

To: Adam Rest Corp.
Cuban Restaurant of Bayside Inc.
The Cuban II, LLC
Margaritas Cafe One Inc.
Margaritas Cafe Two Inc.
Margaritas Cafe Three, Inc.
Margaritas Cafe VI Inc.
Margaritas Cafe VII, Inc.
Margaritas Cafe VIII Inc.
Margaritas Cafe XI Inc.
Pamela Restaurant Corp.
Puglias of Garden City Inc.

c/o Karl J. Silverberg
SILVERBERG P.C.,
320 Carleton Ave., Suite 6400
Central Islip, New York 11722
Attorneys for Defendants

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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COSTANZA ELLISON, on behalf of herself and all	:
others similar situated,	: Index No.: 2023/607508
	:
Plaintiff,	:
- against -	: FIRST AMENDED
	: CLASS ACTION
	: COMPLAINT
ADAM REST CORP., CUBAN RESTAURANT OF	:
BAYSIDE INC., THE CUBAN II, LLC,	:
MARGARITAS CAFE ONE, INC., MARGARITAS	:
CAFE TWO INC., MARGARITAS CAFE THREE,	:
INC., MARGARITAS CAFE VI INC., MARGARITAS	:
CAFÉ VII INC., MARGARITAS CAFE VIII INC.,	:
MARGARITAS CAFE XI, INC., PAMELA	:
RESTAURANT CORP., and PUGLIAS OF GARDEN	:
CITY INC.,	:
	:
Defendants.	:
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Plaintiff Constanza Ellison, on behalf of herself and all others similarly situated (“Plaintiff”), by and through her attorneys Kessler Matura P.C., complaining of Adam Rest Corp., Cuban Restaurant of Bayside Inc., The Cuban II, LLC, Margaritas Cafe One Inc., Margaritas Cafe Two Inc., Margaritas Cafe Three, Inc., Margaritas Cafe VI Inc., Margaritas Cafe VII, Inc., Margaritas Cafe VIII Inc., Margaritas Cafe XI Inc., Pamela Restaurant Corp., and Puglias of Garden City Inc. (collectively, “Defendants”), alleges as follows:

INTRODUCTION

1. Defendants form two interrelated chains of restaurants – Willy’s Margaritas Cafe and Willy’s The Cuban (together, “Willy’s”) – all under the same owner, William Martinez. Defendants employed Constanza Ellison and those individuals similarly situated to her as bartenders and servers (“Tipped Workers”). Defendants relied on a “tip credit” to pay Tipped Workers the “tipped minimum wage,” as opposed to the full minimum wage.

2. Defendants required Tipped Workers to spend over 20 percent of their time performing work unrelated to serving customers (“side work”). Defendants also failed to list the tip credit taken on Tipped Workers’ pay stubs or provide Tipped Workers with proper notice of the tipped minimum wage and its requirements. Thus, Defendants’ tip policy violated the New York Labor Law (“NYLL” or “N.Y. Lab. Law”) and supporting Hospitality Industry Wage Order, 12 N.Y.C.R.R. §§ 146, *et seq.*

3. Defendants’ Tipped Workers regularly worked shifts with a “spread” of over 10 hours. That is, the end of the employee’s shift was over 10 hours from its start.

4. Nevertheless, Defendants failed to pay the Tipped Workers spread-of-hours pay – an additional hour at the minimum wage rate for each shift over 10 hours – as required by the Hospitality Industry Wage Order. *See* 12 N.Y.C.R.R. § 146-1.6.

5. Plaintiff brings this action on behalf of herself and all similarly situated current and former Tipped Workers pursuant to Article 9 of the New York Civil Practice Law and Rules to remedy violations of N.Y. Lab. Law Article 19 §§ 650, *et seq.*, and the supporting Hospitality Industry Wage Order, 12 N.Y.C.R.R. §§ 146, *et seq.*

JURISDICTION & VENUE

6. This Court has jurisdiction over this matter pursuant to N.Y. Lab. Law § 663(1) and C.P.L.R. § 301.

7. This Court is the proper venue under C.P.L.R. § 503(c) because the majority of Defendants’ restaurants are located in Nassau County and Plaintiff is a resident of Nassau County.

THE PARTIES

Plaintiff Constanza Ellison

8. Plaintiff Costanza Ellison is a resident of Nassau County, New York.

9. Ellison previously went by the name Costanza Pizarro.

10. At all times relevant to this Class Action Complaint, Ellison was an “employee” within the meaning of N.Y. Lab. Law §§ 190(2), 651(5), and 12 N.Y.C.R.R § 146-3.2.

