

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| <p>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,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">-against-</p> <p>PASTA RESOURCES INC., IL POSTO MANAGEMENT LLC d/b/a DEL POSTO RISTORANTE, MARIO BATALI, LIDIA MATTICCHIO BASTIANICH, and JOSEPH BASTIANICH,</p> <p style="text-align: center;">Defendants.</p> | <p style="text-align: center;">Case No. 10-CV-7748 (RJH)</p> <p style="text-align: center;">ANSWER TO AMENDED COMPLAINT</p> |
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Defendants Pasta Resources Inc., Il Posto Management LLC d/b/a Del Posto Ristorante, Mario Batali, Lidia Matticchio Bastianich, and Joseph Bastianich (“Defendants”), by and through their undersigned counsel, Little Mendelson, P.C., for their Answer to Plaintiffs’ Amended Complaint (the “Amended Complaint”), state as follows.

Defendants deny the allegations of unlawful conduct set forth in the Nature of Action paragraph, but admit that Plaintiffs assert those allegations in this Action.

1. Admit the allegations in paragraph 1 of the Amended Complaint, but deny that the Court should exercise supplemental jurisdiction over Plaintiffs’ state law claims.

2. Deny the allegations in paragraph 2 of the Amended Complaint.
3. Deny the allegations in paragraph 3 of the Amended Complaint, except admit that Juan Amastal worked at Del Posto as a food runner and has also held the position of back waiter, and deny knowledge or information sufficient to form a belief as to the allegations concerning Amastal's residence.
4. Deny the allegations in paragraph 4 of the Amended Complaint, except admit that Pamela Benn worked at Del Posto as a captain from April 2006 to April 2008, and deny knowledge or information sufficient to form a belief as to the allegations concerning Benn's residence.
5. Deny the allegations in paragraph 5 of the Amended Complaint, except admit that Juan Camarillo worked at Del Posto from November 2007 to October 2009 and held the positions of food runner, back waiter and front waiter, and deny knowledge or information sufficient to form a belief as to the allegations concerning Camarillo's residence.
6. Deny the allegations in paragraph 6 of the Amended Complaint, except deny knowledge or information sufficient to form a belief as to the allegations concerning Checo's residence.
7. Deny the allegations in paragraph 7 of the Amended Complaint, except admit that Jorge Diaz works at Del Posto as a food runner and has also held the position of back waiter, and deny knowledge or information sufficient to form a belief as to the allegations concerning Diaz's residence.
8. Deny the allegations in paragraph 8 of the Amended Complaint, except admit that Edison Deleg worked at Del Posto as a polisher and stocker, and deny knowledge or information sufficient to form a belief as to the allegations concerning Deleg's residence.

9. Deny the allegations in paragraph 9 of the Amended Complaint, except admit that Eusebio Espinoza worked at Del Posto as a back waiter from 2007 to March 2010, and deny knowledge or information sufficient to form a belief as to the allegations concerning Espinoza's residence.

10. Deny the allegations in paragraph 10 of the Amended Complaint, except admit that Miguel Espinoza works at Del Posto as a back waiter and has also held the position of barista, and deny knowledge or information sufficient to form a belief as to the allegations concerning Espinoza's residence.

11. Deny the allegations in paragraph 11 of the Amended Complaint, except admit that Christian Flores works at Del Posto as a front waiter and has also held the positions of food runner and expeditor, and deny knowledge or information sufficient to form a belief as to the allegations concerning Flores's residence.

12. Deny the allegations in paragraph 12 of the Amended Complaint, except admit that Victor Fonseca worked at Del Posto from June 2007 through July 2010 as a front waiter, and deny knowledge or information sufficient to form a belief as to the allegations concerning Fonseca's residence.

13. Deny the allegations in paragraph 13 of the Amended Complaint, except admit that Camerino Galicia works at Del Posto as an expeditor and has also held the position of food runner, and deny knowledge or information sufficient to form a belief as to the allegations concerning Galicia's residence.

14. Deny the allegations in paragraph 14 of the Amended Complaint, except admit that Alberto Gonzalez worked at Del Posto as a back waiter from June 2006 through September

2009 and a food runner from October to November 2009, and deny knowledge or information sufficient to form a belief as to the allegations concerning Gonzalez's residence.

15. Deny the allegations in paragraph 15 of the Amended Complaint, except admit that Ivan Gonzalez works at Del Posto as a food runner and has also held the positions of polisher and busser, and deny knowledge or information sufficient to form a belief as to the allegations concerning Gonzalez's residence.

