inc. and Wilhelmina International LTD. (the "Wilhelmina Class"), Next Management, LLC (the "Next Class"), and MC2 Model and Talent Miami LLC and MC2 Models Management LLC (the "MC2 Class" and together with the Next Class and the Wilhelmina Class, the "Proposed Shanklin Classes").

Motion Sequence Number 008 relates to *Pressley v Ford Models, Inc*., Index No. 653001/2016 ("Pressley Case"). In this case, plaintiff Roberta Little who is also one of the Shanklin Plaintiffs, is the sole remaining plaintiff and Wilhelmina and Next are the only remaining defendants. Little is precluded from representing a class against Next by virtue of the class action waiver provision in her contract with Next (*see* Doc. No. 129) and her motion to be designated as the class representatives against Next must be denied.

For unexplained reasons, the Shanklin Plaintiffs filed motion papers in *Pressley* that are the same as those filed in the Shanklin Case. Their "corrected" Notice of Motion for Class Certification, seeks the appointment of Palomares, Vretman, Griffin Trotter, Shanklin and Little as representatives of the "Wilhelmina Class" (*see* Doc. No. 192). As noted above, only Little is a named plaintiff in *Pressley* and she only has standing in this case. Little's request for designation as the class representative in *Pressley* against the Wilhelmina Defendants is denied in the court's discretion as this branch of her motion will be addressed in the Shanklin Case.

[1] "Doc. No. ___" followed by a number refers to the location in the record of the *Shanklin* case, (Index No. 653702/2013), unless otherwise noted, as filed in the New York State Courts Electronic Filing System.

In the third action, *Raske v Major Model Management, Inc.* ("Major"), Index No. 653534/2018, plaintiff Louisa Raske ("Raske") moves to certify a class against defendant Major alleging breach of contract.

The Shanklin Plaintiffs seek to certify classes with proposed class definitions and a "Class Period" specific to each as follows:

> All persons who entered into modeling contracts with [Defendant] during [Class Period] who (i) were classified as independent contractors rather than employees, (ii) did not receive compensation for one or more uses and/or reuses of images created as part of their relationship with [Defendant]; (iii) attended a casting, go-see, meeting, check-in, or test shoot, or performed any other uncompensated work or service at the direction of [Defendant]; and/or (iv) received a paycheck from [Defendant].

The proposed Wilhelmina Class would be represented by Grecia Palomares, Carina Vretman, Michelle Griffin Trotter, Alex Shanklin, and Roberta Little, with a Class Period of 2001 to the present asserting the following claims:

	Unlawful Deductions (NYLL Section 193)	**Failure to Furnish Accurate Wage Statements (NYLL Section 195(3))**	**Breach of Contract**	**Failure to Pay Wages Due (NYLL Article 6)**
Palomares (2004-2009)	X	X	X*	
Vretman (2003-2009)	X	X	X*	
Griffin Trotter (2008-2009)	X	X	X*	
Shanklin (2002-2004)			X*	
Little (2014-2016)	X	X	X	X

* For breaches sustained after October 24, 2007.

The proposed Next Class would be represented by Vanessa Perron, with an alleged Class Period of 2000 to the present (*see* Shanklin Br. at 6, Doc. No. 837). She is alleged to have had a contract with Next from 2002 through approximately 2009 or 2010. She also asserts claims for unlawful wage deductions in violation of NYLL Section 193 (*Shanklin* Count 3) and failure to furnish accurate wage statements and explanations thereof in violation of NYLL Section 195(3) (*Shanklin* Count 5). She does not assert a usage claim.

The proposed MC2 Class would be represented by Marcelle Almonte and Vanessa Perron, with a Class Period of 2005 to the present *(see id.)*. However, a default judgment was entered against this defendant on January 7, 2018, prior to the filing of this motion for class certification. Accordingly, that branch of the motion in *Shanklin* seeking certification of a Proposed MC2 Class is denied.

Each of the proposed Shanklin Classes seeks to establish that, through use of form contracts, standardized policies and procedures, and industry norms, defendants exercised such substantial control over the models as to render them employees under the law. Accordingly, each seeks to recover for alleged illegal deductions defendants took as a matter of course from the models' paychecks under the guise of the models' supposed independent contractor arrangements with the Agencies (*id.,* at 7). The Shanklin plaintiffs argue that because models were in reality employees, not independent contractors, these deductions violated NYLL Section 193. Similarly, because the accounting statements setting forth the deductions were vague and often indecipherable, defendants violated NYLL Section 195(3). Each of the Proposed Shanklin Classes also seeks to recover any additional unpaid or withheld payments due to models under their contracts, which payments can be identified through Defendants' books and records, such as payments defendants regularly accepted for use or reuse of the models' image without contacting the models themselves ("Usage Claim") *(id.)*.

