

2017 WL 3835960

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United States District Court, S.D. New York.

Isaias GONZALEZ, Jairo Ramirez, Jilmar Daniel Ramirez, Fredy Ramos, Victoriano Perez, Juan Carlos Perez Ramirez, Humberto Rodriguez, Jose Yuquilema, Omar Santos, Salvador Flores, Ricardo Gonzalez, Luis Aleberto Cruz Villanueva, and Guillermo Guzman, Plaintiffs,

v.

MASTERS HEALTH FOOD SERVICE INC. (d/b/a/ Fuel Grill & Juice Bar), Ninth Avenue Food Corp. (d/b/a/ Fuel Grill and Juice Bar), Health & Soul Inc., Chris Campos, Delfino Castillo, Ahmad Alouie, Rick Gursay, Chris Pizzimenti, and Masters Food Service Inc., Defendants.

14-CV-07603 (VEC)

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Signed 07/27/2017

Attorneys and Law Firms

Michael Antonio Faillace, Joshua S. Androphy, Shawn Raymond Clark, Michael Faillace & Associates, P.C., New York, NY, for Plaintiffs.

Adam Casimir Weiss, The Law Firm of Adam C. Weiss, PLLC, Glen Cove, NY, for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

VALERIE CAPRONI, United States District Judge

*1 Plaintiffs, former deliverymen and food preparers at various restaurants in Manhattan operating under the trade name Fuel Grill and Juice Bar,¹ allegedly owned and operated by Defendants,² brought this suit under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*, and the New York Labor Law (“NYLL”), alleging that Defendants did not pay them minimum wage, overtime, or spread of hours, that Defendants did not provide required wage notices and wage statements, and that Defendants failed to reimburse them for equipment required for their position. After nearly three years of litigation, this Court conducted a bench trial from May 15 through 18, 2017.

Based on the Court's observation of the witnesses at trial, its examination of the evidence, and the parties' briefing, the Court makes the following findings of fact and conclusions of law. *See Fed. R. Civ. P. 52(a)*. In brief: (1) Defendants Rick Gursay and Ahmad Alouie are jointly and severally liable for the wage and hour violations proved at each of the four Fuel Grill and Juice Bar locations where Plaintiffs worked, and Ninth Avenue Food Corp. is liable, jointly and severally with Gursay and Alouie, for the wage and hour violations proved at the Ninth Avenue Location; (2) Defendant Chris Pizzimenti is not liable for any claimed wage and hour violations; (3) Defendants were not entitled to take a tip credit against the minimum regular and overtime wages under federal and state law; (4) Defendants failed to pay Plaintiffs minimum wage or overtime premiums as legally required; (5) Defendants failed to pay spread of hours wage when legally required; (6) Defendants did not provide statutorily-required notices of wages or wage statements to Plaintiffs; (7) Defendants failed to reimburse Plaintiffs for required equipment; and (8) Defendants did not make a good faith and reasonable effort to comply with the minimum wage and overtime requirements of federal and state law.³

FINDINGS OF FACT

I. Plaintiffs

Findings Common to All Plaintiffs

*2 1. Except for Jose Yuquilema and Salvador Flores, no Plaintiff was paid time and a half for hours worked in excess of forty in a single week. *See* Tr. 32:5-33:5, 71:9-71:15, 107:10-16, 135:16-19, 156:7-158:4, 184:1-7, 199:13-23, 241:20-242:2, 609:12-18, 632:18-633:11. Salvador Flores received overtime only for a two-month period while one of Gursay and Alouie's business partners was running the Ninth Avenue Location. Tr. 218:22-219:23.

2. No Plaintiff ever received a written notice of: (1) his pay rate; (2) the overtime rate of pay; (3) the basis for the employee's pay (e.g., hourly, daily, weekly, salary, commission, and so forth); (4) all allowances claimed as part of the minimum wage (e.g., tips, meals, or lodging allowances); (5) the employee's regular pay day; (6) the name of the employer, including whether the employer is “doing business as” another name; (7) the employer's address; and (8) the employer's telephone number. *See* Tr. 36:18-37:2, 73:6-12, 112:3-9, 136:3-10, 184:13-18,

201:13-18, 221:15-17, 242:11-17, 610:5-15, 633:12-19, 672:22-24.

3. No Plaintiff who was a tipped employee was ever informed by his employer that the employer would credit his tips against his hourly rate of pay so that he could be paid less than the statutorily-mandated minimum wage. *See* Tr. 37:3-11, 112:10-112:19, 136:11-16, 158:5-10, 184:19-25, 242:18-20, 610:12-18, 672:25-673:5.

4. There are no accurate time records for Plaintiffs. Depending on the Fuel location, either no time records were kept, time records were kept but they were not introduced at trial, or time records were introduced but Plaintiffs credibly testified that they do not reflect the hours they actually worked. *See* Tr. 29:8-31:19, 70:16-71:1, 105:6-106:14, 182:1-6, 239:15-240:9, 630:13-631:2.

5. The Plaintiffs who worked at the 38th Street Location did not receive wage statements, and they were paid in cash. ⁴ Tr. 107:17-18, 108:4-7, 631:6-11, 631:24-632:2, 671:14-672:24.

6. The Plaintiffs who worked at the Third Avenue, Ninth Avenue, and Grand Street Locations received wage statements and were paid by check, ⁵ but the wage statements were not accurate. Tr. 33:1-36:2, 71:16-73:5, 107:19-108:2, 109:1-11, 134:13-135:24, 155:11-156:16, 182:18-184:7, 217:1-220:12, 240:18-241:15, 608:17-609:18, 632:3-633:10. Plaintiffs credibly testified that the wage statements for the Third Avenue Location were accurate as to the total wage or salary amount that Plaintiffs were paid but not as to the hourly rate or number of hours worked. Tr. 72:8-73:5, 109:1-110:18, 134:13-135:24, 182:18-184:12, 608:17-609:18, 632:3-633:10. When Plaintiffs at the Third Avenue Location complained to the managers that they were not being paid for all hours worked, the managers told them that overtime hours were accounted for in the “charge tips” portion of the wage statement. Tr. 109:17-110:13, 190:16-191:19. The amount listed in the “charge tips” portion of the wage statement is consistent with the amount of tips Plaintiffs testified they normally received and is not large enough to also account for overtime given the number of overtime hours Plaintiffs credibly testified that they worked. *See* Tr. 110:7-22, 131:18-20, 181:5-7, 183:14-18; Pl. Exs. 8, 9, 10, 13, 16, 18. Accordingly, the Court relies on the total wage or salary amount provided in the Third Avenue Location's wage statements, but does not rely on the hourly rate or number of hours worked per week reflected on those statements.

*3 7. Plaintiffs credibly testified that the wage statements for the Ninth Avenue Location are accurate as to the rate of pay and the total wage or salary amount but not as to the total hours worked. Tr. 155:13-158:4, 217:22-220:12, 241:5-242:2. When Plaintiffs at the Ninth Avenue Location complained to the managers that they were not being paid for all hours worked, the managers also told them that overtime hours were accounted for in the “charge tips” portion of the wage statement. Tr. 156:5-158:4, 220:2-8, 241:5-25. Unlike the wage statements issued to employees of the Third Avenue Location, the “charge tips” portion of the wage statements issued to the Ninth Avenue Location's employees are sufficiently greater ⁶ than the amount of tips Plaintiffs claimed to have received that the amount appears to account for overtime hours (at a straight time rate) and tips. There is no way, however, to determine what portion of the “charge tips” amount is compensation for overtime versus payment of tips received because the amounts are combined. Moreover, Plaintiffs testified—consistent with the totals in the “charge tips” line—that their overtime rate was the same as their regular rate. Tr. 157:19-158:4, 220:2-12, 241:20-242:10. Accordingly, the Court relies on the rate of pay and the total wage or salary amount but not the number of hours worked provided on the Ninth Avenue Location's wage statements.

Isaias Gonzalez

8. Isaias Gonzalez began his employment at the 38th Street Location in August 2013. Tr. 623:13-24.

9. In approximately October 2013, Isaias Gonzalez began working also at the Third Avenue Location. Tr. 623:25-624:5.

10. Isaias Gonzalez worked at the 38th Street and the Third Avenue Locations until September 2014. Tr. 624:6-9.

11. Isaias Gonzalez regularly worked 20 hours per week at the 38th Street Location. He worked from 11:00 a.m. to 3:00 p.m., five days per week. Tr. 624:20-24, 629:25-630:5.

12. When Isaias Gonzalez worked at the Third Avenue Location, he regularly worked 45 hours per week. He worked from 4:00 p.m. to 11:00 p.m., five days per week, and 11:00 a.m. to 9:00 p.m. on Sundays. Tr. 630:6-12.

13. Isaias Gonzalez was paid \$4.00 per hour for his work at the 38th Street Location from the beginning of his employment until near the end of his employment, when his hourly rate was increased to \$5.00 per hour. Tr. 624:25-625:8, 631:14-23.

14. Isaias Gonzalez was paid by check for his work at the Third Avenue Location. Although the check stubs show that he was paid \$180 per week for 30 hours at the rate of \$6.00 per hour, his credible testimony was that he worked 45 hours per week and was paid \$4.00 per hour (\$180/45 hours). Tr. 632:3-633:11; Pl. Ex. 9.

15. Isaias Gonzalez was required to spend approximately \$490.00 of his own funds for equipment necessary for the performance of his job duties, including a bicycle and related equipment. Tr. 633:23-634:21.

Jairo Ramirez

16. Jairo Ramirez worked at the Third Avenue Location from September 2013 to September 12, 2014. Tr. 176:12-22.

Time Period	Actual Rate of Pay Per Hour	Calculation
September 2013	\$4.27	\$410/2 weeks = \$205 per week; \$205/48 hours
Weeks ending October 3 and 10, 2013	\$3.10	\$220/71 hours
Week ending October 24, 2013	\$3.66	\$260/71 hours
Balance of his employment	\$3.38	\$240/71 hours

*4 20. Jairo Ramirez was required to spend \$700.00 of his own funds for equipment necessary for the performance of his job duties, including a bicycle and related equipment. Tr. 185:1-17.

