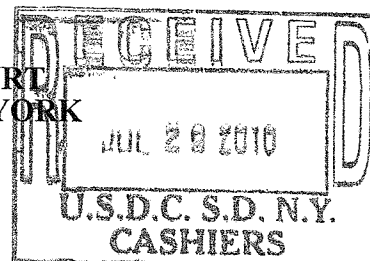


D. Maimon Kirschenbaum  
Denise A. Schulman  
Charles E. Joseph  
**JOSEPH, HERZFELD, HESTER &  
KIRSCHENBAUM LLP**  
757 Third Avenue, 25<sup>th</sup> Floor  
New York, NY 10017  
Telephone: (212) 688-5640  
Facsimile: (212) 688-2548

Justin M. Swartz  
Rachel Bien  
Sonia R. Lin  
**OUTTEN & GOLDEN LLP**  
3 Park Avenue, 29th Floor  
New York, New York 10016  
Telephone: (212) 245-1000  
Facsimile (212) 977-4005

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



**STEPHANIE CAPSOLAS, HERNAN RICARDO  
ALVARADO, JEFFREY CUTAIAR, NICOLE  
MEDVITZ, PAUL TORO, DANIEL JANSON,  
ROGER CARO, CHRIS ELL, CHRIS FORBES,  
JESSE PATRICK, and DIANA DIETRICH, on behalf  
of themselves and other similarly situated,**

**Plaintiffs,**

**v.**

**PASTA RESOURCES INC., BABBO LLC d/b/a  
BABBO RISTORANTE ENOTECA, PANE SARDO  
LLC d/b/a OTTO ENOTECA PIZZERIA, EL MONO  
LLC d/b/a CASA MONO and BAR JAMON, LA  
LOGGIA LLC d/b/a TARRY LODGE, MARIO  
BATALI, and JOSEPH BASTIANICH,  
Defendants.**

**No. 10-cv-5595 (RJH)**

**AMENDED CLASS  
ACTION COMPLAINT**

**Jury Trial Demanded**

Plaintiffs, Stephanie Capsolas, Herman Ricardo Alvarado, Jeffrey Cutaiar, Nicole Medvitz, Paul Toro, Daniel Janson, Roger Caro, Chris Ell, Chris Forbes, Jesse Patrick, and Diana Dietrich, individually and on behalf of all others similarly situated, as class representatives, upon personal knowledge as to themselves and upon information and belief as to other matters, allege as follows:

**NATURE OF THE ACTION**

1. This lawsuit seeks to recover minimum wages, overtime, misappropriated tips, and spread-of-hours pay for Plaintiffs and their similarly situated co-workers – hourly food

service workers who have worked at the critically acclaimed restaurants owned by Defendants Mario Batali and Joseph Bastianich in New York.

2. Mr. Batali and Mr. Bastianich own a restaurant empire that includes Babbo Ristorante e Enoteca, Bar Jamón, Casa Mono, Del Posto, Esca, Lupa Osteria Romana, Otto Enoteca Pizzeria, and The Spotted Pig in New York City, and Tarry Lodge in Port Chester, New York (“Batali Restaurants”). They also plan to open Eataly, a 50,000 foot marketplace in New York City.

3. Outside of New York, the Batali / Bastianich empire includes B&B Ristorante, Carnevino Italian Steakhouse, and Enoteca San Marco in Las Vegas; and Mozza2Go and Osteria Mozza, Pizzeria Mozza in Los Angeles.

4. Mr. Batali has been profiled in publications such as Gourmet Magazine, The New Yorker, Sports Illustrated, People, and Time Magazine. He has appeared on Oprah Winfrey, ABC Nightline, Extra, Good Morning America, The Today Show, and Jimmy Kimmel. His website claims that he holds the honor of most wins in Iron Chef America history. He also co-hosts a prime-time public television series, Spain - On The Road Again, with Gwyneth Paltrow. He was named “Man of the Year” in the chef category by GQ Magazine in 1999. In 2002, he won the James Beard Foundation’s “Best Chef: New York City” award, and in 2005 the James Beard Foundation awarded Batali “Outstanding Chef of the Year.”

5. Despite all of this success, Mr. Batali, Mr. Bastianich, and their restaurants unlawfully confiscated a portion of their workers’ hard-earned tips in order to supplement their own profits.

