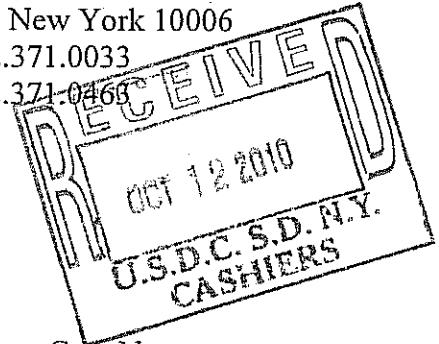


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Case No.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JUAN AMASTAL, PAMELA BENN, )  
JUAN CAMARILLO, JOSE CHECO, JORGE )  
DIAZ, EDISON DELEG, MIGUEL ESPINOZA, )  
CHRISTIAN FLORES, VICTOR FONSECA, )  
CAMERINO GALICIA, ALBERTO GONZALEZ, )  
IVAN GONZALEZ, MARCO GUAMAN, )  
DAVID JUNCAL, JONATHAN MARTINEZ, )  
FERNANDO MORAN, CESAR MUNOZ, )  
CHRISTIAN ONCE, NESTOR PALAQUIBAY, )  
WILSON PORTOVIEJO, FABIAN QUIROGA, )  
JAVIER RAMIREZ, FREDDY RICHARDS, )  
RICHARD SHIN, KLEVER VIRI, CORNELIO )  
XOCHIMTL, and ABRAHAM ZUMBA, )

Plaintiffs, )

-against- )

PASTA RESOURCES INC., IL POSTO )  
MANAGEMENT LLC d/b/a DEL POSTO )  
RISTORANTE, MARIO BATALI, LIDIA )  
MATTICCHIO BASTIANICH, and JOSEPH )  
BASTIANICH, )

Defendants. )

**COMPLAINT AND  
JURY DEMAND**

Plaintiffs, by their attorneys LEWIS, CLIFTON & NIKOLAIDIS, P.C., allege as follows:

**NATURE OF ACTION**

Plaintiffs allege that the defendants, Pasta Resources, Inc., Il Posto Management LLC d/b/a Del Posto Ristorante, Mario Batali, Lidia Matticchio Bastianich, and Joseph Bastianich, (collectively "the employer"), violated and continue to violate the Fair Labor Standards Act, 29

U.S.C. §§ 201 *et seq.*, and the New York State Labor Law §§ 650 *et seq.*, by employing them without paying them the minimum wage, spread-of-hours pay and overtime. Defendants instead pay plaintiffs “the tipped minimum wage,” a minimum wage that is based upon the tip credit allowance available under 29 U.S.C. § 203(m) and 12 N.Y.C.R.R. § 137-1.5. However, defendants are not entitled to pay the tipped minimum wage because they retain portions of plaintiffs’ tips, including a percentage of the restaurant’s nightly wine sales and a portion of the gratuities paid by banquet patrons. Plaintiffs also allege that defendants unlawfully retain gratuities added to banquet bills in violation of New York Labor Law §§196-d and 198. Plaintiffs further allege that defendants violate General Business Law § 349(h) because, as a direct consequence of defendants having misled patrons who attend banquets, plaintiffs are deprived of the gratuities they would have received directly from such patrons had the consumers not been misled into believing that plaintiffs’ gratuity had already been paid. Finally, plaintiffs allege that defendants have failed to pay them for the weekly cost of uniform laundering in violation of New York Labor Law § 193 and supporting New York State Department of Labor regulations.

### **JURISDICTION AND VENUE**

1. This Court has original federal question jurisdiction under 28 U.S.C. §1331 because this case is brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, (“FLSA”). The Court has supplemental jurisdiction over the New York State law claims.
2. Venue is proper in this District because the unlawful employment practices occurred within the Southern District of New York.

### **PARTIES**

3. Plaintiff Juan Amastal is a resident of New York State and is currently

employed by defendants as a Food Runner. During his employment he also held the position of Back Waiter.

4. Plaintiff Pamela Benn is a resident of Florida and was employed by defendants as a Captain from April 2006 to April 2008.

