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**13 CV 6977**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

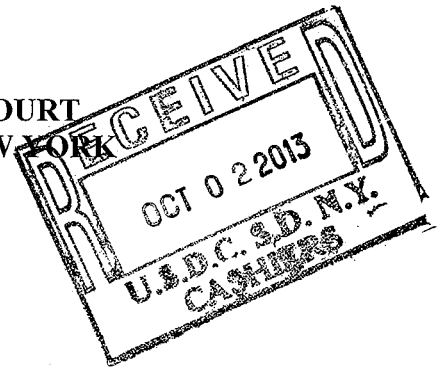
**VINCENTE JUAREZ, on behalf of himself and all  
others similarly situated,**

**Plaintiff,**

**-against-**

**449 RESTAURANT, INC., 88 2ND AVE. FOOD CORP.,  
PIRGOS FOOD CORP., 250 EAST 58TH STREET  
FOOD CORP. (collectively d/b/a the "MOONSTRUCK  
DINERS"), and JOHN KAPETANOS,**

**Defendants.**



**CLASS ACTION  
COMPLAINT**

Plaintiff Vincente Juarez ("Juarez" or "Plaintiff"), individually and on behalf of all others similarly situated, as class representative, upon personal knowledge as to himself, and upon information and belief as to other matters, alleges as follows:

**NATURE OF THE ACTION**

1. This lawsuit seeks to recover minimum wage, overtime compensation, spread-of-hours pay, and statutory penalties for Plaintiff and his similarly situated co-workers – cooks, food preparers, dishwashers, and other "non-exempt workers" – who work or have worked at the Moonstruck Diners located at 449 3<sup>rd</sup> Avenue, 88 2<sup>nd</sup> Avenue, 244 Madison Avenue, and 250 East 58<sup>th</sup> Street in New York City.

2. The Moonstruck Diners are a popular restaurant chain that has been reviewed in numerous printed and online restaurant guides, including Zagat, New York Magazine and the Village Voice. The diners are owned, operated and controlled by 449 Restaurant, Inc., Pirgos Food Corp., 88 2nd Ave. Food Corp., 250 East 58th Street Food Corp., and John Kapetanios.

3. Throughout Plaintiff's employment, non-exempt workers at the Moonstruck Diners were consistently required to work over 10 hours per day and over 40 hours per week.

4. Throughout Plaintiff's employment, Defendants did not make any efforts to monitor and/or record the actual hours worked by non-exempt workers.

5. Throughout Plaintiff's employment, non-exempt workers received flat weekly salaries, regardless of the actual hours they worked. The weekly salaries paid by Defendants failed to compensate non-exempt workers with the appropriate overtime premiums for hours worked beyond 40 per workweek or spread-of-hours pay for days when they worked over 10 hours. At times, the weekly salaries also failed to compensate non-exempt workers at the minimum hourly wage rates required by federal and state labor laws.

6. Throughout Plaintiff's employment, Defendants failed to furnish non-exempt workers with annual wage notices or accurate wage statements. In fact, Defendants generally compensated non-exempt workers with weekly cash payments, without providing any explanation of wages.

7. Defendants have applied the same employment policies, practices and procedures to all non-exempt workers at the Moonstruck Diners.

8. Plaintiff brings this action on behalf of himself and all similarly situated current and non-exempt workers at the Moonstruck Diners who elect to opt-in to this action pursuant to the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201 *et seq.*, and specifically, the collective action provision of 29 U.S.C. § 216(b), to remedy violations of the wage-and-hour provisions of the FLSA by Defendants that have deprived Plaintiff and other similarly situated employees of their lawfully earned wages.

9. Plaintiff also brings this action on behalf of himself and all similarly situated current and former non-exempt workers at the Moonstruck Diners pursuant to Federal Rule of Civil Procedure 23 to remedy violations of the New York Labor Law (“NYLL”), Article 6, §§ 190 *et seq.*, and Article 19, §§ 650 *et seq.*, and the supporting New York State Department of Labor Regulations.

### **THE PARTIES**

#### **Plaintiff**

##### **Vincente Juarez**

10. Juarez is an adult individual who is a resident of Corona, New York.

11. Juarez was employed by Defendants as a cook – a non-exempt worker – at the Moonstruck Diners from in or around 2007 to July 23, 2013. During this period, Juarez performed work at the Moonstruck Diners located at 449 3<sup>rd</sup> Avenue, 88 2<sup>nd</sup> Avenue, and 244 Madison Avenue.

