UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

1199SEIU UNITED HEALTHCARE WORKERS EAST, Petitioner, v. PSC COMMUNITY SERVICES, NEW PARTNERS, INC. D/B/A PARTNERS IN CARE, STELLA ORTON HOME CARE AGENCY, RICHMOND HOME NEEDS, SUNNYSIDE HOME CARE PROJECT, SUNNYSIDE CITYWIDE HOME CARE, FAMILY HOME CARE OF BROOKLYN AND QUEENS, CARE AT HOME, CHINESE-AMERICAN PLANNING COUNCIL HOME ATTENDANT PROGRAM, UNITED JEWISH COUNCIL OF THE EAST SIDE HOME ATTENDANT SERVICE CORP., THE FIRST CHINESE PRESBYTERIAN COMMUNITY AFFAIRS HOME ATTENDANT CORP., AZOR HOME CARE, BUSHWICK STUYVESANT HEIGHTS HOME ATTENDANT, INC., CABS HOMECARE, RIVERSPRING LICENSED HOMECARE SERVICES AGENCY, INC., ST. NICHOLAS HUMAN SUPPORTS CORP., WARTBURG, ALLIANCE FOR HEALTH, INC., REGION CARE, INC., SPECIAL TOUCH HOME CARE SERVICES, INC., RAIN, INC., PRESTIGE HOME CARE, INC., PRESTIGE HOME ATTENDANT, INC. D/B/A ALL SEASON HOME ATTENDANT, PERSONAL TOUCH HOME CARE OF N.Y., INC., PRIORITY HOME SERVICES, PREMIER HOME HEALTH CARE, INC., BRONX JEWISH COMMUNITY COUNCIL HOME ATTENDANT SERVICES, CIDNY INDEPENDENT LIVING SERVICES, HOME CARE SERVICES FOR INDEPENDENT LIVING, NEW YORK FOUNDATION FOR SENIOR CITIZENS HOME ATTENDANT SERVICES, COOPERATIVE HOME CARE ASSOCIATES, RISEBORO HOME CARE, INC., FEGS HOME ATTENDANT SERVICES, HOME HEALTH MANAGEMENT SERVICES, INC., SCHOOL SETTLEMENT HOME ATTENDANT CORP., ROCKAWAY HOME ATTENDANT, BRONXWOOD HOME FOR THE AGED, INC., ACCENTCARE OF NY, INC., ISABELLA VISITING CARE, INC., SOCIAL CONCERN COMMUNITY DEVELOPMENT CORP., ABC HEALTH SERVICES REGISTRY, ALLIANCE HOME SERVICES, *collectively identified by the Arbitrator as the* "HOME HEALTH CARE AGENCIES", Respondents	No. 20-cv-3611 (JGK)

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER 1199SEIU'S PETITION TO CONFIRM SECOND ARBITRATION AWARD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

1199SEIU UNITED HEALTHCARE WORKERS EAST, Petitioner, v. PSC COMMUNITY SERVICES, NEW PARTNERS, INC. D/B/A PARTNERS IN CARE, STELLA ORTON HOME CARE AGENCY, RICHMOND HOME NEEDS, SUNNYSIDE HOME CARE PROJECT, SUNNYSIDE CITYWIDE HOME CARE, FAMILY HOME CARE OF BROOKLYN AND QUEENS, CARE AT HOME, CHINESE-AMERICAN PLANNING COUNCIL HOME ATTENDANT PROGRAM, UNITED JEWISH COUNCIL OF THE EAST SIDE HOME ATTENDANT SERVICE CORP., THE FIRST CHINESE PRESBYTERIAN COMMUNITY AFFAIRS HOME ATTENDANT CORP., AZOR HOME CARE, BUSHWICK STUYVESANT HEIGHTS HOME ATTENDANT, INC., CABS HOMECARE, RIVERSPRING LICENSED HOMECARE SERVICES AGENCY, INC., ST. NICHOLAS HUMAN SUPPORTS CORP., WARTBURG, ALLIANCE FOR HEALTH, INC., REGION CARE, INC., SPECIAL TOUCH HOME CARE SERVICES, INC., RAIN, INC., PRESTIGE HOME CARE, INC., PRESTIGE HOME ATTENDANT, INC. D/B/A ALL SEASON HOME ATTENDANT, PERSONAL TOUCH HOME CARE OF N.Y., INC., PRIORITY HOME SERVICES, PREMIER HOME HEALTH CARE, INC., BRONX JEWISH COMMUNITY COUNCIL HOME ATTENDANT SERVICES, CIDNY INDEPENDENT LIVING SERVICES, HOME CARE SERVICES FOR INDEPENDENT LIVING, NEW YORK FOUNDATION FOR SENIOR CITIZENS HOME ATTENDANT SERVICES, COOPERATIVE HOME CARE ASSOCIATES, RISEBORO HOME CARE, INC., FEGS HOME ATTENDANT SERVICES, HOME HEALTH MANAGEMENT SERVICES, INC., SOCIAL CONCERN COMMUNITY DEVELOPMENT CORP., ABC HEALTH SERVICES REGISTRY, ALLIANCE HOME SERVICES, ISABELLA VISITING CARE, INC., SOCIAL CONCERN COMMUNITY DEVELOPMENT CORP., ABC HEALTH SERVICES REGISTRY, ALLIANCE HOME SERVICES, *collectively identified by the Arbitrator as the* "HOME HEALTH CARE AGENCIES", Respondents	No. 20-cv-3611 (JGK)