6. At the end of every shift, instead of distributing customers’ credit card tips to the workers who earned them as the law requires, Mr. Batali, Mr. Bastianich, and their restaurants

took from the tip pool an amount equal to approximately 4-5% of the restaurants' wine sales (and sometimes other beverage sales) for the night and put it in their own pockets.

7. Defendants also deprived Plaintiffs and their co-workers of proper minimum wages, overtime pay, and spread-of-hours pay.

8. In response to this lawsuit, instead of making a commitment to investigate his workers' claims and change any unlawful practices, Mr. Bastianich reportedly told Eater.com that he is going to fight the charges, that the idea of settling out of court is out of the question, and that this lawsuit is a shake down. He was quoted as saying, "We're going to fight this to every inch of the law, because we know we're right. We're not going to let them shake us down for a quick settlement. We'll fight this to the end."

9. Plaintiffs bring this action on behalf of themselves and similarly situated current and former employees who elect to opt-in to this action pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), and specifically, the collective action provision of 29 U.S.C. § 216(b), to remedy violations of the wage-and-hour provisions of the FLSA by Defendants that have deprived Plaintiffs and others similarly situated of their lawfully earned wages.

10. Plaintiffs also bring this action on behalf of themselves and similarly situated current and former employees pursuant to Federal Rule of Civil Procedure 23 to remedy violations of the New York Labor Law ("NYLL") Article 6, §§ 190 *et seq.*, and Article 19, §§ 650 *et seq.*, and the supporting New York State Department of Labor regulations.

### **JURISDICTION AND VENUE**

11. This Court has original federal question jurisdiction under 28 U.S.C. § 1331 because this case is brought under the FLSA, 29 U.S.C. §§ 201, *et seq.* ("FLSA"). This Court has supplemental jurisdiction over the NYLL claims, as they are so related in this action within

such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

12. The amount in controversy in this matter exceeds the sum or value of \$5,000,000, exclusive of interest and costs.

13. At least one member of the proposed class is a citizen of a state different from that of at least one Defendant.

14. Plaintiffs' claims involve matters of national or interstate interest.

15. Citizenship of the members of the proposed class is dispersed among a substantial number of states.

16. Upon information and belief, at least one Defendant resides in New York.

17. Upon information and belief, at least one Defendant is subject to personal jurisdiction in New York.

18. Venue is proper in this District because Defendants conduct business in this District, and acts and/or omissions giving rise to the claims herein alleged took place in this District.

## **THE PARTIES**

### **Plaintiffs**

#### **Stephanie Capsolas**

19. Plaintiff Stephanie Capsolas ("Capsolas") is an adult individual who is a resident of New York, NY.

20. Capsolas has been employed by Defendants as a server at Babbo Ristorante Enoteca from approximately 2008 to the present.

21. Capsolas is a covered employee within the meaning of the FLSA and NYLL.

**Hernan Ricardo Alvarado**

22. Plaintiff Hernan Ricardo Alvarado (“Alvarado”) is an adult individual who is a resident of New York, NY.

23. Alvarado has been employed by Defendants as a back waiter and runner at Babbo Ristorante Enoteca from approximately 2005 through the present.

24. Alvarado is a covered employee within the meaning of the FLSA and NYLL.

**Jeffrey Cutaiar**

25. Plaintiff Jeffrey Cutaiar (“Cutaiar”) is an adult individual who is a resident of New York.

26. Cutaiar was employed by Defendants as a server at Otto Enoteca Pizzeria from approximately 2005 to approximately 2008.

27. Cutaiar is a covered employee within the meaning of the FLSA and NYLL.

**Nicole Medvitz**

28. Plaintiff Nicole Medvitz (“Medvitz”) is an adult individual who is a resident of Brooklyn, NY.

29. Medvitz was employed by Defendants as a server at Otto Enoteca Pizzeria from approximately 2006 to approximately 2008.