Jilmar Daniel Ramirez

21. Jilmar Daniel Ramirez worked at the Third Avenue, 38th Street, and Ninth Avenue Locations. Tr. 91:20-92:2.

22. Jilmar Daniel Ramirez began working at the Third Avenue Location in September 2013. Tr. 92:3-6. In November 2013, Jilmar Daniel Ramirez began working occasionally, without a fixed schedule, at the Ninth Avenue Location. Tr. 92:7-8, 92:20-93:12.

17. Initially, Jairo Ramirez regularly worked 48 hours per week. He worked from 8:00 a.m. to 3:00 p.m., Monday through Friday, and from 9:00 a.m. to 10:00 p.m. on Saturday. Tr. 181:13-18.

18. From October 2013 until the end of his employment, Jairo Ramirez regularly worked 71 hours per week. He worked from 11:00 a.m. until 11:00 p.m., Monday through Friday, and from 11:00 a.m. to 10:00 p.m. on Saturdays. Tr. 181:19-25.

19. Jairo Ramirez was paid by check. Pl. Ex. 10. He was paid \$410 for the week ending September 26, 2013, but the paycheck covered more than one week of work. Tr. 183:3-8; Pl. Ex. 10. He was paid \$220 per week for the weeks ending October 3 and October 10, 2013, \$260 for the week ending October 24, 2013, and thereafter paid \$240 per week, purportedly for 40 hours of work at \$6.00 per hour. Pl. Ex. 10; Tr. 183:9-184:12. Jairo Ramirez testified credibly regarding his hours; Jairo Ramirez's true rate of pay was:

23. Jilmar Daniel Ramirez began working at the 38th Street Location in June 2014, at which time he stopped periodically working at the Ninth Avenue Location but continued to work at the Third Avenue Location. Tr. 94:22-95:4.

24. Jilmar Daniel Ramirez worked at the Third Avenue and 38th Street Locations until September 12, 2014. Tr. 94:5-9.

25. Jilmar Daniel Ramirez was paid in cash for the hours he worked at the 38th Street Location and by check for the hours he worked at the Third Avenue Location. Tr. 107:17-20; Pl. Ex. 13.

26. From approximately September 2013 until about June 2014, Jilmar Daniel Ramirez worked at the Third Avenue Location for 53.5 hours per week. He worked from 3:00 p.m.

until 11:15 p.m., Monday through Friday, and from 11:00 a.m. to 11:15 p.m. on Sunday. Tr. 102:5-103:4.

27. Once or twice per month from November 2013 to June 2014, Jilmar Daniel Ramirez also worked at the Ninth Avenue Location from 11:00 a.m. to 10:00 p.m. on Saturday. Tr. 103:6-18. When he did, his total work week for both locations was 64.5 hours.

28. From June 2014 until September 12, 2014, Jilmar Daniel Ramirez worked 70.75 hours per week. He worked from 11:00 a.m. to 3:30 p.m., Monday through Friday, at the 38th Street Location, for a total of 22.5 hours per week. Additionally, he worked at the Third Avenue Location from 4:00 p.m. until 11:15 p.m., Monday through Friday, and from 11:00 a.m. to 11:15 p.m. on Sundays, for a total of 48.5 hours per week. Tr. 104:9-105:5.

Time Period	Actual Rate of Pay Per Hour	Calculation
September 2013 to November 2013	\$4.49	\$240/53.5 hours
November 2013 to June 2014	\$3.72	\$240/64.5 hours
Four weeks when he was paid \$270	\$4.19	\$270/64.5 hours

30. From approximately June 2014 until September 2014, Jilmar Daniel Ramirez was paid \$5.00 per hour for his work at the 38th Street Location. Tr. 107:13-16. He continued to be paid \$240 per week for his work at the Third Avenue Location, for a total of \$4.95 per hour (\$240/48.5 hours). Pl. Ex. 13; Tr. 107:10-12.

***5** 31. Jilmar Daniel Ramirez was required to spend approximately \$878.00 of his own funds for equipment necessary for the performance of his job duties, including a bicycle and related equipment. Tr. 112:20-114:3.

Fredy Ramos

32. Fredy Ramos worked at the Third Avenue Location from September 2013 to September 12, 2014. Tr. 128:16-129:4.

33. From the beginning of his employment through approximately December 2013, Ramos worked 37.5 hours

29. Jilmar Daniel Ramirez testified credibly that at the Third Avenue Location he was paid \$5.50 per hour, except for three weeks when he was paid \$6.00 per hour. Tr. 106:25-107:12. His check stubs reflect that he was paid \$6.00 per hour for 40 hours per week (\$240 total), except for four weeks when he was paid \$6.75 per hour (\$270 total). Pl. Ex. 13. Jilmar Daniel Ramirez credibly testified that the hours he worked at the Ninth Avenue Location were included in his pay for the Third Avenue Location. Tr. 107:21-108:2. Thus, the Court includes the hours he worked at the Ninth Avenue Location when calculating his rate of pay at the Third Avenue Location. Because the Court credits his testimony about the number of hours he worked and his testimony that the check stub correctly reflects his income from the restaurant, the evidence demonstrates that his regular rate of pay was as follows:

per week. He worked from 5:00 p.m. until 11:15 p.m., Saturdays through Thursdays. Tr. 131:24-132:2.

34. From January 2014 through March 2014, Ramos worked 51 hours per week. He worked from 3:00 p.m. until 11:30 p.m., Saturdays through Thursdays. Tr. 132:4-10.

35. From March 2014 until the end of his employment on September 12, 2014, Ramos worked 45 hours per week. He worked from 4:00 p.m. until 11:30 p.m., Saturday through Thursday. Tr. 132:11-19.

36. Fredy Ramos testified that he was generally paid \$5.50 per hour, but he was paid \$6.00 per hour for two or three weeks. Tr. 133:22-134:6. Ramos's check stubs show a wage rate of \$6.00 per hour for 40 or fewer hours. Pl. Ex. 8. They show Ramos was paid \$240 or less when Fredy Ramos credibly testified that he worked 45 hours per week. *Id.*; Tr. 132:11-19. Ramos's actual rate of pay was:

Time Period	Actual Rate of Pay Per Hour	Calculation
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September 2013 through December 2013	\$6.40	\$240/37.5 hours
January 2014 into March 2014	\$4.71	\$240/51 hours
March 2014 until the end of his employment	\$5.33	\$240/45 hours

37. Fredy Ramos was required to spend approximately \$510.00 of his own funds for equipment necessary for the performance of his job duties, including a bicycle and related equipment. Tr. 136:17-137:8.

Victoriano Perez

38. Victoriano Perez worked at the Third Avenue Location from June 2012 until August 2014. Tr. 602:17-603:6.

39. From the beginning of his employment through about August 2012, Plaintiff Perez worked 53.5 hours per week. He worked from 3:00 p.m. until 11:00 p.m. on weekdays and from 9:30 a.m. until 11:00 p.m. on Sundays. Tr. 606:4-13.

40. From August 2012 until the end of his employment, Plaintiff Perez worked 73.5 hours per week. He worked from 11:00 a.m. until 11:00 p.m. on weekdays and from 9:30 a.m. to 11:00 p.m. on Sunday. Tr. 606:14-25.

41. Victoriano Perez was paid by check. Through October 2013, his checks show varying amounts of weekly pay and do not provide the number of hours worked or the rate of pay. Pl. Ex. 18. From the pay period ending October 31, 2013, until the end of his employment, his check stubs show that he was paid \$240 per week at \$6.00 per hour for 40 hours, except the check for the pay period ending May 1, 2014, which showed he was paid \$270, reflecting an hourly rate of \$6.75 per hour for 40 hours. *Id.* Victoriano Perez's actual rate of pay was:

Time Period	Actual Rate of Pay Per Hour	Calculation ⁷
From the start of his employment to August 2012	\$4.49	\$240/53.5 hours
From August 2012 to the end of his employment	\$3.27	\$240/73.5 hours
Pay period ending May 1, 2014	\$3.67	\$270/73.5 hours

*6 42. Victoriano Perez was required to spend \$320.00 of his own funds for equipment necessary for the performance of his job duties, including a bicycle and related equipment. Tr. 610:19-611:22.

Juan Carlos Perez Ramirez

43. Juan Carlos Perez Ramirez worked at the Third Avenue Location from June 2013 through August 2014. Tr. 61:20-62:9.

44. At the start of his employment, Juan Carlos Perez Ramirez worked 68 hours per week. He worked from 3:00 p.m. until 11:00 p.m. on weekdays except Thursday, and from 11:00 a.m. until 11:00 p.m. on Thursday, Saturday and Sunday. After two months, Juan Carlos Perez Ramirez had Tuesdays off, but he otherwise continued to work the same schedule, for a total of 60 hours per week. Tr. 67:8-70:15.

45. Juan Carlos Perez Ramirez was paid by check. Pl. Ex. 16. Juan Carlos Perez Ramirez testified that he was paid \$5.50 per hour throughout his employment. Tr. 71:9-18. Crediting his testimony about the number of hours he worked, his checks reflect a lower hourly rate. His check stubs show he was paid between \$140 and \$315 per week through October 2013. Pl. Ex. 16. The pay stubs do not reflect the number of hours worked. Beginning with the check dated November 12, 2013, Juan Carlos Perez Ramirez's check stubs show that he was usually paid \$6.00 per hour for 40 hours (\$240 total). Pl. Ex. 16. Two checks show Juan Carlos Perez Ramirez received \$6.75 per hour (\$270 total) for those two weeks. *Id.*

46. Many weeks of Juan Carlos Perez Ramirez's employment are missing from the check stubs that were admitted into evidence at trial. For purposes of calculating Juan Carlos Perez Ramirez's damages, because he was most consistently

paid \$240, the Court finds that he was paid \$240 per week, except for two weeks when he was paid \$270 per week. Crediting his testimony about the number of hours he worked,

and that he received all of his wages by check, Juan Carlos Perez Ramirez was paid:

Time Period	Actual Rate of Pay Per Hour	Calculation
His first two months of employment	\$3.53	\$240/68 hours
Remained of employment	\$4.00	\$240/60 hours
For two weeks	\$4.50	\$270/60 hours

47. Juan Carlos Perez Ramirez was required to spend \$1,350.00 of his own funds for equipment necessary for the performance of his job duties, including a bicycle and related equipment. Tr. 73:16-75:13.