11. Ellison was employed as a Tipped Worker from approximately July 2014 through July 2018 at a Willy’s Margaritas Café, owned by Margaritas Café Two Inc. and a Willy’s The Cuban, owned by Puglia’s of Garden City Inc.

Defendant Adam Rest Corp.

12. Upon information and belief, Defendant Adam Rest Corp. is a domestic business corporation.

13. Defendant Adam Rest Corp. is authorized to do business pursuant to the laws of the State of New York.

14. Defendant Adam Rest Corp. does business as Willy’s Margaritas Cafe.

15. Willy’s Margaritas Cafe operated by Adam Rest Corp. is located at 392 Woodbury Road, Hicksville, New York 11801.

16. Defendant Adam Rest Corp. maintains control, oversight, and direction over its operations and employment practices.

17. Defendant Adam Rest Corp. maintained control, oversight, and direction over members of the putative Class, including timekeeping, payroll and other employment practices that applied to them.

18. Defendant Adam Rest Corp. was and still is an “employer” within the meaning of the N.Y. Lab. Law §§ 190(3) and 651(6).

Defendant Margaritas Cafe One Inc.

19. Upon information and belief, Defendant Margaritas Cafe One Inc. is a domestic business corporation.

20. Defendant Margaritas Cafe One, Inc. is authorized to do business pursuant to the laws of the laws of the State of New York.

21. Defendant Margaritas Cafe One, Inc. does business as Willy's Margaritas Cafe.

22. Willy's Margaritas Cafe operated by Defendant Margaritas Cafe One, Inc. is located at 139B Merrick Avenue, Merrick, New York, in Nassau County.

23. Defendant Margaritas Cafe One, Inc. maintains control, oversight, and direction over its operations and employment practices.

24. Defendant Margaritas Cafe One, Inc. maintained control, oversight, and direction over members of the putative Class, including timekeeping, payroll and other employment practices that applied to them.

25. Defendant Margaritas Cafe One Inc. was and still is an "employer" within the meaning of the N.Y. Lab. Law §§ 190(3) and 651(6).

Defendant Margaritas Cafe Two Inc.

26. Upon information and belief, Defendant Margaritas Cafe Two Inc. is a domestic business corporation.

27. Defendant Margaritas Cafe Two Inc. is authorized to do business pursuant to the laws of the laws of the State of New York.

28. Defendant Margaritas Cafe Two Inc. does business as Willy's Margaritas Cafe.

29. Willy's Margaritas Cafe operated by Defendant Margaritas Cafe Two Inc. is located at 751-753 Wantagh Ave., Wantagh, New York, in Nassau County.

30. Defendant Margaritas Cafe Two Inc. maintains control, oversight, and direction over its operations and employment practices.

31. Defendant Margaritas Cafe Two Inc. maintained control, oversight, and direction over the putative Class, including timekeeping, payroll and other employment practices that applied to them.

32. Defendant Margaritas Cafe Two Inc. was and still is an “employer” within the meaning of the N.Y. Lab. Law §§ 190(3) and 651(6).

Defendant Margaritas Cafe Three Inc.

33. Upon information and belief, Defendant Margaritas Cafe Three Inc. is a domestic business corporation.

34. Defendant Margaritas Cafe Three Inc. is authorized to do business pursuant to the laws of the laws of the State of New York.

35. Defendant Margaritas Cafe Three Inc. does business as Willy’s Margaritas Cafe.

36. Willy’s Margaritas Cafe operated by Defendant Margaritas Cafe Three Inc. is located at 583 Nesconset Hwy, Hauppauge, New York, in Suffolk County.

37. Defendant Margaritas Cafe Three Inc. maintains control, oversight, and direction over its operations and employment practices.

38. Defendant Margaritas Cafe Three Inc. maintained control, oversight, and direction over the putative Class, including timekeeping, payroll and other employment practices that applied to them.

39. Defendant Margaritas Cafe Three Inc. was and still is an “employer” within the meaning of the N.Y. Lab. Law §§ 190(3) and 651(6).

Defendant Margaritas Cafe VI Inc.

40. Upon information and belief, Defendant Margaritas Cafe VI Inc. is a domestic business corporation.

41. Defendant Margaritas Cafe VI is authorized to do business pursuant to the laws of the laws of the State of New York.

42. Defendant Margaritas Cafe VI Inc. does business as Willy's Margaritas Cafe.

43. Willy's Margaritas Cafe operated by Defendant Margaritas Cafe VI, Inc. is located at 38 Hillside Avenue, Williston Park, New York, in Nassau County.

