STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
KEVIN J. SILVAR AND JOSEPH P. ROMANO AND VISIONPRO COMMUNICATIONS CORP.,	:	
Petitioners,	:	DOCKET NO. PR 14-159
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, an Order to Comply with Article 6, and an Order Under Article 19 of the Labor Law, all dated June 17, 2014,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Kaufman Dolowich & Voluck, LLP, Woodbury (*Jeffrey A. Meyer* of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Jeffrey G. Shapiro* of counsel), for respondent.

WITNESSES

Petitioner Kevin J. Silvar and Eric Michael Springer, for petitioners.

Claimant Xavier Talbot and Senior Labor Standards Investigator John Sarsfield, for respondent.

WHEREAS:

On August 4, 2014, petitioners Kevin J. Silvar, Joseph Romano, and VisionPro Communications Corp. filed a petition with the Industrial Board of Appeals seeking review of three orders issued by respondent Commissioner of Labor on June 17, 2014. Petitioners filed an amended petition on September 15, 2014. The Commissioner answered on November 18, 2014.

Upon notice to the parties, a hearing was held on March 18, 2015, in Hicksville, New York, before Vilda Vera Mayuga, Chairperson of the Board and designated hearing officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and file post-hearing briefs. The Board notes that after the parties filed written summations, petitioners filed a reply brief, to which the Commissioner objected on grounds that the Board did not grant leave to file a reply. Because petitioners made no such request, the Board makes the below findings of facts and conclusions of law without reference to or consideration of petitioners' reply or arguments on the merits made by respondent as part of her letter objecting to petitioner's reply (*see* Board Rules of Procedure and Practice [Board Rules] [12 NYCRR] § 65.36).

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment of minimum wages due and owing to claimant Xavier Talbot in the amount of $7,195.13 for the period from August 24, 2009, through September 27, 2011, and payment of minimum wages due and owing to claimant Kemoy Wright in the amount of $1,068.00 for the period from March 16, 2009, through December 20, 2009. The order assesses interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $5,178.90, 25% liquidated damages in the amount of $2,066.12, and a 100% civil penalty in the amount of $8,263.13. The total amount due is $23,771.28.

The order to comply with Article 6 of the Labor Law (wage order) directs payment of unlawful wage deductions due and owing to claimant Talbot in the amount of $28.00 for the period from August 24, 2009, to September 27, 2011, and payment of unlawful wage deductions due and owing to claimant Wright in the amount of $1,072.00 for the period from March 16, 2009, to December 20, 2009. The wage order assesses interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $783.59, 25% liquidated damages in the amount of $7.00, and a 100% civil penalty in the amount of $1,100.00. The total amount due is $2,990.59.

The order under Article 19 of the Labor Law (penalty order) assesses a civil penalty in the amount of $1,000.00 for each of the following counts for the period from March 22, 2009, through September 27, 2011: (1) violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and / or furnish true and accurate payroll records for each employee; and (2) violation of Labor Law § 661 and 12 NYCRR 142-2.7 for failure to provide each employee complete wage statements with every payment of wages. The total amount due is $2,000.00.

As amended, the petition contends that the orders under review are unreasonable or invalid because claimants were party to a class action brought in federal court against petitioners that sought to recover unpaid wages and unlawful wage deductions in violation of New York Labor Law. On October 6, 2011, the presiding court approved a joint stipulation of class settlement and release, whereby class members voluntarily released their claims against petitioners for unpaid minimum wage and unlawful wage deductions arising on or before June 29, 2011. Accordingly, petitioners argue that any amounts due and owing by petitioners before June 29, 2011, are invalid. Similarly, petitioners claim that, on the same grounds, the Commissioner's decision to assess liquidated damages, interest, and civil penalties are invalid. We note that petitioners have waived all other issues or objections pursuant to Labor Law § 101 (2).

SUMMARY OF EVIDENCE

Federal Class Action

On August 6, 2010, plaintiffs Damion Stewart and Shurwin Thompson filed a lawsuit in the United States District Court for the Eastern District of New York against VisionPro Communications Corp., Cablevision Systems Corporation, and Kevin Silvar, styled as *Stewart v VisionPro Communications Corp.*, No. 10-cv-3688 (E.D.N.Y.). In relevant part, plaintiffs complained, pursuant to Federal Rules of Civil Procedure rule 23 on behalf themselves and a class of similarly situated current and former employees of defendants who worked as technicians in New York, that defendants failed to pay minimum wages, overtime premium pay, and made unlawful pay deductions under New York Labor Law.