Because the court dismissed Raske's Labor Law claim for lost wages and benefits (Doc. No. 18 in the Raske Case), she is unable to (and does not [Raske Reply at 8, Doc. No. 134]) assert Labor Law claims. She asserts claims on behalf of herself and those included in a class consisting of "all persons who entered into modeling contracts with Major during the Major Class Period (2005 to present) who (i) were classified as independent contractors rather than employees, (ii) did not receive compensation for one or more uses and/or reuse of images created as a part of their relationship with Major; (iii) attended a casting, go-see, meeting, check-in or test shoot, or performed any other uncompensated work or service at the direction of Major; and/or (iv) received a paycheck from Major" (Raske Br. at n. 1, Doc. No. 86 in the Raske Case). She asserts that class action treatment is appropriate because Major required each model working for it to sign form contracts, used standard policies to govern its relationships with models, had standard practices for deducting expenses from all its models' paychecks and "systematically breached its contractual obligations" by failing to make timely payments, deducting certain costs and expenses from

models' paychecks and not "adequately document[ing]" deductions (*id*., at 1-2). Notably, these claims track the Labor Law claims of models in the Proposed Shanklin Classes but Raske's Labor Law claims for wages and employee benefits have been dismissed.

A. Legal Standard - Class Representation

In New York, class certification is provided for at CPLR Article 9. "The proponent of class certification bears the burden of establishing the criteria promulgated by CPLR 901 (a) and must do so by the tender of evidence in admissible form. Conclusory assertions are insufficient to satisfy criteria. In determining whether an action should proceed as a class action, it is appropriate to consider whether the claims have merit. However, this 'inquiry is limited' and such threshold determination is not intended to be a substitute for summary judgment or trial. Class action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham" (*Pludeman v Northern Leasing Systems Inc.,* 74 AD3d 420, 422 [1st Dept 2010] [internal citations omitted]). CPLR 901 provides that a class may be certified where: (i) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (ii) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (iv) the representative parties will fairly and adequately protect the interests of the class; and (v) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

In evaluating a proposed class, "the class certification statute should be liberally construed" (*Kudinov v Kel-Tech Const. Inc*., 65 AD3d 481 [1st Dept 2009]; *see also Borden v 400 E. 55th St. Assoc., L.P*., 24 NY3d 382, 393 [2014] ["[T]he legislative history of CPLR 901 . . . provides that the statute requires a liberal reading . . . "]; *Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985] ["[T]he criteria for class certification 'should be broadly construed not only because of the general command for liberal construction of all CPLR sections . . . but also because it is apparent that the Legislature intended Article 9 to be a liberal substitute for the narrow class action legislation which preceded it'"]).

The court may consider, in addition to the factors enumerated in CPLR 902, the merits of the action, with a view toward eliminating spurious and sham suits as early as possible (*see Yollin v Holland America Cruises, Inc*., 97 AD2d 720 [1st Dept 1983] [*citing Seligman v Guardian Life Ins. Co*., 59 AD2d 859, 860 [1st Dept 1977] *app dism*, 44 NY2d 646 [1978]). "The Court should

eliminate spurious and sham suits as early as possible to avoid the expenditure of both time and money by both the courts and the opponents to the class" (2 *Weinstein-Korn-Miller, NY Civ Prac*, ¶ 902.10). The trial court has sound discretion in determining whether the facts presented on a motion for class certification satisfy this criteria, (*see CLC/CFI Liquidating Trust v Bloomingdale's, Inc*., 50 AD3d 446, 447 [1st Dept 2008]). "General or conclusory allegations in the pleadings or affidavits are insufficient to sustain this burden" (*Rallis v City of New York*, 3 AD3d 525, 526 [2nd Dept 2004]).

B. Arguments and Discussion

1. Numerosity

With respect to the Proposed Shanklin Classes, plaintiffs show each of the remaining proposed classes meet the threshold for impracticality of joinder. Plaintiffs show Next has managed around 700 models a year (*see* Fox Aff., Ex C, Doc. No. 841). Wilhelmina has managed over 1,000 models from 2001 to the present (*see* Fox Aff. Ex D, Doc. No. 841). The defendants do not contest this showing.

