IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ALBERONYS CUEVAS, on behalf of himself and all other similarly situated persons, Plaintiffs, v. CITIZENS FINANCIAL GROUP, INC., and RBS CITIZENS, N.A. (d/b/a Citizens Bank) Defendants.	CIVIL ACTION NO. CV-10-5582

MEMORANDUM IN SUPPORT OF PLAINTIFFS' *UNOPPOSED* MOTION FOR FINAL APPROVAL OF SETTLEMENT STIPULATION

COME NOW the Plaintiffs in the above captioned matter, and the Plaintiffs in the following five matters transferred to this Court and consolidated under this case number:

Ross, et al. v. RBS Citizens, N.A., et al. (E.D.N.Y. No. 13-cv-4226-FB-RML) (hereinafter "*Ross*")

Martin, et al. v. Citizens Financial Group, Inc., et al. (E.D.N.Y. No. 13-3871-FB-RML) (hereinafter "*Martin*")

Bell, et al. v. Citizens Financial Group Inc., et al. (E.D.N.Y. No. 13-cv-4073-FB-RML) (hereinafter "*Bell*");

Lyons, et al. v. Citizens Financial Group, Inc., et al. (E.D.N.Y No. 13-cv-3919-FB-RML) (hereinafter "*Lyons*"); and

Watson v. Citizens Bank of Pennsylvania (E.D.N.Y. No. 13-cv-3917-FB-RML) (hereinafter "*Watson*");

and hereby set forth this Memorandum in Support of the Plaintiff's *Unopposed Motion for Final Approval of Settlement Stipulation* (*Cuevas* Doc. 95). The Defendants have reviewed the motion and supporting memorandum and do not oppose the requests made herein.

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I. Preliminary Statement

The Plaintiffs are seeking final approval for a Settlement Stipulation (*Cuevas* Doc. 83) that was finalized on September 15, 2013 and preliminarily approved by this Court on October 28, 2013. In granting the Plaintiffs' Unopposed Motion for Preliminary Approval, the Court: (i) designated the Rule 23 class representatives and class counsel in this matter, (ii) granted preliminary conditional certification under Rule 23 for the *Cuevas* and *Watson* class members, (iii) approved the settlement of claims under § 216(b) of the Fair Labor Standards Act ("FLSA"), and (iv) approved the proposed various notices of settlement for all the class members. The Court set an objectors' hearing for Rule 23 class members on March 11, 2014. As of that date, there were no objectors; therefore, that hearing was adjourned. However, the parties discovered an additional 228 class members who should have been mailed notices. For these persons only, the Court set a second objectors' hearing for May 8, 2014. (*Cuevas* Docket entry dated February 24, 2014). As of the time of this filing, no objectors from this group have come forward.

This settlement involves six wage and hour FLSA collective / Rule 23 class actions listed above brought against the same Defendants (all six cases collectively referred to as the "Wage-Hour Lawsuits").[1] All of these class/collective actions involve retail banking center employees making a claim for overtime pay under federal and state laws. The Parties have resolved all six class/collective claims for a gross settlement amount of $11,501,500.00. The settlement regarding these six cases covers four Rule 23 classes of Assistant Branch Managers ("ABMs"), one collective class under the FLSA § 216(b) of ABMs, one Rule 23 hourly class of employees, and one §216(b) hourly collective class of employees. Details regarding the various claims asserted in these cases and the terms of the Settlement Stipulation were fully set forth in the *Memorandum in Support of Unopposed Motion for Preliminary Approval of Settlement Stipulation* (Doc. 86).

[1] Any capitalized terms in this memorandum adopt the definitions of these terms as set forth in Section 1 of the Settlement Stipulation unless otherwise stated.

The Plaintiffs respectfully request that the Court: (1) certify the proposed settlement classes under Rule 23(b)(3) in the *Cuevas* matter and *Watson v. Citizens Bank of Pennsylvania*;[2] (2) grant final approval of the Global Settlement Stipulation; and (3) grant Plaintiffs' Unopposed Motion for Order Approving Attorneys' Fees and Expenses (*Cuevas* Docs. 90-91).

