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**14 CV 9009**

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

**JUDGE STEIN**

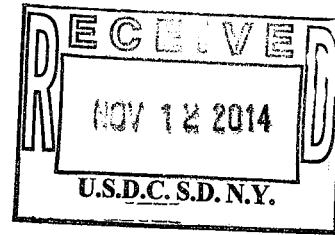
**ANDREW SPICIARICH, on behalf of himself  
and all others similarly situated,**

**Plaintiff,**

**-against-**

**MEXICAN RADIO CORP., MEXICAN  
RADIO HUDSON, LLC, WILLIAM YOUNG,  
AND LORI SELDEN,**

**Defendants.**



**CLASS & COLLECTIVE  
ACTION COMPLAINT**

Plaintiff Andrew Spiciarich (“Plaintiff” or “Spiciarich”), individually and on behalf of all others similarly situated, 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 – servers, bartenders, runners, supervisors, and other “Tipped Workers” – who work or have worked at the Mexican Radio restaurants located at 19 Cleveland Place, New York, New York 10012 and 537 Warren Street, Hudson, New York 12534 (collectively, the “Mexican Radio Restaurants”).

2. Owned and operated by Mexican Radio Corp., Mexican Radio Hudson, LLC, William Young, and Lori Selden (collectively, “Defendants”), the Mexican Radio Restaurants have been profiled and reviewed in numerous print and online publications, and have won awards for Best Mexican Restaurant, Best Margaritas, and Best Flan in America. In addition to the two locations listed above, Defendants also own and operate a Mexican Radio restaurant in Schenectady, New York.

3. Despite operating the businesses under separate corporations, Defendants are part of a single integrated enterprise that jointly employs Tipped Workers at the Mexican Radio Restaurants. This enterprise is centrally controlled by William Young and Lori Selden, who own, manage and oversee operations at all three Mexican Radio locations. All three restaurants are connected through the Mexican Radio website, <http://www.mexrad.com>, which lists all three restaurants and provides links to each location’s website.

4. More importantly, employees – including Tipped Workers – at the Mexican Radio Restaurants perform the same basic job duties, are subject to the same employment policies, practices and procedures, and are directed and/or permitted by Defendants to perform work at multiple Mexican Radio locations without retraining.

5. Plaintiff brings this action on behalf of himself and all similarly situated current and former Tipped Workers 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.

6. Plaintiff also brings this action on behalf of himself and all similarly situated current and former Tipped Workers 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**

##### **Andrew Spiciarich**

7. Spiciarich is an adult individual who is a resident of Hudson, New York.

8. Spiciarich has been employed by Defendants as a server, bartender, runner, and supervisor – a Tipped Worker – at the Mexican Radio Restaurant in Hudson, New York from in or around July 2010 to present.

9. Spiciarich is a covered employee within the meaning of the FLSA and the NYLL.

10. A written consent form for Spiciarich is being filed with this Complaint.

#### **Defendants**

11. Defendants have employed and/or jointly employed Plaintiff and similarly situated employees at all times relevant.

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

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

14. Defendants’ operations are interrelated and unified.

15. During all relevant times, the Mexican Radio Restaurants have shared a common management, and have been centrally controlled and/or owned by Defendants.

16. During all relevant times, Defendants have centrally controlled the labor relations of the Mexican Radio Restaurants.

17. During all relevant times, Defendants have allowed employees to transfer or be shared by and between the Mexican Radio Restaurants without retraining.

**Mexican Radio Corp.**

18. Together with the other Defendants, Defendant Mexican Radio Corp. (“MRC”) has owned and/or operated the Mexican Radio Restaurant located at 9 Cleveland Place, New York, New York, 10012 during the relevant period.

19. MRC is a domestic business corporation organized and existing under the laws of New York.

20. According to the Entity Information provided by the New York State Department of State Division of Corporations, MRC’s principal executive office is located at “LORI J SELDEN, 221 SUNNYSIDE RD, KINDERHOOK, NEW YORK, 12106.”

21. MRC is the “Premises Name” that appears on the active New York State Liquor License for the premises doing business at “19 CLEVELAND PLACE, SPRING & KENMORE STREETS, NEW YORK, NY 10012.”

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

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

24. MRC has applied the same employment policies, practices, and procedures to all Tipped Workers, including policies, practices, and procedures with respect to payment of minimum wage, overtime compensation, and spread-of-hours pay.