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER 1199SEIU'S PETITION TO CONFIRM SECOND ARBITRATION AWARD

INTRODUCTION

In May 2020, Petitioner 1199SEIU United Healthcare Workers East ("Union") petitioned this Court to confirm the April 17, 2020 Arbitration Award of Arbitrator Martin F. Scheinman ("First Award"), pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and Section 1 et seq. of the Federal Arbitration Act, 9 U.S.C. § 1, et seq. See ECF 1. On February 19, 2021, this Court confirmed the First Award. See ECF 159 (502 F. Supp. 3d 588, 608 (S.D.N.Y. 2021)). The Union now seeks confirmation of Arbitrator Martin F. Scheinman's February 23, 2022 Arbitration Award ("Second Award") resolving the arbitration in its entirety. Both the First and Second Awards were issued in an arbitration between the Union and Respondent Home Health Care Agencies (collectively, "Employers") concerning more than 100,000 current and former bargaining unit members in a class grievance filed by the Union alleging that the Employers failed to pay their employees certain wages pursuant to the applicable collective bargaining agreements and a number of state and federal wage and hour laws.

This Second Award found that the Union's grievance had merit and that required wages were underpaid, in varying amounts, during the coverage periods at issue. As a remedy, the Arbitrator ordered the creation of a Special Wage Fund ("Special Wage Fund") in the approximate amount of $30,000,000 funded with per capita contributions from the Employers based on the number of employees they employed during specific periods. The Arbitrator found this remedy would provide a mechanism for prompt funding and payment of proven wage claims. The Special Wage Fund will pay claims submitted by employees for the applicable periods, and employees will receive compensation based on the number of hours they worked

during those periods compared with the total hours worked by all employees, with compensation weighted toward employees who worked 24-hour shifts.

As the Second Award, like the First Award, draws its essence from the Parties' collective bargaining agreements and the Arbitrator acted with the scope of his authority and did not ignore the plain language of the contract, confirmation of the Award is required.

STATEMENT OF FACTS

The Collective Bargaining Agreements

1199SEIU is the sole and exclusive representative of the Employers' home health aide employees for purposes of collective bargaining over the terms and conditions of their employment. Pet. ¶ 9. 1199SEIU is a party to a collective bargaining agreement with each of the Respondents (collectively, "Agreements" or "CBAs"). Pet. ¶ 10. While Respondents may have variations in their CBAs, all of the Respondents are parties to substantially similar agreements. Any CBA provision quoted herein are the same among the CBAs. Pet. ¶ 10.

The CBAs contain a grievance and arbitration provision which provides, in relevant part:

> **ARTICLE XXVI**
> **GRIEVANCE AND ARBITRATION PROCEDURE**
>
> 1. A grievance is defined as any dispute between the Union (on its behalf and/or on behalf of any Employee) with the Employer involving the proper application, interpretation, or compliance with the specific written provisions of the Agreement based on facts and circumstances occurring during the term of this Agreement. A grievance is subject to arbitration.
>
> 2. Grievances will be resolved in accordance with the following procedure.
>
> ***
>
> Step 4 -- If the grievance is not resolved at Step 3, the Union and/or Employer may within ten (10) days thereafter request that the matter be submitted for final and binding arbitration under the Labor Arbitration Rules of the American Arbitration Association.