56. When Guzman worked at the Ninth Avenue Location for his second stint, he worked 30 hours per week. He worked from 5:00 p.m. until 11:00 p.m., five days per week. Tr. 28:25-29:4, 58:14-24.

Guillermo Guzman

48. Guillermo Guzman worked at the Grand Street and Ninth Avenue Locations. Tr. 17:9-20.

57. During his first stint at the Ninth Avenue Location, Guzman was paid \$4 per hour in cash for all hours worked. Tr. 32:5-10.

49. Guillermo Guzman began working at the Ninth Avenue Location in January 2011. Tr. 17:23-24.

58. At the Grand Street Location, Guzman was paid \$5.50 per hour until the end of 2013, when his rate of pay was increased to \$5.75 per hour.⁸ He was paid by check. Tr. 32:14-33:2; Pl. Ex. 40.

50. After four or five months, Guillermo Guzman was fired from the Ninth Avenue Location and one week later was hired at the Grand Street Location. Tr. 17:25-18:20; Pl. Ex. 40.

59. When Guzman returned to work at the Ninth Avenue Location, he was paid \$5.65 per hour until July 22, 2014, when his rate of pay was increased to \$5.75 per hour. Tr. 33:3-5; Pl. Ex. 40.

51. Guillermo Guzman stopped working at the Grand Street Location at the end of 2013. Tr. 19:2-4; Pl. Ex. 40.

52. In December 2013, Guillermo Guzman returned to the Ninth Avenue Location, where he worked until May 2015. Tr. 19:24-20:5; Pl. Ex. 40.

60. Guillermo Guzman was required to spend \$170.00 of his own funds for equipment necessary for the performance of his job duties, including bicycles and related equipment. Tr. 37:12-39:10.

53. During his first stint at the Ninth Avenue Location, Guillermo Guzman was paid in cash, but he was paid by check thereafter. Tr. 32:9-10, 33:1-2; Pl. Ex. 40.

Jose Yuquilema

54. During his initial stint at the Ninth Avenue Location, Guillermo Guzman worked 66 hours per week. He worked from 11:00 a.m. until 10:00 p.m., six days per week. During his last five days at the Ninth Avenue Location, he worked from 9:00 a.m. to 3:00 p.m., for a total of 30 hours. Tr. 27:18-28:16.

61. Jose Yuquilema worked at the 38th Street Location from January 2013 through January 2014. Tr. 668:11-22.

62. Throughout his employment, Jose Yuquilema worked 24 hours per week. He worked from 10:00 a.m. to 10:00 p.m. on Saturdays and Sundays. Tr. 670:8-15.

*7 55. When Guzman worked at the Grand Street Location, he worked 48 hours per week. He worked from 9:00 a.m. to 5:00 p.m., six days per week. Tr. 28:18-24.

63. Jose Yuquilema was paid \$40 per day throughout his employment, excluding tips. Tr. 671:4-672:10. Accordingly, Jose Yuquilema was paid \$3.33 per hour (\$40/12 hours).

Ricardo Gonzalez

64. Ricardo Gonzalez worked at the Ninth Avenue Location from December 2012 through April 2015. Tr. 150:8-17.

65. From the beginning of his employment until March 2013, Ricardo Gonzalez worked 30 hours per week. He worked from 5:00 p.m. to 11:00 p.m. on weekdays. Tr. 152:11-12.

66. From April 2013 until January 2015, Ricardo Gonzalez worked 71 hours per week. He worked from 11:00 a.m. until 11:00 p.m. on weekdays and from 12:00 p.m. to 11:00 p.m. on Sunday. Tr. 152:13-19.

67. From January 2015 through March 2015, Ricardo Gonzalez worked 65 hours per week. He worked from 11:00 a.m. to 11:00 p.m. on weekdays except Thursday, 11:00 a.m. to 3:00 p.m. on Thursday, and 9:00 a.m. to 10:00 p.m. on Sunday. Tr. 152:20-153:2.

68. The last two or three weeks of his employment, Ricardo Gonzalez worked from 11:00 a.m. to 2:00 p.m. and from 6:00 p.m. to 9:00 p.m., Monday through Wednesday, from 5:00 p.m. to 9:00 p.m. on Friday, and from 9:00 a.m. to 10:00 p.m. on Sunday, for a total of 35 hours per week. Tr. 153:15-154:9.

69. From the beginning of his employment until approximately July 2014, Ricardo Gonzalez was paid \$5.65 per hour. In December 2013 and January 2014 he was paid \$8.475 per hour for hours worked in excess of 40 in a week. At all other times, he was paid \$5.65 per hour for all hours worked. For most weeks, Ricardo Gonzalez's checks show that he was paid for only 40 hours. Tr. 154:20-157:3; Pl. Ex. 34.

***8** 70. From approximately July 2014 until the end of his employment, Plaintiff Ricardo Gonzalez was paid \$5.75 per hour. Tr. 157:4-158:4; Pl. Ex. 34.

71. Ricardo Gonzalez was required to spend \$625.00 of his own funds for equipment necessary for the performance of his job duties, including a bicycle and related equipment. Tr. 158:11-159:11.

Luis Alberto Cruz Villanueva

72. Luis Alberto Cruz Villanueva was employed as a cook at the Ninth Avenue Location from April 2014 through April 2015. Tr. 196:24-197:8.

73. From the beginning of his employment until June 2014, Luis Alberto Cruz Villanueva worked 64.5 hours per week. He worked from 8:45 a.m. to 8:00 p.m. on Monday through Wednesday, from 8:45 a.m. to 2:00 p.m. on Friday, from 8:45 a.m. to 10:00 p.m. on Saturday, and from 8:45 a.m. to 9:00 p.m. on Sunday. Tr. 197:9-198:2. In June 2014, Luis Alberto Cruz Villanueva worked 54 hours per week. At that time he worked from 9:00 a.m. to 5:00 p.m. on Monday through Wednesday, from 9:00 a.m. to 2:00 p.m. on Friday, from 9:00 a.m. to 9:00 p.m. on Saturday, and from 9:00 a.m. to 10:00 p.m. on Sunday. Tr. 198:3-11.

74. From July 2014 until April 2015, Luis Alberto Cruz Villanueva worked 57 hours per week. He worked from 9:00 a.m. to 5:00 p.m. on Monday, Tuesday, and Friday, from 9:00 a.m. to 2:00 p.m. on Wednesday, and from 8:00 a.m. to 10:00 p.m. on Saturday and Sunday. Tr. 198:12-199:5.

75. From the beginning of his employment until June 2014, Ricardo Gonzalez was paid \$9.00 per hour for all hours worked, partly by check and partly in cash. Tr. 199:9-23.

76. From approximately June 2014 until July 2014, Luis Alberto Cruz Villanueva was paid \$10.00 per hour. Tr. 200:2-7.

77. From July 2014 until the end of his employment, Luis Alberto Cruz Villanueva was paid \$11.00 per hour for all hours worked. Tr. 200:8-11.

Salvador Flores

78. Salvador Flores worked at the Ninth Avenue Location from May 2013 through April 2015. Tr. 211:1-10.

79. For the first month of his employment, Salvador Flores worked 36 hours per week. He worked from 5:00 p.m. to 11:00 p.m., Monday through Friday and Sunday. Tr. 212:4-14. After the first month until March 2014, Salvador Flores worked 72 hours per week. He worked from 11:00 a.m. to 11:00 p.m., Monday through Friday and on Sunday. Tr. 212:11-14, 213:22-214:5, 214:16-215:1.

80. From March 2014 until the end of his employment, Salvador Flores worked 73 hours per week. He worked from 11:00 a.m. to 11:00 p.m., Monday through Friday, and from 9:00 a.m. to 10:00 p.m. on Sunday. Tr. 214:6-215:24.

81. Salvador Flores was paid by check. He testified that he was paid \$5.65 per hour. Tr. 216:22-217:2. Flores testified that

for a period of two months, while a manager was in charge, he received time and a half overtime pay. Tr. 218:22-219:12.

82. Flores's checks through July 2013 show only total amounts of pay; they do not reflect an hourly rate or the number of hours worked. Pl. Ex. 37. From July 2013 through November 14, 2013, Flores's checks reflect an hourly rate of \$9.00, and sometimes include overtime pay at the rate of \$13.50 per hour. *Id.* From November 15, 2013 through January 23, 2014, Flores's checks reflect an hourly rate of \$5.65 and overtime pay at the rate of \$8.475 per hour. *Id.* From January 23, 2014, until July 2014, Flores's checks show that he was paid \$5.65 per hour for 40 hours per week; from July 11, 2014, until the end of his employment he was paid \$5.75 per hour for 40 hours per week. *Id.* The Court finds that the checks that reflect Flores being paid \$9.00 per hour for straight time and \$13.50 per hour for overtime hours are not accurate as they do not match Flores's credible testimony about his hours or his rate of pay and as Defendants' business records are notoriously unreliable. The Court finds that those rates were false to create the appearance of compliance with wage and hour laws while Flores was actually paid for only some of his hours.

*9 83. The Court finds that Flores was paid \$5.65 per hour or \$5.75 per hour as shown on the checks, for all hours worked, except for the period from November 15, 2013, through January 23, 2014, when he was paid \$5.65 per hour and \$8.475 for overtime hours.

84. Salvador Flores was required to spend approximately \$2,110.00 of his own funds for equipment necessary for the performance of his job duties, including a bicycle and related equipment. Tr. 223:11-224:9.

Omar Santos

85. Omar Santos worked at the Ninth Avenue Location from March 2014 through May 2015. Tr. 237:21-238:5.

86. Throughout his employment, Omar Santos worked 71 hours per week. He worked from 8:00 a.m. to 8:00 p.m. on weekdays and from 10:00 a.m. to 9:00 p.m. on Saturday. Tr. 239:9-14.