2. Common Questions

The Shanklin Plaintiffs argue that questions of law and fact predominate over issues "affecting only individual class members, *i.e.* whether the use of a class action would achieve economies of time, effort and expenses and promote uniformity of decision as to persons similarly situated" (*Pludeman*, 74 AD3d at 423). Plaintiffs emphasize that "[t]he most prominent common question of law for each Proposed Class is; were the model employees or independent contractors" (Shanklin Br. at 10, Doc. No. 837). Plaintiffs assert several additional common questions, including the degree of control defendants exercised over the models, (i) the terms of class members' agreements; and (ii) the amount, nature and timing of the deductions taken from payments to class members (*id.*, at 10-11).

Both the Wilhelmina and Next defendants argue the individual differences among class members "will overwhelm any advantages of proceeding as a class action" (Wilhelmina Br. at 23, Doc. No. 952). Next asserts the facts presented in its cross motion for summary judgment show that not all models should be considered as one and the same and inquiry and investigation of each individual model will be necessary "to . . . determine, among other things . . . (i) who the models performed work for; (ii) how it was performed; and (iii) the control, if any, Next had over the model" (Next Br. at 6, Doc. No. 892).

As Next notes, the United States Supreme Court has confirmed that "[w]hat matters to class certification . . . is not the raising of common 'questions' even in droves – but rather the capacity of a class wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers" (*Wal-Mart Stores, Inc. v Dukes*, 564 US 338, 350 [2011]).

In this case, whether the models were employees, despite what is recited in the form contracts the agencies require prospective models to sign, is a central question and the answer will determine whether the Labor Law applies, thereby triggering a determination of whether defendants failed to pay them in accordance with law (*see Ferrari v The National Football League*, 153 AD3d 1589, 1591 [4th Dept 2017] [Finding the existence of common questions including whether putative class members were employees despite provision classifying them as independent contractors]). If it is determined that the models were employees, they would be entitled to assert rights afforded them under the Labor Law and the common questions plaintiffs assert may be germane.

From the perspective of the Shanklin Plaintiffs, "[i]f a jury finds that defendants exercise of control over their models . . . [means] that models were actually employees, then the remaining questions are mostly about damages . . . If a jury finds instead that models were properly characterized as independent contractors, then that disposes of the claims the other way. Either way, this common question predominates the class" (Shanklin Br. at 10, Doc. No. 837). This aptly describes the common question posed by plaintiffs' Labor Law claims. It also exposes the absence of any common question arising from the breach of contact alleged.

Neither the Shanklin Plaintiffs nor Raske has carried her/his burden of showing the existence of common questions as to the breach of contract claim. Although plaintiffs assert the agencies used form contracts and have "company-wide" policies concerning the models' rights and responsibilities (see Shanklin Br. at 11, Doc. No. 237 and Raske Br. at 8, Doc. No. 86 in Raske), plaintiffs have not identified the actions, policies, and practices that breached any *identified* provision of the form contracts alleged. Moreover, the pre-class certification discovery conducted by the parties raises significant questions as to the merits of plaintiffs' breach of contract

claims (primarily the usages claim)[2], although the claims asserted are neither "spurious" nor "shams" (*see Yollin*, 92 AD2d at 720).

3. Typicality

CPLR Section 901 (a)(3) requires that "the claim or defenses of the representative parties are typical of the claims or defenses of the class." This requirement is satisfied where plaintiffs' claims "arose out of the same course of conduct and are based on the same theories as the other class members" (*Ferrari*, 153 AD3d at 1592 [internal citation omitted]; *see also Ramirez v Mansions Catering, Inc.*, 2009 NY Slip Op 31100U, at *12 [Sup. Ct. New York County April 27, 2009] ["[T]he claims or defenses of the representative parties are typical of the claims or defenses of the class, in that they arise out of the same course of conduct as the class members' claim and are based on the same cause of action."]).

Plaintiffs allege they all seek to recover based on the same legal theory – *i.e.*, they were mischaracterized by defendants as independent contractors when legally they were employees – premised on the same conduct, *e.g.*, defendants' pervasive control over the models and deduction of illegal expenses from their models' pay. Plaintiffs also assert they and all other models were subjected to the agencies "standard contracting procedures" but, as noted above, plaintiffs have not identified any specific contract provision the agencies typically breached or the typical way the breach occurred.