12. Juarez is a covered employee within the meaning of the FLSA and the NYLL.

13. A written consent form for Juarez is being filed with this Class Action Complaint.

## **Defendants**

14. Defendants jointly employed Plaintiff and similarly situated employees at all times relevant.

15. Each Defendant has had substantial control over Plaintiff's and similarly situated employees' working conditions, and over the unlawful policies and practices alleged herein.

16. Defendants are part of a single integrated enterprise that jointly employed Plaintiff and similarly situated employees at all times relevant.

17. Defendants' operations are interrelated and unified.

18. During all relevant times, the Moonstruck Diners have shared a common management, and were centrally controlled and/or owned by Defendants.

19. During all relevant times, Defendants centrally controlled the labor relations of the Moonstruck Diners.

20. During all relevant times, Defendants have allowed employees to transfer or be shared by and between the Moonstruck Diners without retraining.

### **449 Restaurant, Inc.**

21. Together with the other Defendants, 449 Restaurant, Inc. ("449 Restaurant") has owned and/or operated the Moonstruck Diners during the relevant period.

22. 449 Restaurant is a domestic limited liability company organized and existing under the laws of New York.

23. 449 Restaurant's principal executive office is located at 449 3<sup>rd</sup> Avenue, New York, NY 10016.

24. 449 Restaurant is the "Premises Name" that appears on the New York State Liquor Authority license for the premises located at "449 3RD AVENUE, NEW YORK, NY 10016."

25. 449 Restaurant is a covered employer within the meaning of the FLSA and the NYLL, and, at all times relevant, employed Plaintiff and similarly situated employees.

26. At all relevant times, 449 Restaurant has maintained control, oversight, and direction over Plaintiff and similarly situated employees, including timekeeping, payroll and other employment practices that applied to them.

27. 449 Restaurant applies the same employment policies, practices, and procedures to all non-exempt workers, including policies, practices, and procedures with respect to payment of minimum wage, overtime compensation and spread-of-hours pay.

28. Upon information and belief, at all relevant times, 449 Restaurant's annual gross volume of sales made or business done was not less than \$500,000.00

**88 2nd Ave. Food Corp.**

29. Together with the other Defendants, 88 2nd Ave. Food Corp. ("88 2nd") has owned and/or operated the Moonstruck Diners during the relevant period.

30. 88 2nd is a domestic limited liability company organized and existing under the laws of New York.

31. 88 2nd's principal executive office is located at 88 2<sup>nd</sup> Avenue, New York, NY 10003.

32. 88 2nd is a covered employer within the meaning of the FLSA and the NYLL, and, at all times relevant, employed Plaintiff and similarly situated employees.

33. At all relevant times, 88 2nd has maintained control, oversight, and direction over Plaintiff and similarly situated employees, including timekeeping, payroll and other employment practices that applied to them.

34. 88 2nd applies the same employment policies, practices, and procedures to all non-exempt workers, including policies, practices, and procedures with respect to payment of minimum wage, overtime compensation and spread-of-hours pay.

35. Upon information and belief, at all relevant times, 88 2nd's annual gross volume of sales made or business done was not less than \$500,000.00.

**Pirgos Food Corp.**

36. Together with the other Defendants, Pirgos Food Corp. ("Pirgos") has owned and/or operated the Moonstruck Diners during the relevant period.

37. Pirgos is a domestic limited liability company organized and existing under the laws of New York.

38. Pirgos' principal executive office is located at 244 Madison Avenue, New York, NY 11368.

39. Pirgos is a covered employer within the meaning of the FLSA and the NYLL, and, at all times relevant, employed Plaintiff and similarly situated employees.

40. At all relevant times, Pirgos has maintained control, oversight, and direction over Plaintiff and similarly situated employees, including timekeeping, payroll and other employment practices that applied to them.

41. Pirgos applies the same employment policies, practices, and procedures to all non-exempt workers, including policies, practices, and procedures with respect to payment of minimum wage, overtime compensation and spread-of-hours pay.

42. Upon information and belief, at all relevant times, Pirgos' annual gross volume of sales made or business done was not less than \$500,000.00.

**250 East 58th Street Food Corp.**

43. Together with the other Defendants, 250 East 58th Street Food Corp. ("250 East") has owned and/or operated the Moonstruck Diners during the relevant period.

44. 250 East is a domestic limited liability company organized and existing under the laws of New York.

45. 250 East's principal executive office is located at 250 East 58<sup>th</sup> Street, New York, NY 10022.

46. 250 East is the "Premises Name" that appears on the New York State Liquor Authority license for the premises located at "250 E 58TH ST, E 58TH & 2ND AVE, NEW YORK, NY 10022."