87. Omar Santos was paid \$5.65 per hour from the beginning of his employment to July 2014, and was paid \$5.75 per hour from July 22, 2014, until the end of his employment. Tr. 240:15-242:10; Pl. Ex. 31.

88. Omar Santos was required to spend \$455 of his own funds for equipment necessary for the performance of his job duties, including a bicycle and related equipment. Tr. 242:21-243:17.

II. Operational Control of the Fuel Locations

89. As discussed below, Gursoy and Alouie⁹ acknowledged owning the 38th Street and Ninth Avenue Locations but denied any involvement in their operation. They denied ownership or involvement in the Third Avenue and Grand Street Locations. For the reasons discussed more fully below, none of their denials is credible.

Grand Street Location

90. Guillermo Guzman is the only Plaintiff who ever worked at the Grand Street Location. Tr. 17:9-20.

91. Although Gursoy and Alouie denied having any involvement at all in the Grand Street Location, Tr. 262:11-12, 264:6-9, 264:19-265:8, 351:6-8, 420:18-421:19, the overwhelming circumstantial evidence is that they had operational control of the Grand Street Location.

92. After Guillermo Guzman had been fired from the Ninth Avenue Location, Gursoy hired him for the Grand Street Location. Tr. 18:15-20.

93. "Mo" and later "Gary" were the day-to-day managers of the Grand Street Location, but Guillermo Guzman knew that they were not the owners. Tr. 22:5-15. Guillermo Guzman knew Gursoy and Alouie to be the owners of the Grand Street location, Tr. 22:16-19, and they would occasionally task him to clean when they came to the Grand Street Location. Tr. 48:19-49:1. Gursoy and Alouie were at the Grand Street Location two to three times per week on a regular basis, staying for approximately thirty minutes to an hour on each visit. Tr. 23:1-2, 43:12-44:1. When Gursoy and Alouie came to the restaurant, they would bring merchandise, instruct the employees in the kitchen about cooking, and talk to the manager. Tr. 23:3-24:3.

94. Gursoy and Alouie were involved in resolving employee disputes. On at least one occasion, Gursoy and Alouie met in person with Guillermo Guzman and the manager to discuss a work-related dispute that existed between Guzman and the manager. Tr. 24:5-23.

95. After Superstorm Sandy, the Grand Street Location was closed for a week because of problems with the electricity. For two or three days during that time, Gursoy directed Guillermo Guzman to work at the Ninth Avenue Location. Tr. 19:8-17.

*10 96. The Ninth Avenue and Grand Street Locations shared the same menu. Tr. 20:19-22.

97. Plaintiffs introduced into evidence a business card that identified Gursoy as the Founder/CEO of Fuel, provided his telephone number, and provided the addresses for the 38th Street, Ninth Avenue, Third Avenue, and Grand Street Fuel Locations. Pl. Ex. 5.

98. Pizzimenti, who was a one-time partner of Gursoy and Alouie, testified that they offered him an ownership interest in the Grand Street Location. Tr. 564:24-565:9; *see also* Tr. 489:16-494:19.

Third Avenue Location

99. The Third Avenue Location was owned and operated by Health & Soul, Inc.¹⁰ *See* Pl. Exs. 10, 18; D. Ex. X; Tr. 193:12-21.

100. Delfino Castillo and Chris Campos were the managers of the Third Avenue Location.¹¹ Tr. 62:17-63:16.

101. Juan Carlos Perez Ramirez, Jilmar Daniel Ramirez, and Victoriano Perez knew Gursoy and Alouie to be the owners of the Third Avenue Location. Tr. 63:17-20, 97:1-2, 603:24-604:7.

102. Gursoy and Alouie went to the Third Avenue Location on at least a weekly basis, and they met with the manager, brought merchandise and paychecks, instructed the cooks to make food for them (for which Gursoy and Alouie would not pay), inspected for cleanliness, and prepared drinks for customers. Tr. 63:21-64:18, 78:16-80:16, 97:10-22, 123:15-124:1, 130:3-11, 139:12-20, 179:20-180:7, 604:8-605:2, 628:10-15. Gursoy and Alouie gave instructions to managers, who relayed those instruction to the employees. Tr. 179:9-15. The manager of the Third Avenue Location, Delfino Castillo, responded to complaints about pay rates by telling the employees that Gursoy and Alouie made decisions about pay. Tr. 64:20-65:2, 99:24-100:14, 142:18-23, 178:4-11, 628:16-24.

103. Employees from the Third Avenue Location were occasionally directed to work at the Ninth Avenue Location and the 38th Street Location. Tr. 94:16-96:25, 98:13-99:16, 103:19-104:8. Jairo Ramirez heard Gursoy and Alouie instruct Castillo to send him (Ramirez) to another Fuel location, which Castillo did. Tr. 98:25-99:16. Employees were also directed to take items to and from the Third Avenue Location and other Fuel locations. Tr. 97:25-98:12. Jilmar Daniel Ramirez, who worked at the Third Avenue, Ninth Avenue, and 38th Street Locations, testified credibly that Gursoy and Alouie were as involved in the Third Avenue Location as they were at the other locations. Tr. 97:10-13.

104. Gursoy and Alouie met with employees of the Third Avenue Location after the employees complained to the managers about their pay. Gursoy and Alouie were personally present for a meeting about the employees' pay and agreed to give the employees a 50 cent per hour raise. Tr. 140:4-146:23, 177:20-179:8.

105. Gursoy and Alouie denied any ownership or involvement with the Third Avenue Location, but their testimony was not credible. Tr. 253:22-254:15, 262:13-263:8, 418:15-420:17. In addition to the Plaintiffs' credible testimony regarding their involvement, there is other circumstantial evidence that Gursoy and Alouie operated the Third Avenue Location. For example, Gursoy's business card identifies him as Founder/CEO of Fuel and includes the Third Avenue Location (discussed *supra* ¶ 97). Pl. Ex. 5; Tr. 260:15-261:17. Gursoy also signed an application filed with the New York City Department of Buildings on behalf of Health & Soul, Inc. for building permits for the address of the Third Avenue Location. Pl. Ex. 4. Additionally, when Gursoy and Alouie bought Chris Pizzimenti's one-third ownership in Masters Food Service, Inc., which owned and operated the 38th Street Location, they required Pizzimenti to enter into a non-competition agreement that prohibited him from opening a restaurant in the vicinity of the Third Avenue Location. Pl. Ex. 6. Pizzimenti testified that Gursoy and Alouie said that they did not want him to open a restaurant near the Third Avenue Location because they owned that location. Tr. 588:18-589:16. Gursoy and Alouie's attempts to explain a non-competition agreement to protect a restaurant they purportedly did not own were thoroughly unconvincing. Tr. 271:1-278:10, 401:7-14, 429:17-431:13, 464:22-468:10.

Ninth Avenue Location

*11 106. The Ninth Avenue Location was owned and operated by Ninth Ave Food Corp. Stipulated Fact No. 8 (Dkt. 177). Alouie and Gursoy own Ninth Ave Food Corp.¹² Stipulated Fact Nos. 12, 13.

107. Gursoy and Alouie were at the Ninth Avenue Location two or three times per week at first, and later one time per week; sometimes they ate at the restaurant and prepared drinks for customers. Tr. 42:3-20, 44:23-45:15, 97:20-24, 150:23-151:12, 202:22-203:12, 212:17-22, 239:2-4. Gursoy and Alouie directed the managers at the Ninth Avenue Location. Tr. 46:23-47:1. In December 2013, Gursoy rehired Guillermo Guzman to work at the Ninth Avenue Location after Guzman had left to work at a different restaurant, and Gursoy later fired him. Tr. 19:22-20:2, 40:20-41:4. Gursoy and Alouie occasionally directed Jilmar Daniel Ramirez to work at the Ninth Avenue Location when he was regularly working at the Third Avenue Location. Tr. 93:5-14, 98:25-99:16. Luis Alberto Cruz Villanueva saw Gursoy and Alouie preparing employees' pay at the Ninth Avenue Location. Tr. 202:1-5, 202:19-21, 208:11-209:10; *see also* Tr. 151:5-12. Alouie and Gursoy informed Salvador Flores that he would receive a ten-cent per hour raise, Tr. 231:7-16, and notified him of a change in his work schedule. Tr. 233:2-7. Alouie and Gursoy interviewed Omar Santos for his job at the Ninth Avenue Location. Tr. 238:9-21.

108. Gursoy admitted that he met with the managers of the Ninth Avenue Location to discuss and set rates of pay. Tr. 290:14-293:6. Alouie's and Gursoy's testimony denying having an operational role at the Ninth Avenue Location, Tr. 300:25-302:8, 426:24-428:25, was not credible.

38th Street Location

109. The 38th Street Location was owned and operated by Masters Food Service, Inc.¹³ Tr. 265:9-266:5. Initially, there were three equal shareholders in Masters Food Service, Inc.: Alouie, Gursoy, and Pizzimenti, Tr. 268:20-25, 421:20-22, 554:9-555:1, and the company was formed sometime in 2010, Tr. 555:2-4. In April 2014, Pizzimenti sold his shares to Gursoy and Alouie. Pl. Ex. 6; Tr. 269:2-270:1, 572:11-21.

110. Defendants gave dramatically differing accounts of their respective roles at the 38th Street Location. According to Gursoy, Pizzimenti approached him with the idea of opening the 38th Street Location. Tr. 314:13-315:12. Gursoy brought in Alouie, his longtime friend, to provide capital.