The Wilhelmina defendants respond that plaintiffs' claims are not typical because each of plaintiffs' claims is subject to varied and individualized defenses and counterclaims, including capacity to sue, statute of limitations and breaches which preclude plaintiffs from enforcing their contracts (*see* Wilhelmina Br. at 21). Next asserts that Perron's testimony that "[a] lot of us models, we have all experienced similar stories" refers to Next's standard contract and procedures but lacks "detail as to who those models are, who they work for, how they are similar, *etc.*" (Next Br. 8-9). However, Perron claims she was misclassified, that unlawful wage reductions were taken and that Next failed to furnish accurate wage statements, all in violation of Labor Law (*see*

[2] According to Wilhelmina, the usage claims alleged by Shanklin, Griffin-Trotter and Raske are time-barred and neither Vretman and Palomares could identify any usage for which she was not paid (*see* Wilhelmina, Br. at 18-19, Doc. No. 952).

Shanklin Compl. Count 5). Major argues that "all of Raske's claims against it have been negated by her own testimony or documentary evidence" (*see* Major Br. at 1, Doc. No. 133 in Raske Case).

"That . . . defenses vary does not preclude class certification . . . and, defendant's counterclaim does not materially add to the consistency or difficulty of resolving plaintiff's individual claim" *Borden v 400 East 55th St. Assoc., LP*, 105 AD3d 630, 631 (1st Dept 2013), aff 24 NY3d 382, 390 [2014]). "To be typical, it is not necessary that the claims of the named plaintiff be identical to those of the class . . . The [typicality] requirement is satisfied even if the class representative cannot personally assert all the claims made on behalf of the class." *Pruitt v Rockefeller Ctr. Properties, Inc*., 167 AD2d 14, 22 (1st Dept 1991). Nor is it important that plaintiffs may not be able to assert claims in each of the years covered by the relevant Class Periods; the point of a class action is to permit claims that are highly similar, not identical, to proceed together (*see Ferrari*, 153 AD3d at 1592 [fact that none of the named plaintiffs worked for defendant during part of the class period insufficient to defeat class certification]). Defendants have already raised and the court has decided whether any particular claim of the named plaintiffs is time-barred. Whether a named plaintiff has filed for bankruptcy but failed to name Wilhelmina or may be required to engage in mediation before proceeding with litigation (an issue the court has already resolved, *see* Doc. No. 563, at p. 37) does not detract from his or her claim - - typical to the class - - of misclassification in violation of the Labor Law.

Plaintiffs have satisfied the typicality requirements of CPLR 901 (a)(3) as against Wilhelmina and Next with respect to the Labor Law claims only.

4. Adequacy of Representation

CPLR 901 (a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This involves "looking at whether the named plaintiffs' interests are antagonistic to other members of the class and whether plaintiffs' attorneys are qualified, experienced and able to conduct the litigation" (*Marshall v Roselli Moving & Stor. Corp*., 2012 NY Slip Op 30165U, at *8 [Sup Ct New York County January 23, 2012] [internal quotations omitted]). Accordingly, courts typically consider: "(1) whether a conflict of interest exists between the representative and the class members; (2) the representative's background and personal character, as well as his [or her] familiarity with the lawsuit, to determine [the] ability to assist counsel in its prosecution; and (3) the competence, experience and vigor of the representative's attorneys" (*id*., at *8-9, quoting *Pruitt*, 167 AD2d at 24).

Next does not argue Perron failed to satisfy the adequacy of representation requirement. The other defendants do not dispute (i) there are no conflicts of interest between plaintiffs and the class members or (ii) plaintiffs' counsel will ably represent the interests of the classes. Plaintiffs maintain that by their active participation in these proceedings, including working with counsel to prepare the operative complaints and sitting for depositions, they have shown themselves sufficiently capable of assisting counsel in the prosecution of their claims and the claims of the proposed classes. Each of the plaintiffs, therefore, qualifies as an adequate representative of the class she/he proposes to represent (*see Dabrowski v Abax, Inc*., 84 AD3d 633, 634 [1st Dept 2011] ["The motion court correctly determined that the plaintiffs are adequate representatives for the putative class, as they have thus far engaged in a contentious and litigious prosecution of the instant matter."]; *Nawrocki v Proto Const. & Dev. Corp*., 82 AD3d 534, 535 [1st Dept 2011] ["Plaintiffs meet the requirements of CPLR 901 [a][4] to fairly and adequately protect the interests of the class. The record reveals no conflict of interest between the class members and the class representatives. Indeed, plaintiffs seek the same relief as the class members – to receive the wages . . . allegedly owed to them under . . . contracts."]). Moreover, each of the plaintiffs had a contract with the defendant they are suing during the respective Class Periods, provided testimony on their claims, and has sufficiently followed the progress of this proceeding, establishing that they possess the requisite, and minimal, "general awareness" of their claims in this proceeding necessary for a class representative (*see Brandon,* 106 AD2d at 170 [1st Dept 1985]; *see also Stecko*, 121 AD3d at 542 [adequacy prong satisfied where plaintiffs "possess[ed] more that the required general awareness of the claims at issue"] [internal quotations omitted]). Further, it is undisputed plaintiffs have retained qualified and experienced counsel that has extensive experience in this type of class action and employment litigation and has successfully managed numerous large class-actions. Plaintiffs' counsel has zealously prosecuted this action and has sufficient resources to represent the proposed classes.