II. Administration of Notice of Settlement

The Court approved the various notices to the class members when it granted preliminary approval on October 28, 2013. On December 27, 2013, the Court approved administrator Class Action Administration, Inc. (hereafter "CAA") mailed a copy of the "Notice of Class Action Settlement," "Class Member Claim Form," and, if applicable, "Request for Exclusion from Class Action Settlement" (collectively "Notice Package") to 5,713 mailing addresses. (CAA declaration, ¶ 3, attached as **Exhibit A**). Subsequently, the parties discovered an additional 228 class members who should have received notice. On March 3, 2014, notice was mailed to these persons. (*Id.* at ¶ 4).

The Notice Package informed recipients that any member of the Settlement Classes who wanted to object to the proposed Settlement and was qualified to do so must submit a written objection to CAA. (*Id.* at ¶ 5). Zero timely objections to the Settlement were submitted to CAA on or before the February 25, 2014 deadline. (*Id.* at ¶ 6). The second mailing to the 228 class members had an objection deadline of May 2, 2014. At the time of this filing, there have been no objections from this group of class members. (*Id.* at ¶ 6).

The Notice Package also informed recipients that any member of the applicable Settlement Classes who wanted to exclude themselves from the Settlement ("opt out"), and were qualified to do so, must complete, sign and return the Request for Exclusion from Class Action Settlement form to CAA. (*Id.* at ¶ 7). CAA received 27 opt-out requests that were submitted on

[2] The Rule 23 class claims in *Ross* and *Lyons* do not need provisional certification since they were already certified by the transferring courts prior to this settlement.

or before the February 25, 2014 deadline. Zero opt-out requests were submitted after the February 25, 2014 deadline. Fifteen (15) of the 27 opt-out requests that were submitted on or before the February 25, 2014 deadline were from members of the Settlement Classes who also submitted a Class Member Claim Form. The parties agreed to resolve of these discrepancies as follows:

a. Twelve (12) of these individuals provided CAA confirmation via email, fax, or telephone that they truly intended to participate in the settlement, rather than opt-out.

b. Three (3) of these individuals did not provide CAA confirmation of their true intention, but were mailed a letter explaining that CAA will only process their Class Member Claim Form unless they advise CAA in writing within 14 days of their true intention to exclude themselves.

Thus, CAA has approved a grand total of twelve (12) valid and timely opt-out requests comprising approximately 0.2% of all members of the Settlement Classes. The list of the twelve (12) valid and timely opt-out requests, submitted on or before the February 25, 2014 deadline, is attached as Exhibit A to CAA's declaration. (*Id.* at ¶ 8).

The Notice Package also informed recipients that any member of the Settlement Classes wishing to receive a settlement payment must complete and return the Class Member Claim Form to CAA. (*Id.* at ¶ 9). As of April 18, 2014, CAA has received a total of 4,450 unique Class Member Claim Forms. Forty-nine (49) Class Member Claim Forms that were received fall under unique circumstances as follows:

a. Thirty-six (36) of the Class Member Claim Forms received were submitted after their respective deadline. CAA, in conjunction with Class Counsel and counsel for the Defendants, recommends approving these claims.

b. Ten (10) of the Class Member Claim Forms received did not provide a complete or valid Social Security Number. CAA, in conjunction with Class Counsel and counsel for the

Defendants, recommends approving these claims after a complete and valid Social Security Number has been provided by the Defendants.

c. One (1) of the Class Member Claim Forms received did not have a signature. CAA, in conjunction with Class Counsel and counsel for the Defendants, recommends denying this claim.

d. Two (2) of the Class Member Claim Forms received did not provide either a signature, or a complete and valid Social Security Number, but are within the allotted time to cure this deficiency. These claims are currently pending a final determination.

(*Id.* at ¶ 10). In total, 4,449 Class Member Claim Forms are currently approved, representing approximately $6,136,338 in gross payments to class members, which is approximately 85% of their Net Settlement Fund. (*Id.* at ¶ 11).

III. Argument

A. Approval of the Rule 23 Class Claims for *Ross* and *Lyons* has Occurred:

Since *Lyons* and *Ross* have already been certified as class actions under Rule 23(b)(3) in their respective courts before transfer,[3] this Court will only need to grant Rule 23 certification for *Cuevas* and *Watson* to effectuate the Settlement Stipulation.

