SUMMONS ISSUED

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Attorneys for Plaintiff

-against-

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BROOKLYN OFFICE

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

LIGORIO CORTEZANO HERNANDEZ,

Plaintiff.

COMPLAINT

ECF Case

ELI'S BREAD (ELI ZABAR) INC., ELI ZABAR AND MARK STEWART.

Defendants.

CV 12- 586

Plaintiff, Ligorio Cortezano Hernandez ("Ligorio Hernandez"), by and through

attorneys, Hernandez & Paulonis, P.C., upon their knowledge and belief, as and against 2

defendants, Eli's Bread (Eli Zabar) Inc. ("Eli's Bread"), Eli Zabar and Mark Stewart alleges as

follows:

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NATURE OF THE ACTION

- 6 1. "Eli's Bread" is a 15,000 square foot specialty bakery located at 403 East 91st
- 7 Street, New York, NY. Defendants are the owners and managers of the establishment.
- 8 2. For more than six years prior to the filing of this action until June 2011, defendants
- 9 employed plaintiff to work in Eli's Bread bakery, rolling and cutting dough, oiling bread molds
- 10 and trays, placing dough in molds and trays, painting bread with egg batter and then baking the
- bread. In addition to his regular duties, plaintiff was required to train new employees how to 11
- perform the same duties. 12

- 3. For more than six years prior to the filing of this action until June 2011, plaintiff
- 2 was paid a fixed sum on a weekly basis, despite working in excess of 55 to 58 hours each week.
- 3 His shifts were Monday through Friday, from 8:00 am to 7:00 pm or 7:30 pm any given day.
- 4 4. From June 2011 until November 2011, defendants employed plaintiff as a bread packer and delivery driver.
- 5. From June 2011 until November 2011, plaintiff was paid a fixed sum on a weekly basis despite working in excess of 50 hours a week, Monday through Saturday, 10:00 pm to 8:00 am.
 - 6. At all times mentioned herein, defendants maintained a policy and practice of requiring plaintiff to work in excess of forty (40) hours per week without providing lawful wages required by federal and state law.
 - 7. As a result of these unlawful practices, among others, defendants failed to pay plaintiff overtime wages for the hours worked over forty (40) hours, either at the straight rate of pay, or for any additional overtime premium and one (1) additional hour of pay for each day he worked a spread of hours over 10 hours per day.
- 8. Plaintiff commences this action pursuant to the Fair Labor Standards Act of 1938, 16 29 U.S.C. §201 et seq. ("FLSA"), the Code of Federal Regulations Relating to Labor, Wage and 17 Hour Division, Department of Labor, 29 C.F.R. § 500 et seq. (CFR), New York State Labor Law 18 19 §§ 190 et seq. and 650 et seq. ("NYLL") and Wage Orders of the New York State Commission of Labor codified at N.Y.C.R.R. Tit. 12, §§ 142 et seq and 146 et seq. (NYCRR), seeking 20 compensation for unpaid wages, double damages, liquidated damages, pre-judgment interest, 21 attorney's fees, costs, disbursements and all other available legal remedies for the defendants' 22 violations of federal and state labor laws. 23

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1	JURISDICTION AND VENUE
2	9. The court has subject matter jurisdiction under 28 U.S.C. § 1331 and the Fair
3	Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq The court has supplemental jurisdiction
4	over plaintiff's state law claims pursuant to 28 U.S.C. § 1367(a).
5	10. Venue is proper in this district under 28 U.S.C. § 1391(b) and (c) because all or a
6	substantial part of the events or omissions giving rise to the claims occurred in this district. The
7	defendants maintain their headquarters and offices within this district, and defendants operate a
8	business located in this district. Further, plaintiff was employed by defendants in this district.
9	
10	THE PARTIES
11	11. At all times mentioned herein, from January 1994 through November 2011,
12	plaintiff was a resident of Kings and Queens Counties and employed by defendants to work at
13	Eli's Bread in New York County.
14	12. Eli's Bread (Eli Zabar), Inc. is a domestic for-profit corporation organized and
15	existing under the laws of the State of New York.
16	13. Eli's Bread (Eli Zabar), Inc. maintains its principal place of business at 403 East
17	91st Street, New York, New York 10128.
18	14. Eli's Bread (Eli Zabar), Inc. maintains its principal place of business at 1064
19	Madison Avenue, New York, New York 10028.
20	15. Eli's Bread (Eli Zabar), Inc. conducts business in New York County under the
21	assumed name "Eli's Bread".
22	16. Eli Zabar is an individual engaging in business in this judicial district during all
23	times mentioned herein.