47. 250 East is a covered employer within the meaning of the FLSA and the NYLL, and, at all times relevant, employed Plaintiff and similarly situated employees.

48. At all relevant times, 250 East has maintained control, oversight, and direction over Plaintiff and similarly situated employees, including timekeeping, payroll and other employment practices that applied to them.

49. 250 East applies the same employment policies, practices, and procedures to all non-exempt workers, including policies, practices, and procedures with respect to payment of minimum wage, overtime compensation and spread-of-hours pay.

50. Upon information and belief, at all relevant times, 250 East's annual gross volume of sales made or business done was not less than \$500,000.00.

**John Kapetanios**

51. Upon information and belief, John Kapetanios ("Kapetanios") is a resident of the State of New York.

52. At all relevant times, Kapetanios has been an owner of the Moonstruck Diners.

53. Kapetanios was the individual who hired Juarez to work at the Moonstruck Diners.

54. Kapetanios was the individual who Juarez spoke to about pay increases at the Moonstruck Diners, and the individual who made decisions regarding Juarez's compensation.

55. Kapetanios directed Juarez to perform work as a cook at multiple Moonstruck Diners without retraining.

56. During Plaintiff's employment, Kapetanios regularly provided Plaintiff and similarly situated employees with their weekly wages at the Moonstruck Diners.

57. The Entity Information provided by the New York State Department of State – Division of Corporations identifies Kapetanios as the Chief Executive Officer of 449 Restaurant, Pirgos, and 250 East.

58. Kapetanios is identified by the New York State Liquor Authority as a "Principal" for the premises doing business as "MOONSTRUCK E RESTAURANT" located at "449 3RD AVENUE, NEW YORK, NY 10016," and "MOONSTRUCK DINER" located at "250 E 58TH ST, E 58TH & 2ND AVE, NEW YORK, NY 10022."

59. At all relevant times, Kapetanios had power over personnel decisions at the Moonstruck Diners, including the power to hire and fire employees, set their wages, and otherwise control the terms and conditions of their employment.

60. At all relevant times, Kapetanios has had power over payroll decisions at the Moonstruck Diners, including the power to retain time and/or wage records.

61. At all relevant times, Kapetanios has been actively involved in managing the day to day operations of the Moonstruck Diners.

62. At all relevant times, Kapetanios has had the power to stop any illegal pay practices that harmed Plaintiff and similarly situated employees.

63. At all relevant times, Kapetanios has had the power to transfer the assets and/or liabilities of the Moonstruck Diners.

64. At all relevant times, Kapetanios has had the power to declare bankruptcy on behalf of the Moonstruck Diners.



65. At all relevant times, Kapetanios has had the power to enter into contracts on behalf of the Moonstruck Diners.

66. At all relevant times, Kapetanios has had the power to close, shut down, and/or sell the Moonstruck Diners.

67. At all relevant times, Kapetanios has had the power to close, shut down, and/or sell the Moonstruck Diners.

68. Kapetanios is a covered employer within the meaning of the FLSA and the NYLL, and, at all times relevant, employed and/or jointly employed Plaintiff and similarly situated employees.

### **JURISDICTION AND VENUE**

69. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 and jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.

70. This Court also has jurisdiction over Plaintiff's claims under the FLSA pursuant to 29 U.S.C. § 216(b).

71. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

72. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this district.

### **COLLECTIVE ACTION ALLEGATIONS**

73. Plaintiff brings the First and Second Causes of Action, FLSA claims, on behalf of himself and all similarly situated current and former non-exempt workers at the Moonstruck Diners, who elect to opt-in to this action (the "FLSA Collective").

74. Defendants are liable under the FLSA for, *inter alia*, failing to properly compensate Plaintiff and the FLSA Collective.

75. Consistent with Defendants' policy and pattern or practice, Plaintiff and the FLSA Collective were not paid minimum wage for all hours worked or the appropriate premium overtime compensation for all hours worked beyond 40 per workweek.

76. All of the work that Plaintiff and the FLSA Collective have performed has been assigned by Defendants, and/or Defendants have been aware of all of the work that Plaintiff and the FLSA Collective have performed.

77. As part of their regular business practice, Defendants have intentionally, willfully, and repeatedly engaged in a pattern, practice, and/or policy of violating the FLSA with respect to Plaintiff and the FLSA Collective. This policy and pattern or practice includes, but is not limited to:

- (a) willfully failing to pay its employees, including Plaintiff and the FLSA Collective, minimum wage for all hours worked and the appropriate premium overtime wages for hours worked in excess of 40 hours per workweek; and
- (b) willfully failing to record all of the time that its employees, including Plaintiff and the FLSA Collective, have worked for the benefit of Defendants.