> 3. Notwithstanding the foregoing, a grievance that affects a substantial number of Employees and is outside the authority of the Employer's representatives designated in Steps 1 and 2 may be presented initially at Step 3 of the grievance procedures. This grievance must be presented in writing and within ten (10) days of the occurrence which gave rise to the grievance.
>
> ***
>
> 5. The opinion and award of the arbitrator must be made in writing and is final and binding upon all parties. The arbitrator has full authority to decide the issue or issues in dispute, except that s/he does not have authority to amend, alter, modify, add to or subtract from the provisions of this Agreement.
>
> ***

Pet. ¶ 11 (Ex. B at 28-29).

In or about 2014, the Union signed a Memorandum of Agreement amending the CBA with each of the Respondents, which provided that, given changes in federal and state law, the Union and subject Employer would meet in good faith to negotiate an "expeditious and effective alternative dispute resolution procedure for the resolution of claims arising under such laws." Pet. ¶ 12. Specifically, the Parties agreed:

> [G]iven changes in federal and state law imposing new obligations on the Employer and exposing Employers to significantly increased level of litigation, it is in the interest of the Union, Employees, and the Employer to develop an expeditious and effective alternative dispute resolution procedure for the resolution of claims arising under such laws. Accordingly, between the execution of this Agreement and December 1, 2014, or as otherwise agreed by the parties, the parties shall meet in good faith to negotiate such an alternative dispute resolution procedure. If the parties are unable to agree to such a procedure in the allotted time, the Employer may submit the dispute to Martin F. Scheinman for final and binding arbitration.

Pet. ¶ 12 (Ex. C at 6-7).

In or about December 2015, the Union signed a Memorandum of Agreement with each of the Respondents that further amended the CBA and that provided for the resolution of claims

under the Fair Labor Standards Act, the New York Home Care Worker Wage Parity Law, and/or the New York Labor Law ("Covered Statutes") pursuant to an alternative dispute resolution process:

> **New Article in the CBA, "ALTERNATIVE DISPUTE RESOLUTION", is hereby created, to read . . . as follows:**
>
> 1. The parties agree a goal of this Agreement is to ensure compliance with all federal, state and local wage hour law and wage parity statutes. Accordingly, to ensure the uniform administration and interpretation of this Agreement in connection with federal, state and local wage-hour and wage parity statutes, all claims brought by either the Union or Employees, asserting violations of or arising under the Fair Labor Standards Act ("FLSA"), New York Home Care Worker Wage Parity Law, or New York Labor Law (collectively, the "Covered Statutes"), in any manner, shall be subject exclusively, to the grievance and arbitration procedures described in this Article. The statute of limitations to file a grievance concerning the Covered Statutes shall be consistent with the applicable statutory statute of limitations. All such claims if not resolved in the grievance procedure, including class grievances filed by the Union, or mediation as described below shall be submitted to final and binding arbitration before Martin F. Scheinman, Esq. The Arbitrator shall apply appropriate law and shall award all statutory remedies and penalties, including attorneys' fees, consistent with the FLSA and New York Labor Law in rendering decisions regarding disputes arising under this Article.

Pet. ¶ 13 (Ex. D at 9).

Under the terms of the Alternative Dispute Resolution provision ("ADR Provision"), unresolved grievances concerning violations of the Covered Statutes would be submitted to mandatory mediation before Martin F. Scheinman, Esq. Pet. ¶ 13. Following the completion of the mandatory mediation process, the dispute may proceed to arbitration before Martin F. Scheinman. Pet. ¶ 14. Specifically, the MOAs provided:

> 2. Whenever the parties are unable to resolve a grievance alleging a violation of any of the Covered Statutes, before the matter is submitted to arbitration, the dispute shall be submitted to mandatory mediation. The parties hereby designate Martin F.

> Scheinman, Esq., as Mediator for such disputes. Such mediation shall be requested no more than thirty (30) calendar days following exhaustion of the grievance procedure. Following submission of the dispute to mediation, the parties with the assistance of the Mediator shall establish such procedures as shall expeditiously advance the mediation process, including the scheduling of the exchange of relevant information, submission of position statements, and dates for mediation. In the absence of an agreement, the Mediator shall determine such procedures. Once the matter has been submitted to mediation, the Employer shall be obligated to produce relevant documents as requested by the Union and any objections to production shall be ruled on by the Mediator. The fees of the Mediator shall be shared equally by the Union and the Employer.
>
> 3. No party may proceed to arbitration prior to completion of the mediation process as determined by the Mediator. In the event the Union seeks arbitration of a grievance subject to these procedures, the Union shall submit its demand for arbitration to the Employer and the Arbitrator within four (4) months following the Mediator's declaration that mediation has concluded. The Employer shall be obligated to produce relevant documents as requested by the Union and any objections to production shall be ruled on by the Arbitrator. Prior to hearing, if noticed, the Union shall also be entitled to depositions of relevant witnesses. The fees of the arbitrator shall be shared equally by the Union and the Employer. The Employer shall upon notice be entitled to take the deposition of any Employee seeking relief in such arbitration or any other relevant witness.
>
> ***
>
> 5. The parties agree not to contest court confirmation of an arbitration award rendered under this Article. . . .