44. Defendant Margaritas Cafe VI Inc. maintains control, oversight, and direction over its operations and employment practices.

45. Defendant Margaritas Cafe VI Inc. maintained control, oversight, and direction over the putative Class, including timekeeping, payroll and other employment practices that applied to her.

46. Defendant Margaritas Cafe VI Inc. was and still is an "employer" within the meaning of the N.Y. Lab. Law §§ 190(3) and 651(6).

Defendant Margaritas Cafe VII Inc.

47. Upon information and belief, Defendant Margaritas Cafe VII Inc. is a domestic business corporation.

48. Defendant Margaritas Cafe VII is authorized to do business pursuant to the laws of the laws of the State of New York.

49. Defendant Margaritas Cafe VII Inc. does business as Willy's Margaritas Cafe.

50. Willy's Margaritas Cafe operated by Defendant Margaritas Cafe VII is located at 445 S. Main Street, Freeport, New York 11520, in Nassau County.

51. Defendant Margaritas Cafe VII Inc. maintains control, oversight, and direction over its operations and employment practices.

52. Defendant Margaritas Cafe VII Inc. maintained control, oversight, and direction over the putative Class, including timekeeping, payroll and other employment practices that applied to them.

53. Defendant Margaritas Cafe VII Inc. was and still is an “employer” within the meaning of the N.Y. Lab. Law §§ 190(3) and 651(6).

Defendant Margaritas Cafe VIII Inc.

54. Upon information and belief, Defendant Margaritas Cafe VIII Inc. is a domestic business corporation.

55. Defendant Margaritas Cafe VIII is authorized to do business pursuant to the laws of the laws of the State of New York.

56. Defendant Margaritas Cafe VIII Inc. does business as Willy’s Margaritas Cafe.

57. Willy’s Margaritas Cafe operated by Defendant Margaritas Cafe VIII, Inc. is located at 95 Manorhaven Blvd., Port Washington, New York, in Nassau County.

58. Defendant Margaritas Cafe VIII Inc. maintains control, oversight, and direction over its operations and employment practices.

59. Defendant Margaritas Cafe VIII Inc. maintained control, oversight, and direction over the putative Class, including timekeeping, payroll and other employment practices that applied to her.

60. Defendant Margaritas Cafe VIII Inc. was and still is an “employer” within the meaning of the N.Y. Lab. Law §§ 190(3) and 651(6).

Defendant Margaritas Cafe XI Inc.

61. Upon information and belief, Defendant Margaritas Cafe XI Inc. is a domestic business corporation.

62. Defendant Margaritas Cafe XI is authorized to do business pursuant to the laws of the laws of the State of New York.

63. Defendant Margaritas Cafe XI Inc. does business as Willy's Margaritas Cafe.

64. Willy's Margaritas Cafe operated by Defendant Margaritas Cafe XI, Inc. is located at 124 East Park Avenue, Long Beach, New York, in Nassau County.

65. Defendant Margaritas Cafe XI Inc. maintains control, oversight, and direction over its operations and employment practices.

66. Defendant Margaritas Cafe XI Inc. maintained control, oversight, and direction over the putative Class, including timekeeping, payroll and other employment practices that applied to them.

67. Defendant Margaritas Cafe XI Inc. was and still is an "employer" within the meaning of the N.Y. Lab. Law §§ 190(3) and 651(6).

Defendant Pamela Restaurant Corp.

68. Upon information and belief, Defendant is a domestic business corporation.

69. Defendant is authorized to do business pursuant to the laws of the laws of the State of New York.

70. Defendant Pamela Restaurant Corp. does business as Willy's Margaritas Cafe.

71. Willy's Margaritas Cafe operated by Pamela Restaurant Corp. is located at 1868 Front Street, East Meadow, New York 11554.

72. Defendant Pamela Restaurant Corp. maintains control, oversight, and direction over its operations and employment practices.

73. Defendant Pamela Restaurant Corp. maintained control, oversight, and direction over the putative Class, including timekeeping, payroll and other employment practices that applied to them.

74. Defendant was and still is an “employer” within the meaning of the N.Y. Lab. Law §§ 190(3) and 651(6).

Defendant Cuban Restaurant of Bayside Inc.