5. Plaintiff Juan Camarillo is a resident of New York State and was employed by defendants as a Food Runner, Back Waiter and Front Waiter from November 2007 to October 2009.

6. Plaintiff Jose Checo is a resident of New York State and was employed by defendants as a Front Waiter from April 2007 to December 2009.

7. Plaintiff Jorge Diaz is a resident of New York State and is currently employed by defendants as a Food Runner. During his employment he also held the position of Back Waiter.

8. Plaintiff Edison Deleg is a resident of New York State and is currently employed by defendants as a Polisher.

9. Plaintiff Miguel Espinoza is a resident of New York State and is currently employed by defendants as a Back Waiter. During his employment he also held the positions of Stocker and Barrister.

10. Plaintiff Christian Flores is a resident of New York State and is currently employed by defendants as a Front Waiter. During his employment he also held the positions of Food Runner and Expediter.

11. Plaintiff Victor Fonseca is a resident of New York State and was employed by defendants as a Front Waiter from June 2007 through July 2010.

12. Plaintiff Camerino Galicia is a resident of New York State and is

currently employed by defendants as an Expediter. During his employment he also held the position of Food Runner.

13. Plaintiff Alberto Gonzalez is a resident of New York State and was employed by defendants as a Backwaiter (June 2006 to September 2009) and Food Runner (October to November 2009).

14. Plaintiff Ivan Gonzalez is a resident of New York State and is currently employed by defendants as a Food Runner. During his employment he also held the positions of Polisher and Busser.

15. Plaintiff Marco Guaman is a resident of New York State and was employed by defendants as a Back Waiter from April 2006 to September 2009.

16. Plaintiff David Juncal is a resident of New York State and is currently employed by defendants as a Front Waiter.

17. Plaintiff Jonathan Martinez is a resident of New York State and was employed by defendants as a Stocker from October 2008 to October 2009.

18. Plaintiff Fernando Moran is a resident of New York State and is currently employed by defendants as a Back Waiter.

19. Plaintiff Cesar Munoz is a resident of New York State and was employed by defendants as a Busser from January 2006 to May 2009.

20. Plaintiff Christian Once a/k/a Christian Ponce is a resident of New York State and is currently employed by defendants as a Front Waiter. During his employment he also held the positions of Back Waiter and Food Runner.

21. Plaintiff Nestor Palaquibay is a resident of New York State and is currently employed by defendants as a Food Runner.

22. Plaintiff Wilson Portoviejo is a resident of New York State and was employed by defendants as a Back Waiter from January 2006 to August 2010.

23. Plaintiff Fabian Quiroga is a resident of New York State and is currently employed by defendants as a Bartender. During his employment he also held the positions of Food Runner and Expediter.

24. Plaintiff Javier Ramirez is a resident of New York State and is currently employed by defendants as a Back Waiter.

25. Plaintiff Freddy Richards is a resident of New York State and was employed by defendants as a Back Waiter (April 2006 to June 2006) and as a Front Waiter (July 2006 to November 2009).

26. Plaintiff Richard Shin is a resident of New York State and was employed by defendants as a Bartender from May 2007 to November 2007.

27. Plaintiff Klever Viri is a resident of New York State and is currently employed by defendants as a Front Waiter. During his employment he also held the position of Busser.

28. Plaintiff Cornelio Xochimitl is a resident of New York State and is currently employed by defendants as a Back Waiter. During his employment he also held the position of Stocker.

29. Plaintiff Abraham Zumba is a resident of New York State and was employed by defendants as a Back Waiter (April 2007 to November 2009) and Food Runner (December 2009 to August 2010).

30. Upon information and belief, defendant Pasta Resources, Inc. is a New

York Corporation with its principal office located at 45 East 20<sup>th</sup> Street, New York, New York 10003.

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

32. Upon information and belief, defendant Il Posto Management LLC is a New York limited liability corporation that operates and does business as Del Posto Ristorante. Il Posto Management LLC is located at 45 East 20<sup>th</sup> Street, 3<sup>rd</sup> Floor, New York, New York 10003 and Del Posto Ristorante is located at 85 Tenth Avenue, New York, NY 10011.