30. Medvitz is a covered employee within the meaning of the FLSA and NYLL.

**Paul Toro**

31. Plaintiff Paul Toro (“Toro”) is an adult individual who is a resident of Bridgeport, CT.

32. Toro has been employed by Defendants as a bartender at Tarry Lodge from approximately 2008 to the present.

33. Toro is a covered employee within the meaning of the FLSA and NYLL.

**Daniel Jansen**

34. Plaintiff Daniel Jansen (“Jansen”) is an adult individual who is a resident of Greenwich, CT.

35. Jansen has been employed by Defendants as a server at Tarry Lodge from approximately 2008 to the present.

36. Jansen is a covered employee within the meaning of the FLSA and NYLL.

**Roger Caro**

37. Plaintiff Roger Caro (“Caro”) is an adult individual who is a resident of Greenwich, CT.

38. Caro has been employed by Defendants as a server at Tarry Lodge from approximately 2008 to the present.

39. Caro is a covered employee within the meaning of the FLSA and NYLL.

**Chris Ell**

40. Plaintiff Chris Ell (“Ell”) is an adult individual who is a resident of Brooklyn, NY.

41. Ell was employed by Defendants as a server at Casa Mono from approximately 2007 to approximately 2010.

42. Ell is a covered employee within the meaning of the FLSA and NYLL.

**Chris Forbes**

43. Plaintiff Chris Forbes (“Forbes”) is an adult individual who is a resident of Brooklyn, NY.

44. Forbes was employed by Defendants as a server at Casa Mono from approximately 2008 to approximately 2009.

45. Forbes is a covered employee within the meaning of the FLSA and NYLL.

**Jesse Patrick**

46. Plaintiff Jesse Patrick (“Patrick”) is an adult individual who is a resident of New York, NY.

47. Patrick was employed by Defendants as a bartender at Bar Jamón from approximately 2008 to approximately 2009.

48. Patrick is a covered employee within the meaning of the FLSA and NYLL.

**Diana Dietrich**

49. Plaintiff Diana Dietrich (“Dietrich”) is an adult individual who is a resident of Brooklyn, NY.

50. Dietrich was employed by Defendants as a server at Lupa Osteria Romana from approximately 2002 to the present.

51. Dietrich is a covered employee within the meaning of the FLSA and NYLL.

**Defendants**

52. Defendants Pasta Resources, Inc., Babbo LLC, Pane Sardo LLC, El Mono LLC, La Loggia LLC, Mario Batali, and Joseph Bastianich (together “Defendants”) jointly employed Plaintiffs and similarly situated employees at all times relevant. Each Defendant has had substantial control over Plaintiffs’ working conditions, and over the unlawful policies and practices alleged herein.

53. During all relevant times, Defendants have been Plaintiffs’ employers within the meaning of the FLSA and the NYLL.

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

55. Defendants' operations are interrelated and unified.

56. Defendants list all of their restaurants, including Babbo Ristorante Enoteca ("Babbo"), Otto Enoteca Pizzeria ("Otto"), Casa Mono, Bar Jamón, Lupa Osteria Romana ("Lupa"), and Tarry Lodge, on the same website, <http://www.pastaresources.com/hospitality/>.

57. In addition, many of the restaurants' websites, including the websites for Casa Mono, Bar Jamón, and Otto, include a page entitled, "Our Restaurants," that lists all of the restaurants owned and operated by Defendants Batali and Bastianich.

58. For example, the Casa Mono/Bar Jamón and Otto websites state that Defendants "Mario Batali and Joseph Bastianich are the distinctive forces behind an eclectic group of critically acclaimed, unanimously adored restaurants. Their collection includes: Babbo Ristorante & Enoteca, Bar Jamón, Casa Mono, Del Posto, Esca, Lupa Osteria Romana, Otto Enoteca & Pizzeria and Tarry Lodge in New York[.]"

59. Mario Batali and Joseph Bastianich co-own all Defendant restaurants.

60. Upon information and belief, during all relevant times, Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge shared a common management and were centrally controlled and/or owned by Defendants.

61. Upon information and belief, during all relevant times, Defendants have had control over, and the power to change compensation practices at Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge.



62. Upon information and belief, Defendants have had the power to determine employee policies at Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge, including, but not limited to, policies governing the allocation of tips and/or gratuities.

**Pasta Resources, Inc.**

63. Defendant Pasta Resources, Inc. (“Pasta Resources”) is a New York Corporation with its principal office located at 45 East 20th Street, New York, NY 10003.

64. Upon information and belief, Pasta Resources has an annual gross volume of sales in excess of \$500,000.

65. Upon information and belief, Defendants Batali and Bastianich are owners of Pasta Resources.

66. Pasta Resources is a covered employer within the meaning of the FLSA and NYLL, and, at all times relevant, employed Plaintiffs and/or jointly employed Plaintiffs and similarly situated employees.