Tr. 315:13-316:4; *see also* Tr. 424:25-425:8. The parties entered into a written agreement, which was not introduced at trial, pursuant to which, allegedly, Gursoy, who owns a Fuel restaurant in Brooklyn, would "be there for the first month ... [to] teach Chris Pizzimenti the business ... and move forward with it," and Pizzimenti "would handle everything from A to Z." Tr. 278:17-279:10; *see also* Tr. 316:6-16. Alouie would provide capital for the business. Tr. 315:15-316:13. Gursoy further testified that this was how the 38th Street Location actually operated: after the initial period, Pizzimenti operated the business, hired managers, set pay rates, maintained employment records, and paid employees. Tr. 279:11-280:8, 316:25-317:4, 318:19-319:9. Gursoy further testified that Pizzimenti's involvement at the 38th Street Location decreased approximately three months before Pizzimenti sold his interest. Tr. 280:6-18. Gursoy also testified that despite the decrease in Pizzimenti's involvement and the restaurant being "in shambles," Gursoy and Alouie did not increase their personal involvement in the business. Tr. 280:15-281:9.

*12 111. Alouie testified similarly to Gursoy.¹⁴ Alouie testified he was "just an investor" but went to the location almost daily the first month, weekly the second month, and rarely thereafter. Tr. 421:23-422:18. Alouie testified that his personal involvement was limited to design and repairs. Tr. 424:7-15. Alouie denied any personal involvement in hiring, firing or paying employees. Tr. 424:16-21, 426:7-20. Alouie testified that Pizzimenti was the only one of the three partners who ever received a salary, and he received that pay because he was working at the 38th Street Location full-time. Tr. 425:21-426:3. Alouie also testified that he would meet periodically with Gursoy and Pizzimenti to review the performance of the 38th Street Location. Tr. 433:20-434:10. Alouie testified that Pizzimenti remained involved in the 38th Street Location until March 2014, just before Pizzimenti sold his interest. Tr. 443:22-444:12.

112. Pizzimenti had an entirely different story. According to Pizzimenti, when the 38th Street Location opened, all three owners were present on a regular basis, and by 2011, all three had stopped going to the 38th Street Location on a daily basis. Tr. 524:8-526:12. Gursoy and Alouie continued to go to the 38th Street Location a couple of times per week through 2012, and then once a week in 2013 and 2014. Tr. 526:13-527:13. Pizzimenti testified he went far less often, going once every few months for

part of 2011 and 2012, and stopping completely in 2013. Tr. 527:14-528:2. Pizzimenti testified that he did not hire the managers for the 38th Street Location and that those managers must have been hired by Gursoy and Alouie. Tr. 528:3-20. He also testified that Gursoy and Alouie were in charge of hiring employees when the restaurant opened and in 2011, 2012, and 2013; they were, together with the manager, in charge of firing employees in 2011 and 2012; and they oversaw employees' work schedules in 2011 and 2012. Tr. 528:22-530:9, 531:1-11, 533:4-7, 559:10-18, 576:12-24. According to Pizzimenti, Gursoy and Alouie handled the budgeting, finances, and payment of employees, although the three men jointly opened a bank account for Masters Food Service, Inc., and all had authority to sign checks. Tr. 543:12-19, 560:1-4, 560:19-561:4, 576:19-578:2. Pizzimenti, who had no experience in the restaurant industry or as a business owner, was responsible for working inside the business on a day-to-day basis, performing tasks like answering the phone and packing food for delivery. Tr. 555:9-25, 562:25-563:20, 576:8-11. He was also responsible for promoting the business and building clientele in the neighborhood. Tr. 563:5-15, 583:6-15.

113. According to Pizzimenti, around June 2011, Alouie and Gursoy told him that they intended to open the Ninth Avenue Location, without Pizzimenti's involvement. Tr. 564:5-20. Pizzimenti was upset that they would open another Fuel restaurant so close to the 38th Street Location without including him. Tr. 564:11-23. Pizzimenti claims that Gursoy and Alouie offered to include him in the Grand Street Location, but he rejected that because he did not want to do business with people who would operate "behind [his] back." Tr. 564:24-565:9. This was the beginning of the deterioration of Pizzimenti's relationship with Gursoy and Alouie. Tr. 565:10-12. Pizzimenti testified that he decreased his involvement significantly at the 38th Street Location and was there much less frequently; around this time, he began exploring opening his own restaurant, which he did in November 2012. Tr. 565:13-567:24.

114. In December 2012, Gursoy and Alouie visited Pizzimenti's new restaurant, unannounced. Tr. 567:25-568:15. Pizzimenti claims that Gursoy and Alouie were angry and threatened to sue him; by January 2013, Gursoy and Alouie told him he was not allowed at the 38th Street Location and revoked his access to the bank account. Tr. 568:25-570:3. Pizzimenti denied having anything

to do with the 38th Street Location thereafter. Tr. 570:5-11, 571:19-572:6.

***13** 115. Two Plaintiffs have claims against Pizzimenti, and their testimony contradicts Pizzimenti's with respect to when Pizzimenti stopped being operationally involved at the 38th Street Location.




116. Isaias Gonzalez, who began working at the 38th Street Location in August 2013, testified that he was interviewed by the manager, Jimmy Morales, and that he understood when he started that Pizzimenti was the owner. Tr. 623:23-24, 624:13-14, 626:9-15. Isaias Gonzales testified that he saw Pizzimenti two or three times in his first two or three weeks at the 38th Street Location and then stopped seeing him there. Tr. 626:16-24. Isaias Gonzalez originally testified in his deposition that he saw Pizzimenti bring the employees' pay the handful of times he saw Pizzimenti at the restaurant, but at trial he retreated from that testimony on cross-examination. Tr. 646:25-647:4, 649:19-651:19, 654:17-658:9. He also testified that he saw Pizzimenti give directions to the managers, but he could not understand what was being said because the conversations were in English. Tr. 658:2-659:6. Isaias Gonzales further testified that he understood that Gursoy and Alouie became the owners after those first two or three weeks and that at that point Gursoy and Alouie began paying him. Tr. 627:1-628:7.






117. Jose Yuquilema testified that he worked at the 38th Street Location from January 2013 to January 2014, only on the weekends. Tr. 668:20-22, 670:11-12. Jose Yuquilema understood that Pizzimenti was an owner of 38th Street Location and saw him three or four times giving directions to the managers. Tr. 669:7-21.






118. Pizzimenti's account was the only credible version of management of the 38th Street Location, including the timing of Pizzimenti's withdrawal from any operational role. Neither Gursoy nor Alouie were credible on this point, and their testimony overall was almost entirely unbelievable. Gonzalez's and Yuquilema's testimony that they saw Pizzimenti at the 38th Street Location a handful of times in 2013—even if credited—is not sufficient to prove by a preponderance that after January 2013, Pizzimenti had any sort of control or authority over the operations of the 38th Street Location and its employees.


CONCLUSIONS OF LAW

I. Employers

119. Under the FLSA, an employer is any “person acting directly or indirectly in the interest of an employer in relation to an employee.”  29 U.S.C. § 203(d); *see also*  *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (“The Supreme Court has emphasized the ‘expansiveness’ of the FLSA’s definition of employer.” (citing  *Falk v. Brennan*, 414 U.S. 190, 195 (1973))).


120. NYLL is similarly broad.  N.Y. Lab. Law § 190. Although the New York Court of Appeals has not resolved whether the tests for employer status are the same under the FLSA and NYLL,  *Saleem v. Corp. Transp. Grp., Ltd.*, 52 F. Supp. 3d 526, 537 (S.D.N.Y. 2014), courts have generally assumed that they are the same.  *Ramirez v. Riverbay Corp.*, 35 F. Supp. 3d 513, 521 n.2 (S.D.N.Y. 2014); *see also*  *Sethi v. Narod*, 974 F. Supp. 2d 162, 188 (E.D.N.Y. 2013) (“District courts in this Circuit ‘have interpreted the definition of employer under the [NYLL] coextensively with the definition used by the FLSA.’” (quoting  *Spicer v. Pier Sixty LLC*, 269 F.R.D. 321, 335 n.13 (S.D.N.Y. 2010)) (other citations omitted)).

*14 121. An individual is liable as an employer if he or she had power to control the employees in question.  *Moon v. Kwon*, 248 F. Supp. 2d 201, 236 (S.D.N.Y. 2002). Specifically, in determining control, courts consider whether the employer had the power to: (1) hire and fire employees; (2) supervise and control work schedules or conditions of employment; (3) determine the rate and method of pay; and (4) maintain employment records.  *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984). No single factor is dispositive. *See*  *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003) (“We did not hold [in *Carter*] ... that a positive finding on those four factors is necessary to establish an employment relationship.”);  *Moon*, 248 F. Supp. 2d at 236. Occasional control is sufficient for employer liability to arise.  *Moon*, 248 F. Supp. 2d at 236 (“Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitation on control ‘do[] not

diminish the significance of its existence.’” (quoting  *RSR Sec. Servs.*, 172 F.3d at 139)).

122. Ninth Avenue Food Corp. was the employer of Jilmar Daniel Ramirez, Omar Santos, Salvador Flores, Ricardo Gonzalez, Luis Alberto Cruz Villanueva, and Guillermo Guzman, all of whom worked at the Ninth Avenue Location.

123. The Court finds that Gursoy and Alouie were Plaintiffs’ employers at all relevant times under the FLSA and NYLL because they satisfy the *Carter* factors with respect to all four Fuel locations. They directed employees, resolved disputes, instructed managers, and provided payroll. *Supra* ¶¶ 92-95, 102-104, 107-108, 112, 116. In addition, outside of this litigation, Gursoy held himself out as the founder and CEO of all Fuel locations, as reflected on his business card. *Supra* ¶¶ 97, 105; Pl. Ex. 5.

124. Gursoy and Alouie’s denials of involvement at the Third Avenue and Grand Street Locations were not credible, nor were their attempts to limit their involvement in the 38th Street and Ninth Avenue Locations. On some issues, Gursoy and Alouie appeared to be outright lying, and their false testimony allows the Court to conclude that the opposite of their testimony is true. *Bravo v. Shamailov*, 221 F. Supp. 3d 413, 424 n.14 (S.D.N.Y. 2016) (if a factfinder determines that a witness has lied, the factfinder may conclude that the opposite of the testimony is true (citing *Dyer v. MacDougall*, 201 F.3d 265, 269 (2d Cir. 1952))). Moreover, the fact that Gursoy and Alouie had managers at all of the Fuel locations who were present daily to supervise employees and that Gursoy and Alouie only went to each location a few times per week does not mean that Gursoy and Alouie did not operationally control the Plaintiffs’ employment. *See*  *Irizarry v. Catsimatidis*, 722 F.3d 99, 102, 113-17 (2d Cir. 2013) (CEO was personally liable for the company’s FLSA and NYLL violations at the company’s 30-35 stores even though the CEO would visit five to ten stores once per week for about ten minutes each because he controlled the entire operation and was aware of what was going on in the stores). The credible evidence shows that Gursoy and Alouie had decision-making authority and that they directly affected the terms and conditions of employees’ employment.