75. Upon information and belief, Defendant Cuban Restaurant of Bayside Inc. is a domestic business corporation.

76. Defendant Cuban Restaurant of Bayside Inc. is authorized to do business pursuant to the laws of the State of New York.

77. Defendant Cuban Restaurant of Bayside Inc. does business as Willy’s The Cuban.

78. Willy’s The Cuban operated by Defendant Cuban Restaurant of Bayside Inc. is located at 39-17 Bell Boulevard, Bayside, New York.

79. Defendant Cuban Restaurant of Bayside Inc. maintains control, oversight, and direction over its operations and employment practices.

80. Defendant Cuban Restaurant of Bayside Inc. maintained control, oversight, and direction over the putative Class, including timekeeping, payroll and other employment practices that applied to them.

81. Defendant Cuban Restaurant of Bayside Inc. was and still is an “employer” within the meaning of the N.Y. Lab. Law §§ 190(3) and 651(6).

Defendant The Cuban II, LLC

82. Upon information and belief, Defendant The Cuban II, LLC is a domestic business corporation.

83. Defendant The Cuban II, LLC is authorized to do business pursuant to the laws of the laws of the State of New York.

84. Defendant The Cuban II, LLC does business as Willy's The Cuban.

85. Willy's The Cuban operated by Defendant The Cuban II, LLC is located at 95 W. Main Street, Patchogue, New York 11772, in Suffolk County.

86. Defendant The Cuban II, LLC maintains control, oversight, and direction over its operations and employment practices.

87. Defendant The Cuban II, LLC maintained control, oversight, and direction over the putative Class, including timekeeping, payroll and other employment practices that applied to them.

88. Defendant The Cuban II, LLC was and still is an "employer" within the meaning of the N.Y. Lab. Law §§ 190(3) and 651(6).

Defendant Puglias of Garden City Inc.

89. Upon information and belief, Defendant Puglias of Garden City Inc. is a domestic business corporation.

90. Defendant Puglias of Garden City Inc. is authorized to do business pursuant to the laws of the laws of the State of New York.

91. Defendant Puglias of Garden City Inc. does business as Willy's The Cuban.

92. Willy's The Cuban operated by Defendant Puglias of Garden City Inc. is located at 987 Stewart Avenue, Garden City, New York.

93. Defendant Puglias of Garden City Inc. maintains control, oversight, and direction over its operations and employment practices.

94. Defendant Puglias of Garden City Inc. maintained control, oversight, and direction over the putative Class, including timekeeping, payroll and other employment practices that applied to them.

95. Defendant was and still is an “employer” within the meaning of the N.Y. Lab. Law §§ 190(3) and 651(6).

Defendants

96. Defendants form two restaurant chains: Willy’s Margaritas Cafe and Willy’s The Cuban, all with the same owner and operator, William Martinez.

97. The two chains each show their common ownership with the name “Willy’s,” which appears on the signage, décor, and menus of each restaurant.

98. Each of the 10 Willy’s Margaritas Cafes advertise as a single integrated enterprise, using the same website: margaritascafe.com (last accessed Apr. 13, 2023).

99. Each of the 10 Willy’s Margaritas Cafes share reservation systems.

100. Each of the 10 Willy’s Margaritas Cafes share a common Facebook page.

101. Each of the 10 Willy’s Margaritas Cafes share a common Instagram account.

102. Each of the 10 Willy’s Margaritas Cafes share pickup/delivery order systems.

103. Each of the 10 Willy’s Margaritas Cafes have the same menu.

104. Each of the three Willy’s The Cubans advertise as a single integrated enterprise, using the same website: thecubanny.com (last accessed Apr. 13, 2023).

105. Each of the three Willy’s The Cubans share reservation systems.

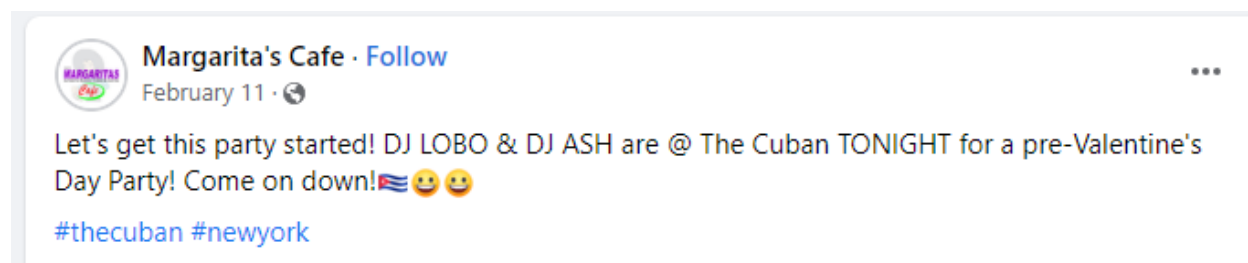
106. Each of the three Willy’s The Cubans share pickup/delivery order systems.