1	17. Eli Zabar is sued individually in his capacity as an owner of Eli's Bread (Eli
2	Zabar), Inc
3	18. Eli Zabar is sued individually in his capacity as an officer of Eli's Bread (Eli
4	Zabar), Inc
5	19. Eli Zabar is sued individually in his capacity as an agent of Eli's Bread (Eli
6	Zabar), Inc
7	20. Eli Zabar is sued individually in his capacity as a sole proprietor conducting
8	business under the assumed name Eli's Bread.
9	21. Eli Zabar is sued individually in his capacity as a partner of a partnership
10	conducting business under the assumed name Eli's Bread.
11	22. Eli Zabar possesses or possessed operational control over Eli's Bread (Eli Zabar)
12	Inc., possesses or possessed and ownership interest in Eli's Bread (Eli Zabar), Inc., and controls
13	or controlled significant functions of Eli's Bread (Eli Zabar), Inc
14	23. Eli Zabar possesses or possessed operational control over Eli's Bread (Eli Zabar)
15	Inc., possesses or possessed and ownership interest in Eli's Bread (Eli Zabar), Inc. and controls
16	or controlled significant functions of Eli's Bread (Eli Zabar), Inc
17	24. Eli Zabar determined the wages and compensation of persons employed to work
18	at Eli's Bread, including the plaintiff, established the schedules of the employees, maintained
19	employee records, and had the authority to hire and fire employees.
20	25. Mark Stewart is an individual engaging in business in this judicial district during
21	all times mentioned herein.
22	26. Mark Stewart is sued individually in his capacity as an owner of Eli's Bread (Eli
23	Zabar), Inc

1	27. Mark Stewart is sued individually in his capacity as an officer of Eli's Bread (Eli
2	Zabar), Inc
3	28. Mark Stewart is sued individually in his capacity as an agent of Eli's Bread (Eli
4	Zabar), Inc
5	29. Mark Stewart is sued individually in his capacity as a sole proprietor conducting
6	business under the assumed name Eli's Bread.
7	30. Mark Stewart is sued individually in his capacity as a partner of a partnership
8	conducting business under the assumed name Eli's Bread.
9	31. Mark Stewart possesses or possessed operational control over Eli's Bread (Eli
10	Zabar), Inc., possesses or possessed and ownership interest in Eli's Bread (Eli Zabar), Inc., and
11	controls or controlled significant functions of Eli's Bread (Eli Zabar), Inc
12	32. Mark Stewart possesses or possessed operational control over Eli's Bread (Eli
13	Zabar), Inc., possesses or possessed and ownership interest in Eli's Bread (Eli Zabar), Inc. and
14	controls or controlled significant functions of Eli's Bread (Eli Zabar), Inc
15	33. Mark Stewart determined the wages and compensation of persons employed to
16	work at Eli's Bread (Eli Zabar), Inc., including the plaintiff, and established the schedules of the
17	employees, maintained employee records, and had the authority to hire and fire employees.
18	Defendants Constitute Joint Employers
19	34. Defendants maintain as their principal place of business a centralized office
20	located at 403 East 91st Street, New York, New York.
21	35. Defendants, Eli Zabar and Mark Stewart, possess operational control over Eli's
22	Bread, possess an ownership interest in Eli's Bread, and control significant functions of Eli's
23	Bread.