67. Upon information and belief, Pasta Resources is the entity printed on Plaintiffs’ paychecks.

**Babbo LLC**

68. Defendant Babbo LLC is a New York limited liability corporation with its principal office located at 110 Waverly Place, New York, NY 10011.

69. Upon information and belief, Babbo LLC has an annual gross volume of sales in excess of \$500,000.

70. Defendants Batali and Bastianich are owners of Babbo LLC.

71. Babbo LLC is a covered employer within the meaning of the FLSA and NYLL, and, at all times relevant, employed Plaintiffs and/or jointly employed Plaintiffs and similarly situated employees.

**Pane Sardo LLC**

72. Defendant Pane Sardo LLC is a New York limited liability corporation with its principal office located at 45 East 20th Street, New York, NY 10003.

73. Upon information and belief, Pane Sardo LLC has an annual gross volume of sales in excess of \$500,000.

74. Defendants Batali and Bastianich are owners of Pane Sardo LLC.

75. Pane Sardo LLC is a covered employer within the meaning of the FLSA and NYLL, and, at all times relevant, employed Plaintiffs and/or jointly employed Plaintiffs and similarly situated employees.

**El Mono LLC**

76. Defendant El Mono LLC is a New York limited liability corporation with its principal office located at 45 East 20th Street, New York, NY 10003.

77. Upon information and belief, El Mono LLC has an annual gross volume of sales in excess of \$500,000.

78. Defendants Batali and Bastianich are owners of El Mono LLC.

79. El Mono LLC is a covered employer within the meaning of the FLSA and NYLL, and, at all times relevant, employed Plaintiffs and/or jointly employed Plaintiffs and similarly situated employees.

### **La Loggia LLC**

80. Defendant La Loggia LLC is a New York limited liability corporation with its principal office located at 45 East 20th Street, New York, NY 10003.

81. Upon information and belief, La Loggia LLC has an annual gross volume of sales in excess of \$500,000.

82. Defendants Batali and Bastianich are owners of La Loggia LLC.

83. La Loggia LLC is a covered employer within the meaning of the FLSA and NYLL, and, at all times relevant, employed Plaintiffs and/or jointly employed Plaintiffs and similarly situated employees.

### **Individual Defendants**

84. Upon information and belief, Mario Batali and Joseph Bastianich (“Individual Defendants”), maintained control over, oversaw, and directed the operation of Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge, including their employment practices, during the relevant period.

85. The Individual Defendants own and/or operate Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge.

86. During all times relevant, the Individual Defendants were “employers” under the FLSA and NYLL, and employed or jointly employed Plaintiffs and similarly situated employees.

87. Upon information and belief, throughout the relevant period, the Individual Defendants have had the power to control the operations and compensation practices at Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge.

### **Mario Batali**

88. Upon information and belief, Defendant Mario Batali is a resident of Michigan.

89. Batali is an owner and operator of Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge.

90. Batali is also an owner and operator of other restaurants in New York, including Esca and Del Posto.

91. Upon information and belief, at all relevant times, Batali has had power over personnel decisions at Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge, including the power to hire and fire employees, set their wages, and otherwise control the terms and conditions of their employment.

92. Upon information and belief, at all relevant times, Batali has had power over compensation decisions at Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge, including the power to set employee pay and determine the allocation of employee gratuities and/or tips.

93. Upon information and belief, Batali is actively involved in managing the day to day operations of Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge.

94. At all times relevant, Batali has also had the power to stop any illegal pay practices that harmed Plaintiffs.

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

**Joseph Bastianich**

96. Upon information and belief, Defendant Joseph Bastianich is a resident of New York.

97. Bastianich is an owner and operator of Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge.

96. Bastianich is also an owner and operator of other restaurants in New York, including Esca and Del Posto.

97. Upon information and belief, at all relevant times, Bastianich has had power over personnel decisions at Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge, including the power to hire and fire employees, set their wages, and otherwise control the terms and conditions of their employment.

98. Upon information and belief, at all relevant times, Bastianich has had power over compensation decisions at Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge, including the power to set employee pay and determine the allocation of employee gratuities and/or tips.