125. The Court concludes that Pizzimenti was not Isaias Gonzalez’s or Jose Yuquilema’s employer because, based on the credible testimony, he does not satisfy the *Carter* factors. According to Pizzimenti’s credible testimony,

his involvement at the 38th Street Location ended in approximately January 2013, when Gursoy and Alouie banished him from the restaurant, which was approximately when Yuquilema's employment began and months before Isaias Gonzalez's employment began. *Supra* ¶¶ 114-117. Even if the court were to credit Yuquilema's and Gonzalez's testimony, they only saw Pizzimenti a handful of times at the 38th Street Location, and their testimony regarding what he did at the 38th Street Location was vague at best. *Supra* ¶¶ 116-117. This evidence alone, even if credited, does not suffice to prove the *Carter* factors by a preponderance of the evidence. Accordingly, Pizzimenti is not liable to Isaias Gonzalez or Yuquilema for their FLSA and NYLL claims, and their claims against him are dismissed.

*15 126. As Plaintiffs' employers, Gursoy and Alouie are jointly and severally liable with each other and with Ninth Avenue Food Corp. and with the defaulted corporate Defendants for all wage and hour violations found in these Findings of Fact and Conclusions of Law. See 29 C.F.R. § 791.2; *Fermin v. Las Delicias Peruanas Rest., Inc.*, 93 F. Supp. 3d 19, 37 (E.D.N.Y. 2015) (“As the Court has found that [the Restaurant] and the Individual Defendants were jointly Plaintiffs' employers, each Defendant is jointly and severally liable under the FLSA and NYLL for any damages award made in Plaintiffs' favor.”).

II. Tip Credit

127. The FLSA and NYLL require covered employers to pay their employees the minimum hourly wage. 29 U.S.C. § 206(a)(1); N.Y. Lab. Law § 652. The FLSA allows an employer to take a “tip credit” against the minimum wage requirements for a “tipped employee” provided: (1) “such employee has been informed by the employer of the provisions of [the tip credit law]”; and (2) “all tips received ... have been retained by the employee,” or, if tips are pooled and shared among employees, the tips are shared only “among employees who customarily and regularly receive tips.” 29 U.S.C. § 203(m). To be eligible to take the tip credit an employer must strictly comply with both statutory requirements. See, e.g., *Copantitla v. Fiskardo Estiatorio, Inc.*, 788 F. Supp. 2d 253, 287-88 (S.D.N.Y. 2011) (collecting cases). “Employers bear the burden of showing that they have satisfied this requirement by, for example, providing employees with a copy of § 203(m) and informing them

that their tips will be used as a credit against the minimum wage as permitted by law.” *Id.* (quoting *Heng Chan v. Sung Yue Tung Corp.*, No. 03 Civ. 6048 (GEL), 2007 WL 313483, at *18 (S.D.N.Y. May 8, 2007)).

128. Except for Luis Alberto Cruz Villanueva, who was definitely not a tipped employee because he was a cook, the Plaintiffs were aware that tips were part of their compensation.¹⁵ Nevertheless, Defendants failed to inform the Plaintiffs of the relevant tip credit provisions of the minimum wage laws, what the applicable minimum wage was during the relevant period, or that the Plaintiffs would be paid less than the applicable minimum wage because Defendants were taking a tip credit. *Supra* ¶¶ 2-3. Defendants never explained the restaurants' intention to take the tip credit, either orally or in writing. *Supra* ¶ 3.

129. Because Defendants failed to inform the Plaintiffs of the FLSA's tip credit provisions or that they were taking a credit against their wages, Defendants have failed to satisfy their burden under the FLSA to demonstrate notice. Accordingly, the Court finds that Defendants were ineligible to take a tip credit under the FLSA. See *Copantitla*, 788 F. Supp. 2d at 288.¹⁶

III. Minimum Wage




130. The federal minimum wage rate for the relevant time period was \$7.25 per hour. 29 U.S.C. § 206(a)(1).

*16 131. During the relevant time period through December 30, 2013, the New York minimum wage rate was \$7.15 per hour. N.Y. Lab. Law § 652.

132. From December 31, 2013, through December 30, 2014, the New York minimum wage rate was \$8.00 per hour. *Id.*

133. From December 31, 2014, through December 30, 2015, the New York minimum wage rate was \$8.75 per hour. *Id.*

134. When an employer fails to maintain accurate and complete records of the hours employees work and the amounts they are paid, the plaintiff-employee need only to submit “sufficient evidence from which violations of the [FLSA] and the amount of an award may be reasonably inferred.” *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 66 (2d Cir. 1997) (citation omitted). The burden then



shifts to the employer to come forward with evidence either to show “the precise amount of work performed,” or to “negative the reasonableness of the inference to be drawn from the employee's evidence.”  *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 362 (2d Cir. 2011) (quoting  *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)). “If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result may be only approximate.” *Id.* (quoting  *Anderson*, 328 U.S. at 688). A similar standard applies to unpaid compensation claims under NYLL. *Canelas v. World Pizza, Inc.*, No. 14 CIV. 7748 (ER), 2017 WL 1233998, at *9 (S.D.N.Y. Mar. 31, 2017); N.Y. Lab. Law § 196-a(a).

135. Here, there are time records for the Ninth Avenue Location, but testimony establishes that the records are not accurate, as the times were entered by managers and bore no actual relationship to the hours worked by Plaintiffs. *Supra* ¶ 4. No time records were introduced for the Third Avenue, 38th Street or Grand Street Locations. Accordingly, the Court credits Plaintiffs' testimony about the hours they worked.




136. Regarding pay, as set out above, pay stubs were admitted into evidence for some Plaintiffs. Also as explained above, the Court generally accepts the pay stubs from the Third Avenue Location as accurate as to the total amount paid to Plaintiffs, but not accurate as to the hourly rate of pay or hours worked. *Supra* ¶ 6. The Court accepts the pay stubs from the Ninth Avenue Location as generally accurate as to rate of pay and the total amount paid but not as to the total hours worked. *Supra* ¶ 7.


137. The records and testimony establish that Defendants paid Plaintiffs (except Luis Alberto Cruz Villanueva) at rates below the regular minimum wage rate. *Supra* ¶¶ 13-14, 19, 29-30, 36, 41, 46, 57-59, 63, 69-70, 83, 87. Accordingly, Defendants are liable to Plaintiffs for the unpaid minimum wages to which they were entitled under the FLSA and NYLL.

IV. Overtime Wages


138. The FLSA and NYLL require employers to pay employees an overtime rate of at least one and one-half times their regular rate of pay for any hours over forty in a workweek. See  29 U.S.C. § 207(a)(1); 29 C.F.R. § 778.5;  N.Y. Lab. Law § 652; 12 N.Y.C.R.R. § 146-1.4 (effective

Jan. 1, 2011);  12 N.Y.C.R.R. § 137-1.3 (repealed Jan. 1, 2011).

139. The regular rate of pay is “the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed.”  *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945). Under the FLSA, the regular rate of pay is typically determined by “dividing the employee's weekly compensation by the number of hours for which that compensation is intended.”  *Doo Nam Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 338 (S.D.N.Y. 2005) (quoting  *Moon*, 248 F. Supp. 2d at 230).

*17 140. The records and testimony in this action demonstrate that Defendants generally failed to pay all Plaintiffs (except Jose Yuquilema, who never worked more than 40 hours per week) for all hours in excess of 40 in a week at one-and-a-half times the greater of their regular rate of pay or the minimum legal rate of pay. Accordingly, Defendants are liable to Plaintiffs for the unpaid overtime wages to which they were entitled under the FLSA and the NYLL.  29 U.S.C. § 207; 12 N.Y.C.R.R. § 146-1.4.

V. Spread of Hours

141. New York law requires employers to pay employees one extra hour at the full statutory minimum wage rate for each day on which an employee's “spread of hours” exceeds 10 hours. 12 N.Y.C.R.R. § 146-1.6 (effective Jan. 1, 2011);  12 N.Y.C.R.R. § 137-1.7 (repealed Jan. 1, 211). The “spread of hours” measures “the interval between the beginning and end of an employee's workday” and “includes working time plus time off for meals plus intervals off duty.” 12 N.Y.C.R.R. § 146-1.6 (effective Jan. 1, 2011).

142. Defendants violated this provision by failing to pay Jilmar Daniel Ramirez, Jose Yuquilema, Jairo Ramirez, Victoriano Perez, Juan Carlos Perez Ramirez, Omar Santos, Salvador Flores, Ricardo Gonzalez, Luis Alberto Cruz Villanueva, and Guillermo Guzman an additional hour at the full minimum wage rate on days when they worked a spread of hours exceeding 10 hours. See *supra* ¶¶ 17-18, 26-28, 39-40, 44, 54, 62, 66-68, 73-74, 79-80, 86.

VI. Damages

Statute of Limitations

143. The statute of limitations for violations of the pertinent provisions of the New York Labor Law is six years. [N.Y. Lab. Law § 663\(3\)](#). Defendants are therefore liable for all damages accruing under NYLL from September 19, 2008, through September 19, 2014.

144. The statute of limitations for an FLSA claim is two years, unless the violation is “willful,” in which case the statute of limitations is three years. [29 U.S.C. § 255\(a\)](#). A violation is willful if the employer knew or showed reckless disregard for whether its conduct was prohibited. [Kuebel, 643 F.3d at 366](#).