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

**Mexican Radio Hudson, LLC**

26. Together with the other Defendants, Defendant Mexican Radio Hudson, LLC ("MRH") has owned and/or operated the Mexican Radio Restaurant located at 37 Warren Street, Hudson, New York 12534 during the relevant period.

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

28. According to the Entity Information provided by the New York State Department of State Division of Corporations, the address to which DOS will mail process on behalf of MRH is "LORI J SELDEN, 221 SUNNYSIDE RD, KINDERHOOK, NEW YORK, 12106."

29. MRH is the "Premises Name" that appears on the active New York State Liquor License for the premises doing business as "MEXICAN RADIO" located at "537 WARREN STREET, HUDSON, NY 12534."

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

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

32. MRH has applied the same employment policies, practices, and procedures to all Tipped Workers, including policies, practices, and procedures with respect to payment of minimum wage, overtime compensation, and spread-of-hours pay.

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

**William Young**

34. Upon information and belief, Defendant William Young (“Young”) is a resident of the State of New York.

35. Young is a founder of the Mexican Radio Restaurants, and, at all relevant times, has been an owner and operator of the Mexican Radio Restaurants.

36. On his LinkedIn page, Young states that he has been the “Chief of Operations at Mexican Radio” from March 1996 to present.

37. The Entity Information provided by the New York State Department of State Division of Corporations identifies Young as the “Chief Executive Officer” of MRC.

38. Young is a “Principal” listed on the active New York State Liquor Licenses for: MRC – located at “19 CLEVELAND PLACE, SPRING & KENMORE STREETS, NEW YORK, NY 10012”; and MRH d/b/a “MEXICAN RADIO” – located at 537 WARREN STREET, HUDSON, NY 12534.” Young is also a principal listed on the active New York State Liquor License for the premises doing business as “MEXICAN RADIO” located at 325 STATE ST, SCHENECTADY, NY 12305.”

39. In a June 27, 2014 Times Union article titled “*Lori Selden brings her Mexican Radio franchise to Schenectady,*” Young is identified as the Mexican Radio restaurant group’s “operations director, responsible for making sure the equipment, facilities and staff all work.” The article further states that Young and Defendant Lori Selden (“Selden”) are the founders of the Mexican Radio restaurant group, have focused on training employees, and, according to a manager, “give you direction and like to be very informed, and if there’s something they have definite ideas about, they’re very specific about what they want.”

40. At all relevant times, Young has had power over personnel decisions at the Mexican Radio Restaurants, including the power to hire and fire employees, set their wages, and otherwise control the terms and conditions of their employment.

41. At all relevant times, Young has had power over payroll decisions at the Mexican Radio Restaurants, including the power to retain time and/or wage records.

42. At all relevant times, Young has been actively involved in managing the day to day operations of the Mexican Radio Restaurants.

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

44. At all relevant times, Young has had the power to transfer the assets and/or liabilities of the Mexican Radio Restaurants.

45. At all relevant times, Young has had the power to declare bankruptcy on behalf of the Mexican Radio Restaurants.

46. At all relevant times, Young has had the power to enter into contracts on behalf of the Mexican Radio Restaurants.

47. At all relevant times, Young has had the power to close, shut down, and/or sell the Mexican Radio Restaurants.

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

**Lori Selden**

49. Upon information and belief, Selden is a resident of the State of New York.

50. Selden is a founder of the Mexican Radio Restaurants, and, at all relevant times, has been an owner and operator of the Mexican Radio Restaurants.

51. On her LinkedIn page, Selden states that she has been the “CEO, CFO” of the “Mexican Radio Restaurant Group” from March 1996 to present.

52. The Entity Information provided by the New York State Department of State Division of Corporations identifies the “Principal Executive Office” of MRC as “LORI J SELDEN, 221 SUNNYSIDE RD, KINDERHOOK, NEW YORK, 12106,” and the “[a]ddress to which DOS will mail process” on behalf of MRH as LORI J SELDEN, 221 SUNNYSIDE RD, KINDERHOOK, NEW YORK, 12106.”

53. Selden is a “Principal” listed on the active New York State Liquor Licenses for: MRC – located at “19 CLEVELAND PLACE, SPRING & KENMORE STREETS, NEW YORK, NY 10012”; and MRH d/b/a “MEXICAN RADIO” – located at 537 WARREN STREET, HUDSON, NY 12534.” Young is also a principal listed on the active New York State Liquor License for the premises doing business as “MEXICAN RADIO” located at 325 STATE ST, SCHENECTADY, NY 12305.”