1	36. Individual Defendants, Eli Zabar and Mark Stewart, possess operational control
2	over Eli's Bread (Eli Zabar), Inc., possess an ownership interest in Eli's Bread, and control
3	significant functions of Eli's Bread (Eli Zabar), Inc
4	37. Upon information and belief, Eli Zabar serves as or served as Chairman and/or
5	Chief Executive Officer of Eli's Bread.
6	38. Upon information and belief, Mark Stewart serves as or served as Chairman
7	and/or Chief Executive Officer of Eli's Bread.
8	39. Upon information and belief, Eli Zabar serves as or served as Chairman and/or
9	Chief Executive Officer of Eli's Bread (Eli Zabar), Inc
10	40. Upon information and belief, Mark Stewart serves as or served as Chairman
11	and/or Chief Executive Officer of Eli's Bread (Eli Zabar), Inc
12	41. All defendants are associated and joint employers, act in the interest of each other
13	with respect to employees, pay employees by the same method, and share control over the
14	employees.
15	42. Each defendant possessed substantial control over the plaintiff's working
16	conditions, and over the policies and practices with respect to the employment and compensation
17	of the plaintiff.
18	43. Defendants jointly employed the plaintiff and are plaintiff's employers within the
19	meaning of 29 U.S.C. 201 et seq. and the NYLL.
20	44. In the alternative, all defendants constitute a single employer of the plaintiff.
21	Corporation as Alter Ego of Individual Defendants
22	45. Upon information and belief, Eli Zabar and Mark Stewart operate Eli's Bread (Eli
23	Zabar), Inc. as either an alter ego of themselves and/or fail to operate Eli's Bread (Eli Zabar),
24	Inc. as an entity legally separate and apart from their own selves, by, among other things

1	a. failing to adhere to the corporate formalities necessary to operate Eli's Bread (Eli
2	Zabar), Inc. as a corporation;
3	b. defectively forming or maintaining the entity of Eli's Bread (Eli Zabar), Inc., by
4	among other things failing to hold annual meetings or maintaining appropriate
5	company records;
6	c. transferring assets and debts freely as between all Defendants;
7	d. operating Eli's Bread (Eli Zabar), Inc. for their own benefit as the sole or majority
8	shareholder;
9	e. operating Eli's Bread (Eli Zabar), Inc. for their own benefit and maintaining
10	control over it as a closed corporation or closely held controlled entity;
11	f. intermingling assets and debts of their own with Eli's Bread (Eli Zabar), Inc.;
12	g. diminishing and/or transferring assets to protect their own interests; and
13	h. other actions evincing a failure to adhere to the corporate form.
14	Enterprise Coverage
15	46. At all relevant times, defendants were the plaintiff's employers within the
16	meaning of the FLSA and New York Labor Law.
17	47. Defendants had the power to hire and fire plaintiff, control the terms and
18	conditions of employment, and determine the rate and method of any compensation in exchange
L9	for plaintiff's services.
20	48. At all times mentioned, defendants, separately and jointly, had a gross annual
21	volume of sales of not less than \$500,000.00 (exclusive of excise taxes at the retail level that are
22	separately stated).
23	49. Defendants and/or their enterprise were directly engaged in interstate commerce.
4	As examples, numerous items and products that were used in the bakery on a daily basis include

_	terns such as flour, dairy products, fruits, nuts, eggs, oils and spices, among other ingredients
2	produced outside of the State of New York. Defendants also market and sell bakery goods over
3	the internet across state lines.
4	<u>Plaintiff</u>
5	50. At all relevant times, plaintiff was employed primarily as a baker and bread
6	packer and delivery man.
7	51. Plaintiff regularly handled goods bought and sold in interstate commerce, such as
8	bakery ingredients and products produced and shipped outside of the State of New York.
9	52. Plaintiff's work duties required neither discretion nor independent judgment.
10	53. Plaintiff regularly worked in excess of 40 hours per week.
11	54. For more than six years prior to the filing of this action until June 2011,
12	defendants employed plaintiff to work in Eli's Bread bakery, rolling and cutting dough, oiling
13	bread molds and trays, placing dough in molds and trays, painting bread with egg batter and then
14	baking the bread. In addition to his regular duties, plaintiff was required to train new employees
15	how to perform the same duties.
16	55. For more than six years prior to the filing of this action until June 2011, plaintiff
17	was paid a fixed sum on a weekly basis, despite working in excess of 55 to 58 hours each week.
18	His shifts were Monday through Friday, from 8:00 am to 7:00 pm or 7:30 pm any given day.
19	56. From May 31, 2011 until October 29, 2011, defendants employed plaintiff as a
20	bread packer and delivery driver.
21	57. From May 31, 2011 until October 29, 2011, plaintiff was paid a fixed sum on a
22	weekly basis despite working in excess of 50 hours a week, Monday through Saturday, 10 pm to
23	8 am.