33. Upon information and belief, Il Posto Management LLC d/b/a Del Posto Ristorante, (“Del Posto” or “the restaurant”) has annual gross volume of sales in excess of \$500,000.

34. Upon information and belief, defendant Mario Batali is an owner and operator of Del Posto. Upon information and belief, Batali exercises sufficient control over the restaurant’s day-to-day operations to be considered an employer of plaintiffs.

35. Upon information and belief, defendant Lidia Matticchio Bastianich is an owner and operator of Del Posto. Upon information and belief, Lidia Matticchio Bastianich exercises sufficient control over the restaurant’s day-to-day operations to be considered an employer of plaintiffs.

36. Upon information and belief, defendant Joseph Bastianich is an owner and operator of Del Posto. Upon information and belief, Joseph Bastianich exercises sufficient control over the restaurant’s day-to-day operations to be considered an employer of plaintiffs.

#### **PLAINTIFFS’ FACTUAL ALLEGATIONS**

37. Plaintiffs are present and former employees of Del Posto. Del Posto has

regular dining rooms and separate dining rooms for banquets. The restaurant is open for dinner seven days a week and is open for lunch on weekdays. Plaintiffs work a combination of single and double shifts. A typical double shift exceeds ten hours in duration.

38. Plaintiffs are paid the statutory tipped minimum wage plus gratuities paid by the patrons. The tips are pooled and plaintiffs are given a percentage of the total tip pool. This percentage is based upon a point system which provides that Captains receive 6 points, Bartenders receive 5 points, Front Waiters and Expeditors receive 4 points, Food Runners receive 3 points, Back Waiters receive 2.5 points and Stockers receive 2 points. The amount of tips each employee receives per shift is indicated on a tip sheet. The tip sheet is prepared jointly by a Del Posto Captain and manager.

39. Not all of the tips are given to the tipped employees. Defendants currently retain between 8% and 9% of the nightly wine sales. From December 2005 until June 2006, defendants also retained a percentage of the restaurant's nightly chocolate and cheese sales.

40. Defendants unlawfully paid each of the plaintiffs an hourly rate below the federal and New York State minimum wage for regular and overtime hours worked.

41. Defendants were not entitled to reduce the minimum wage by applying the tip credit allowance that is available under 29 U.S.C. § 203(m) and 12 N.Y.C.R.R. §137-1.5 because defendants retained portions of plaintiffs' tips, including but not limited to, an amount equal to 8% - 9% of the restaurant's nightly wine sales and a percentage of the nightly chocolate and cheese sales.

42. Every plaintiff worked 10 hours per day or more on at least one occasion during their employment at Del Posto. Many of the plaintiffs have worked double shifts one or more days per week. Each double shift exceeds 10 hours per day. Defendants did not

compensate plaintiffs by paying them New York's "spread of hours" premium equal to one hour's pay at the minimum wage for each such workday.

43. Defendants require every member of the service staff to wear a uniform. Defendants do not clean or maintain such uniforms for the plaintiffs, nor do they pay plaintiffs for the cost of laundering their uniforms.

#### Banquets

44. It is defendants' practice to offer private rooms to accommodate dining for groups of 20 to 350 people for social and business events. These events, referred to as "banquets," are booked by both individuals and corporate patrons.

45. Upon information and belief, it is defendants' practice to memorialize an agreement with a banquet patron regarding the cost of food and beverages that will be served, the number of guests and any other special arrangements such as flowers, music and entertainment, in a Banquet Event Order form and a one page contract. Upon information and belief, before March 2010, the contract routinely stated in relevant part that "a service charge of twenty-three percent of the total food and beverage charge will be added to the patron's bill, 18% of which is distributed to wait staff and other floor staff, the balance of which is distributed to sales, administrative, or supervisory personnel at the discretion of Del Posto."

46. Upon information and belief, patrons reasonably believed that the service charge would be paid as a gratuity to each of the plaintiffs.