16. Deny the allegations in paragraph 16 of the Amended Complaint, except admit that Marco Guaman worked at Del Posto from April 2006 to September 2009 as a back waiter, and deny knowledge or information sufficient to form a belief as to the allegations concerning Guaman's residence.

17. Deny the allegations in paragraph 17 of the Amended Complaint, except admit that David Juncal works at Del Posto as a front waiter, and deny knowledge or information sufficient to form a belief as to the allegations concerning Juncal's residence.

18. Deny the allegations in paragraph 18 of the Amended Complaint, except admit that Jonathan Martinez worked at Del Posto from October 2008 to October 2009 as a stocker, and deny knowledge or information sufficient to form a belief as to the allegations concerning Martinez's residence.

19. Deny the allegations in paragraph 19 of the Amended Complaint, except admit that Fernando Moran works at Del Posto as a back waiter, and deny knowledge or information sufficient to form a belief as to the allegations concerning Moran's residence.

20. Deny the allegations in paragraph 20 of the Amended Complaint, except deny knowledge or information sufficient to form a belief as to the allegations concerning Munoz's residence.

21. Deny the allegations in paragraph 21 of the Amended Complaint, except admit that Christian Ponce works at Del Posto as front waiter, and deny knowledge or information sufficient to form a belief as to the allegations concerning Ponce's residence.

22. Deny the allegations in paragraph 22 of the Amended Complaint, except admit that Nestor Palaquibay works at Del Posto as a food runner, and deny knowledge or information sufficient to form a belief as to the allegations concerning Palaquibay's residence.

23. Deny the allegations in paragraph 23 of the Amended Complaint, except deny knowledge or information sufficient to form a belief as to the allegations concerning Portoviejo's residence.

24. Deny the allegations in paragraph 24 of the Amended Complaint, except admit that Fabian Quiroga worked at Del Posto from 2006 to November 2010 and held the positions of food runner and expeditor, and deny knowledge or information sufficient to form a belief as to the allegations concerning Quiroga's residence.

25. Deny the allegations in paragraph 25 of the Amended Complaint, except admit that Javier Ramirez works at Del Posto as a back waiter, and deny knowledge or information sufficient to form a belief as to the allegations concerning Ramirez's residence.

26. Deny the allegations in paragraph 26 of the Amended Complaint, except admit that Freddy Richards worked at Del Posto as a back waiter from April 2006 to June 2006 and as a front waiter from July 2006 to November 2009, and deny knowledge or information sufficient to form a belief as to the allegations concerning Richards's residence.

27. Deny the allegations in paragraph 27 of the Amended Complaint, except admit that Hugo Rosas works at Del Posto as a front waiter, and deny knowledge or information sufficient to form a belief as to the allegations concerning Rosas's residence.

28. Deny the allegations in paragraph 28 of the Amended Complaint, except admit that Richard Shin worked at Del Posto from May 2007 to November 2007, and deny knowledge or information sufficient to form a belief as to the allegations concerning Shin's residence.

29. Deny the allegations in paragraph 29 of the Amended Complaint, except admit that Klever Viri works at Del Posto as a front waiter, and deny knowledge or information sufficient to form a belief as to the allegations concerning Viri's residence.

30. Deny the allegations in paragraph 30 of the Amended Complaint, except admit that Cornelio Xochimitl works at Del Posto as a back waiter, and deny knowledge or information sufficient to form a belief as to the allegations concerning Xochimitl's residence.

31. Deny the allegations in paragraph 31 of the Amended Complaint, except admit that Abraham Zumba worked at Del Posto as a back waiter and as a food runner, and deny knowledge or information sufficient to form a belief as to the allegations concerning Zumba's residence.

32. Admit the allegations in paragraph 32 of the Amended Complaint.

33. Deny the allegations in paragraph 33 of the Amended Complaint.

34. Deny the allegations in paragraph 34 of the Amended Complaint, except admit that Del Posto Ristorante is located at 85 Tenth Avenue, New York, NY 10011.

35. Deny the allegations in paragraph 35 of the Amended Complaint.

36. Deny the allegations in paragraph 36 of the Amended Complaint, except admit that Mario Batali has an ownership interest in Del Posto.

37. Deny the allegations in paragraph 37 of the Amended Complaint, except admit that Lidia Bastianich has an ownership interest in Del Posto.

38. Deny the allegations in paragraph 38 of the Amended Complaint, except admit that Joseph Bastianich has an ownership interest in Del Posto.