B. Certification of the *Cuevas* and *Watson* Rule 23 Classes is Appropriate

This Court had granted Rule 23 certification for *Cuevas* prior to the Second Circuit vacating and remanding the matter for further consideration. The Second Circuit's decision should not cause this Court concern. It clearly stated that it was not holding that certification was not possible. Instead, it just sought additional clarification/discussion from this Court regarding the body of evidence that was presented by the Defendants. The Rule 23 analysis in

[3] *See Ross v. RBS Citizens, N.A.*, 2010 WL 3980113 (N.D.Ill. Oct. 8, 2010); *Lyons v. Citizens Financial Group, Inc.*, 2012 WL 5499878 (D.Mass. Nov. 9, 2012).

Watson would mirror the one undertaken by this Court in *Cuevas* since the class members and their claims are identical.

When faced with a proposed class settlement, courts first examine whether the settlement class is certifiable. *Denney v. Deutsche Bank AG,* 443 F.3d 253, 270 (2d Cir. 2006); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 180 (W.D.N.Y. 2005). Furthermore, "settlement is relevant to a class certification." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 238-39 (2d Cir. 2012) *(quoting Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 619 (1997)).

The Court should now grant certification of the *Cuevas* and *Watson* Rule 23 classes because all of the certification requirements for settlement purposes are met. Defendants do not concede that Plaintiffs could meet the Rule 23 standards for certification if either case was to proceed to litigation or that either case could be properly tried on a class basis. *Cf. id.* Defendants do not, however, oppose certification of the proposed Rule 23 classes for settlement purposes. *See Tiro v. Public House Investments, LLC,* Nos. 11 Civ 7679 (CM), 11 Civ. 8249 (CM), 2013 WL 2254551, at *3 (S.D.N.Y. May 22, 2013) ("[w]hen the court has not yet entered a formal order determining that the action may be maintained as a class action, the parties may stipulate that it be maintained as a class action for the purpose of settlement only.") (*quoting* Herbert B, Newberg & Alba Conte, Newberg on Class Actions, § 11.27 (4th ed. 2002)).

In order to obtain class certification, the movant must demonstrate that Rule 23(a)'s four requisites and at least one part of Rule 23(b) are met. *See In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d. Cir. 2006). Like *Ross* and *Lyons*, in *Cuevas* and *Watson*, the Plaintiffs are seeking certification under Rule 23(b)(3).

1. Rule 23(a)(1) Numerosity has Been Met:

"[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2nd Cir. 1995). "The plaintiff is required to "show some evidence or reasonably estimate the number of class members." *Pecere v. Empire Blue Cross & Blue*

Shield, 194 F.R.D. 66, 70 (E.D.N.Y. 2001). The Defendants have identified over 800 putative class members in *Cuevas* and over 800 in *Watson*. Plaintiffs has easily meet the numerosity requirement under Rule 23(a)(1).

2. Rule 23(a)(2) Commonality has Been Met:

The commonality "requirement is liberally construed; the question is whether there is a unifying thread among the claims alleged by members of the class." *Hart*, 2010 WL 5297221, at *6. New York courts overseeing NYLL misclassification lawsuits have found that the commonality requirement is usually satisfied. Even in light of *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), Plaintiffs are able to meet this requirement. The Plaintiff Cuevas has presented the same evidence regarding ABMs. All ABMs are subject to the same corporate policies and procedures (including detailed job descriptions, expectations, and training materials). They all share the same common legal theory and claim for overtime damages in that Defendants required them to work in excess of forty hours per week without overtime compensation as required under the NYLL.

These factors mirror numerous other cases from districts in New York finding that commonality exists. *See Torres v. Gristede's Operating Corp.*, 2006 WL 2819730, at *14 (S.D.N.Y. Sept. 9, 2006) (held management positions were all subject to the same corporate policies and practices and shared a common allegation that they were required to work in excess of forty hours per week); *Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330, 343 (S.D.N.Y.2004) (holding that the commonality requirement was satisfied where all potential class members are alleged to have been harmed by a common practice,[4] *i.e.*, defendants' failure to adequately compensate employees for overtime hours, and the legal theory set forth in plaintiffs' complaint is common to all class members, *i.e.*, this alleged failure to pay overtime violates New York's labor law).

