Dias v PS Bros. Gourmet, Inc.
2017 NY Slip Op 31756(U)
August 18, 2017
Supreme Court, New York County
Docket Number: 150259/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY – PART 42

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UZZOL DIAS, MOHAMMED JAMIL, SHUBON KANTIDAS, NARESH MOLHOTRA, and JASINTO POVO,

Plaintiffs,

-against-

PS BROTHERS GOURMET, INC., d/b/a INDUS VALLEY, LAKHVIR SINGH, and PHUMAN SINGH,

Defendants.

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DECISION AND ORDER AFTER INQUEST

Index No. 150259/2015

NANCY M. BANNON, J.

The plaintiffs are former employees of the defendant PS Brothers Gourmet, Inc., doing business as Indus Valley (Indus Valley), which was owned, operated, and managed by the defendants Lakhvir Singh and Phuman Singh. They all worked for various lengths of time as busboys, waiters, food runners, and cooks at the Indian restaurant operated by Indus Valley in Manhattan. They seek a judgment against Indus Valley, Lakhvir Singh, and Phuman Singh pursuant to the federal Fair Labor Standards Act (29 USC §§ 201-219; hereinafter the FLSA) and the Labor Law for unpaid minimum wages, unpaid overtime wages, unpaid spread-of-hours compensation, statutory damages, liquidated damages, and prejudgment interest, plus an award of attorneys' fees.

By order dated October 7, 2016, this court struck the defendants' answer for their failure to appear at two scheduled preliminary conferences, and held an inquest on the issue of damages on February 8, 2017.

At the inquest, all of the plaintiffs testified on their own behalf, and the earnings statements of the plaintiff Jasinto Povo from September 14, 2009, through March 14, 2010, were admitted into evidence. Every plaintiff testified that they worked at least 70-72 hours per week, with one plaintiff asserting that he sometimes worked as many as 75 hours per week.

Each plaintiff described the pay he actually received from the defendants, and how much of the pay was received in cash or by check. Each plaintiff further attested that the defendants never provided notice of their initial rate of pay, the defendants' option to pay them tips in lieu of salary, or any change in the rate of pay, did not request or require the plaintiffs to sign for the receipt of any such notices, and failed to provide annual wage statements. At least one plaintiff testified that the weekly earnings statements provided to him were inaccurate.

Following the inquest, the plaintiffs submitted proposed findings of fact and conclusions of law to the court.

The court credits the testimony of the witnesses and the documentary evidence to the extent indicated in the following findings of fact.

FINDINGS OF FACT

Uzzol Dias worked as a cook for Indus Valley from November 15, 2013, until November 1, 2014. He worked every week for 72 hours per week, and was paid $1,200 in cash each week. Although the times of day during which Dias worked differed from week to week, he was paid $1,200 per week regardless of whether his schedule was "unusual," involved "late" hours, or conformed to regular restaurant business hours. The defendants never provided Dias with anything to sign that had information about his pay.

Mohammed Jamil worked as a "tandoori chef" for Indus Valley from December 1, 2009, until January 9, 2015. He worked every week for 72 hours per week, and was paid $1,050 each week, with $525 paid in cash and $525 paid by check. When his 72 hours of work required him to seven days in any given week, he received "extra money." When those 72 hours involved working only six days in a given week, but Jamil was required to work an extra hour on a Friday or Saturday, he would be paid for that extra hour. Although Jamil did not explicitly recall receiving any documents to sign that said anything about his rate of pay, he was asked by the defendants to sign 10-15 pages in blank, and did so.

Shuban Kantidas worked as a "food runner" for Indus Valley from March 1, 2012, until January 9, 2015. He worked six days each week for 72 hours, and was initially paid $150 per week by check, which was later increased to $270 per week, with $180 paid by check and $90 in cash. He was not provided with any notice or document to sign that mentioned anything about his wages, and the checks that he received did not list the number of hours that he worked in any given week, month, or year. Based on Kantidas's credible testimony, the court reasonably infers that he was paid at the rate of $150 per week from March 1, 2012, until December 31, 2013, and at the rate of $270 per week from January 1, 2014, until January 9, 2015.