In June 2011, the parties entered into a Joint Stipulation of Class Settlement and Release (Joint Stipulation). Among other details, the Joint Stipulation defines the relevant class as: "[A]ll individuals who are currently employed, or formerly have been employed, by VisionPro in the position of Technician or a comparable position in the State of New York at any time during the period from August 6, 2004 through the date of the Preliminary Approval Order." The "class period" is defined as "beginning on August 6, 2004 and ending on the date of the Preliminary Approval Order." For purposes of settlement only, the parties stipulated that the court may certify the class as an opt-out class under Federal Rules of Civil Procedure rule 23 (b) (3). The Joint Stipulation appointed a "Settlement Administrator" to perform a list of duties associated with administration of the settlement. The Joint Stipulation also contained a general release of claims.[1]

The court filed an Order Granting Preliminary Approval of Settlement on June 29, 2011, and, on October 6, 2011, granted final approval of the parties' Joint Stipulation, incorporating, in substantial part, the release language from the Joint Stipulation. The action was "dismissed on its merits and with prejudice, permanently barring the Class Representatives, Plaintiffs and all other Settlement Class Members (other than those who timely filed Opt-Out Forms) from prosecuting any of the Released Claims."

Petitioners' Evidence

Testimony of Petitioner Kevin J. Silvar

Petitioner Kevin J. Silvar testified that he is the Vice President of VisionPro. He acknowledged that a class action lawsuit was filed against petitioners. For purposes of settlement, Silvar was required to provide a list of employees to the claims administrator. He identified a document containing "an employee list of all the employees that worked currently and past for VisionPro," which he testified was the list that he submitted on VisionPro's behalf to the claims administrator. The list contains 710 individuals and corresponding addresses but includes no information identifying by whom or when the list was created. Silvar could not recall the date on which he submitted the list to the claims administrator.

[1] The *Stewart* litigation also included claims under the federal Fair Standards Labor Act (FLSA), which were certified for purposes of settlement as an opt-in collective action under 29 U.S.C. § 216 (b). The Board makes no determination relating to the *Stewart* settlement and release of claims under the FLSA.

Testimony of Eric Michael Springer

Eric Springer testified that he works as a project manager at Simpluris Incorporated, "a class action settlement administration company," which was appointed the claims administrator for the *Stewart* litigation. He acknowledged that in an October 3, 2011, declaration submitted to the *Stewart* court, he stated that on July 18, 2011, defense counsel provided to Simpluris a list that contained data for 707 class members. Springer testified that the original list contained two duplicated class members, "so there were four records that were basically combined into two." The duplicate entries related to Jose Olivo DeJesus and James Wilkins. There was also an individual included whose employment start date was outside the class period, so he did not qualify to be part of the class, and Simpluris removed him from the list. Springer's declaration and its exhibits do not note the changes Simpluris made to the list or include the names of individuals who submitted claims for a share of, objected to, or opted out of the settlement.

Springer testified that Simpluris uses proprietary software for all communications between Simpluris and class members. The software records when mail is dispatched to a specific class member, if and when Simpluris had to further research a class member's address, and whether a class member responded with a claim, objected, or opted out of the settlement. Springer further testified to a "communication log" for Talbot and a separate one for Wright, although nowhere on either document does it state the claimants' names. Springer did not know when the logs were printed.

With respect to both logs, Singer testified that with Simpluris's software he is able to "look up" an individual by first or last name or using a "Sim ID number." Singer further testified that it is possible to modify or delete an entry after it is made. Singer did not know whether any additions or deletions had been made to the logs for Talbot and Wright.

Respondent's Evidence

Testimony of Claimant Xavier Talbot

Xavier Talbot testified that he was employed by VisionPro Communications Corp. from 2009 until September 2011. He further testified that he submitted to respondent a minimum wage claim dated January 31, 2012.

Testimony of Senior Labor Standards Investigator John Sarsfield

John Sarsfield testified that he is a senior labor standards investigator for respondent and supervised the work of Urvashi Aggarwal, the labor standards investigator in this matter who was unable to attend the hearing due to a death in the family.

Sarsfield testified that neither claimant received timely notice of the class action settlement, and once claimants did receive notice, it was "too late" for them to participate. He confirmed his handwritten notes as part of his "narrative report" regarding respondent's investigation of the claims against petitioners. In the report, he noted that on October 28, 2011, the investigator called to get the list of employees "to be sure claimant was included." On December 12, 2011, a "manager" called on behalf of Joseph Romano to say the "info" was "private" and would not be released.