Pet. ¶ 14 (Ex. D at 9-10).

The Grievance and Mediation

On January 2, 2019, 1199SEIU filed a class action grievance on behalf of more than 100,000 current and former home care bargaining unit members employed by forty-two (42) agencies concerning violations of the CBAs regarding wage and hour claims arising under the Covered Statutes. Pet. ¶ 15. The Union and many of the Employers participated in a mediation of

the grievance for approximately one year in accordance with the procedures set forth in the CBAs. Id. ¶ 16. Thereafter, the Parties reached an impasse at mediation, at which time the Arbitration commenced. Id. ¶ 17.

Arbitration of the Grievance

Initially, the Parties submitted bifurcated issues pertaining to arbitrability and jurisdiction to the Arbitrator and on April 17, 2020, the Arbitrator issued the First Award holding, in pertinent part, that:

> 1. The claims encompassed by the wage and hour related grievances involving current and former 1199 bargaining unit members, including those arising under federal, state and local law, are arbitrable.
>
> 2. I have jurisdiction to adjudicate the claims asserted in the wage and hour grievances, arising under federal, state and local law, filed by the parties to the Collective Bargaining Agreement which encompass all claims arising under the federal, state and local laws named in the Agreement, as well as any pending litigation or administrative actions on the identical claims, irrespective of whether employees' employment terminated prior to the effective date of the Memorandum of Agreement providing Alternative Dispute Resolution language for exclusive mediation/arbitration procedures for wage and hour disputes pursuant to the Agreement between the parties. [1]

Pet. ¶ 18 (Ex. A at 8, 12).

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[1] The Arbitrator excluded the following individuals from the Award in light of court rulings holding their wage and hour claims are not subject to arbitration: Alvaro Ramirez Guzman, Elida Agustina Mejia Herrera, Leticia Panama Rivas, Boris Pustilnik, Maral Agarunova, Epifania Hichez, Carmen Carrasco, Seferina Acosta, and Eugenia Barahona Alvarado.

Following the issuance of the First Award on the bifurcated issues pertaining to arbitrability and jurisdiction, the Union moved to confirm the First Award before this Court. On February 19, 2021, this Court confirmed the First Award:

> Because the CBA and 2015 MOA evince a clear consent to arbitrate and delegate questions of arbitrability to the Arbitrator, and because the Arbitrator's Award is sufficient to survive the highly deferential review appropriate for confirmation of LMRA arbitration awards, the Award is confirmed.

ECF 159 (520 F. Supp. 3d 588, 608 (S.D.N.Y. 2021)).

Between July 2020 and February 2021, the Employers produced extensive discovery pursuant to orders of the Arbitrator dated July 7, 2020 and September 23, 2020, including financial records submitted to the Arbitrator. Pet. ¶ 20. The July 7, 2020 discovery order granted the Union's motion to compel discovery and required the Employers to provide, inter alia: (1) the number of service hours worked by Employees in each calendar year; (2) the number of overtime hours worked by Employees in each calendar year; (3) the number of twenty-four hour shifts worked by Employees per calendar year and the cumulative number of all such shifts; (4) sample wage notices, including when notices became compliant with relevant laws; (5) sample wage statements, including when statements became compliant with relevant laws; and (6) financial information demonstrating Employers' ability to pay. Pet. ¶ 21.

The September 23, 2020 discovery order granted the Union's further motion to compel discovery and required the Employers to provide, inter alia: (1) last name, first name, address, telephone number, last four digits of social security number, start date and end date of employment for each employee during the statute of limitations period; (2) annualized payroll data for each calendar year from 2014 to August 2020; (3) the number of twenty-four (24) hour shifts worked by employees cumulatively during the statute of limitations period; (4) 2018 and

2019 Form 990s for non-profit Employers; and (5) sample wage notices sufficient to establish compliance with New York Labor Law Sections 195 (1) and (3). Pet. ¶ 22.