78. Defendants' unlawful conduct, as described in this Class Action Complaint, is pursuant to a corporate policy or practice of minimizing labor costs by failing to properly compensate Plaintiff and the FLSA Collective for the hours they work.

79. Defendants are aware or should have been aware that federal law required them to pay employees minimum wage for all of the hours they worked.

80. Defendants are aware or should have been aware that federal law required them to pay Plaintiff and the FLSA Collective overtime premiums for hours worked in excess of 40 per workweek.

81. Plaintiff and the FLSA Collective perform or performed the same primary duties.

82. Defendants' unlawful conduct has been widespread, repeated, and consistent.

83. There are many similarly situated current and former non-exempt workers who have been denied minimum wage and overtime compensation in violation of the FLSA who would benefit from the issuance of a court-supervised notice of this lawsuit and the opportunity to join it. This notice should be sent to the FLSA Collective pursuant to 29 U.S.C. § 216(b).

84. Those similarly situated employees are known to Defendants, are readily identifiable, and can be located through Defendants' records.

85. In recognition of the services Plaintiff has rendered and will continue to render to the FLSA Collective, Plaintiff will request payment of a service award upon resolution of this action.

### **CLASS ACTION ALLEGATIONS**

86. Plaintiff brings the Third, Fourth, Fifth, Sixth, and Seventh Causes of Action, NYLL claims, under Rule 23 of the Federal Rules of Civil Procedure, on behalf of himself and a class of persons consisting of:

All persons who work or have worked as cooks, food preparers, dishwashers, and other similarly situated non-exempt workers at the Moonstruck Diners in New York between October 2, 2007 and the date of final judgment in this matter (the "Rule 23 Class").

87. Excluded from the Rule 23 Class are Defendants, Defendants' legal representatives, officers, directors, assigns, and successors, or any individual who has, or who at any time during the class period has had, a controlling interest in Defendants; the Judge(s) to whom this case is assigned and any member of the Judges' immediate family; and all persons who will submit timely and otherwise proper requests for exclusion from the Rule 23 Class.

88. The members of the Rule 23 Class are so numerous that joinder of all members is impracticable.

89. Upon information and belief, the size of the Rule 23 Class is at least 50 individuals. Although the precise number of such employees is unknown, the facts on which the calculation of that number depends are presently within the sole control of Defendants.

90. Defendants have acted or have refused to act on grounds generally applicable to the Rule 23 Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Rule 23 Class as a whole.

91. Common questions of law and fact exist as to the Rule 23 Class that predominate over any questions only affecting them individually and include, but are not limited to, the following:

- (a) whether Defendants violated NYLL Articles 6 and 19, and the supporting New York State Department of Labor Regulations;
- (b) whether Defendants failed to pay Plaintiff and the Rule 23 Class minimum wage for all of the hours they worked;
- (c) whether Defendants correctly compensated Plaintiff and the Rule 23 Class for hours worked in excess of 40 hours per workweek;
- (d) whether Defendants failed to provide Plaintiff and the Rule 23 Class spread-of-hours pay when the length of their workday was greater than 10 hours;
- (e) whether Defendants failed to keep true and accurate time and pay records for all hours worked by Plaintiff and the Rule 23 Class, and other records required by the NYLL;
- (f) whether Defendants failed to furnish Plaintiff and the Rule 23 Class with annual wage notices, as required by the NYLL;
- (g) whether Defendants failed to furnish Plaintiff and the Rule 23 Class with accurate statements of wages, hours worked, rates paid, and gross wages, as required by the NYLL;
- (h) whether Defendants' policy of failing to pay workers was instituted willfully or with reckless disregard of the law; and
- (i) the nature and extent of class-wide injury and the measure of damages for those injuries.

92. The claims of Plaintiff are typical of the claims of the Rule 23 Class he seeks to represent. Plaintiff and all of the Rule 23 Class members work, or have worked, for Defendants as non-exempt workers at the Moonstruck Diners in New York. Plaintiff and the Rule 23 Class members enjoy the same statutory rights under the NYLL, including to be paid minimum wage for all hours worked, to be properly compensated for all hours worked in excess of 40 hours per workweek, and to be paid spread-of-hours pay. Plaintiff and the Rule 23 Class members have all sustained similar types of damages as a result of Defendants' failure to comply with the NYLL. Plaintiff and the Rule 23 Class members have all been injured in that they have been uncompensated or under-compensated due to Defendants' common policies, practices, and patterns of conduct.