Sarsfield identified a January 6, 2010 claim form for unpaid wages submitted by Wright.

SCOPE OF REVIEW AND BURDEN OF PROOF

The Labor Law provides that an order of the Commissioner is presumed valid (Labor Law § 103 [1]). The hearing before the Board is original in nature (Board Rules [12 NYCRR] § 66.1 [c]). The party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act (SAPA) § 306 [1]; Board Rules (12 NYCRR) § 65.30; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). A petitioner must prove that the challenged order is invalid or unreasonable by a preponderance of evidence (Labor Law § 101 [1]; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 11, 2011]). Should the Board find the order or any part thereof invalid or unreasonable, the Board must revoke, amend, or modify the order (Labor Law § 101 [3]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule (12 NYCRR) § 65.39. Petitioners failed to meet their burden to establish that the minimum wage, wage, and penalty orders are invalid or unreasonable. As discussed below, we affirm the minimum wage, wage, and penalty orders in their entirety.

We Affirm the Minimum Wage, Wage, and Penalty Orders

Petitioners contend that (1) the defense of release bars claimants from pursuing their claims under the Labor Law; (2) even absent the *Stewart* release, claimant's claims are barred by *res judicata,* otherwise known as claim preclusion; and (3) claim preclusion bars the Commissioner from prosecuting this action on behalf of claimants. Petitioners do not contest their liability under Articles 6 or 19 or dispute the Commissioner's calculations of the wages due.

Doctrine of Release

A defense of release is effective when it applies to claimants, encompassed the claims asserted below, and was legally enforceable (*Nottingham Partners v Trans-Lux Corp.*, 925 F2d 29, 32 [1st Cir 1991]). The parties do not dispute that the release is legally enforceable and encompasses the legal claims at issue. The class period, beginning on August 6, 2004, and ending on June 29, 2011, encompasses Talbot's claim and most of Wright's claim. At issue is whether the release specifically applies to claimants.

"[A] court-approved settlement containing a release may be applied against a class member . . . so long as acceptable procedural safeguards have been employed" (*id.* at 33 [citing *TBK Partners, Ltd. v W. Union Corp.*, 675 F2d 456, 460 (2d Cir 1982)]; *see also Matter of People of the State of NY, by Eliot Spitzer, as Attorney Gen. v Applied Card Sys., Inc.*, 11 NY3d 105, 123-124 [2008]). "As for the manner of notice, due process requires that 'notice [be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,'" (*Wenzel v Partsearch Techs., Inc.* [*In*

re Partsearch Techs., Inc.], 453 BR 84, 97 [Bankr SDNY 2011] [citing *Mullane v Cent. Hanover Bank & Trust Co.*, 339 US 306, 314 (1950)]).

In the first instance, the *Stewart* court accepted, as a general matter, the soundness of the procedures to notify class members of the general release extinguishing the claims of class members against petitioners. By extension, petitioners contend that, as an evidentiary matter, they have met their burden to show they acted with reasonable diligence to provide notice to claimants Talbot and Wright (*cf. Williams v Marvin Windows & Doors*, 15 AD3d 393, 395 [2nd Dept 2005]). We disagree.

To support their contention, petitioners introduced into evidence a list of "all the employees that worked currently and past for VisionPro" that petitioner Silvar provided to the claims administrator for purposes of administering the class-wide settlement. The list, however, contains no identifying information, such as its author or the date on which it was created or delivered, and Silvar could not recall the date on which he submitted the list to the claims administrator. The list in evidence is a list of names and addresses. Without more, we cannot credit the document as reliable or credible evidence.

Springer's testimony further compounds issues with petitioners' evidence. Springer acknowledged that in his October 3, 2011 declaration, he stated that defense counsel provided to Simpluris a list that contained data for 707 class members. The list in evidence contains 710 names. On cross examination, Springer explained that the original list contained two duplicated class members, so Simpluris combined the two duplicate entries into a single entry, respectively. Springer further explained that the duplicate entries related to class members Jose Olivo DeJesus and James Wilkins. The list in evidence, which is organized alphabetically by last name, contains no duplicate for Jose Olivo DeJesus or James Wilkins or any reasonable permutation thereof. Springer also testified that there was an individual included in the original list whose employment date was outside the class definition, so he did not qualify to be part of the class. Springer acknowledged that his declaration to the *Stewart* court addressed none of these modifications to the list. The discrepancy between the list in evidence, which contains 710 names, and Springer's declaration that states that the list, as Simpluris received it, contained 707 names, suggests, in contradiction with petitioner Silvar's testimony, that the list in evidence is not the original list petitioners provided to Simpluris. Considering Springer's testimony about when and how Simpluris received the list, taken together with the absence of any indicia of authenticity, we cannot credit the list as accurate or reliable evidence showing that claimants were timely sent notice reasonably calculated, under the circumstances, to apprise them "of the pendency of the action and afford them an opportunity to present their objections,'" (*In re Partsearch Techs., Inc.*, 453 BR at 97).