107. Upon information and belief, each of the 10 Willy’s Margaritas Cafes and 3 Willy’s The Cubans use the same payroll system.

108. The Defendants market for each other.

109. Defendants market for the three Willy’s The Cubans on the Willy’s Margaritas Cafes’ Facebook page, including on the following instances:

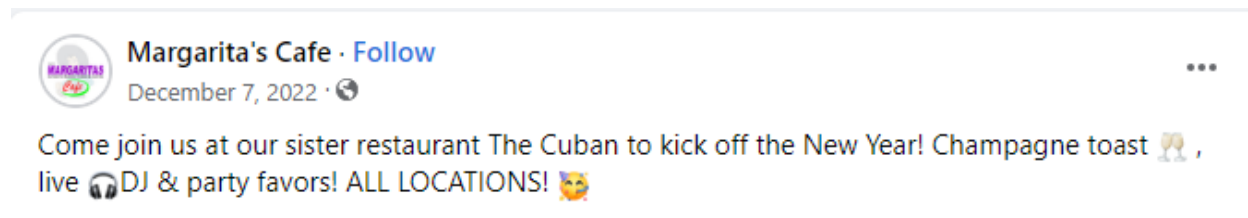
a. February 11, 2023, post announcing a pre-Valentine’s Day party including two DJs:



b. March 1, 2019, post announcing the opening of Defendants’ Patchogue location:

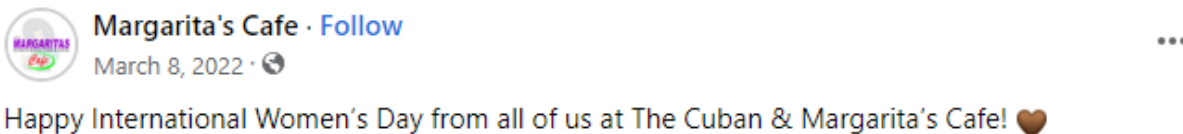


c. December 7, 2022 post advertising for a cross-location New Year’s Eve event:



110. Defendants make unified announcements to the public, such as:

a. March 8, 2022, post on Facebook:



b. June 29, 2022, post on Facebook announcing an all-location closure:



- 111. The Defendants constitute a unified operation.
- 112. The Defendants constitute a common enterprise.
- 113. The Defendants constitute an integrated enterprise.
- 114. The Defendants have interrelated operations.
- 115. The Defendants share employees.

116. For example, in 2017 and 2018, Defendants Margaritas Cafe Three Inc. and Margaritas Cafe Two Inc. employed Heidi Nunez as a bartender and waitress. *See Ans., Nunez v. Magaritas Cafe Three, Inc., et al.*, No. 2:19 Civ. 3081 (E.D.N.Y. May 23, 2019) (“*Nunez Ans.*”), ECF No. 9 ¶¶ 13, 15, 16.

117. Defendants have common management.

118. For example, Antonio Garduno was an employee of Defendants Margaritas Café Three Inc. and Margaritas Café Two Inc. *See Nunez Ans.* ¶ 11.

119. Antonio Garduno was employed by Defendants Margaritas Café Three Inc. and Margaritas Café Two Inc. as a manager. *See Nunez Ans.* ¶ 11.

120. Defendants have common ownership.

121. William Martinez is registered as the principal with the New York State Liquor Authority for the following Defendants:

- a. Pamela Restaurant Corp.;
- b. Margaritas Cafe VII, Inc.;
- c. Margaritas Cafe VII, Inc.;
- d. Margaritas Cafe Three Inc.;
- e. Margaritas Cafe Two Inc.; and
- f. Margaritas Café VI Inc.

122. William Martinez also holds himself out as the owner in interviews with the media. *See, e.g., A Bright Future for Margarita’s Café*, Levittown Tribune (Mar. 13, 2015), <https://levittown-tribune.com/2015/03/13/a-bright-future-for-margaritas-cafe/>; Dave Gil de Rubio, *Bringing Little Havana to Long Island*, Nassua Illustrated News (Jan. 11, 2017), <https://nassauillustrated.com/2017/01/bringing-little-havana-to-long-island/>.