[4] This is the same language as used in *Dukes* when addressing commonality.

Under these principles, and for certification for settlement approval, the *Cuevas* and *Watson* Plaintiffs satisfy the commonality requirement. Plaintiffs share all, and not just one, of the same questions of law and fact as the putative class. In particular, the Plaintiffs' lawsuit challenges Defendants' common practice of classifying all ABMs as overtime-exempt under the NYLL and Pennsylvania's wage laws. Regarding the question of law, have Defendants met their burden of proof in establishing that all ABMs are exempt from overtime under the respective state laws? Regarding the question of fact, what are the ABMs' primary job duties, and do they permit an exemption? The existence of these two issues is sufficient to meet the commonality requirement.

3. Rule 23(a)(3) Typicality has Been Met:

Typicality is met "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 v. Giuliani*, 126 F.3d 372, 376 (2nd Cir. 1997). The plaintiff's claims do not have to be identical to those of the members of the putative class, so long as "the disputed issue of law or fact occup[ies] essentially the same degree of centrality to the named plaintiff[s'] claim as to that of other members of the proposed class." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d. Cir. 1999).

In *Torres*, the court found that where the class representatives allege that they were not paid overtime in violation of NYLL and where "the same legal and factual claims are being made for each individual class member ... the typicality requirement is satisfied." *Torres*, 2006 WL 2819730, at *14 (quoting *Mascol v. E & L Transps., Inc.*, 2005 U.S. Dist. LEXIS 32634, at *17). Once again, the same factors exist for the *Cuevas* and *Watson* classes as their respective class representatives. The ABMs in both classes are subject to the same alleged illegal policy: misclassification under the respective state's wage and hour laws. All ABMs worked at Defendants' Bank branches in New York or Pennsylvania, were subject to the same alleged misclassification, and were all denied overtime wages.

4. Rule 23(a)(4) Adequacy has Been Met:

"The adequacy requirement exists to ensure that the named 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. of N.Y.*, 2007 WL 2872455, at *7 (S.D.N.Y. Sept. 28, 2007) (quoting *Penney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d. Cir. 2006)). Two standards dictate whether the movant has fulfilled the adequacy of representation requirement: (1) class counsel must be qualified; and (2) class members must not have interests that are antagonistic to each other. *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291-292 (2d. Cir. 1992).

Here, Rule 23(a)(4)'s adequacy requirement is satisfied. Plaintiffs Cuevas and Watson do not have interests that are antagonistic to other respective putative class members. Rather, the Plaintiffs and the class members all share a common interest in seeking the recovery of lost overtime wages. As discussed in prior filings with this Court, proposed class counsel Donelon, P.C. and Winebrake & Santillo, LLC are qualified, experienced, and more than able to conduct this litigation on behalf of the putative class.

5. Rule 23(b)(3) Requirements Have Been Met:

Once Rule 23(a) is satisfied, the movant must satisfy one part of Rule 23(b). Here, Plaintiffs seek class certification under Rule 23(b)(3), which provides:

> A class action may be maintained if . . . (3) the court finds that the 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. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The above requirements are commonly referred to as "predominance" and "superiority."

a. Common Issues Predominate:

Predominance exists when "questions of law or fact common to class members predominate over any questions affecting only individual members..." Rule 23(b)(3). To establish predominance, the 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." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d. Cir. 2001) (internal quotation marks and citation omitted). The fact that individualized damage calculations might be required does not alter this analysis. Courts "focus on the liability issue ... and if the liability issue is common to the class, common questions are held to predominate over individual questions." *Hart v. Rick's Cabaret Int'l Inc.*, 2010 WL 5297221, at *7 (S.D.N.Y. 2010) (quoting *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981)).

It is clear that the same legal theory, claims, defenses, and factors to be examined will predominate over the ABMs' claims for overtime. All ABMs are claiming overtime is owed. All will be subject to Defendants' affirmative defense that ABMs are exempt from overtime. If each class member brought their claims individually, they would all be litigating these same legal and factual questions.