1	58. From January 2006 through April 23, 2006, plaintiff received fixed weekly	
2	compensation in the amount of \$745.00.	
3	59. From April 24, 2006 through April 22, 2007, plaintiff received fixed weekly	
4	compensation in the amount of \$845.00.	
5	60. From April 23, 2007 through April 13, 2008, plaintiff received fixed weekly	
6	compensation in the amount of \$870.00.	
7	61. From April 14, 2008 through October 29, 2011, plaintiff received fixed weekly	
8	compensation in the amount of \$870.00.	
9	62. At all times mentioned herein, defendants maintained a policy and practice of	
10	requiring plaintiff to work in excess of forty (40) hours per week without providing lawful wages	
11	required by federal and state law.	
12	63. Plaintiff was not permitted to take breaks from work and did not receive his 30	
13	minute lunch break or afternoon break, as required under NYLL. Rather, he received an	
14	occasional few minutes break during momentary lulls in work.	
15	64. Plaintiff's pay did not vary even when he was required to stay later or work a	
16	longer day than his usual schedule.	
17	65. Defendants did not provide plaintiff with any document or other statement	
18	accurately accounting for all of his actual hours worked, or setting forth the rate of pay for all of	
19	his hours worked.	
20	66. No notification, either in the form of posted notices, or other means, was ever	
21	given to plaintiff regarding overtime and wages as required under the FLSA and NYLL.	
22	67. During his employment with the defendants, plaintiff was paid by weekly	
23	paycheck.	

Defendants' General Employment Practices

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2	68. Defendants regularly required plaintiff to work in excess of forty (40) hours per	
3	week without paying the proper regular rate of pay, overtime wages, or spread of hours	
4	compensation.	
5	69. Defendants maintained a policy and practice of requiring the Plaintiff to work in	
6	excess of forty (40) hours per week without paying him appropriate minimum wage and/or	
7	overtime compensation, or spread of hours compensation, as required by federal and state law.	
8	70. Plaintiff was paid week to week at the same flat rate of pay regardless of the	
9	actual hours worked.	
10	71. Defendants' pay practices resulted in plaintiff not receiving payment for all of his	
11	hours worked, resulting in plaintiff's effective rate of pay falling below the required minimum	
12	wage rate.	
13	72. Defendants failed to post at the workplace, or otherwise provide to plaintiff, the	
14	required wage and hour posters in the bakery, and did not provide plaintiff with statutorily	
15	required wage and hour records or statements of his pay received, in part so as to hide	
16	defendants' violations of the wage and hour laws, and to take advantage of plaintiff's lack of	
17	sophistication in wage and hour laws.	
18	73. Defendants willfully disregarded and purposefully evaded recordkeeping	
19	requirements of FLSA and NYLL by failing to maintain accurate and complete timesheets and	
20	payroll records.	
21	74. Defendants did not pay plaintiff for his full time worked, nor did they pay	

additional overtime pay.

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_	73. Defendants and not provide plaintiff with any document or other statement
2	accurately accounting for his actual hours worked, and setting forth rate of minimum wage and
3	overtime wage.
4	76. Defendants failed to post at the workplace, or otherwise provide to employees, the
5	required postings or notices to employees regarding the applicable wage and hour requirements
6	of the FLSA and NYLL.
7	
8	FIRST CAUSE OF ACTION
9	(VIOLATION OF THE OVERTIME PROVISIONS OF THE FLSA)
10	77. Plaintiff repeats and realleges all paragraphs above as though fully set forth
11	herein.
12	78. Defendants, in violation of the FLSA, failed to pay plaintiff overtime
13	compensation at rates of one and one-half times the regular rate of pay for each hour worked in
14	excess of forty (40) hours in a workweek, in violation of 29 U.S.C. § 207 (a)(1).
15	79. Defendants' failure to pay plaintiff overtime compensation was willful within the
16	meaning of 29 U.S.C. § 255(a).
17	80. Plaintiff has been damaged in an amount to be determined by trial.
18	
19	SECOND CAUSE OF ACTION
20	(VIOLATION OF THE OVERTIME PROVISIONS OF THE
21	NEW YORK LABOR LAW)
22	81. Plaintiff repeats and realleges all paragraphs above as though fully set forth
23	herein.