123. William Martinez's email address is listed as a point of contact on the Margaritas Cafe Facebook page.

124. Defendants hold William Martinez out as the owner to the public.

125. For example, in April 2017, Defendants posted an announcement of Martinez's birthday on the Margaritas Cafe Facebook page.

126. On July 11, 2017, Defendants shared a photo on Facebook of "[o]wner [William] Martinez greeting diners at" the Williston Park location.

127. At all relevant times, Defendants maintained control, oversight, and direction over their employees, including timekeeping, payroll and other employment practices that applied to them.

128. At all relevant times, Defendants applied the same employment policies, practices, and procedures to all Tipped Workers, including policies, practices, and procedures with respect to tip credits, the minimum wage, and failure to pay spread-of-hours pay.

CLASS ALLEGATIONS

129. Plaintiff brings the First and Second Causes of Action on her own behalf and as a class action, pursuant to Article 9 of the New York Civil Practice Law and Rules on behalf of the following class of persons:

All current and former employees of Willy's who worked as Tipped Workers at any time since June 1, 2017 through entry of the judgment in the case (the "Class").

130. The persons in the Class ("Class Members") are so numerous that joinder of all members is impracticable. Further, the precise number of such persons is unknown, and facts on which the calculation of that number can be based are presently within the sole control of Defendants.

131. Upon information and belief, the size of the Class is at least 100 individuals.

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

- a. Whether Defendants' tip policies and practices violated the NYLL and Hospitality Industry Wage Order by requiring Tipped Workers to work more than 20 percent of their time on side work, while still claiming a tip credit;
- b. Whether Defendants failed to pay proper spread-of-hours compensation for shifts lasting over 10 hours, in violation of the NYLL and the Hospitality Industry Wage Order;
- c. The nature and extent of the Class-wide injury and the appropriate measure of damages sustained by Plaintiff and the Class; and,
- d. Whether Defendants acted willfully or with reckless disregard in their failure to properly pay Plaintiff and the Class.

133. Plaintiff fairly and adequately protects the interests of and has no interests antagonistic to the Class. Plaintiff is represented by attorneys who are experienced and competent in both class-action and employment litigation.

134. A class is superior to other available methods for the fair and efficient adjudication of the controversy, particularly in the context of wage-and-hour litigation where an individual plaintiff lacks the financial resources to vigorously prosecute a lawsuit in court against the corporate defendant. The damages sustained by individual class members are small, compared to the expense and burden of individual prosecution of this litigation. Class action treatment will obviate unduly duplicative litigation and the possibility of inconsistent judgments.

135. Further, Plaintiff and the Class have been equally affected by Defendants' failure to pay proper wages.

136. Members of the Class still employed by Defendants may be reluctant to raise individual claims for fear of retaliation.

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

138. Plaintiff's claims are typical of those of the Class. Plaintiff and the other Class members were subjected to Defendants' policies, practices, programs, procedures, protocols, and plans alleged herein concerning the failure to pay proper wages. Plaintiffs' job duties are typical of those of the class members.

139. A class action is superior to other available methods for the fair and efficient adjudication of this litigation - particularly in the context of wage litigation like the present action, where individual plaintiffs may lack the financial resources to vigorously prosecute a lawsuit in court against a corporate defendant. The members of the Class have been damaged and are entitled to recovery because of Defendants' common and uniform policies, practices, and procedures. Although the relative damages suffered by individual members of the Class are not *de minimis*, such damages are small compared to the expense and burden of individual prosecution of this litigation. For these reasons and because current employees are often afraid to sue their employer, the interest of Class Members to prosecute their own individual actions is limited.

140. In addition, class treatment is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about Defendants' practices. Such piecemeal litigation would also be inefficient and impracticable.

141. Upon information and belief, no Class Members have filed an action regarding these claims.

142. Nassau County is a desirable forum for this action, as the large majority of Defendants' restaurants are located in Nassau County.

143. There are no anticipated difficulties in managing this case should it be certified as a class action because the class would consist almost entirely of New York residents, the Defendants are New York residents, and Class Counsel has offices in New York, is experienced in litigating in Nassau County, and is experienced in litigating class actions.