99. Upon information and belief, Bastianich is actively involved in managing the day to day operations of Babbo, Otto, Casa Mono, Bar Jamón, Lupa, and Tarry Lodge.

100. At all times relevant, Bastianich has also had the power to stop any illegal pay practices that harmed Plaintiffs.

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

#### **FLSA COLLECTIVE ACTION ALLEGATIONS**

102. Plaintiffs bring the First and Second Claims for Relief as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of all tipped, hourly workers employed by Defendants at the Batali Restaurants between July 22, 2007 and the date of final judgment in this matter and who elect to opt-in to this action (“FLSA Collective Plaintiffs”).

103. At all relevant times, Plaintiffs and the other FLSA Collective Plaintiffs are and have been similarly situated, have had substantially similar job requirements and pay provisions, and are and have been subject to Defendants' decision, policy, plan and common policies, programs, practices, procedures, protocols, routines, and rules willfully failing and refusing to pay them at the legally required minimum wage for all hours worked and one and one half times this rate for work in excess of forty (40) hours per workweek, and allowing non-tipped employees to share in their tips. The claims of Plaintiffs stated herein are essentially the same as those of the other FLSA Collective Plaintiffs.

104. The First and Second Claims for Relief are properly brought under and maintained as an opt-in collective action pursuant to § 16(b) of the FLSA, 29 U.S.C. 216(b). The FLSA Collective Plaintiffs are readily ascertainable. For purpose of notice and other purposes related to this action, their names and addresses are readily available from Defendants' records. Notice can be provided to the FLSA Collective Plaintiffs via first class mail to the last address known to Defendants.

#### **RULE 23 CLASS ALLEGATIONS – NEW YORK**

105. Plaintiffs bring the Third, Fourth, Fifth, and Sixth Claims for Relief pursuant to the Federal Rules of Civil Procedure ("F.R.C.P.") Rule 23, on behalf of all tipped, hourly workers employed by Defendants at the Batali Restaurants between July 22, 2004 and the date of final judgment in this matter (the "Class Period").

106. All said persons, including Plaintiffs, are referred to herein as the "Class." The Class members are readily ascertainable. The number and identity of the Class members are determinable from the records of Defendants. The hours assigned and worked, the positions held, and the rates of pay for each Class member are also determinable from Defendants'

records. For purposes of notice and other purposes related to this action, their names and addresses are readily available from Defendants. Notice can be provided by means permissible under said F.R.C.P. 23.

107. The proposed Class is so numerous that joinder of all members is impracticable, and the disposition of their claims as a class will benefit the parties and the Court. Although the precise number of such persons is unknown, and the facts on which the calculation of that number are presently within the sole control of Defendants, upon information and belief, there are more than fifty (50) members of the Class.

108. Plaintiffs' claims are typical of those claims which could be alleged by any member of the Class, and the relief sought is typical of the relief which would be sought by each member of the Class in separate actions. All the Class members were subject to the same corporate practices of Defendants, as alleged herein, of failing to pay minimum wage, spread of hours, and overtime compensation, and illegal retention of tips. Defendants' corporate-wide policies and practices affected all Class members similarly, and Defendants benefited from the same type of unfair and/or wrongful acts as to each Class member. Plaintiffs and other Class members sustained similar losses, injuries and damages arising from the same unlawful policies, practices and procedures.

109. Plaintiffs are able to fairly and adequately protect the interests of the Class and have no interests antagonistic to the Class. Plaintiffs are represented by attorneys who are experienced and competent in both class action litigation and employment litigation and have previously represented plaintiffs in wage and hour cases.

110. A class action 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

individual class members lack the financial resources to vigorously prosecute a lawsuit against corporate defendants. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of efforts and expense that numerous individual actions engender. Because the losses, injuries and damages suffered by each of the individual Class members are small in the sense pertinent to a class action analysis, the expenses and burden of individual litigation would make it extremely difficult or impossible for the individual Class members to redress the wrongs done to them. On the other hand, important public interests will be served by addressing the matter as a class action. The adjudication of individual litigation claims would result in a great expenditure of Court and public resources; however, treating the claims as a class action would result in a significant saving of these costs. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent and/or varying adjudications with respect to the individual members of the Class, establishing incompatible standards of conduct for Defendants and resulting in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties. The issues in this action can be decided by means of common, class-wide proof. In addition, if appropriate, the Court can, and is empowered to, fashion methods to efficiently manage this action as a class action.