47. In March 2010, the Del Posto website advised the public that a 23% gratuity would be added to all food and beverage sales for banquets. However, shortly after plaintiffs' advised the restaurant in writing of its unlawful wage and hour practices, defendants removed the words "23% gratuity" from its website.



48. Plaintiffs do not receive an hourly wage nor do they receive any tips for the work they perform on banquets. Instead, defendants pay plaintiffs a flat rate for each shift they work. Defendants typically pay Runners \$150, Back Waiters \$150, Front Waiters \$200 and Captains \$250 per shift. Defendants pay plaintiffs the same flat rate whether they are working one, two or three banquets per shift.

49. None of the plaintiffs has ever received a tip directly from a banquet patron.

50. Plaintiffs receive no compensation other than the flat rate for banquet work. Nor are plaintiffs paid overtime for work performed at banquets even if they have worked 40 or more hours per work week.

51. Upon information and belief, Del Posto's banquet contract now states that: "A private dining fee of twenty-three percent (23%) of the total food and beverage charge will be added to the Patron's bill, which will be distributed in such amounts at the discretion of management to wait staff, other floor and back of the house staff, sales, administrative and supervisory personnel."

52. Plaintiffs consent to sue forms are attached hereto as Exhibit A.

**AS AND FOR A FIRST CAUSE OF ACTION**  
**(FLSA Minimum Wage Claims)**

53. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 52 above.

54. At all relevant times, each defendant has been, and continues to be, an "employer" engaged in "commerce" and/or in the production of "goods" for "commerce" within the meaning of the FLSA, 29 U.S.C. § 203. At all relevant times, each defendant has employed "employees," including plaintiffs.

55. Defendants were required to pay directly to each plaintiff the applicable federal minimum wage rate for all hours worked.

56. Defendants were not entitled to reduce the minimum wage by applying the tip credit allowance that is available 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 to retain all tips they received, in violation of the FLSA, 29 U.S.C. § 203(m).

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

58. Throughout the limitations period covered by these claims, defendants knowingly failed to pay plaintiffs the applicable minimum wage for each hour worked.

59. Defendants' failure to pay plaintiffs the minimum wage was willful within the meaning the FLSA.

60. Plaintiffs seek damages in the amount of their respective unpaid compensation, liquidated damages, attorney's fees and costs, and such other legal and equitable relief as this Court deems just and proper.

**AS AND FOR A SECOND CAUSE OF ACTION**  
**(New York Labor Law Minimum Wage Claims)**

61. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 60 above.

62. Defendants knowingly paid plaintiffs less than the New York State minimum wage, as established in Labor Law § 652 and supporting regulations of the New York State Department of Labor.

63. Defendants' failure to pay plaintiffs the minimum wage was willful within

the meaning of Labor Law § 663.

64. As a result of defendants' willful violations of the Labor Law, plaintiffs are entitled to recover their unpaid compensation, liquidated damages as provided by the Labor Law, attorney's fees and costs, pre- and post-judgment interest, and such other legal and equitable relief as this Court deems just and proper.

**AS AND FOR A THIRD CAUSE OF ACTION**  
**(FLSA Overtime Claims)**

65. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 64 above.

66. Throughout the limitations period covered by these claims, defendants knowingly failed to pay plaintiffs at one and one half times their regular hourly rate of pay for all hours worked in excess of 40 hours per workweek.

67. Defendants' failure to pay plaintiffs overtime was willful within the meaning of the FLSA.

68. Plaintiffs seek damages in the amount of their respective unpaid overtime compensation, liquidated damages as provided in the FLSA, attorney's fees and costs, and such other legal and equitable relief as this Court deems just and proper.

**AS AND FOR A FOURTH CAUSE OF ACTION**  
**(New York Labor Law Overtime Claims)**

69. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 68 above.

70. Defendants knowingly failed to pay plaintiffs the New York State overtime rate of one and one half times their regular hourly rate of pay for all hours worked in excess of 40 hours per workweek.

71. Defendants' failure to pay overtime was willful within the meaning of Labor Law § 663.

72. As a result of defendants' willful violations of the Labor Law, plaintiffs are entitled to recover their unpaid compensation, liquidated damages as provided by the Labor Law, attorneys' fees and costs, pre- and post-judgment interest, and such other legal and equitable relief as this Court deems just and proper.