144. This action is properly maintainable as a class action under C.P.L.R. Article 9.

COMMON FACTUAL ALLEGATIONS

145. Plaintiff and the Class Members have been victims of Defendants' common policy and plan that has violated their rights under the NYLL by requiring Tipped Workers to work shifts with a spread of over 10 hours a day without the benefit of spread-of-hours pay.

146. Tipped Workers regularly work a spread of over 10 hours in a workday.

147. For instance, Willy's Tipped Workers regularly work double shifts. That is, they work the opening shift, starting at 11:00 am and a closing shift, ending at 10:00 pm or later, on the day.

148. Moreover, Tipped Workers, such as Plaintiff, regularly worked evening shifts, particularly on weekends, that started at or before 3:30 pm and ended between 1:30 and 2:00 am or later.

149. Defendants, however, do not pay Tipped Workers an additional hour at the minimum wage for each shift that spans over a 10-hour period.

150. Plaintiff and members of the Class have further been victims of Defendants' common policy and plan requiring Tipped Workers to spend more than 20 percent of their time on side work, while still claiming a "tip credit" against the minimum wage for all hours worked.

151. For instance, as part of the process for opening the restaurant, Tipped Workers regularly fold napkins, clean menus, fill and clean salt and pepper shakers, prepare garnishes and mixes, and organize indoor and outdoor dining tables and chairs.

152. As part of the process for closing the restaurant, Tipped Workers take inventory, clean the bar, refrigerators, bottles, and tables, bring dishes to the kitchen, sweep, polish silverware and glasses, and clean coffee machines and other pieces of equipment.

153. However, Defendants claim a tip credit all hours worked by their Tipped Workers, instead of paying Tipped Workers the full minimum wage.

154. Defendants fail to report the value of the tip credit taken on Tipped Workers paystubs.

155. Defendants fail to provide proper written notice to their Tipped Workers that they will be taking a credit against the minimum wage for the tips they receive.

Defendants' NYLL Violations Were Widespread

156. As part of their regular business practice, Defendants repeatedly engaged in a pattern, practice, or policy that violated the NYLL, including:

- a. Requiring Tipped Workers to work shifts with a spread of hours longer than 10 hours;
- b. Failing to pay Tipped Workers, including Plaintiff and Class Members, an additional hour at the minimum wage;
- c. Requiring Tipped Workers to spend more than 20 percent of their work hours on side work; and,
- d. Failing to pay Tipped Workers the full minimum wage, and instead claiming a tip credit wage.

157. Defendants were or should have been aware that the NYLL and Hospitality Industry Wage Order required them to pay Tipped Workers an additional hour at the minimum wage for each shift that spanned over a 10-hour period.

158. Defendants' failure to pay Plaintiff and Class Members proper spread-of-hours wages was willful, intentional, and in bad faith.

159. Defendants were or should have been aware that the NYLL and Hospitality Industry Wage Order prohibited them from claiming a "tip credit" for hours spent on side work, when the Tipped Workers spent more than 20 percent of their time on such side work.

160. Defendants' unlawful conduct was widespread, repeated, and consistent.

161. Regardless of the location at which Plaintiff and Class Members worked for Defendants, Defendants' policies and practices remained substantially the same.

INDIVIDUAL FACTUAL ALLEGATIONS

162. Defendants employed Plaintiff Ellison from in or about July 2014 through in or about July 2018.

163. Defendants Margaritas Cafe Two Inc. and Puglia's of Garden City Inc. employed Ellison as a bartender at Margaritas Cafe and the Cuban, respectively.

164. In addition to serving customers, Ellison regularly spent more than 20 percent of her work hours on side work, such as preparing and cleaning glasses, restocking beer, inventory, cleaning the bottles, restocking ice, cleaning the bar area, putting away glasses, and other restaurant cleaning tasks.

165. Customers regularly tipped Ellison.

166. At all times during her employment with Defendants, Ellison was required to be paid at the hourly minimum wage.

167. Defendants failed to adequately inform Ellison of the tipped minimum wage or tip credit provisions of the NYLL, or their intent to apply a tip credit to her wages.

168. Defendants failed to list the tip credit taken against the minimum wage on her paystubs.

169. Defendants regularly failed to pay Ellison the full minimum wage, despite her spending more than 20 percent of her time on side work.

170. Ellison regularly worked shifts for Defendants of greater than 10 hours in length.

171. However, Defendants failed to pay her the requisite extra hour at the minimum wage rate for any such shifts.

172. Defendants failed to supply Ellison with accurate statements of wages, as statements provided did not accurately reflect tip credits taken by Defendants.