145. Courts have found violations to be “willful” where employers “were very hands-on in their management of restaurant operations” and would be unlikely not to know what hours deliverymen were working, [Yu G. Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 250 \(S.D.N.Y. 2008\)](#); where they failed to comply with “basic recordkeeping requirements,” [Moon, 248 F. Supp. 2d at 231](#); and where “they made no effort to learn about the FLSA’s requirements,” [Jin M. Cao v. Wu Liang Ye Lexington Rest., Inc., No. 09-CV-3725 \(DC\), 2010 WL 4159391, at *2 \(S.D.N.Y. Sept. 30, 2010\)](#). To qualify as “willful,” “[a]ctual knowledge of the violative practices” is not necessary where there is proof that the defendant “recklessly disregarded the possibility that [the company] was violating the FLSA.” [RSR Sec. Servs. Ltd., 172 F.3d at 141](#).

146. Gursory testified that he knew about the FLSA and NYLL, Tr. 290:14-21, 292:21-293:1, 297:14-300:21, and the Court therefore finds that he knew that the wage and hour practices at the four Fuel Locations violated the FLSA and NYLL. Moreover, both Gursory and Alouie were “hands-on” and failed to keep basic records. Although Alouie did not testify regarding his knowledge of the FLSA or NYLL, he recklessly disregarded whether the four Fuel Locations were violating the FLSA and NYLL because he was involved in decisions regarding employee pay and regularly visited the four Fuel Locations to conduct oversight. See *supra* ¶¶ 93-94, 102-104, 107, 112, 116. Notwithstanding his oversight, he denied *any* responsibility for ensuring the Fuel Locations complied with wage and hour laws, Tr. 434:11-441:5, and apparently blindly trusted Gursory to act appropriately, despite having provided the capital for the Fuel businesses, Tr. 486:16-487:12. Gursory and Alouie’s violations of the FLSA

and NYLL were therefore willful. See [Moon, 248 F. Supp. 2d at 235](#) (“[T]he standard for willfulness for purposes of the FLSA statute of limitations does not appreciably differ from the standard applicable under New York law when determining whether to award liquidated damages.”). Accordingly, the applicable statute of limitations under the FLSA is three years, and Defendants are liable for all damages accruing under the FLSA from September 19, 2011, through September 19, 2014.

Compensatory Damages

*18 147. Where state law prescribes a higher minimum wage than the federal minimum wage, the higher state law minimum wage is used as the measure of damages for unpaid wages and overtime under the FLSA. See [29 U.S.C. § 218\(a\)](#).

148. Based on the Court’s conclusions above that Defendants failed to pay Plaintiffs minimum wage, overtime wages, and spread of hours, each Plaintiff is entitled to compensatory damages totaling:

- The difference between the hourly wage he was paid and the full statutorily-prescribed minimum wage;
- An extra hour of pay at the applicable New York minimum wage for each day on which he worked a spread of more than 10 hours; and
- The difference between the hourly rate he was paid for hours in excess of 40 in a week and the federally prescribed overtime rate of one and one-half times the full statutory minimum wage, including at the applicable New York minimum wage for all hours worked.

Liquidated Damages

149. Employers who violate the minimum wage or overtime provisions of the FLSA “shall be liable to the employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, ..., and in an *additional equal amount* as liquidated damages.” [29 U.S.C. § 216\(b\)](#) (emphasis added). Liquidated damages under the FLSA are compensatory; they compensate “for the retention of a workman’s pay which might result in damages too obscure and difficult of proof for estimate” by other means.

[Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707-08](#)

(1945); [Soler v. G & U, Inc.](#), 628 F. Supp. 720, 725 (S.D.N.Y. 1986) (liquidated damages are compensation for “certain intangible losses” suffered by undercompensated workers).

150. An employer may avoid liquidated damages if it demonstrates that its actions were taken in good faith and that it had reasonable grounds for believing its actions or omissions did not violate the FLSA. 29 U.S.C. § 260. Defendants bear the burden “of establishing, ‘by plain and substantial evidence,’ subjective good faith and objective reasonableness.... The burden, under 29 U.S.C. § 260, ‘is a difficult one to meet, however, and double damages are the norm, single damages the exception.’” [Reich](#), 121 F.3d at 71 (quoting *Brock v. Wilamowsky*, 833 F.3d 11, 19 (2d Cir. 1987)). “To establish the requisite subjective ‘good faith,’ an employer must show that it took ‘active steps to ascertain the dictates of the FLSA and then act[ed] to comply with them.’” [Barfield v. N.Y. City Health and Hosp. Corp.](#), 537 F.3d 132, 150 (2d Cir. 2008) (quoting [RSR Sec. Servs.](#), 172 F.3d at 142).

151. Liquidated damages are also available under NYLL “unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law.” [N.Y. Lab. Law §§ 198\(1-a\)](#), [663\(1\)](#). Prior to April 9, 2011, workers could recover damages in the amount of the unpaid minimum wage and overtime, plus an additional 25 percent of those unpaid wages as liquidated damages. [N.Y. Lab. Law §§ 198\(1-a\)](#), [663\(1\)](#) (effective Nov. 24, 2009). The Wage Theft Prevention Act (“WTPA”) increased the amount of liquidated damages recoverable under NYLL to 100 percent of the total unpaid wages, including spread of hours claims. [N.Y. Lab. Law §§ 198\(1-a\)](#), [663\(1\)](#) (effective Apr. 9, 2011). The burden of proof to establish good faith under NYLL is substantially the same as under the [FLSA](#). See *Inclan v. N.Y. Hosp. Grp., Inc.*, 95 F. Supp. 3d 490, 505 (S.D.N.Y. 2015).

*19 152. Defendants made no effort to prove that their violations of the NYLL and the FLSA were in good faith. Defendants are therefore liable to pay liquidated damages.

153. “Stacked” or overlapping liquidated damages awards under the FLSA and NYLL are generally not available for

the same injury or violation. See [Chowdhury v. Hamza Express Food Corp.](#), 666 Fed.Appx. 59, 60-61 (2d Cir. 2016) (summary order) (due to the WTPA amendments, NYLL liquidated damages provision “now mirrors” that of the FLSA). Since *Chowdhury*, courts in the Eastern and Southern Districts of New York have generally declined to award liquidated damages for the same period under both the FLSA and NYLL. See *Qui Hua Tan v. Voyage Express Inc.*, No. 15-CIV-6202 (RJD)(RML), 2017 WL 2334969, at *7 (E.D.N.Y. May 25, 2017) (describing “emerging trend” in the Eastern District finding that stacked damages are not available); *Changxing Li v. Kai Xiang Dong*, No. 15-CIV-7554 (GBD)(AJP), 2017 WL 892611, at *13 (S.D.N.Y. Mar. 7, 2017) (declining to award stacked damages in light of *Chowdhury* and noting that “even before *Chowdhury*” an increasing number of cases had declined to award stacked damages). Likewise, this Court declines to award liquidated damages for the same period under both the FLSA and NYLL.

154. Accordingly, Plaintiffs are entitled to liquidated damages of 100 percent of their damages, except for Guillermo Guzman's liquidated damages through April 8, 2011, which are calculated at 25 percent.¹⁷

Prejudgment Interest Under NYLL

155. Plaintiffs are entitled to prejudgment interest for violations of NYLL. [N.Y. C.P.L.R. § 5001\(a\)](#) (2013); [N.Y. Lab. Law § 663\(1\)](#); [Reilly v. NatWest Mkts. Grp. Inc.](#), 181 F.3d 253, 265 (2d Cir. 1999).

156. When damages occur at different times, it is proper to utilize “a single reasonable intermediate date.” [N.Y. C.P.L.R. § 5001\(b\)](#). Courts awarding interest for NYLL violations utilize the “midpoint of the accrual of ... damages to calculate interest.” [Doo Nam Yang](#), 427 F. Supp. 2d at 342.

157. “[C]ourts do not award statutory prejudgment interest on any portion of their recovery for which liquidated damages were awarded under the FLSA.” [Tackie v. Keff Enters. LLC](#), No. 14-CV-2074 (JPO), 2014 WL 4626229, at *5 (S.D.N.Y. Sept. 16, 2014). Plaintiffs are entitled to an award of prejudgment interest only for claims for which no FLSA liquidated damages are awarded, including unpaid spread of hours claims. See [Gunawan v. Sake Sushi Rest.](#), 897 F. Supp. 2d 76, 92 (E.D.N.Y. 2012).

Statutory Penalties

158. Plaintiffs are entitled to statutory penalties because they were not provided with statutorily-required wage notices and wage statements.

159. New York law requires employers to provide to all employees at the time of hiring and each subsequent year of employment written notice of: (1) the worker's rate of pay; (2) the basis for determining that rate; and (3) any allowances, such as tips, claimed against the employer's minimum wage obligations. See [N.Y. Lab. Law § 195\(1\)\(a\)](#); 12 N.Y.C.R.R. § 146-2.2 (effective Jan. 1, 2011). The notice must be in English and in the employee's primary language if other than English. See [N.Y. Lab. Law § 195\(1\)\(a\)](#) (effective Apr. 9, 2011).

***20** 160. Defendants failed to provide Plaintiffs with wage notices in English and Spanish setting forth all required information, such as their rate of pay, the basis for determining that rate, and any allowances, such as tips, claimed against Defendants' minimum wage obligations. See *supra* ¶¶ 2-3.

161. An employer may avoid liability for violating this provision of NYLL by showing, as an affirmative defense, either that: (1) the employee was paid in full and on time, or (2) the employer had a good faith, reasonable belief that no notice was required. See [N.Y. Lab. Law § 198\(1-b\)](#). Defendants have failed to establish this affirmative defense; Defendants presented no evidence that they had a reasonable or good faith belief that no notice was required.

162. Between April 9, 2011, and February 27, 2015, failure to comply with this wage statement requirement resulted in a \$50 penalty for each week that the employer was in violation, up to a maximum of \$2,500. [N.Y. Lab. Law § 198\(1-d\)](#) (effective Apr. 9, 2011). Beginning on February 27, 2015, failure to comply results in a \$50 penalty for each workday the employer is in violation of the notice of pay requirement, up to a maximum of \$5,000, plus costs and reasonable attorneys' fees. [N.Y. Lab. Law § 198\(1-b\)](#) (effective Feb. 27, 2015). The Court finds that Plaintiffs are entitled to recover damages in accordance with these provisions.