93. Plaintiff will fairly and adequately represent and protect the interests of the members of the Rule 23 Class. Plaintiff understands that as class representative, he assumes a fiduciary responsibility to the class to represent its interests fairly and adequately. Plaintiff recognizes that as class representative, he must represent and consider the interests of the class just as he would represent and consider his own interests. Plaintiff understands that in decisions regarding the conduct of the litigation and its possible settlement, he must not favor his own interests over the class. Plaintiff recognizes that any resolution of a class action must be in the best interest of the class. Plaintiff understands that in order to provide adequate representation, he must be informed of developments in litigation, cooperate with class counsel, and testify at deposition and/or trial. Plaintiff has retained counsel competent and experienced in complex class actions and employment litigation. There is no conflict between Plaintiff and the Rule 23 members.

94. In recognition of the services Plaintiff has rendered and will continue to render to the Rule 23 Class, Plaintiff will request payment of a service award upon resolution of this action.

95. A class action is superior to other available methods for the fair and efficient adjudication of this litigation. The members of the Rule 23 Class have been damaged and are entitled to recovery as a result of Defendants' violations of the NYLL, as well as their common and uniform policies, practices, and procedures. Although the relative damages suffered by individual Rule 23 Class members are not *de minimis*, such damages are small compared to the expense and burden of individual prosecution of this litigation. The individual Plaintiff lacks the financial resources to conduct a thorough examination of Defendants' timekeeping and compensation practices and to prosecute vigorously a lawsuit against Defendants to recover such damages. In addition, class litigation is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about Defendants' practices.

96. This action is properly maintainable as a class action under Federal Rule of Civil Procedure 23(b)(3).

#### **PLAINTIFF'S FACTUAL ALLEGATIONS**

97. Consistent with their policies and patterns or practices as described herein, Defendants harmed Plaintiff, individually, as follows:

##### **Vincente Juarez**

98. Defendants did not pay Juarez the proper minimum wages, overtime wages, and spread-of-hours pay for all of the time that he was suffered or permitted to work each workweek.

99. Defendants generally compensated Juarez with a set weekly salary, regardless of the hours he worked. The fixed weekly salary received by Juarez started at approximately \$350.00 and gradually increased every six to twelve months until reaching \$720.00 in or around February 2013.

100. Defendants did not compensate Juarez at the appropriate minimum wage rate for all of the hours he worked. In that regard, there were numerous pay periods when the regular hourly rate received by Juarez was below the minimum hourly wage rates required by the FLSA and NYLL.

101. Defendants consistently suffered or permitted Juarez to work over 40 hours per week as a cook, up to a maximum of approximately 65 hours per week. During such workweeks, Defendants did not compensate Juarez at time and one-half his regular hourly rate for all of the overtime hours he worked.

102. Defendants did not pay Juarez one additional hour of pay at the basic minimum hourly rate for all of the times that the length of the interval between the beginning and end of his workday – including working time plus time off for meals plus intervals off duty – was greater than 10 hours.

103. Defendants did not keep accurate records of wages earned or of hours worked by Juarez. In fact, Defendants did not utilize any procedures to monitor or record the hours worked by non-exempt workers at the Moonstruck Diners.

104. Defendants failed to furnish Juarez with annual wage notices.

105. Defendants failed to furnish Juarez with accurate statements of wages, hours worked, rates paid, and gross wages.

**FIRST CAUSE OF ACTION**  
**Fair Labor Standards Act – Minimum Wages**  
**(Brought on behalf of Plaintiff and the FLSA Collective)**

106. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

107. Defendants have engaged in a widespread pattern, policy, and practice of violating the FLSA, as detailed in this Class Action Complaint.

108. Plaintiff has consented in writing to be a party to this action, pursuant to 29 U.S.C. § 216(b).

109. At all times relevant, Plaintiff and the members of the FLSA Collective were employed by an entity engaged in commerce and/or the production or sale of goods for commerce within the meaning of 29 U.S.C. §§ 201 *et seq.*, and/or they were engaged in commerce and/or the production or sale of goods for commerce within the meaning of 29 U.S.C. §§ 201 *et seq.*

110. At all times relevant, Plaintiff and the members of the FLSA Collective were or have been employees within the meaning of 29 U.S.C. §§ 201 *et seq.*

111. At all times relevant, Defendants have been employers of Plaintiff and the members of the FLSA Collective, engaged in commerce and/or the production of goods for commerce within the meaning of 29 U.S.C. §§ 201 *et seq.*

112. The minimum wage provisions set forth in the FLSA, 29 U.S.C. §§ 201 *et seq.*, and the supporting federal regulations, apply to Defendants and protect Plaintiff and the members of the FLSA Collective.