On or about March 26, 2021, the Arbitrator accepted from the parties (1) a joint stipulation of undisputed facts common to all of the forty-two Employers, (2) facts disputed by the Union and each of the Employers, and (3) a statement of affirmative and other defenses asserted collectively by the forty-two Employers with legal argument and the Union's responses thereto. Pet. ¶ 23. Thereafter, approximately two dozen Employers supplemented these submissions with addenda of additional undisputed and disputed facts, and/or defenses unique to a particular employer and providing individualized undisputed and disputed facts as to such Employer's practices, including whether and to what extent their practices and facts differ from the statement of undisputed facts, including submission of documentary evidence. Id. The Union additionally submitted further evidence in support of its grievance, including multiple affidavits from affected Employees. Id.

On February 25, 2022, the Arbitrator issued the Second Award deciding the merits of the Union's grievance. Pet. ¶ 24. The Arbitrator transmitted the Second Award to counsel via electronic mail on February 25, 2022.[2] Id. ¶ 25.

As summarized by the Arbitrator:

> Six (6) categories of claims were presented in the arbitration: 1) Claims for minimum pay rates on Medicaid funded assignments pursuant to the New York Home Care Worker Wage Parity Law,

[2] The Second Award was initially issued on February 23, 2022 but was superseded by a Modified Award on February 25, 2022 after a number of incorrect agency descriptions were brought to the Arbitrator's attention by the Parties.

> 2) Claims for spread of hours premiums under the New York Minimum Wage Order for Miscellaneous Industries and Occupations, 12 N.Y.C.R.R. Part 142) (hereinafter, the "New York Minimum Wage Order), 3) Claims for overtime compensation under the FLSA, 4) Claims for pay for interruptions of sleep and meal periods occurring during 24 hour shifts, pursuant to New York's Minimum Wage Order as interpreted by the New York State Department of Labor, 5) Claims for travel time and pay, and 6) Claims for wage notice violations under New York's Wage Theft Prevention Act, New York Labor Law §§195(1), 195(3).

See Pet. ¶ 26 (Ex. A at 13).

As authorized by the parties, the Arbitrator formulated the issues to be decided as follows:

> 1. Have the Employers violated the Collective Bargaining Agreement by failing to pay employees as required by the New York State Home Care Worker Parity Law ("WPL"), the Fair Labor Standards Act, the New York Labor Law and other applicable federal, state or local wage and hour laws or regulations, by failing to pay a) minimum rates of total compensation required by the WPL, b) overtime pay, c) spread of hours pay, d) pay for interruptions of sleep and meal time on twenty four (24) hour cases, e) travel time pay, and by f) failing to provide requisite statutory wage notices and statements?
>
> 2. If so, what shall be the remedy?

See Pet. ¶ 27 (Ex. A at 26-27).

As to the first issue, the Arbitrator ruled that:

> [R]equired wages were underpaid to these employees, in varying amounts, during the coverage periods at issue. I recognize not all of the Employers violated the coverage statutes to the same degree or for the same periods of time, and a few of the Employers had no liability at all for claims made under certain of the covered statutes. Nevertheless, I conclude, in general, violations were committed by all of the Employers during their coverage periods, resulting in underpayment of required wages to the affected home health aides.

See Pet. ¶ 28 (Ex. A at 46).

As to the second issue, the Arbitrator awarded a per capita contribution remedy to provide a mechanism for prompt funding and payment of proven wage claims. See Pet. ¶ 30 (Ex. A at 48-49). The Arbitrator concluded that "[s]uch a remedy is fair to the individual employees, who will benefit by creation of a fund for prompt recovery of claims" and that payment of a uniform contribution rate was appropriate "in the interests of arbitral economy, efficiency and stability of the home care industry." Id. (Ex. A at 49).

The Arbitrator explained that he had arrived at the per capita contribution after "considering fully the parties' submissions including employee affidavits submitted by the Union, relevant Employer financial records submitted by virtually all Employers, the level of funding needed to assure fair compensation to the employees, and the financial stability of the industry." See Pet. ¶ 31 (Ex. A at 54). Balancing a number of factors, including the need to avoid serious disruption of the delivery of essential services, the Arbitrator came "to the inevitable conclusion a per capita contribution greater than two hundred fifty ($250) dollars is not sustainable and will, inevitably, lead to deserving employees failing to recover upon their meritorious claims." Id. (Ex. A at 55).