163. NYLL requires employers to provide detailed wage statements to employees. The wage statement must include:

(1) the dates of the work covered by that payment of wages; (2) the names of the employee and employer; (3) the address and phone number of the employer; (4) the rate of pay and basis thereof; and (5) any allowances claimed. See [N.Y. Lab. Law § 195\(3\)](#). To satisfy [Section 195](#), the wage statements must be accurate. See *Copper v. Cavalry Staffing, LLC*, 132 F. Supp. 3d 460, 467-68 (E.D.N.Y. 2015).

164. Many Plaintiffs did not receive wage statements, while other Plaintiffs received inaccurate wage statements. See *supra* ¶¶ 5-7.

165. Between April 9, 2011, and February 26, 2015, failure to comply with this wage statement requirement resulted in a \$100 penalty for each week that the employer was in violation, up to a maximum of \$2,500. [N.Y. Lab. Law § 198\(1-d\)](#) (effective Apr. 9, 2011). Beginning on February 27, 2015, failure to comply results in a \$250 penalty for each workday the employer is in violation of the notice of pay requirement, up to a maximum of \$5,000, plus costs and reasonably attorneys' fees. [N.Y. Lab. Law § 198\(1-d\)](#) (effective Feb. 27, 2015). Plaintiffs are entitled to recover damages in accordance with these provisions.




Recovery of Equipment Costs

166. Both federal and New York law prohibit an employer from requiring employees to incur expenses for tools of the trade needed to perform their jobs if such expenses bring the employee's wage below the required minimum or overtime wage in any workweek. 29 C.F.R. § 531.35; 12 N.Y.C.R.R. § 146-2.7(c); see also *Hernandez v. JRPAC*, 14-CIV-4176 (PAE), [2016 WL 3248493](#), *33 (S.D.N.Y. June 9, 2016) (awarding damages to deliverymen for the cost of purchasing bicycles and related equipment).

167. Here, Plaintiffs (except Luis Alberto Cruz Villanueva and Jose Yuquilema) testified they were required to obtain bicycles and related equipment in order to perform their job. *Supra* ¶¶ 15, 20, 31, 37, 42, 47, 60, 71, 84, 88. Plaintiffs are entitled to recover the expenses they incurred in purchasing that equipment.

Attorneys' Fees and Costs

***21** 168. Prevailing plaintiffs are entitled to have the defendant pay reasonable attorneys' fees and costs. [29](#)

U.S.C. § 216(b);  N.Y. Lab. Law § 663(1). Reasonable rates “should be based on ‘rates prevailing in the community for similar services of lawyers of reasonably comparable skill, experience, and reputation.’ ”  *Spain v. Kinder Stuff 2010 LLC*, No. 14-CV-2058, 2015 WL 5772190, at *8 (E.D.N.Y. Sept. 29, 2015) (quoting  *Cruz v. Local Union No. 3 of IBEW*, 34 F.3d 1148, 1159 (2d Cir. 1994)).

169. Recoverable costs include expenses incurred for interpreters. 28 U.S.C. § 1920(6).

170. Therefore, in addition to the above amounts, Plaintiffs are entitled to an award of reasonable attorney's fees and costs in an amount to be determined upon receipt of Plaintiffs' fee application.

CONCLUSION

For the foregoing reasons, the Court finds in favor of Plaintiffs as to all of their claims against Gursoy, Alouie, and Ninth Avenue Food Corp., and the Plaintiffs are granted judgment as to all of their claims against those Defendants. For the foregoing reasons, the Court finds against Plaintiffs as to their claims against Pizzimenti, and their claims against Pizzimenti are dismissed. The Court finds that individual defendants Gursoy and Alouie are jointly and severally liable

to Plaintiffs, together with Ninth Avenue Food Corp. and the defaulted Defendants Chris Campos, Delfino Castillo, Health & Soul Inc., and Masters Food Service Inc., for their damages throughout the relevant period.

No later than **August 10, 2017**, Plaintiffs must submit (1) a proposed damages calculation consistent with the Court's findings, and (2) proposed judgments for each Defendant, including the defaulted Defendants. No later than **August 17, 2017**, taking into account the Court's findings and without prejudice to their right to appeal those findings, Defendants must notify the Court of any objections to Plaintiffs' proposed damages calculation and to the proposed judgments.

The parties are directed to meet and confer regarding attorneys' fees. If the parties agree on Plaintiffs' attorneys' fees, a joint proposal is due no later than **August 28, 2017**. If the parties are unable to agree, Plaintiffs shall submit a motion for attorneys' fees, not longer than 10 pages, supported by the attorneys' contemporaneous billing records, not later than **September 1, 2017**.¹⁸ Defendants shall respond with a brief not longer than 10 pages not later than **September 8, 2017**.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 3835960

Footnotes

- ¹ The four locations of Fuel Grill and Juice Bar where Plaintiffs worked are: (1) 112 West 38th Street (“the 38th Street Location”); (2) 683 Ninth Avenue (“the Ninth Avenue Location”); (3) 379 Third Avenue (“the Third Avenue Location”); and (4) 181 Grand Street (“the Grand Street Location”).
- ² A number of Defendants have defaulted, including Chris Campos, Delfino Castillo, Health & Soul Inc., and Masters Food Service Inc., and a default judgment has been entered against those Defendants. Dkts. 124-127, 142. Although counsel for Defendants Ninth Avenue Food Corp., Rick Gursoy, and Ahmad Alouie entered a notice of appearance on behalf of Masters Health Food Service Inc. and submitted proposed findings of fact and conclusions of law on behalf of those four Defendants, Defense counsel stated at trial that he does not represent Masters Health Food Service Inc. and that he had mistakenly filed a notice of appearance on its behalf, confusing that entity with Masters Food Service Inc. Tr. 594:16-595:20. No evidence was introduced at trial to show that Masters Health Food Service Inc. owned the restaurants for which Plaintiffs worked. Accordingly, all claims against Masters Health Food Service Inc. are dismissed. The remaining

Defendants are Ninth Avenue Food Corp., Rick Gursoy, Ahmad Alouie, and Chris Pizzimenti, and the Court addresses Plaintiffs' claims against those four Defendants in these findings of fact and conclusions of law.

- 3 During trial, the Court learned that Plaintiff Humberto Rodriguez is deceased. Tr. 251-52. Accordingly, his claims are dismissed. See [Kaplan v. Lehrer](#), 173 Fed.Appx. 934, 935 (2d Cir. 2006) (summary order) (a district court may in its discretion dismiss claims of a party who has died before the 90 days provided for in [Federal Rule of Civil Procedure 25\(a\)\(1\)](#)).
- 4 Guillermo Guzman was also initially paid in cash at the Ninth Avenue Location and did not receive wage statements. Tr. 32:5-13.
- 5 Luis Alberto Cruz Villanueva, who was a cook at the Ninth Avenue Location, was paid by check and in cash, but he testified that his check did not include a pay stub or a wage statement. Tr. 199:19-200:1, 201:19-24.
- 6 The "charge tips" portion of the Ninth Avenue Location wage statements are approximately twice the amount of "charge tips" in the Third Avenue Location, even though Plaintiffs' testimony suggested that the amount of tips earned at the two locations was roughly the same. Compare, e.g., Pl. Exs. 34 and 37 with Pl. Exs. 8 and 10; see also Tr. 156:23-25.
- 7 The Court uses the \$240 wage amount for its calculation because that is the amount Victoriano Perez was most consistently paid, but the Court also relies on the \$270 wage amount because the wage statements for other Plaintiffs at the Third Avenue Location also show that they were paid \$270 per week in that limited time period. See, e.g., Pl. Ex. 13.
- 8 Guillermo Guzman testified that he was paid \$5.65 for the entirety of his second stint of employment at the Ninth Avenue Location. Tr. 33:3-8. Consistent with the other Plaintiffs who worked at the Ninth Avenue Location, however, his wage statements reflect a \$5.75 raise starting in July 2014. Pl. Ex. 40.
- 9 Ahmad Alouie is also known as Daniel or Danny. Tr. 22:20-24, 268:17-18.
- 10 A default judgment was previously entered against Health & Soul, Inc. Dkt. 142.
- 11 Default judgments were previously entered against Messrs. Castillo and Campos. Dkt. 142.
- 12 Originally, Jeff Tinney was also an owner. Tr. 426:25-427:4. All claims against Jeff Tinney have been dismissed. Dkt. 112.
- 13 A default judgment was previously entered against Masters Food Service, Inc. Dkt. 142.
- 14 The relationship between Gursoy and Alouie was unusual. They were long-time friends, and Alouie seemed to trust Gursoy implicitly. Tr. 424:25-425:7, 463:5-18, 486:4-487:15. It appears that they were largely inseparable, and Plaintiffs viewed them as a pair. See, e.g., Tr. 23:14-18, 42:12-20, 643:20-24.
- 15 Plaintiffs maintain that they do not qualify as tipped employees because they spent more than twenty percent of their shifts doing non-tipped work. The Court need not reach this issue because even if Plaintiffs were tipped employees, Defendants are not entitled to take a tip credit for the reasons described above.
- 16 The Defendants were also not entitled to take a tip credit under NYLL. Although the requirements for the tip credit under NYLL differ slightly from the FLSA requirements, Defendants' failure to provide accurate wage statements, including allowances, is also fatal under NYLL.
- 17 Guillermo Guzman is the only Plaintiff to have damages dating prior to April 9, 2011. Prior to that date, New York's liquidated damages were 25 percent of unpaid wages.

- 18 The Court has recently had occasion to consider the appropriate hourly rate for Plaintiffs' attorneys in *Ortiz Sandoval et al. v. Tere Restaurant Corp. et al.*, No. 16-cv-6306 (VEC). Without prejudice to Plaintiffs' right to argue those hourly rates are inadequate, Plaintiffs' attorneys fees application should assume the Court will adhere to the rates approved in *Ortiz Sandoval et al. v. Tere Restaurant Corp. et al.*

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