1	82. Defendants, in violation of the NYLL and associated rules and regulations, failed	
2	to pay plaintiff overtime compensation at rates of one and one-half times the regular rate of pay	
3	for each hour worked in excess of forty (40) hours in a workweek.	
4	83. Defendants failed to pay plaintiff in a timely fashion, as required by Article 6 of	
5	the New York Labor Law.	
6	84. Defendants' failure to pay plaintiff's overtime compensation was willful within	
7	the meaning of NYLL.	
8	85. Plaintiff has been damaged in an amount to be determined by trial.	
9		
10	THIRD CAUSE OF ACTION	
11	(VIOLATION OF THE SPREAD OF HOURS WAGE ORDER	
12	OF THE NEW YORK COMMISIONER OF LABOR)	
13	86. Plaintiff repeats and realleges all paragraphs above as though fully set forth	
14	herein.	
15	87. Defendants failed to pay Plaintiff one additional hour's pay at the basic minimum	
16	wage rate before allowances for each day Plaintiff's spread of hours exceeded ten hours in	
17	violation of NYLL and the Wage Order of the New York Commissioner of Labor.	
18	88. Defendants' failure to pay Plaintiff an additional hour's pay for each day	
19	plaintiff's spread of hours exceeded ten hours was willful within the meaning of NYLL.	
20	89. Plaintiff has been damaged in an amount to be determined at trial.	
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-		TRATER FOR RELIEF
2	WHEREF	FORE, plaintiff respectfully request that this court enter judgment against defendants:
3	a.	Declaring that the defendants have violated the overtime wage provisions of, and
4		associated rules and regulations under, the FLSA as to plaintiff;
5	b.	Declaring that defendants' violation of the provisions of the FLSA was willful as to
6		plaintiff;
7	c.	Awarding plaintiff damages for the amount of unpaid overtime wages, and damages
8		for any improper deductions or credits taken against wages under the FLSA;
9	d.	Awarding plaintiff liquidated damages in an amount equal to 100% of his damages
10		for the amount of unpaid minimum and overtime wages, and damages for any
11		improper deductions or credits taken against wages under the FLSA;
12	e.	Declaring that defendants have violated the overtime wage provisions of, and rules
13		and orders promulgated under, the NYLL as to plaintiff;
14	f.	Declaring that defendants have violated the Spread of Hours Wage Order of the New
15		York Commission of Labor as to plaintiff;
16	g.	Declaring that defendants have violated the recordkeeping requirements of NYLL
17		with respect to plaintiff's compensations, hours, wages and any deductions or credits
18		taken against wages;
19	h.	Declaring that the defendants' violations of the New York Labor Law and Spread of
20		Hours Wage Order were willful as to plaintiff;
21	i.	Awarding plaintiff damages for the amount of unpaid overtime wages, damages for
22		any improper deductions or credits taken against wages, as well as awarding spread of
23		hours pay under the NYLL as applicable;

1	j. Awarding plaintiff liquidated damages in an amount equal to twenty-five percent	
2	(25%) of the total amount of minimum wage, spread of hours pay, and overtime	
3	compensation shown to be owed pursuant to NYLL as applicable;	
4	k. Awarding plaintiff pre-judgment and post-judgment interest as applicable;	
5	1. Awarding plaintiff the expenses incurred in this action, including costs and attorney'	
6	fees; and	
7	m. All such other and further relief as the Court deems just and proper.	
8		
9	DEMAND FOR TRIAL BY JURY	
10	Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, plaintiff demands a	
11	trial by jury on all questions of fact raised by the complaint.	
12 13 14 15 16	Dated: New York, New York February 6, 2012 HERNANDEZ & PAULONIS, P.C.	
17 18 19 20 21 22 23 24 25 26 27 28	By: Michael S. Paulonis, Esq. [MP-8987] 1501 Broadway 12 th Floor New York, New York 10036 T. (646) 606-2190 F. (347) 274-2888	

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

Docket
LIGORIO CORTEZANO HERNANDEZ,
Plaintiff,
-against-
ELI'S BREAD (ELI ZABAR) INC., ELI ZABAR AND MARK STEWART,
Defendants.
COMPLAINT
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