Naresh Molhotra began working as a busboy for Indus Valley in "the end" of 2006, and then worked as a food runner until he left his employment in September 2015. He worked 70-72 hours on a fixed six-day-per-week schedule. Molhotra was first paid $150 per week in cash but, "after a few years," his cash pay was increased to $170 per week. By the time he left his employment, he was being paid $350 per week, consisting of a weekly salary paid by check and tips paid in cash. When he was first hired by Indus Valley, it did not provide him with a notice of the rate of his salary. Nor did Indus Valley provide him with a notice when his salary was increased. Based on Molhotra's credible testimony, the court reasonably infers that he worked an average of 72 hours per week, and was paid at the rate of $150 per week from December 1, 2006, until December 31, 2008, at the rate of $170 per week from January 1, 2009, until December 31, 2013, and at the rate of $350 per week from January 1, 2014, until September 30, 2015.

Jasinto Povo worked as a waiter for Indus Valley from January 1, 2009 until March 14, 2010. He worked 70-75 hours per week. He was paid the sum of $175 per week by check and an additional $65 in cash, for a total of $240 per week, plus "a little more" in cash referable to tips. Although his weekly earnings statements from September 14, 2009, through March 14, 2010, recite that he was paid a total of $575 per week, consisting of $175 in salary and $400 in tips, those statements are not an accurate reflection either of what he was actually paid or the year-to-date totals for salary and tips. Hence they are not an accurate reflection of how long he actually worked for Indus Valley during 2009. The earnings statements do not set forth the number of hours that he worked each week, nor his base rate of pay. Indus Valley did not provide him with a notice setting forth the rate of salary and did not ask him to sign any

documents explaining his salary or the hours he was expected to work. Based on Povo's testimony, the court reasonably infers that he was paid $260 per week during the course of his employment with Indus Valley, and that he worked an average of 72 hours per week each week.

Although Indus Valley instituted a clock-in system for its employees in 2013 or 2014, the checks issued to employees did not set forth the number of hours worked by an employee, the hourly rate of pay, or how gross pay was calculated.

CONCLUSIONS OF LAW

I. Evidentiary Standards of Proof

A defaulting defendant admits all traversable allegations in the complaint, including the basic issue of liability. See Amusement Bus. Underwriters v American Intl. Group, 66 NY2d 878 (1985); Cole-Hatchard v Eggers, 132 AD3d 718 (2nd Dept. 2015); Gonzalez v Wu, 131 AD3d 1205 (2nd Dept. 2015). The defendants are, however, "entitled to present testimony and evidence and cross-examine the plaintiff's witnesses at the inquest on damages." Minicozzi v Gerbino, 301 AD2d 580, 581 (2nd Dept. 2003) (internal quotation marks omitted); see Rudra v Friedman, 123 AD3d 1104 (2nd Dept. 2014); Toure v Harrison, 6 AD3d 270 (1st Dept. 2004). The defendants elected not to present such testimony or cross-examine witnesses at the inquest here.

Where a claim is made for unpaid wages under the Labor Law, and an employer has failed to comply with its statutory obligation to preserve complete and accurate payroll records (see Labor Law §§ 196-a, 661; see also 12 NYCRR 142-2.6), the plaintiffs are entitled to the benefits of a reduced burden of proof with regard to the claim. See Carroll v Tangier, 46 Misc 3d 148(A) (App Term, 1st Dept. 2015); see also Matter of Agnello v National Fin. Corp., 1 AD3d 850 (1st Dept. 2003).

Generally, a plaintiff prosecuting a claim under the FLSA "has the burden of proving that he [or she] performed work for which he [or she] was not properly compensated." Anderson v Mt. Clemens Pottery Co., 328 US 680, 687 (1946). Given the statute's remedial purpose and

its broader public policy goals, a plaintiff can meet this burden "through estimates based on his [or her] own recollection." Kuebel v Black & Decker Inc., 643 F3d 352, 362 (2nd Cir. 2011); Jemine v Dennis, 901 F Supp 2d 365, 376 (ED NY 2012); see Doo Nam Yang v ACBL Corp., 427 F Supp 2d 327 (SD NY 2005). As the United States Supreme Court recognized in Anderson, "employees seldom keep . . . records [of hours worked] themselves; even if they do, the records may be and frequently are untrustworthy." Anderson v Mt. Clemens Pottery Co., supra, at 687. Furthermore, it is the employer who has the statutory duty to "keep proper records of wages, hours . . . and who is in position to know and produce the most probative facts concerning the nature and amount of work performed." Id.; see Kuebel v Black & Decker Inc., supra; Jemine v Dennis, supra.