111. Upon information and belief, Defendants and other employers throughout the state violate the New York Labor Law. Current employees are often afraid to assert their rights out of fear of direct or indirect retaliation. Former employees are fearful of bringing claims because doing so can harm their employment, future employment, and future efforts to secure employment. Class actions provide class members who are not named in the complaint a degree



of anonymity which allows for the vindication of their rights while eliminating or reducing these risks.

112. There are questions of law and fact common to the Class which predominate over any questions affecting only individual class members, including:

- a) Whether Defendants employed Plaintiffs and the Class within the meaning of the NYLL.
- b) Whether Defendants paid Plaintiffs and the Class members at the proper minimum wage rate for all hours worked.
- c) What are and were the policies, practices, programs, procedures, protocols and plans of Defendants regarding the types of work and labor for which Defendants did not pay the Class members at all.
- d) At what common rate, or rates subject to common methods of calculation, were Defendants required to pay the Class members for their work.
- e) Whether Defendants have a policy of retaining a portion of Plaintiffs' tips and the Class members' tips for purposes of supporting their wine and/or beverage programs at the Batali Restaurants and whether such policy violates the NYLL.
- f) Whether Defendants misappropriated Plaintiffs' tips and the Class members' tips by distributing a portion of them to tip ineligible workers at the Batali Restaurants in violation of the NYLL.
- g) Whether Defendants properly compensated Plaintiffs and Class members for overtime.
- h) Whether Defendants' properly paid Plaintiffs and the Class Members New

York's spread of hours premium.

**CLASSWIDE FACTUAL ALLEGATIONS**

113. Defendants committed the acts alleged in this complaint knowingly, intentionally and willfully.

114. Defendants knew that nonpayment of minimum wage, nonpayment of overtime and spread of hours premium, and improperly forcing the Plaintiffs, the FLSA Collective Plaintiffs, and members of the Class to share their tips with Defendants' agents would economically injure Plaintiffs and violated federal and state laws.

115. Defendants unlawfully paid the Plaintiffs and Class Members an hourly rate below the federal and state minimum wage for regular and overtime hours worked.

116. Plaintiff and Class Members often worked in excess of 40 hours per workweek.

117. Defendants were not entitled to reduce the minimum wage by applying the tip credit allowance that is available cases under 29 U.S.C. § 203(m) and 12 N.Y.C.R.R. § 137-1.5 because Defendants retained portions of Plaintiffs' and Class Members' tips, including but not limited to, an amount equal to approximately 4-5% of the restaurants' nightly wine and/or beverage sales.

118. Plaintiffs' and Class Members' workdays often lasted longer than 10 hours. Defendants did not compensate Plaintiffs or the Class Members by paying them New York's "spread of hours" premium equal to one hour's pay at the minimum wage for each such workday.

119. Defendants committed the foregoing acts against the Plaintiffs, the FLSA Collective Plaintiffs, and the Class.

**FIRST CLAIM FOR RELIEF**  
**(FLSA Minimum Wage Claim, 29 U.S.C. §§ 201, *et seq.*,**  
**Brought by Plaintiffs on Behalf of**  
**Themselves and the FLSA Collective Plaintiffs)**

120. Plaintiffs, on behalf of themselves and the FLSA Collective Plaintiffs, reallege and incorporate by reference all preceding paragraphs as if they were set forth again herein.

121. At all relevant times, each Defendant has been, and continue to be, an “employer” engaged in interstate “commerce” and/or in the production of “goods” for “commerce,” within the meaning of FLSA, 29 U.S.C. § 203. At all relevant times, each Defendant has employed “employee[s],” including Plaintiffs and the FLSA Collective Plaintiffs.

122. Defendants were required to pay directly to Plaintiffs and the FLSA Collective Plaintiffs the applicable New York State minimum wage rate for all hours worked.

123. Defendants were not eligible to avail themselves of the tipped minimum wage rate under the FLSA, 29 U.S.C. § 203(m), and supporting federal regulations, including but not limited to 29 C.F.R. § 531.50 *et seq.*, because Defendants did not permit Plaintiffs and the FLSA Collective Plaintiffs to retain all tips they received, in violation of the FLSA, 29 U.S.C. § 203(m).