Wilhelmina asserts plaintiffs cannot fairly and adequately protect the interests of the proposed Wilhelmina Class where the named plaintiffs cannot show any injury. It cites two inapposite cases that were dismissed on motions for summary judgment following discovery. The cases here are in the pre-class-certification stage and the court has yet to authorize merits discovery (*see* Doc. No. 775). Wilhelmina also attacks plaintiffs for being insufficiently knowledgeable about the case (*see* Wilhelmina Br. at 23). Here, the law is well settled. Although it is appropriate

to consider whether the claims of plaintiff have merit, "this inquiry is limited and such threshold determination is not intended to be a substitute for summary judgment or trial" (*Pludeman*, 74 AD3d at 422). A plaintiff can adequately represent the class if she or he has a general awareness of the claims" (*Stecko v RLI Insurance Co*., 121 AD3d 542, 543 [1st Dept 2014]). In these cases, plaintiffs have satisfied this standard.[3]

5. Superiority

Regarding the requirement that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (CPLR 901 [a][5]), courts have routinely found a "[c]lass action is an appropriate method of adjudicating wage claims arising from an employer's alleged practice of underpaying employees, given that 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" (*Weinstein*, 138 AD3d at 620 [1st Dept 2016]; *see also Stecko*, 121 AD3d at 542; *Nawrocki*, 82 AD3d at 534).

Plaintiffs argue the costs for each member of the Proposed Classes to prosecute their claims individually would be prohibitively high. Plaintiffs also contend these members are, in general, individuals of modest means, and each is seeking a relatively modest amount, particularly in relation to typical litigation costs.

Wilhelmina disputes this, pointing to its arguments addressed to commonality and typicality to declare that "the time, effort and expense of parsing through individual differences between class member claims will overwhelm any advantages of proceeding by a class action" (Wilhelmina Br. at 23). However, the court has already rejected this argument as applied to the New York Labor Law claims. Next maintains plaintiffs have not shouldered their burden because their Labor Law case "can be undertaken by the [New York] Commissioner of Labor" (Next Br. At 11). Suffice it to say, Next's suggested ground for rejection of the class action vehicle to address plaintiffs' wage and hour claims is not what the Legislature contemplated when it enacted CPLR

[3] The unwarranted attack by Wilhelmina's counsel on Ms. Palomares does not expose either a lack of familiarity with the facts or an absence of engagement as counsel asserts. Accepting that she "literally took 36 minutes to respond to one question" (Wilhelmina Br. at 23), which was the result of Mr. Haddad's insistence over objection that she read a lengthy bankruptcy court petition merely to confirm that Wilhelmina was not referenced by name in the bankruptcy petition, the testimony he sought to elicit could have been obtained in seconds had he merely re-phrased the question (Palomares 13:9-15:23, Doc. No. 935). Wilhelmina has not alleged that Ms. Palomares has any conflicts and the court is satisfied that she is engaged and generally familiar with the issues to qualify as a class representative.

Article 9 and the Labor Law. If the Legislature wanted to give the New York State Commissioner of Labor exclusive enforcement authority over the Labor Laws, it knew how to do so.

6. Requirements of CPLR 902

In determining whether a class should be certified, the court should also consider the factors set forth in CPLR 902 which include:

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; [and]