Where, as here, the employer has defaulted, and has thus failed to show that it maintained accurate and complete employment records, a plaintiff only needs to submit "sufficient evidence from which violations of the [FLSA] and the amount of an award may be reasonably inferred." Reich v Southern New England Telecomms. Corp., 121 F3d 58, 66 (2nd Cir. 1997), quoting Martin v Selker Bros., 949 F2d 1286, 1296-1297 (3rd Cir. 1991); see Jemine v Dennis, supra. "An employee's burden in this regard is not high." Kuebel v Black & Decker Inc., supra at 362. The burden then shifts to the employer to come forward with any evidence to either show "the precise amount of work performed," or to "negative the reasonableness of the inference to be drawn from the employee's evidence." Anderson v Mt. Clemens Pottery Co., supra, at 687-688. If the employer fails to produce such evidence, the court may award damages to the employee, even though the result is only "approximate." Id. at 688; see Jemine v Dennis, supra. "In the absence of rebuttal by defendants," (Chen v Jenna Lane, Inc., 30 F Supp 2d 622, 624 [SD NY 1998]), or "where the employer has defaulted, [as here, the employees'] recollection and estimate of hours worked are presumed to be correct." Pavia v Around the Clock Grocery, Inc., 2005 US Dist LEXIS 43229, 2005 WL 4655383, *5 (ED NY, Nov. 15, 2005); see Harold Levinson Assocs., Inc. v Chao, 37 Fed Appx 19 (2nd Cir. 2002); Jemine v Dennis, supra. Likewise, the Labor Law imposes a higher burden on employers who fail to maintain the appropriate records, requiring that they "bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements." Labor Law § 196-a.

Each of the plaintiffs testified at the inquest and, based on his recollection, provided either the precise number of hours he worked, or estimates of hours worked. In addition, at least one plaintiff provided his earnings statements, to the extent they were available, to support

his allegations. These earnings statements were characteristic of those provided by the defendants to the other plaintiffs. The testimony adduced at the inquest, along with the earnings statements of that one plaintiff "provided a sufficient and reasonable basis" (Jemine v Dennis, supra, at 376) upon which to calculate the hours worked by each plaintiff and the wages owed by the defendants to the plaintiffs for the purpose of determining damages, "particularly in the absence of any admissible evidence disputing the approach used by plaintiffs." Id.

II. Minimum Wage and Maximum Hour Laws

A. Basic Minimum Wage

An employer's obligations to pay its employees at a certain minimum rate of pay are codified in the FLSA, articles 6, 7, and 19 of the Labor Law, and title 12, chapter II, subchapter B, part 142 of the New York Code Rules and Regulations.

The FLSA fixes a nationwide minimum hourly wage and a maximum number of hours in a work week for employees in most industries. It provides, however, that "[n]o provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter." 29 USC § 218(a). This

> "Savings Clause operates . . . to allow states, municipalities, or the federal government to pass more protective wage and hour laws in the labor law context. Thus, based upon the face of the statute, the Savings Clause indicates simply that Congress did not intend to preempt the entire labor law field—in the context of labor law statutes, the FLSA merely sets the floor for wages owed and the ceiling for hours that can be worked . . . It is clear that New York and other states are free to legislate in the labor law context in order to set a higher minimum wage or a lower maximum workweek."

DeSilva v North Shore-Long Isl. Jewish Health Sys., 770 F Supp 2d 497, 517-518 (ED NY 2011).

New York has availed itself of the opportunity to legislate in this regard. As relevant here, in New York, "[e]very employer shall pay to each of its employees for each hour worked a wage of not less than: . . . $7.15 on and after January 1, 2007, $8.00 on and after December 31, 2013, [and] $8.75 on and after December 31, 2014." Labor Law § 652(1); see 12 NYCRR 142-2.1(a). As permitted by FLSA, however (see 29 USC § 203[m]), New York has also provided that

> "[n]otwithstanding subdivisions one and two of this section, the wage for an employee who is a food service worker receiving tips shall be a cash wage of at least two-thirds of the minimum wage rates set forth in subdivision one of this section, rounded to the nearest five cents or seven dollars and fifty cents, whichever is higher, provided that the tips of such an employee, when added to such cash wage, are equal to or exceed the minimum wage in effect pursuant to subdivision one of this section and provided further that no other cash wage is established pursuant to section six hundred fifty-three of this article."