54. In a June 27, 2014 Times Union article titled “*Lori Selden brings her Mexican Radio franchise to Schenectady*,” Selden is identified as the Mexican Radio restaurant group’s “CEO and its de facto CAO, or chief aesthetic officer ... [s]he develops the recipes, designs the restaurants and handles the books.” The article further states that Selden and Young are the founders of the Mexican Radio restaurant group, have focused on training employees, and, according to a manager, “give you direction and like to be very informed, and if there’s something they have definite ideas about, they’re very specific about what they want.”

55. At all relevant times, Selden has had power over personnel decisions at the Mexican Radio Restaurants, including the power to hire and fire employees, set their wages, and otherwise control the terms and conditions of their employment.



56. At all relevant times, Selden has had power over payroll decisions at the Mexican Radio Restaurants, including the power to retain time and/or wage records.

57. At all relevant times, Selden has been actively involved in managing the day to day operations of the Mexican Radio Restaurants.

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

59. At all relevant times, Selden has had the power to transfer the assets and/or liabilities of the Mexican Radio Restaurants.

60. At all relevant times, Selden has had the power to declare bankruptcy on behalf of the Mexican Radio Restaurants.

61. At all relevant times, Selden has had the power to enter into contracts on behalf of the Mexican Radio Restaurants.

62. At all relevant times, Selden has had the power to close, shut down, and/or sell the Mexican Radio Restaurants.

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

#### **JURISDICTION AND VENUE**

64. 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.

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

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

67. 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**

68. Plaintiff brings the First and Second Causes of Action, FLSA claims, on behalf of himself and all similarly situated persons who have worked as Tipped Workers at the Mexican Radio Restaurants in New York, who elect to opt-in to this action (the “FLSA Collective”).

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

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

71. 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.

72. As part of its 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, the appropriate minimum wages for all hours worked and premium overtime wages for all 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.

73. Defendants' unlawful conduct, as described in this 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 have worked.

74. Defendants are aware or should have been aware that federal law required them to pay Tipped Workers minimum wage for all hours worked and overtime premiums for all hours worked in excess of 40 per workweek.

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

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

77. There are many similarly situated current and former Tipped 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).

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

79. 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**

80. 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 Tipped Workers and similar employees at the Mexican Radio Restaurants in New York between November 12, 2008 and the date of final judgment in this matter (the "Rule 23 Class").

81. 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.

82. The members of the Rule 23 Class are so numerous that joinder of all members is impracticable. Upon information and belief, the size of the Rule 23 Class is at least 100 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.

83. 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.

84. 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 the appropriate 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 per workweek;
- (d) whether Defendants failed to provide Plaintiff and the Rule 23 Class with 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 proper wage notices, as required by the NYLL;

- (g) whether Defendants failed to furnish Plaintiff and the Rule 23 Class with a proper statement with every payment of 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.

85. 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 Tipped Workers at the Mexican Radio Restaurants in New York. Plaintiff and the Rule 23 Class members enjoy the same statutory rights under the NYLL, including to be paid minimum wage, overtime compensation, and 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.

86. 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 interests of 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 Class members.

87. 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.

88. 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 plaintiffs lack 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.

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

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

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

##### **Andrew Spiciarich**

91. Defendants have not paid Spiciarich the proper minimum wage, overtime compensation, and spread-of-hours pay for all of the time that he has been suffered or permitted to work each workweek.

92. Throughout his employment, Defendants have paid Spiciarich the following fixed shift pay, regardless of the total hours he has worked each day and week:

- (a) In or around July 2010 to late 2012-mid 2013: \$22.00 per server and runner shift;
- (b) In or around late 2012-mid 2013 to present: \$35.00 per server and runner shift;
- (c) In or around 2012 to present: \$40.00 per bartender shift; and
- (d) In or around May 2014 to present: \$70.00 per shift as a supervisor.