**AS AND FOR A FIFTH CAUSE OF ACTION**  
**(Illegal Deductions from Gratuities, New York Labor Law § 196-d)**

73. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 72 above.

74. Defendants retained portions of plaintiffs' tips by:

(a) Deducting a percentage of their tips each shift and using such tips to support the restaurant's wine and/or beverage programs;

(b) Deducting a percentage of their tips each shift and using such tips to offset the cost of the restaurant's chocolate and cheese service.

(c) Paying plaintiffs a flat rate for banquet work instead of a percentage of the total food and beverage charge as provided in banquet contracts.

75. Defendants unlawfully distributed the tips earned by plaintiffs to tip ineligible employees.

76. As a result of defendants willful violations of the Labor Law, plaintiffs are entitled to recover their respective unpaid compensation, liquidated damages as provided by Labor Law § 198, attorney's fees and costs, pre-and post-judgment interest, and such other legal and equitable relief as this Court deems just and proper.

**AS AND FOR A SIXTH CAUSE OF ACTION**  
**(New York Spread of Hours Claims)**

77. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 76 above.

78. Plaintiffs regularly worked more than 10 hours in a workday.

79. Defendants willfully and intentionally failed to compensate plaintiffs one hour's pay at the New York State minimum hourly wage rate on days in which they worked more than 10 hours, as required by New York law.

80. As a result of defendants' willful violations of the Labor Law, plaintiffs are entitled to recover their respective unpaid compensation, liquidated damages as provided by Labor Law § 198, attorney's fees and costs, pre-and post-judgment interest, and such other legal and equitable relief as this Court deems just and proper.

**AS AND FOR A SEVENTH CAUSE OF ACTION**  
**(General Business Law § 349(h) Claims)**

81. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 80 above.

82. Defendants charged banquet patrons a 23% gratuity on the total food and beverage cost, which gratuity banquet patrons reasonably believed would be paid to each of the plaintiffs.

83. Defendants violated General Business Law § 349(h) because as a direct consequence of defendants having misled consumers who attend banquets, plaintiffs were deprived of the gratuities they would have received directly from such patrons had they not been misled into believing that plaintiffs' gratuity had not already been paid.

84. Defendants willfully and knowingly violated General Business Law § 349(h).

85. As a result of defendants' violations of General Business Law § 349(h), plaintiffs are entitled to recover their actual damages, attorney's fees, pre-and post-judgment interest, and such other legal and equitable relief as this Court deems just and proper.

**AS AND FOR AN EIGHTH CAUSE OF ACTION**  
**(New York Labor Law Uniform Violations)**

86. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 85 above.

87. Defendants failed to reimburse plaintiffs for the cost of laundering required uniforms in violation of Labor Law § 193 and supporting New York State Department of Labor regulations.

88. As a result of defendants' violation of the Labor Law, defendants are liable to plaintiffs for the cost of cleaning and maintaining such required uniforms.

**PRAYER FOR RELIEF**

**WHEREFORE**, plaintiffs pray for a judgment against defendants awarding the following relief:

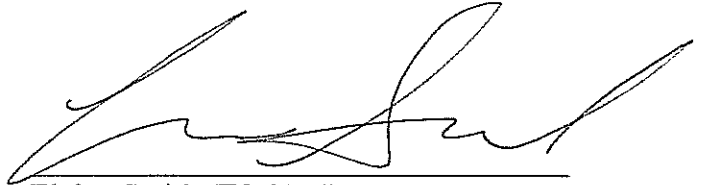
- a) An award of backpay;
- b) Liquidated damages;
- c) Attorney's fees and costs;
- d) Pre-judgment and post-judgment interest; and
- e) Such other and further relief as this Court deems just and proper.

**JURY DEMAND**

Plaintiffs demand a trial by jury on all issues.

Dated: New York, New York  
October 12, 2010

LEWIS, CLIFTON & NIKOLAIDIS, P.C.



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