39. Admit the allegations in paragraph 39 of the Amended Complaint, except deny that the Plaintiffs who are no longer employed work any shifts at Del Posto, and deny that double shifts typically exceed ten hours in duration.

40. Admit the allegations in paragraph 40 of the Amended Complaint, except deny that the Plaintiffs who are no longer employed are paid; deny that prior to March or April 2011 defendants had never informed Plaintiffs about the tip-credit provisions of the FLSA; and deny that a manager prepares the tip sheet.

41. Deny the allegations in paragraph 41 of the Amended Complaint.

42. Deny the allegations in paragraph 42 of the Amended Complaint.

43. Deny the allegations in paragraph 43 of the Amended Complaint.

44. Admit the allegations in paragraph 44 of the Amended Complaint, except deny that each double shift exceeds 10 hours per day, and deny that Plaintiffs were entitled to a “spread of hours” premium.

45. Deny the allegations in paragraph 45 of the Amended Complaint.

46. Deny the allegations in paragraph 46 of the Amended Complaint, except admit that Del Posto offers private dining rooms to patrons for social and business events, and admit that those events vary in size.

47. Deny the allegations in paragraph 47 of the Amended Complaint, except admit that it is Del Posto’s practice to memorialize an agreement with a private dining patron regarding, *inter alia*, the cost of food and beverages that will be served and the approximate number of guests.

48. Deny the allegations in paragraph 48 of the Amended Complaint.
49. Deny the allegations in paragraph 49 of the Amended Complaint.
50. Deny the allegations in paragraph 50 of the Amended Complaint.
51. Deny the allegations in paragraph 51 of the Amended Complaint.
52. Deny the allegations in paragraph 52 of the Amended Complaint.
53. Admit the allegations in paragraph 53 of the Amended Complaint.
54. Deny knowledge or information sufficient to form a belief as the allegations in paragraph 54 of the Amended Complaint, except admit that Plaintiffs have attached documents that purport to be consent to sue forms for Eusubio Espininoza and Hugo Rosas.
55. Deny the allegations in paragraph 55 of the Amended Complaint, except admit that Deleg worked at Del Posto as a polisher and stocker; admit that Deleg was responsible, *inter alia*, for cleaning the restaurant's glassware, silverware and specialty dishware, stocking glasses, and staffing the bread station; and admit that Deleg frequently transported food from the kitchen to the dining room, and on occasion prepared and served coffee.
56. Deny the allegations in paragraph 56 of the Amended Complaint, except deny knowledge or information sufficient to form a belief as to the truth of the allegation that Deleg met with other workers to discuss alleged unfair wage practices, alleged verbal and physical abuse, and/or alleged discrimination against Latino workers.
57. Deny the allegations in paragraph 57 of the Amended Complaint, except deny knowledge or information sufficient to form a belief as to the truth of the allegations that Deleg and other Del Posto employees met with the Restaurant Opportunities Center of New York, Inc. ("ROC-NY"), or that Rekha Eanni-Rodriguez drafted the February letter to Del Posto; and admit

that a letter on ROC-NY's letterhead was delivered to Del Posto in February 2010, which letter purported to attach the signatures of Deleg and other persons.

58. Deny the allegations in paragraph 58 of the Amended Complaint, except admit that a group of persons purporting to be affiliated with ROC-NY picketed outside Del Posto on August 4, 2010; admit that said picketers distributed defamatory flyers to passers by; and deny knowledge or information sufficient to form a belief as to the truth of the allegations regarding who participated in the picketing, or that Deleg recorded the picketing with a video camera.

59. Deny the allegations in paragraph 59 of the Amended Complaint, except admit that on or about September 9, 2010, Deleg advised manager Maria Gabriella Naranjo that he wanted to update his W-4 form; admit that Naranjo asked Deleg to provide a copy of his social security card in order to update his W-4 form; admit that Deleg informed Naranjo that the restaurant already had a copy of his social security card on file; admit upon information and belief that Deleg underwent oral surgery on September 20, 2010; admit upon information and belief that Deleg obtained a note from his doctor; deny knowledge or information sufficient to form a belief as to the truth of the allegation that Deleg was taking classes to improve his English language abilities or that his work schedule interfered with such classes; admit that in or about November 2010, Del Posto implemented a business decision to employ a separate banquet staff and that, as a result, regular dining room employees no longer worked banquets; and admit that plaintiffs' counsel sent a letter to Del Posto's attorneys dated December 20, 2010, the content of which speaks for itself.