113. Defendants have failed to pay Plaintiff and the members of the FLSA Collective the minimum wages to which they are entitled under the FLSA.

114. Defendants' unlawful conduct, as described in this Class Action Complaint, has been willful and intentional. Defendants were aware or should have been aware that the practices described in this Class Action Complaint were unlawful. Defendants have not made a good faith effort to comply with the FLSA with respect to the compensation of Plaintiff and the members of the FLSA Collective.

115. Because Defendants' violations of the FLSA have been willful, a three-year statute of limitations applies, pursuant to 29 U.S.C. §§ 201 *et seq.*



116. As a result of Defendants' willful violations of the FLSA, Plaintiff and the members of the FLSA Collective have suffered damages by being denied minimum wages in accordance with the FLSA in amounts to be determined at trial, and are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation pursuant to 29 U.S.C. §§ 201 *et seq.*

**SECOND CAUSE OF ACTION**  
**Fair Labor Standards Act – Overtime Wages**  
**(Brought on behalf of Plaintiff and the FLSA Collective)**

117. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

118. The overtime wage provisions set forth in the FLSA, 29 U.S.C. §§ 201 *et seq.*, and the supporting federal regulations, apply to Defendants and protect Plaintiff and the members of the FLSA Collective.

119. Defendants have failed to pay Plaintiff and the members of the FLSA Collective the appropriate overtime wages for all of the hours they have worked in excess of 40 hours in a workweek.

120. Defendants have failed to pay Plaintiff and the members of the FLSA Collective overtime at a rate of time and one-half their regular hourly rate for all hours worked in excess of 40 hours per workweek.

121. Defendants' unlawful conduct, as described in this Class Action Complaint, has been willful and intentional. Defendants have been aware or should have been aware that the practices described in this Class Action Complaint were unlawful. Defendants have not made a good faith effort to comply with the FLSA with respect to the compensation of Plaintiff and the members of the FLSA Collective.

122. Because Defendants' violations of the FLSA have been willful, a three-year statute of limitations applies, pursuant to 29 U.S.C. §§ 201 *et seq.*

123. As a result of Defendants' willful violations of the FLSA, Plaintiff and the members of the FLSA Collective have suffered damages by being denied overtime compensation in amounts to be determined at trial, and are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation pursuant to 29 U.S.C. §§ 201 *et seq.*

**THIRD CAUSE OF ACTION**  
**New York Labor Law – Minimum Wages**  
**(Brought on behalf of Plaintiff and the Rule 23 Class)**

124. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

125. Defendants have engaged in a widespread pattern, policy, and practice of violating the NYLL, as detailed in this Class Action Complaint.

126. At all times relevant, Plaintiff and the members of the Rule 23 Class have been employees of Defendants, and Defendants have been employers of Plaintiff and the members of the Rule 23 Class within the meaning of the NYLL §§ 650 *et seq.* and the supporting New York State Department of Labor Regulations.

127. At all times relevant, Plaintiff and the members of the Rule 23 Class have been covered by the NYLL.

128. The minimum wage provisions of Article 19 of the NYLL and the supporting New York State Department of Labor Regulations apply to Defendants, and protect Plaintiff and the members of the Rule 23 Class.

129. Defendants have failed to pay Plaintiff and the members of the Rule 23 Class the minimum hourly wages to which they are entitled under the NYLL and the supporting New York State Department of Labor Regulations.

130. Defendants have been required to pay Plaintiff and the members of the Rule 23 Class minimum wage at a rate of (a) \$7.15 per hour for all hours worked from October 2, 2007 through July 23, 2009; and (b) \$7.25 per hour for all hours worked from July 24, 2009 through the present, under the NYLL §§ 650 *et seq.* and the supporting New York State Department of Labor Regulations.

131. Through their knowing or intentional failure to pay minimum hourly wages to Plaintiff and the members of the Rule 23 Class, Defendants have willfully violated the NYLL, Article 19, §§ 650 *et seq.* and the supporting New York State Department of Labor Regulations.

132. Due to Defendants' willful violations of the NYLL, Plaintiff and the members of the Rule 23 Class are entitled to recover from Defendants their unpaid minimum wages, liquidated damages as provided for by the NYLL, reasonable attorneys' fees, costs, and pre-judgment and post-judgment interest.