124. Upon information and belief, Defendants unlawfully retained portions of the tips received by Plaintiffs and the FLSA Collective Plaintiffs, in violation of the FLSA, 29 U.S.C. § 203(m) and supporting regulations.

125. Throughout the statute of limitations period covered by these claims, Defendants knowingly failed to pay Plaintiffs the applicable minimum wage for each hour worked.

126. Plaintiffs, on behalf of themselves and the FLSA Collective Plaintiffs, seek damages in the amount of their respective unpaid compensation, liquidated (double) damages as

provided by the FLSA for minimum wage violations, attorneys' fees and costs, and such other legal and equitable relief as this Court deems just and proper.

**SECOND CLAIM FOR RELIEF**  
**(FLSA Overtime Violations, 29 U.S.C. §§ 201 *et seq.***  
**Brought by Plaintiffs on Behalf of Themselves**  
**and the FLSA Collective Plaintiffs)**

127. Plaintiffs, on behalf of themselves and other FLSA Collective Plaintiffs, reallege and incorporate by reference all previous paragraphs.

128. Throughout the statute of limitations period covered by these claims, Plaintiffs and the other FLSA Collective Plaintiffs regularly worked in excess of forty (40) hours per workweek and continue to do so.

129. At all relevant times, Defendants have operated under a decision, policy and plan, and under common policies, programs, practices, procedures, protocols, routines and rules of willfully failing and refusing to pay the FLSA Collective Plaintiffs at one and one half times the minimum wage for all work in excess of forty (40) hours per workweek and willfully failing to keep records required by the FLSA even though the FLSA Collective Plaintiffs have been and are entitled to overtime.

130. At all relevant times, Defendants willfully, regularly and repeatedly failed to pay Plaintiffs and the FLSA Collective Plaintiffs at the required overtime rates, one and a half times the federal minimum wage for hours worked in excess of forty (40) hours per workweek.

131. Plaintiffs, on behalf of themselves and the FLSA Collective Plaintiffs, seek damages in the amount of their respective unpaid overtime compensation, liquidated (double) damages as provided by the FLSA for overtime violations, attorneys' fees and costs, and such other legal and equitable relief as this Court deems just and proper.

**THIRD CLAIM FOR RELIEF**

**(New York State Minimum Wage Act, New York Labor Law §§ 650 *et seq.*  
Brought by Plaintiffs on Behalf of Themselves and the Class)**

132. Plaintiffs, on behalf of themselves and members of the Class, reallege and incorporate by reference all preceding paragraphs as if they were set forth again herein.

133. Defendants knowingly paid the Plaintiffs and members of the Class less than the New York State Minimum Wage § 652 and supporting regulations of the New York State Department of Labor.

134. Defendants did not pay Plaintiffs minimum wage for all hours worked.

135. Defendants' failure to pay Plaintiffs and members the Class the minimum wage was willful within the meaning of N.Y. Lab. Law § 663.

136. As a result of Defendants' willful violations of the N.Y. Lab. Law, Plaintiffs and the Class members are entitled to recover their respective unpaid compensation, liquidated damages as provided for by NYLL Article 6, § 198, attorneys' fees and costs, pre- and post-judgment interest, and such other legal and equitable relief as this Court deems just and proper.

**FOURTH CLAIM FOR RELIEF**

**(New York Minimum Wage Act, N.Y. Stat. § 650 *et seq.*,  
Brought by Plaintiffs on Behalf of  
Themselves and the Class)**

137. Plaintiffs, on behalf of themselves and members of the Class, reallege and incorporate by reference all preceding paragraphs as if they were set forth again herein.

138. It is unlawful under New York law for an employer to suffer or permit a non-exempt employee to work without paying overtime wages for all hours worked in excess of forty (40) hours in any workweek.

139. Throughout the Class Period, Defendants willfully, regularly and repeatedly failed to pay Plaintiffs and the Class at the required overtime rates, one and a half times the minimum wages for hours worked in excess of forty (40) hours per workweek.

140. As a result of Defendants' willful violations of the N.Y. Lab. Law, Plaintiffs and the Class members are entitled to recover their respective unpaid compensation, liquidated damages as provided for by NYLL Article 6, § 198, attorneys' fees and costs, pre- and post-judgment interest, and such other legal and equitable relief as this Court deems just and proper.