The Arbitrator designed the remedy awarded to address a number of issues he identified. Specifically, the Arbitrator found that, while all the Employers had failed to pay required wages, calculating exact amounts owed to specific employees would be "impractical, if not impossible" and would "require the expenditure of substantially more legal time and expense, while causing employees to miss work to attend hearings." See Pet. ¶ 32 (Ex. A at 47). While severity of violations varied, the Arbitrator found that all Employers had liability. Id. (Ex. A at 48). While "the amount being required of all Employers is less than what they would face even if their alleged uniqueness was calculated" id. (Ex. A at 50), "such a remedy is fair to the individual

employees, who will benefit by creation of a fund for prompt recovery of claims." Id. (Ex. A at 49). The Arbitrator concluded that "[c]ommon sense and the interests of arbitral economy favor a remedy which fairly compensated employees for their losses, while avoiding depletion of resources through years of costly, individual hearings." Id. (Ex. A at 48). The Arbitrator grounded this remedy in the intent of the Parties to adopt a "fair and expeditious process for resolving their disputes." Id. By doing so, the Arbitrator reasoned, the Parties had also "empowered [the Arbitrator] to fashion a remedy which takes into account conditions in the industry and existing realities affecting the Employers and employees alike." Id.

Specifically, the Arbitrator awarded as follows:

1. A Special Wage Fund shall be created by contributions from the forty two (42) Employers in this proceeding . . . .

2. The coverage periods for the Employers are as follows:

   Alliance for Health: June 8, 2012 – October 31, 2021

   Chinese-American Planning Council Home Attendant Program, Inc.: April 1, 2008 – October 31, 2021

   First Chinese Presbyterian Community Affairs Home Attendant Corp.: September 2, 2010 – October 31, 2021

   New Partners Inc. d/b/a Partners in Care: July 14, 2011 – October 31, 2021

   PSC Community Services, Inc: July 12, 2012 – October 31, 2021

   United Jewish Council of the East Side Home Attendant Service Corp.: June 14, 2011 – October 31, 2021

   All other Employers: January 2, 2013 – October 31, 2021

3. Within thirty (30) calendar days from issuance of this [Second] Award, each of the Employers shall provide to the Claims Administrator ("Administrator") . . . [specified] information for

each home aide in its employ during its coverage period [and through October 31, 2021] . . . .[3]

4. Within sixty (60) calendar days after the issuance of this [Second] Award, each Employer listed in paragraph 1, above, shall contribute the sum of two hundred fifty ($250) dollars for each home aide in its employ during all or part of its coverage period. If an employee worked for more than one (1) employer, each Employer shall be bound to separately contribute two hundred fifty ($250) dollars for that employee. All contributions shall be paid to the Claims Administrator named below. . . .

5. The Fund shall be allocated sixty (60%) percent to 24-hour shift claims and forty (40%) percent to total hours inclusive of 24-hour shifts. A fifteen (15%) percent enhancement shall be added to the 24-hour shifts and total hours for the coverage period ending December 31, 2015, in calculating the amounts to be paid to the employees. . . .

6. [addressing how disbursements will be structured as it related to wages and payroll taxes] . . . .

7. [directing Employers and Claims Administrator to exchange information] . . . .

8. [providing for costs and fees to be calculated and deducted from the Fund] . . . .

9. [giving attorneys 30 days to submit applications for attorneys' fees and expenses to be determined by the arbitrator though noting that the Union has advised they will be returning to the Fund any attorneys' fees awarded to the Union, for disbursement to employees] . . . .

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[3] The Arbitrator specifically excluded the following individuals: Alvaro Ramirez Guzman, Elida Agustina Mejia Herrera, Leticia Panama Rivas, Boris Pustilnik, Maral Agarunova, Epifania Hichez, Carmen Carrasco, Seferina Acosta, and Eugenia Barahona Alvarado. See Pet. ¶ 33 (Ex. A at 52-53, 67).

> 10. In the event there are funds remaining on hand after distribution to employees has been made, those funds shall be deposited to the jointly administered 1199SEIU Home Care Industry Education Fund, which is a benefit fund to which all Employers contribute and which operated for the benefit of educating and training home care employees.
>
> 11. Each aide who timely provides a claim form shall receive a minimum of ten ($10) dollars . . . .
>
> 12. Employees of Employer who fails to provide data or funding directed by my Award shall not receive payment for the portion of time they worked for such employer, unless or until the data and funding is received. The Union may seek provisional remedies before me in order to ensure my Award is not ineffectual, by requesting attachment, undertaking, an increased *pro rata* distribution, or such other relief as may be proper to achieve compliance with my Award by such Employer.
>
> 13. [identifying notice and claim form as Exhibit A] . . . .
>
> 14. [directing methods of notice by Claims Administrator, cut off times for claims to be submitted, and payment method and timeline] . . . .
>
> 15. [appointing Arden Claims Services, LLC, as Claims Administrator] . . . .