We reach the same conclusion regarding the communication logs petitioners entered into evidence. In the first instance, neither log identified either claimant by name, nor "Sim ID Number," nor any other identifying information other than addresses and, in the case of the log Springer attributed to Wright, several telephone numbers. That the communication logs contain addresses that correlate with other evidence in the record, standing alone, is not dispositive as to the reliability of the logs. Springer also acknowledged that it is possible to modify or delete an entry in a log after it is first made, and he could not verify when the logs were produced or that no additions or deletions had been made to them. As such, we do no credit either communication log or Springer's testimony as reliable evidence showing that claimants were sent notice. We are left

with nothing more than petitioners' unsupported and discredited testimony that they acted with reasonable diligence to send notice to claimants.

By contrast, respondent offered the testimony of investigator Sarsfield, who identified a January 6, 2010, claim form for unpaid wages submitted by claimant Wright seeking unpaid wages from March 2009 through December 24, 2009. Additionally, claimant Talbot testified that he submitted a minimum wage claim dated January 31, 2011, seeking wages from August 20, 2009, though September 27, 2011. Investigator Sarsfield testified that neither claimant received timely notice of the class action settlement, and once claimants did receive notice, it was "too late" to submit a claim, object, or opt out of the class-wide settlement. Moreover, Sarsfield's narrative report indicates that respondent sought from petitioners a list of class members to verify whether claimants were included, but petitioners refused to provide such a list because the data included therein was "private." Absent petitioners presenting reliable and credible evidence that notice was sent to claimants thus extinguishing their claims against petitioners and shifting the burden to respondent, we must credit respondent's evidence (*see* Labor Law § 103 [1]; SAPA § 306 [1]; Board Rule (12 NYCRR) § 65.30; *Angello*, 1 AD3d at 854).

Petitioners have failed to meet their burden of showing that petitioners acted with reasonable diligence to send timely individual notice to claimants Talbot and Wright. On the record before us, we find that the *Stewart* release does not apply to claimants (*see Nottingham Partners* 925 F2d at 32).

Claim Preclusion as to Claimants

Claim preclusion bars successive litigation based upon the "same transaction or series of connected transactions" if there is a judgment on the merits rendered by a court of competent jurisdiction, and the party against whom the doctrine is invoked was a party to the previous action, or in "privity" with a party who was (*Applied Card Sys., Inc.*, 11 NY3d at 122 [internal citation omitted]). For purposes of a class action, class members are bound by the terms of the judgment when they are adequately represented in the action (*Richards v Jefferson County*, 517 US 793, 800-801 [1996]; *Applied Card Sys., Inc.*, 11 NY3d at 123). The parties do not dispute that there was a judgment on the merits rendered by a court of competent jurisdiction. Petitioners contend, however, that claimants were adequately represented in the *Stewart* litigation because they were members of the *Stewart* class, which was certified as a class action under the Federal Rules of Civil Procedure rule 23 (b) (3) for purposes of settlement, and they did not opt out of the settlement. Therefore, petitioners argue, claimants are in privity with the class representatives.

As discussed above, petitioners have failed to meet their burden of showing with reliable and credible evidence that petitioners acted with reasonable diligence to send timely individual notice to claimants Talbot and Wright. Accordingly, we find that claimants were not adequately represented by or in privity with the *Stewart* class. We find further, under the circumstances as we find them, that the final resolution of the *Stewart* matter does not preclude claimants from pursuing their claims apart from the *Stewart* litigation.

Claim Preclusion as to the Commissioner

Because we find, as discussed above, that claim preclusion does not bar claimants from pursuing their claims under the Labor Law, we need not address whether the Commissioner, who

was not a party to the *Stewart* litigation, is precluded under the terms of *Applied Card Systems, Inc.* (11 NY3d 105), from, consistent with her statutory duty, pursuing claims on behalf of claimants Talbot and Wright.

Petitioners only challenged the interest, liquidated damages, and civil penalties to the extent that the claims were barred the claims from going forward. Accordingly, we affirm the orders in their entirety.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed; and

2. The wage order is affirmed; and

3. The penalty order is affirmed; and

4. The petition for review is denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York
on March 1, 2017.