The same legal issue applies to all ABMs: whether Defendants can fulfill their burden of proving ABMs are exempt from overtime under? The same factual issues will arise when examining the exemption factors. This applies across the board to all the class members, whether as a class or individually. In determining whether an employee meets either exemption, the main focus will reside on their "primary duty." All of this will predominate over any individual issues that might exist. There will be "common answers" to these common questions. *Dukes*, 131 S.Ct. at 2551. Defendants implemented a companywide policy governing most aspects of the ABMs' job duties.

Misclassification claims under the NYLL are usually found to meet the predominance requirement, and are routinely certified in New York district courts. *See In Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 156-64 (S.D.N.Y. 2008) (the court certified a class of over 270 assistant store managers notwithstanding defendant's argument "that 'individual issues predominate' because 'the duties and responsibilities of [assistant managers] varied . . . in ways that bear upon an analysis of whether or not management was the "primary duty" of individual [assistant managers]'"); *Torres*, 2006 WL 2819730, at *16 (court reached the same conclusion regarding predominance when the employees were alleging misclassification and denial of overtime under the NYLL); *Noble v. 93 Univ. Place Corp.*, 224 F.R.D. at 345 (predominance found where "issues that are subject to generalized proof predominate over those issues premised on individualized findings"); *Ansoumana*, 201 F.R.D. at 86, 89 (finding predominance where central issues were whether plaintiffs were properly categorized as exempt independent contractors and the consequences of the resolution of that issue in relation to minimum wage); *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y.2007) (finding that common question of whether class members "were supposed to be paid the minimum wage as a matter of law and were not" is "about the most perfect question[ ] for class treatment").

b. A Class Action is Superior to Other Methods:

In determining whether the superiority requirement of Rule 23(b)(3) has been met, the Court should consider, among other things, the interest of the members of the class "in individually controlling the prosecution or defense of separate actions" and "the likely difficulties in managing a class action." Fed.R.Civ.P. 23(b). Factors that militate in favor of finding that a class action is the best method of adjudicating the claims of class members include: (1) the fact that the value of each individual claim is small compared to the possible costs associated with pursuing it; (2) the assumed socioeconomic status of the proposed class members; and (3) the fact that members of the putative class who currently work for the

defendants may be reluctant to pursue any claims against the source of their current income. *Hart*, 2010 WL 5297221, at *7. Applying these factors, it becomes clear that Rule 23(b)(3)'s superiority requirement is satisfied here. The value of each class member's individual claim is small compared to the class as a whole. Class members are not of the means to pay an attorney to pursue the value of these claims on their own. Finally, numerous class members are current employees of the Defendants, and therefore, would be hesitant to bring such claims on an individual basis.

Also, federal courts will be inundated with hundreds of individual lawsuits where ABMs are all asserting the same claims, and facing the same defense. This would inevitably lead to varying and inconsistent rulings. First, there is really no need to tailor trial tactics since all ABMs are making the exact same claim. Second, Rule 23(b)(3)(B) requires courts to consider "the extent and nature of any litigation concerning the controversy already begun by" class members. To the parties' knowledge, no other litigation has been initiated by any member of the putative class regarding the NYLL claims at issue herein. Third, Rule 23(b)(3)(C) requires the court to consider the desirability of "concentrating the litigation of the claims in a particular forum." Fed.R.Civ.P. 23(b)(3)(C). Here, concentration of all claims in the Eastern District of New York for resolution is both efficient and desirable for obvious reasons. Fourth, Rule 23(b)(3)(D) requires the Court to consider any "likely difficulties in managing the class action." Fed.R.Civ.P. 23(b)(3)(D). Here, there are no difficulties in managing the resolution of the Settlement Stipulation before one court.

WHEREFORE, the Parties respectfully request that this Court enter an order: (1) certifying the proposed settlement classes under Rule 23(b)(3) in the *Cuevas* matter and *Watson v. Citizens Bank of Pennsylvania*; (2) granting final approval of the Global Settlement Stipulation; and (3) granting Plaintiffs' Unopposed Motion for Order Approving Attorneys' Fees and Expenses.

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I hereby certify that a true and correct copy of the above was sent on May 5, 2014 pursuant to the service requirements of the ECF/CM for the Northern District of Illinois to the following:

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