See Pet. ¶ 33 (Ex. A at 50-64).

In crafting the remedy, the Arbitrator considered, but ultimately found unpersuasive, some Employers' arguments that their exposure to damages was lower than others due to a higher degree of compliance. See Pet. ¶ 34 (Ex. A at 49). The Arbitrator was "convinced their argument [was] outweighed by the overarching interest of the Union and all Employers as a whole in maintaining the viability of the industry and its workforce." Id. The Arbitrator reasoned that, given the time and expense of individualized damages assessments, it made "no sense to issue an award requiring employees wait several more years before their claims are determined and collection of damages can be attempted." Id. As a result, the Arbitrator concluded that, "in

these particular circumstances, a per capita contribution remedy is the only reasonable course." Id.

ARGUMENT

I. LEGAL STANDARD

"'A federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, among the most deferential in the law.'" A&A Maint. Enter., Inc. v. Ramnarain, 982 F.3d 864, 868 (2d Cir. 2020) (internal citation omitted). In Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 532 (2d Cir. 2016) the Second Circuit explained the standard for confirmation of an arbitration award:

> [A] federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, among the most deferential in the law. . . . Our obligation is limited to determining whether the arbitration proceedings and award met the minimum legal standards established by the Labor Management Relations Act, 29 U.S.C. § 141 et seq. (the "LMRA"). We must simply ensure that the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority" and did not "ignore the plain language of the contract." United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). These standards do not require perfection in arbitration awards. Rather, they dictate that even if an arbitrator makes mistakes of fact or law, we may not disturb an award so long as he acted within the bounds of his bargained-for authority.

In other words, "[c]onfirmation of an arbitration award is a 'summary proceeding that merely makes what is already a final arbitration award a judgment of the court.'" N.Y. Hotel & Motel Trades Council v. Hotel St. George, 988 F. Supp. 770, 773-74 (S.D.N.Y. 1997) (quoting Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984)). A court's review is limited in order to "avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." N.Y. Hotel & Motel Trades Council, 988 F. Supp. at 774 (quoting Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993).

"[T]he court 'must grant' the award 'unless the award is vacated, modified, or corrected.'" D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006) (quoting 9 U.S.C. § 9). A court need only find "a barely colorable justification for the outcome reached" in order to confirm the award. Id. (quoting Landy Michaels Realty Corp. v. Local 32B-32J, Serv. Emps. Int'l Union, 954 F.2d 794, 797 (2d Cir. 1992)). In sum, a labor arbitration award must be confirmed unless it does not draw its "essence" from the parties' collective bargaining agreement, but rather, is a dispensation of the arbitrator's "own brand of industrial justice." United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

II. THE PARTIES AGREED NOT TO CONTEST COURT CONFIRMATION OF AN AWARD RENDERED UNDER THE CBA

The Parties' CBAs provide that the parties will not contest court confirmation of an arbitration award rendered under the ADR Provision. See Pet. ¶ 14 (Ex. D at 10). Here, where the parties agreed not to contest court confirmation and the underlying dispute arises from a violation of a labor contract, pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, confirmation of the Award and entry of judgment is required. See N.Y. Hotel & Motel Trades Council, 988 F. Supp. at 773-74 (acknowledging that § 301 governs a union's petition to confirm because the award arises from violation of a collective bargaining agreement).

III. THE AWARD DRAWS ITS ESSENCE FROM THE PARTIES' CBAS, SETS FORTH A CLEAR JUSTIFICATION AND RATIONALE FOR THE ARBITRATOR'S CONCLUSIONS AND REMEDY, AND THEREFORE, MUST BE CONFIRMED

The Second Award must be confirmed because the Arbitrator offers a clear, thorough, and well-reasoned justification for the outcome reached, based on an analysis of the express terms of the CBAs, the facts stipulated to by the parties, and the goals of settling disputes

efficiently and avoiding long and expensive litigation that led the parties to agree to Arbitration under the CBA. See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 532 (2d Cir. 2016).