**FOURTH CAUSE OF ACTION**  
**New York Labor Law – Overtime Wages**  
**(Brought on behalf of Plaintiff and the Rule 23 Class)**

133. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

134. The overtime wage provisions of Article 19 of the NYLL and its supporting regulations apply to Defendants, and protect Plaintiff and the members of the Rule 23 Class.

135. Defendants have failed to pay Plaintiff and the members of the Rule 23 Class the appropriate overtime wages for all of the hours they have worked in excess of 40 hours in a workweek.

136. Defendants have failed to pay Plaintiff and the members of the Rule 23 Class overtime at a rate of time and one-half their regular hourly rate for all hours worked in excess of 40 per workweek.

137. Defendants have failed to keep, make, preserve, maintain, and furnish accurate records of time worked by Plaintiff and the members of the Rule 23 Class.

138. Through their knowing or intentional failure to pay Plaintiff and the members of the Rule 23 Class overtime wages for hours worked in excess of 40 hours per workweek, Defendants have willfully violated the NYLL, Article 19, §§ 650 *et seq.* and the supporting New York State Department of Labor Regulations.

139. Due to Defendants' willful violations of the NYLL, Plaintiff and the members of the Rule 23 Class are entitled to recover from Defendants their unpaid overtime wages, liquidated damages as provided for by the NYLL, reasonable attorneys' fees and costs of the action, and pre-judgment and post-judgment interest.

**FIFTH CAUSE OF ACTION**  
**New York Labor Law – Spread-of-Hours Pay**  
**(Brought on behalf of Plaintiff and the Rule 23 Class)**

140. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

141. Defendants have failed to pay Plaintiff and the members of the Rule 23 Class additional compensation of one hour's pay at the basic minimum hourly wage rate for each day that the length of the interval between the beginning and end of their workday – including working time plus time off for meals plus intervals off duty – was greater than 10 hours.

142. Through their knowing or intentional failure to pay Plaintiff and the members of the Rule 23 Class spread-of-hours pay, Defendants have willfully violated the NYLL, Article 19, §§ 650 *et seq.* and the supporting New York State Department of Labor Regulations.

143. Due to Defendants' willful violations of the NYLL, Plaintiff and the members of the Rule 23 Class are entitled to recover from Defendants their unpaid spread-of-hours wages, liquidated damages as provided for by the NYLL, reasonable attorneys' fees, costs, and pre-judgment and post-judgment interest.

**SIXTH CAUSE OF ACTION**  
**New York Labor Law – Failure to Provide Annual Wage Notices**  
**(Brought on behalf of Plaintiff and the Rule 23 Class)**

144. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

145. Defendants have willfully failed to supply Plaintiff and the members of the Rule 23 Class with wage notices, as required by NYLL, Article 6, § 195(1), in English or in the language identified by Plaintiff and the members of the Rule 23 Class as their primary language, containing Plaintiff's and the members of the Rule 23 Class' rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; hourly rate or rates of pay and overtime rate or rates of pay if applicable; the regular pay day designated by the employer in accordance with NYLL, Article 6, § 191; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; the telephone number of the employer; plus such other information as the commissioner deems material and necessary.

146. Through their knowing or intentional failure to provide Plaintiff and the members of the Rule 23 Class with the wage notices required by the NYLL, Defendants have willfully violated NYLL, Article 6, §§ 190 *et seq.*, and the supporting New York State Department of Labor Regulations.

147. Due to Defendants' willful violations of NYLL, Article 6, § 195(1), Plaintiff and the members of the Rule 23 Class are entitled to statutory penalties of fifty dollars for each workweek that Defendants failed to provide Plaintiff and the members of the Rule 23 Class with wage notices, or a total of twenty-five hundred dollars each, reasonable attorneys' fees, costs, and injunctive and declaratory relief, as provided for by NYLL, Article 6, § 198(1-b).

**SEVENTH CAUSE OF ACTION**  
**New York Labor Law – Failure to Provide Accurate Wage Statements**  
**(Brought on behalf of Plaintiff and the Rule 23 Class)**

148. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

149. Defendants have willfully failed to supply Plaintiff and the members of the Rule 23 Class with accurate statements of wages as required by NYLL, Article 6, § 195(3), containing the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; hourly rate or rates of pay and overtime rate or rates of pay if applicable; the number of hours worked, including overtime hours worked if applicable; deductions; and net wages.

150. Through their knowing or intentional failure to provide Plaintiff and the members of the Rule 23 Class with the accurate wage statements required by the NYLL, Defendants have willfully violated NYLL, Article 6, §§ 190 *et seq.* and the supporting New York State Department of Labor Regulations.