60. Deny the allegations in paragraph 60 of the Amended Complaint.

61. Deny the allegations in paragraph 61 of the Amended Complaint, except deny knowledge or information sufficient to form a belief as to the truth of the allegation that Deleg participated in the picketing outside Del Posto on February 14, 2011.

62. Deny the allegations in paragraph 62 of the Amended Complaint, except admit that Fabian Quiroga worked at Del Posto as a food runner and was promoted to expediter.

63. Deny the allegations in paragraph 63 of the Amended Complaint, except admit that the a signature purported to be that of Quiroga is attached to the February letter; and deny knowledge or information sufficient to form a belief as to the truth of the allegation that Quiroga began meeting with ROC-NY in December 2009.

64. Deny the allegations in paragraph 64 of the Amended Complaint, except admit that Quiroga was at work on or about November 13, 2010, when a group of persons purporting to be affiliated with ROC-NY began picketing outside of Del Posto.

65. Defendants repeat and reallege their answers to paragraphs 1 through 64 of the Amended Complaint as if each were fully set forth at length herein.

66. Deny the allegations in paragraph 66 of the Amended Complaint.

67. Deny the allegations in paragraph 67 of the Amended Complaint.

68. Deny the allegations in paragraph 68 of the Amended Complaint.

69. Deny the allegations in paragraph 69 of the Amended Complaint.

70. Deny the allegations in paragraph 70 of the Amended Complaint.

71. Deny the allegations in paragraph 71 of the Amended Complaint.

72. Admit that Plaintiffs purport to seek the damages alleged in paragraph 72 of the Amended Complaint, but deny any basis therefor.

73. Defendants repeat and reallege their answers to paragraphs 1 through 72 of the Amended Complaint as if each were fully set forth at length herein.

74. Deny the allegations in paragraph 74 of the Amended Complaint.

75. Deny the allegations in paragraph 75 of the Amended Complaint.

76. Deny the allegations in paragraph 76 of the Amended Complaint.

77. Defendants repeat and reallege their answers to paragraphs 1 through 76 of the Amended Complaint as if each were fully set forth at length herein.

78. Deny the allegations in paragraph 78 of the Amended Complaint.

79. Deny the allegations in paragraph 79 of the Amended Complaint.

80. Admit that Plaintiffs purport to seek the damages alleged in paragraph 80 of the Amended Complaint, but deny any basis therefor.

81. Defendants repeat and reallege their answers to paragraphs 1 through 80 of the Amended Complaint as if each were fully set forth at length herein.

82. Deny the allegations in paragraph 82 of the Amended Complaint.

83. Deny the allegations in paragraph 83 of the Amended Complaint.

84. Deny the allegations in paragraph 84 of the Amended Complaint.

85. Defendants repeat and reallege their answers to paragraphs 1 through 84 of the Amended Complaint as if each were fully set forth at length herein.

86. Deny the allegations in paragraph 86 of the Amended Complaint.

87. Deny the allegations in paragraph 87 of the Amended Complaint.

88. Deny the allegations in paragraph 88 of the Amended Complaint.

89. Defendants repeat and reallege their answers to paragraphs 1 through 88 of the Amended Complaint as if each were fully set forth at length herein.

90. Deny the allegations in paragraph 90 of the Amended Complaint.

91. Deny the allegations in paragraph 91 of the Amended Complaint.

92. Deny the allegations in paragraph 92 of the Amended Complaint.

93. Defendants repeat and reallege their answers to paragraphs 1 through 92 of the Amended Complaint as if each were fully set forth at length herein.

94. Deny the allegations in paragraph 94 of the Amended Complaint.

95. Deny the allegations in paragraph 95 of the Amended Complaint.

96. Deny the allegations in paragraph 96 of the Amended Complaint.

97. Deny the allegations in paragraph 97 of the Amended Complaint.

98. Defendants repeat and reallege their answers to paragraphs 1 through 97 of the Amended Complaint as if each were fully set forth at length herein.

99. Deny the allegations in paragraph 99 of the Amended Complaint.

100. Deny the allegations in paragraph 100 of the Amended Complaint.

101. Defendants repeat and reallege their answers to paragraphs 1 through 100 of the Amended Complaint as if each were fully set forth at length herein.

102. Deny the allegations in paragraph 102 of the Amended Complaint.

103. Deny the allegations in paragraph 103 of the Amended Complaint.

104. Defendants repeat and reallege their answers to paragraphs 1 through 103 of the Amended Complaint as if each were fully set forth at length herein.