FIRST CAUSE OF ACTION
NYLL - Failure to Pay the Minimum Wage
(Brought on behalf of the Plaintiff and the Class)

173. Plaintiff incorporates by reference all preceding allegations.

174. Defendants employed Plaintiffs and the members of the Class and willfully failed to compensate Plaintiffs and the members of the Class for the time worked at or above the minimum wage, as required by the NYLL.

175. By the course of conduct set forth above, Defendants have violated N.Y. Lab. Law § 650, et seq.; 12 N.Y.C.R.R. § 146-1.1, *et seq.*

176. Defendants have a policy and practice of refusing to pay the minimum wage to Plaintiff and the members of the Class.

177. Defendants were not eligible to avail themselves of the New York tipped minimum wage rate because Defendants failed to inform Plaintiffs and members of the Class of the tip credit

and required Plaintiffs and members of the Class to spend over 20 percent of their work time performing side work.

178. Defendants' failure to pay the minimum wage to Plaintiffs and the members of the Class was not done in good faith within the meaning of N.Y. Lab. Law § 663.

179. Because of these underpayment of wages, alleged above, Plaintiffs and the Class have incurred damages thereby and the Defendants are indebted to them in the amount of the unpaid minimum wages, together with interest, liquidated damages, attorneys' fees, and costs in an amount to be determined at trial.

SECOND CAUSE OF ACTION
NYLL – Spread of Hours Pay
(Brought on behalf of the Plaintiff and the Class)

180. Plaintiff incorporates by reference all preceding allegations.

181. Plaintiff and Class Members worked shifts in which the spread of hours exceeded 10 hours, as defined by 12 N.Y.C.R.R. § 146-1.6.

182. Throughout the six years prior to the filing of this Class Action Complaint there have been times in which Plaintiff and Class Members were entitled to an additional hour of pay at the "basic minimum hourly rate," as defined by 12 N.Y.C.R.R. §§ 146-1.2(1)-(2).

183. Defendants failed to pay Plaintiff and Class Members one additional hour pay at the basic minimum wage rate before allowances for each day Plaintiffs spread of hours exceeded 10 hours, in violation of N.Y. Lab. Law §§ 650, et seq., as codified by 12 N.Y.C.R.R. § 146-1.6.

184. Defendants' failure to pay Plaintiff and the Class an additional hour of pay for each day where the spread of hours exceeded 10 was not done in good faith within the meaning of N.Y. Lab. Law § 663.

185. As a result, Defendants owe Plaintiff and the Class their unpaid spread-of-hours pay, together with liquidated damages, interest, attorneys' fees and costs.

THIRD CAUSE OF ACTION
NYLL – Failure to Provide Accurate Wage Statements
(Brought on behalf of Plaintiff)

186. Plaintiff incorporates by reference all preceding allegations.

187. Defendants failed to supply Plaintiff with accurate statements of wages as required by N.Y. Lab. Law § 195, 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.

188. Due to Defendants' violations of N.Y. Lab. Law § 195, Plaintiff is entitled to damages of \$250 per work week, or a total of \$5,000, as provided for by N.Y. Lab. Law § 198, reasonable attorneys' fees, costs, and injunctive and declaratory relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff seeks the following relief:

- A. That, at the earliest possible time, the Court certify this case as a class action pursuant to Article 9 of the C.P.L.R., and authorize the issuance of notice to the Class;
- B. Designation of Plaintiff Ellison as the class representative, and counsel of record as class counsel;
- C. Unpaid wages that were unlawfully deducted, reduced, and withheld pursuant to the NYLL and the supporting Hospitality Wage Order;
- D. Unpaid spread-of-hours wages pursuant to the NYLL and the supporting Hospitality Industry Wage Order;

- E. Liquidated damages, unless a class action is certified and such damages are waived;
- F. Statutory damages for Plaintiff for Defendants' wage-statement violations;
- G. Pre-judgment interest and post-judgment interest as provided by law;
- H. Appropriate equitable and injunctive relief to remedy violations;
- I. Attorneys' fees and costs of the action;
- J. A declaratory judgment that the practices complained of are unlawful;
- K. A reasonable incentive award for Plaintiff to compensate her for the time she spent and for the risks she took attempting to recover wages for the Class;
- L. Any other injunctive and equitable relief as this Court deems just and proper; and,
- M. Such other relief as this Court deems just and proper.

Dated: Melville, New York
August 11, 2023

Respectfully submitted,

/s/ Troy L. Kessler

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