**FIFTH CLAIM FOR RELIEF**  
**(Illegal Deductions from Gratuities,**  
**N.Y. Lab. L. § 196-d**  
**Brought by Plaintiffs on Behalf of**  
**Themselves and the Class)**

141. Plaintiffs, on behalf of themselves and members of the Class, reallege and incorporate by reference all preceding paragraphs as if they were set forth again herein.

142. Defendants retained portions of Plaintiffs' tips and Class members' tips by deducting a percentage of their tips each shift and using such tips for purposes of supporting the restaurants' wine and/or beverage programs.

143. Defendants unlawfully distributed tips earned by Plaintiffs and the Class Members to tip ineligible workers.

144. As a result of Defendants' willful violations of the NYLL, Plaintiffs and the Class members are entitled to recover their respective unpaid compensation, liquidated damages as provided for by NYLL Article 6, § 198, attorneys' fees and costs, pre- and post-judgment interest, and such other legal and equitable relief as this Court deems just and proper.

**SIXTH CLAIM FOR RELIEF**  
**(New York Spread of Hours Provisions,**  
**N.Y. Lab. L. § 650 *et seq.*, and N.Y. Comp. Code R. & Regs. tit. 12, § 137-1.7**  
**Brought by Plaintiffs on Behalf of**  
**Themselves and the Class)**

145. Plaintiffs, on behalf of themselves and members of the Class, reallege and incorporate by reference all preceding paragraphs as if they were set forth again herein.

146. Plaintiffs and the Class Members regularly worked more than 10 hours in a workday.

147. Defendants willfully and intentionally failed to compensate Plaintiffs and/or Class Members one hour's pay at the basic New York minimum hourly wage rate on days in which they worked more than 10 hours, as required by New York law.

148. As a result of Defendants' willful violations of the N.Y. Lab. Law, Plaintiffs and the Class members are entitled to recover their respective unpaid compensation, liquidated damages as provided for by NYLL Article 6, § 198, attorneys' fees and costs, pre- and post-judgment interest, and such other legal and equitable relief as this Court deems just and proper.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of themselves, and the FLSA Collective Plaintiffs and members of the Class, pray for relief as follows:

- A. Designation of this action as a collective action on behalf of the FLSA Collective Plaintiffs (asserting FLSA claims and state claims) and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated members of the FLSA opt-in class, apprising them of the pendency of this action, and permitting them to assert timely FLSA claims and state claims in this action by filing individual Consent to Sue forms pursuant to 29 U.S.C. § 216(b);

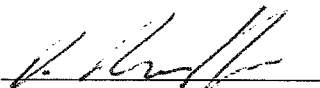
- B. Designation of Plaintiffs as Representatives of the FLSA Collective Plaintiffs;
- C. Designation of this action as a class action pursuant to F.R.C.P. 23.
- D. Designation of Plaintiffs as Representatives of the Class.
- E. An award of damages, according to proof, including liquidated damages, to be paid by Defendants;
- F. Penalties available under applicable laws;
- G. Costs of the action incurred herein, including expert fees;
- H. Attorneys' fees, including fees pursuant to 29 U.S.C. § 216, N.Y. Lab. L. § 663 and other applicable statutes;
- I. Pre-Judgment and post-judgment interest, as provided by law; and
- J. Such other and further legal and equitable relief as this Court deems necessary, just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiffs hereby demand a jury trial on all causes of action and claims with respect to which they have a right to jury trial.

Dated: New York, New York  
July 29, 2010

Respectfully submitted,  
**JOSEPH, HERZFELD, HESTER &  
KIRSCHENBAUM LLP**

By:   
D. Maimon Kirschenbaum

D. Maimon Kirschenbaum  
Denise A. Schulman  
Charles E. Joseph  
757 Third Avenue, 25<sup>th</sup> Floor  
New York, NY 10017  
Telephone: (212) 688-5640  
Facsimile: (212) 688-2548



**OUTTEN & GOLDEN LLP**

Justin M. Swartz

Rachel Bien

Sonia R. Lin

3 Park Avenue, 29th Floor

New York, New York 10016

Telephone: (212) 245-1000

Facsimile (212) 977-4005

*Attorneys for Named Plaintiffs, proposed  
FLSA Collective Plaintiffs, and proposed  
Class*