151. Due to Defendants' willful violations of NYLL, Article 6, § 195(3), Plaintiff and the members of the Rule 23 Class are entitled to statutory penalties of one hundred dollars for each workweek that Defendants failed to provide Plaintiff and the members of the Rule 23 Class with accurate wage statements, or a total of twenty-five hundred dollars each, reasonable attorneys' fees, costs, and injunctive and declaratory relief, as provided for by NYLL, Article 6, § 198(1-d).

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff, individually, and on behalf of all other similarly situated persons, respectfully requests that this Court grant the following relief:

A. That, at the earliest possible time, Plaintiff be allowed to give notice of this collective action, or that the Court issue such notice, to all non-exempt workers who are presently, or have at any time during the six years immediately preceding the filing of this suit, up through and including the date of this Court's issuance of court-supervised notice, worked at the Moonstruck Diners. Such notice shall inform them that this civil action has been filed, of the nature of the action, and of their right to join this lawsuit if they believe they were denied proper wages;

B. Unpaid minimum wages, overtime pay, and an additional and equal amount as liquidated damages pursuant to the FLSA and the supporting United States Department of Labor Regulations;

C. Certification of this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

D. Designation of Plaintiff as representative of the Rule 23 Class and counsel of record as Class Counsel;

E. Payment of a service award to Plaintiff in recognition of the services he has rendered and will continue to render to the FLSA Collective and Rule 23 Class;

F. Issuance of a declaratory judgment that the practices complained of in this Class Action Complaint are unlawful under the NYLL, Article 6, §§ 190 *et seq.*, NYLL, Article 19, §§ 650 *et seq.*, and the supporting New York State Department of Labor Regulations;

G. Unpaid minimum wages, overtime pay, spread-of-hours pay, and liquidated damages permitted by law pursuant to the NYLL and the supporting New York State Department of Labor Regulations;

H. Statutory penalties of fifty dollars for each workweek that Defendants failed to provide Plaintiff and the members of the Rule 23 Class with wage notices, or a total of twenty-five hundred dollars each, as provided for by NYLL, Article 6 § 198;

I. Statutory penalties of one hundred dollars for each workweek that Defendants failed to provide Plaintiff and the members of the Rule 23 Class with accurate wage statements, or a total of twenty-five hundred dollars each, as provided for by NYLL, Article 6 § 198;

J. Prejudgment and post-judgment interest;

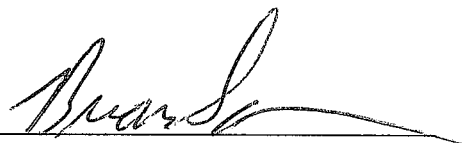
K. An injunction requiring Defendants to pay all statutorily required wages and cease the unlawful activity described herein pursuant to the NYLL;

L. Reasonable attorneys' fees and costs of the action; and

M. Such other relief as this Court shall deem just and proper.

Dated: New York, New York  
October 2, 2013

Respectfully submitted,



Brian S. Schaffer

**FITAPELLI & SCHAFFER, LLP**

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*Attorneys for Plaintiff and  
the Putative Class*



## FORMULARIO DE CONSENTIMIENTO DE UNIÓN

1. Doy mi consentimiento para ser parte demandante en una demanda contra Moonstruck Diner y / o entidades e individuos relacionados con el fin de obtener reparación por violaciones de la Fair Labor Standards Act, (*Ley de las Normas Laborales Justas*) de conformidad con 29 USC § 216 (b).

2. Al firmar y devolver este formulario de consentimiento, yo designo Fitapelli & Schaffer, LLP ("La Firma") para representarme y hacer decisiones en mi defensa acerca del caso y cualquier acuerdo extrajudicial. Entiendo que costos razonables hechos en mi defensa serán deducido de cualquier acuerdo extrajudicial o juicio será prorrateado entre todos los otros demandantes. Entiendo que la firma peticionara con la Corte para conseguir los costos de abogado de cualquier acuerdo extrajudicial o juicio en la suma que será el mayor de lo siguiente: (1) la suma "lodestar", que es calculada por multiplicar una tarifa por hora razonable por los números de horas dedicado a la demanda, o (2) 1/3 del total bruto del acuerdo judicial o juicio. Estoy de acuerdo de ser vinculado a cualquier proceso legal de este asunto por la Corte, sea favorable o desfavorable.

  
Firma (Signature)

Vicente Juárez Hernández  
Nombre legal completo (Imprenta) (Full Legal Name (Print))