105. Deny the allegations in paragraph 105 of the Amended Complaint.

106. Deny the allegations in paragraph 106 of the Amended Complaint.

107. Deny that Plaintiffs are entitled to the relief requested in the "Prayer for Relief."

DEFENSES

FIRST DEFENSE

The Amended Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Individual defendants Mario Batali, Lidia Matticchio Bastianich, and Joseph Bastianich are not and were not Plaintiffs' "employer" within the meaning of the Fair Labor Standards Act or the New York State Labor Law.

THIRD DEFENSE

Defendant Il Posto Management LLC is not and was not Plaintiffs' "employer" within the meaning of the Fair Labor Standards Act or the New York State Labor Law.

FOURTH DEFENSE

Defendant Pasta Resources Inc. is not and was not Plaintiffs' "employer" within the meaning of the Fair Labor Standards Act or the New York State Labor Law.

FIFTH DEFENSE

Defendants are not joint employers.

SIXTH DEFENSE

To the extent that the period of time alluded to in the Amended Complaint, or the period of time alleged later in this action, predates the limitations period set forth in Section 6(a) of the Portal-to-Portal Act, 29 U.S.C. § 255(a), and/or any other applicable statutes of limitation, such claims are barred.

SEVENTH DEFENSE

The Court should not exercise supplemental jurisdiction over the counts in the Amended Complaint that purport to arise under the New York State Labor Law.

EIGHTH DEFENSE

Defendants, at all times, acted in good faith to comply with the FLSA and the New York State Labor Law, and with reasonable grounds to believe that their actions did not violate the statutes cited in the Amended Complaint, and Defendants assert a lack of willfulness or intent to violate the FLSA or the New York State Labor Law as a defense to any claim by Plaintiffs for liquidated damages.

NINTH DEFENSE

Plaintiffs' claims are barred in whole or in part by the provisions of Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, because actions taken in connection with Plaintiffs' compensation were done in good faith in conformity with and reliance upon written administrative regulations, orders, rulings, approvals, interpretations, and written and unwritten administrative practices or enforcement policies of the Administrator of the Wage and Hour Division of the United States Department of Labor.

TENTH DEFENSE

Plaintiffs' claims are barred in whole or in part by the provisions of Section 11 of the Portal-to-Portal Act, 29 U.S.C. § 260, because any acts or omissions giving rise to this action were done in good faith and with reasonable grounds for believing that the actions or omissions were not a violation of the FLSA or the New York State Labor Law.

ELEVENTH DEFENSE

Plaintiffs' claims are barred in whole or in part to the extent that the work they performed falls within exemptions, exclusions, exceptions, or credits provided for in Section 7 of the FLSA, 29 U.S.C. § 207, or the New York State Labor Law.

TWELFTH DEFENSE

Plaintiffs' claims are barred to the extent Plaintiffs failed, refused, and/or neglected to mitigate or avoid the damages complained of in the Amended Complaint, if any.

THIRTEENTH DEFENSE

Any claim for additional compensation by Plaintiffs must be reduced by compensation already paid to Plaintiffs for periods not compensable under the Fair Labor Standards Act and the New York State Labor Law.

FOURTEENTH DEFENSE

Plaintiffs' Amended Complaint is presented in conclusory and vague terms, which prevents Defendants from anticipating all affirmative defenses and claims that may be applicable in this action. Therefore, to the extent permitted under the Federal Rules of Civil Procedure and applicable case law, Defendants reserve the right to assert additional defenses or claims that may become known during the course of discovery.

FIFTEENTH DEFENSE

Plaintiffs' claims are barred to the extent any particular employee petitioned for bankruptcy under either Chapter 7 or Chapter 13 of the United States bankruptcy code, yet failed to disclose potential claims against Defendants as required under applicable bankruptcy laws.

SIXTEENTH DEFENSE

Even assuming, *arguendo*, that any adverse employment actions taken against Plaintiffs were motivated by their participation in activity protected under federal or state law, such adverse actions would have been taken regardless of any alleged retaliatory motivation.

SEVENTEENTH DEFENSE

In addition to the foregoing defenses, Defendants reserve the right to amend their Answer to raise any and all other additional affirmative and other defenses that may become evident

during discovery and during any other proceeding in this action or pursue any available counterclaims against Plaintiffs or any putative class member who joins this action as those claims become known during this litigation.

WHEREFORE, Defendants request judgment against the Plaintiffs with respect to their claims asserted herein, dismissing the Amended Complaint in this action, and entering judgment in favor of Defendants, together with costs and disbursements of the above-entitled action and any other relief this Court may deem just and proper.

Dated: June 24, 2011
New York, New York

/s A. Michael Weber

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