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

Plaintiffs argue that all of these factors support certification of the Proposed Classes, for largely the same reasons already discussed (*see Manor v Hornblower New York, LLC*, 38 NYS3d 831, at *9 [Sup Ct New York County 2016] ["The discussion of superiority under CPLR 901 (a) overlaps with the factors of CPLR 902."]). Plaintiffs maintain requiring class members to prosecute separate actions would be so costly as to render it realistically impossible for them to prosecute their claims (*see In re HSBC Bank U.S.A., N.A., Checking Account Overdraft Litig.*, 29 NYS3d 847, at *8 [Sup Ct New York County 2015) ("With respect to the first two factors - § 902 (1), class members' interest in individually prosecuting their claims and § 902 (2), the impracticability of prosecuting separate actions – these two factors are satisfied by the Court's finding that the class action is the superior method of adjudication."). New York is the most desirable forum for this action given that the defendants, most of the plaintiffs, and many of the other class members are located here, and most of the events at issue occurred here. Finally, there are no difficulties that are likely to arise in prosecuting this case as a class action, as there are common issues of law and fact. Plaintiffs' claim typifies those issues. Plaintiffs will vigorously litigate their claims, and plaintiffs have retained experienced counsel to assist them in doing so. Therefore, each of the Section 902 factors supports certification (*see, e.g., Stecko*, 12 AD3d at 542;

Pesantez, 251 AD2d at 11; *Ferrari*, 153 AD3d at 1593). For the reasons discussed above, the court agrees as to the Labor Law claims.

II. SUMMARY JUDGMENT

By cross-motions for summary judgment, defendants Wilhelmina, Next and Major seek to defeat plaintiffs' individual claims and thereby their claims to standing as class representatives (*see* Wilhelmina Br. at 11 ["Once [their individual claims are] dismissed plaintiffs obviously cannot serve as class representatives"], Doc. No. 952). The gambit fails. First, the motion is premature as the court, at defendants' urging, declined to allow merits discovery until after class certification issues are decided (*see* Doc. No. 775 [denying "Plaintiffs' document demands . . . without prejudice to their renewal following the class certification stage"]). Second, inquiry "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" (*Super Glue Corp v Avis Rent-A-Car Sys., Inc.*, 132 AD2d 604, 607 [2d Dept 1987]). The issues defendants would have the court decide may not be considered at this time.

III. SUMMARY AND CONCLUSION

The court has already held that the remaining claims are sufficiently pleaded. In this Decision and Order, the court holds that plaintiffs have satisfied the requirements for class action certification as to the Labor Law claims but not as to the breach of contract claims based on alleged improper withholding of usage payments. The motion for class action certification in the Shanklin Case (Motion Sequence Number 035) shall be granted as to the proposed Wilhelmina and Next classes with a class period from October 24, 2007 to the present (*see* Decision and Order dated May 25, 2017 at 15 [Doc. No. 563] affd 161 AD3d 610, 611 [affirming limitation of claims "to those accruing on or after October 24, 2007]). The certified classes shall be limited to the alleged violation of New York Labor Law §§ 193 and 195(3) *(see id.)*. The motion in *Pressley* to certify a class (Motion Sequence Number 008) is denied for the reasons discussed above. The requests in all three cases to certify classes alleging breach of contract shall be denied for failure to satisfy the requirements of CPLR 901(a)(2) and (3).

The motions for summary judgment shall be denied as premature.

The court has considered the parties' other arguments, including the competing requests for imposition of sanctions, and finds them unavailing.

Accordingly, it is hereby

ORDERED that the motion of plaintiffs in *Shanklin v Wilhelmina Models, Inc*., Index No. 653702/2013 (Motion Sequence Number 035) for class certification is GRANTED to the extent that the proposed Wilhelmina Class and Next Class, limited to Labor Law claims that accrued on or after October 24, 2007, may be formed and is otherwise DENIED; and it is further

ORDERED that the motion for class action certification in *Pressley v Ford Models, Inc*., Index No. 653001/2016 (Motion Sequence Number 008) is DENIED in its entirety as Little's class action claim against Next has been waived and as the remaining class action claim is duplicative of the class action claim against Wilhelmina in the Shanklin Case; and it is further

ORDERED that the motion of plaintiff Louisa Raske in *Raske v Major Model Mgt., Inc*., Index No. 653534/2018 for certification of a class (Motion Sequence Number 004) is DENIED; and it is further

ORDERED that the cross-motions of the Major, Wilhelmina and Next defendants for summary judgment is DENIED; and it is further

ORDERED that the requests for sanctions are DENIED; and it is further

ORDERED that plaintiffs' counsel shall e-file a proposed order certifying classes as authorized after counsel have met and conferred to attempt to agree on the form of said order; and it is further

ORDERED that counsel meet and confer to agree on a discovery schedule to be discussed and fixed at a compliance conference to be held on Wednesday, June 10, 2020 at 10:00 AM at Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: May 8, 2020 **E N T E R,**

O. P. Sherwood

O. PETER SHERWOOD J.S.C.