A. THE ARBITRATOR FOUND THE UNION'S GRIEVANCE MERITORIOUS BECAUSE ALL THE EMPLOYERS VIOLATED THE CBA BY FAILING TO PAY THEIR EMPLOYEES IN VARYING AMOUNTS WAGES REQUIRED BY THE RELEVANT WAGE AND HOUR LAWS

The Arbitrator found that all of the Employers violated the CBA by failing to pay employees wages required under the relevant wage and hour statutes. See Pet. ¶ 28 (Ex. A at 46). The Arbitrator first found that the Parties' 2015 MOA containing the ADR Provision had "the goal of ensuring compliance with the wage and hour provisions of the covered statutes." See Pet. ¶ 29 (Ex. A at 45). The Arbitrator then found that, "required wages were underpaid to these employees, during the covered periods at issue." Id. (Ex. at 46). The Arbitrator concluded that while "not all of the Employers violated the covered statutes to the same degree or for the same periods of time, and a few of the Employers had no liability at all for claims made under certain of the covered statutes[,] [n]evertheless, I conclude . . .violations were committed by all of the Employers. . .resulting in underpayment of required wages. . . ." See Pet. ¶ 28 (Ex. A at 46). The Arbitrator reached this conclusion "based on the parties' submissions, including their joint stipulation of facts, addenda to the joint stipulation of facts, evidence of the Employers' pay practices, and assertions made during conference and hearings held the course of this proceeding." See Pet. ¶ 29 (Ex. A at 46).

B. THE ARBITRATOR CONCLUDED THAT THE REMEDY AWARDED WAS THE BEST WAY TO OFFER EMPLOYEES SIGNIFICANT RELIEF FOR THEIR WAGE AND HOUR CLAIMS WHILE AVOIDING LONG AND EXPENSIVE LITIGATION THAT COULD UNDERMINE EMPLOYEES ABILITY TO GET COMPENSATION AND RISK SIGNIFICANT DISRUPTIONS FOR CURRENT EMPLOYEES AND PATIENTS

After concluding that the Employers had violated the CBAs and relevant law by failing to pay required wages, the Arbitrator awarded "a per capita contribution remedy," wherein Employers will pay into a Special Wage Fund from which their Employees can recover wages. See Pet. ¶ 30 (Ex. A at 48-49). Pursuant to this remedy, the Employers are required to pay $250 for every employee employed by each Employer during the covered period into the Special Wage Fund. See Pet. ¶ 33 (Ex. A at 50-64). Employees employed during the covered period are eligible to receive compensation from the Special Wage Fund based on their relative hours worked and number of 24-hour shifts worked during the covered period. Id. The Arbitrator designed the remedy awarded to address a number of issues he identified. Specifically, the Arbitrator found that, while all the Employers had failed to pay required wages, calculating exact amounts owed to specific employees would be "impractical, if not impossible" and would "require the expenditure of substantially more legal time and expense, while causing employees to miss work to attend hearings." See Pet. ¶ 32 (Ex. A at 47). While severity of violations varied, the Arbitrator found that all Employers had liability. Id. (Ex. A at 48). While "the amount being required of all Employers is less than what they would face even if their alleged uniqueness was calculated" id. (Ex. A at 50), "such a remedy is fair to the individual employees, who will benefit by creation of a fund for prompt recovery of claims." Id. (Ex. A at 49). The Arbitrator concluded that "[c]ommon sense and the interests of arbitral economy favor a remedy which fairly compensated employees for their losses, while avoiding depletion of resources through years of

costly, individual hearings." Id. (Ex. A at 48). The Arbitrator noted the intent of the Parties to adopt a "fair and expeditious process for resolving their disputes" and that, by doing so, the Parties had "empowered [the Arbitrator] to fashion a remedy which takes into account conditions in the industry and existing realities affecting the Employers and employees alike." Id.

The Arbitrator rejected some Employers' arguments that their exposure to damages was lower than others due to a higher degree of compliance. See Pet. ¶ 34 (Ex. A at 49). The Arbitrator was "convinced their argument [was] outweighed by the overarching interest of the Union and all Employers as a whole in maintaining the viability of the industry and its workforce." Id. Individualized hearings for each Employer's specific circumstances would require enormous time and expense and the Arbitrator concluded that it made "no sense to issue an award requiring employees wait several more years before their claims are determined and collection of damages can be attempted." As a result, the Arbitrator concluded that, "in these particular circumstances, a per capita contribution remedy is the only reasonable course." Id.

CONCLUSION

The Second Award clearly articulates the reasons for the decision and award, which draws its essence from the Parties' CBAs and the record as a whole. Accordingly, confirmation of the Award is required. Therefore, 1199SEIU respectfully requests that this Court confirm the Second Award.

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New York, New York

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CERTIFICATION

I, Laureve Blackstone, certify that this Memorandum of Law contains 5,568 words and that it complies with Hon. John G. Koeltl's Individual Practices § II(D).

/s Laureve Blackstone