93. During his employment, Spiciarich has generally been scheduled to work six to seven shifts per week – Sunday morning and/or evening, Monday evening, Tuesday morning or evening, Friday evening, and Saturday morning and evening (double) – unless he missed time for vacation, sick days and/or holidays. Generally, the approximate hours Spiciarich has worked during his scheduled shifts are as follows:

- (a) In or around July 2010 to May 2014 (all as server, runner or bartender): Sunday from approximately 10:00 a.m. to 6:00 p.m. and/or 4:30 p.m. to 11:30 p.m.-12:00 a.m.; Monday from approximately 4:30 p.m. to 11:30 p.m.-12:00 a.m.; Tuesday from approximately 10:00 a.m. to 6:00 p.m. or 4:30 p.m. to 11:30 p.m.-12:00 a.m., Friday from approximately 4:30 p.m. to 12-12:30 a.m.; and Saturday from approximately 10:00 a.m. to 12-12:30 a.m. (double shift).
- (b) In or around May 2014 to present (four to five shifts as a supervisor and two to three shifts as a server, runner or bartender): Sunday from approximately 9:30 a.m. to 6-6:30 p.m. and/or 4:30 p.m. to 12:30-1:00 a.m.; Monday from approximately 4:30 p.m. to 12:30-1:00 a.m.; Tuesday from approximately 9:30 a.m. to 6-6:30 p.m. or 4:30 p.m. to 12:30-1:00 a.m., Friday from approximately 4:30 p.m. to 12-12:30 a.m.; and Saturday from approximately 9:30 a.m. to 12-12:30 a.m. (double shift).

Spiciarich has also regularly picked up one unscheduled shift from a coworker each week as a server, runner or bartender. The precise number of shifts worked by Spiciarich each workweek have generally been recorded by Defendants and reported on Plaintiff's paystubs.

94. Defendants have failed to accurately monitor and record the hours worked by Spiciarich.

95. At all times relevant, Spiciarich has been entitled to receive the full statutory minimum wage rate.

96. Defendants have failed to notify Spiciarich in writing of the tip credit provisions of the FLSA and the NYLL, or of their intent to apply a tip credit to his wages.

97. Defendants have failed to furnish Spiciarich with a statement with each payment of wages listing his hours worked, rates paid, gross wages, and tip allowance claimed.

98. As a result of the above, Defendants have not satisfied the requirements under the FLSA and NYLL by which they could apply a tip credit to Spiciarich's wages.

99. Defendants have suffered or permitted Spiciarich to work over 40 hours per week.

100. Throughout his employment, Spiciarich has been entitled to overtime wages of 1.5 times the full minimum wage rate for all hours worked in excess of 40 per workweek.

101. Defendants have suffered or permitted Spiciarich to work over 10 hours per day. Defendants have not paid Spiciarich 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 – has been greater than 10 hours.

102. Defendants have not kept accurate records of wages earned or of hours worked by Spiciarich.

103. Defendants have failed to furnish Spiciarich with proper wage notices, as required by the NYLL.

104. Defendants have failed to furnish Spiciarich with a proper statement with every payment of wages, as required by the NYLL.



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

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

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

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

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

109. 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.*

110. 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.*

111. 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.

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

113. Defendants have been required to pay directly to Plaintiff and the members of the FLSA Collective the full federal minimum wage rate for all hours worked.

114. Defendants have not been eligible to avail themselves of the federal tipped minimum wage rate under the FLSA, 29 U.S.C. §§ 201 *et seq.*, because Defendants have failed to inform Plaintiff and the FLSA Collective of the provisions of subsection 203(m) of the FLSA.

115. Defendants' unlawful conduct, as described in this Complaint, has been willful and intentional. Defendants are aware or should have been aware that the practices described in this Complaint are 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.

116. 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.*

117. 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)**

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

119. 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.

120. Defendants have failed to pay Plaintiff and the members of the FLSA Collective the overtime wages to which they have been entitled under the FLSA.

121. Defendants' unlawful conduct, as described in this Complaint, has been willful and intentional. Defendants were aware or should have been aware that the practices described in this 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. § 255.

123. As a result of Defendants' violations of the FLSA, Plaintiff and the members of the FLSA Collective have been deprived of 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. § 216(b).

**THIRD CAUSE OF ACTION**  
**New York Labor Law – Minimum Wage**  
**(Brought on behalf of Plaintiff and the members of 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 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. Pursuant to the NYLL, Article 19, §§ 650 *et seq.*, and the supporting New York State Department of Labor Regulations, Defendants have been required to pay Plaintiff and the members of the Rule 23 Class the full minimum wage at a rate of (a) \$7.15 per hour for all hours worked from November 12, 2008 through July 23, 2009; (b) \$7.25 per hour for all hours worked from July 24, 2009 through December 30, 2013; and (c) \$8.00 per hour for all hours worked from December 31, 2013 through the present.

131. Prior to January 1, 2011, Defendants failed to furnish with every payment of wages to Plaintiff and the members of the Rule 23 Class a statement listing hours worked, rates paid, gross wages, and tip allowance claimed as part of their minimum hourly wage rate, as required by the NYLL and the supporting New York State Department of Labor Regulations. As a result, Plaintiff and the members of the Rule 23 Class were entitled to the full minimum wage rate rather than the reduced tipped minimum wage rate during this time period.

132. Prior to January 1, 2011, Defendants failed to keep, make, preserve, maintain, and furnish accurate records of time worked by Plaintiff and the members of the Rule 23 Class, as required by the NYLL and the supporting New York State Department of Labor Regulations. As a result, Plaintiff and the members of the Rule 23 Class were entitled to the full minimum wage rate rather than the reduced tipped minimum wage rate during this time period.

133. Since January 1, 2011, Defendants have failed to notify Plaintiff and the members of the Rule 23 Class of the tip credit in writing as required by the NYLL and the supporting New York State Department of Labor Regulations. As a result, Plaintiff and the members of the Rule 23 Class have been entitled to the full minimum wage rate rather than the reduced tipped minimum wage rate at all relevant times.

134. 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.

135. 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 Wage**  
**(Brought on behalf of Plaintiff and the members of the Rule 23 Class)**

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

137. 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.

138. Defendants have failed to pay Plaintiff and the members of the Rule 23 Class the overtime wages to which they have been entitled under the NYLL and the supporting New York State Department of Labor Regulations.

139. 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.

140. 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 week, Defendants have willfully violated the NYLL, Article 19, §§ 650 *et seq.*, and the supporting New York State Department of Labor Regulations.

141. Due to Defendants' 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, costs, 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 members of the Rule 23 Class)**

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

143. Defendants have willfully 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 – has been greater than 10 hours.

144. 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.

145. Due to Defendants' 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 Proper Wage Notices  
(Brought on behalf of Plaintiff and the members of the Rule 23 Class)**

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

147. Defendants have willfully failed to furnish 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 each employee as their primary language, at the time of hiring, and on or before February first of each subsequent year of the employee's employment with the employer, a notice containing: the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; 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.

148. 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.

149. 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 proper 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 Proper Wage Statements  
(Brought on behalf of Plaintiff and the members of the Rule 23 Class)**

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

151. Defendants have willfully failed to furnish Plaintiff and the members of the Rule 23 Class with a statement with every payment of wages as required by NYLL, Article 6, § 195(3), listing: 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; deductions; allowances, if any, claimed as part of the minimum wage; net wages; the regular hourly rate or rates of pay; the overtime rate or rates of pay; and the number of regular and overtime hours worked.

152. Through their knowing or intentional failure to provide Plaintiff and the members of the Rule 23 Class with the 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.

153. 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 proper 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 Tipped Workers who are presently working, or have worked 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, at the Mexican Radio Restaurants. 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 wage, overtime compensation, 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 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 compensation, 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 proper 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 proper 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  
November 12, 2014

Respectfully submitted,



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Brian S. Schaffer

**FITAPELLI & SCHAFFER, LLP**

Brian S. Schaffer

Eric J. Gitig

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New York, New York 10016

Telephone: (212) 300-0375

*Attorneys for Plaintiff and  
the Putative Class*

FAIR LABOR STANDARDS ACT CONSENT

1. I consent to be a party plaintiff in a lawsuit against MEXICAN RADIO and/or related entities and individuals in order to seek redress for violations of the Fair Labor Standards Act, pursuant to 29 U.S.C. § 216(b).

2. By signing and returning this consent form, I hereby designate FITAPELLI & SCHAFFER, LLP and FIBICH, LEEBRON, COPELAND, BRIGGS & JOSEPHSON, LLP ("the Firms") to represent me and make decisions on my behalf concerning the litigation and any settlement. I understand that reasonable costs expended on my behalf will be deducted from any settlement or judgment amount on a pro rata basis among all other plaintiffs. I understand that the Firms will petition the Court for attorney's fees from any settlement or judgment in the amount of the greater of: (1) the "lodestar" amount, calculated by multiplying reasonable hourly rates by the number of hours expended on the lawsuit, or (2) 1/3 of the gross settlement or judgment amount. I agree to be bound by any adjudication of this action by a court, whether it is favorable or unfavorable.

andrew spiciarich  
andrew spiciarich (Nov 3, 2014)  
Signature

andrew spiciarich  
Full Legal Name (Print)