Labor Law § 652(4). A "[f]ood service worker" means any employee primarily engaged in the serving of food or beverages to guests, patrons or customers in the hotel or restaurant industries, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receive tips from such guests, patrons or customers." Labor Law § 651(9); see 12 NYCRR 146-1.3 (permitting employees to claim a credit towards the basic minimum hourly rate of pay with respect to certain tipped employees beginning December 31, 2016).

However, an employer may elect to pay tipped employees less than the statutorily prescribed minimum wage only if the employees' total compensation, measured by the sum of tips actually received and hourly wages, equals at least the minimum wage. See 29 USC § 203(m); Labor Law § 652(4); 12 NYCRR 137-1.1-1.3. Moreover, the employer must inform the employee of the tip credit rules. See 29 USC § 203(m); Changxing Li v Kai Xiang Dong, 2017 US Dist LEXIS 32222 (SD NY, Mar. 7, 2017). "Courts have interpreted that provision to require that an employer satisfy two conditions: (1) inform the employee of the 'tip credit' provision of the FLSA, and (2) permit the employee to retain all of the tips the employee receives to qualify for the tip credit." Khereed v W. 12th St. Rest. Grp. LLC, 2016 US Dist. LEXIS 16893, 2016 WL 590233, *2 (SD NY, Feb. 11, 2016) (some internal quotation marks omitted). Likewise, under the Labor Law, employers are entitled to a tip credit for service employees. See 12 NYCRR 146-1.3(a). Similar to federal law, an employer may not take a state tip credit unless the employer has given the employee written notice stating: (1) the amount of tip credit to be taken against the hourly minimum wage; and (2) that extra pay is required if tips are insufficient to

bring the employee up to the basic minimum hourly rate. See Changxing Li v Kai Xiang Dong, supra; 12 NYCRR 146-2.2(a); see also 12 NYCRR 146-1.3 ("An employer may take a credit towards the basic minimum hourly rate if [the tipped employee] receives enough tips and if the employee has been notified of the tip credit as required in section 146-2.2 of this Part."). To be entitled to the credit the employer must provide the notice in English and "any other language spoken by the . . . employee as his/her primary language," and retain an acknowledgment of receipt of the notice for six years. 12 NYCRR 146-2.2(a), (c).

Although Kantidis, Povo, and Molhotra were "food service workers" within the meaning of the Labor Law, inasmuch as their compensation derived in part from tips, the defendants are not entitled to take the credit provided by the FLSA or Labor Law § 652(4), since they did not advise those plaintiffs of their right to an undiminished wage if their tips fell short of the tip credit taken, or of their right to be paid the minimum wage; nor did the defendants provide the plaintiffs with written notice of the tip credit at all, let alone in Bengali or Hindi, which is the native language of two of the plaintiffs, respectively. Consequently, these plaintiffs are entitled to unpaid minimum wages at the full minimum wage rate set forth in Labor Law § 652(1). See Changxing Li v Kai Xiang Dong, supra; Hernandez v JRPAC, Inc., 2016 US Dist LEXIS 75430, 2016 WL 3248493 (SD NY, Jun. 9, 2016).

B. Unpaid Overtime

Restrictions on the number of hours per week that an employer may compel an employee to work are also codified in the FLSA, the Labor Law, and title 12 of the NYCRR.

An employer is obligated to pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate or, if no regular rate has been fixed, at one and one-half times the basic minimum hourly rate, in the manner and pursuant to the methods prescribed by the FLSA. See 12 NYCRR 142-2.2. "The applicable overtime rate shall be paid for each workweek [to] non-residential employees for working time over 40 hours." Id.

All of the plaintiffs here worked for far more than 40 hours per week during their entire tenure at Indus Valley. Kantidis, Povo, and Molhotra, who were paid less than the minimum wage, are thus entitled to overtime pay equal to one and one half times the basic minimum hourly rate for the overtime hours that they worked. See Lanzetta v Florio's Enters., 763 F

Supp 2d 615 (SD NY 2011). Although Dias and Jamil were paid at a rate greater than the statutory minimum wage, the court reasonably infers that their "regular" hourly rate of pay should be calculated by dividing their actual weekly rate of pay by 40, that is, the number of hours constituting a regular work week. The court concludes that they are entitled to overtime pay equal to one and one half times the regular hourly rate, as so calculated, multiplied by the number of overtime hours that they each worked. See Matter of Aldeen v Industrial Appeals Bd., 82 AD3d 1220 (2nd Dept. 2011).

C. Unpaid "Spread-of-Hours" Compensation

"An employee shall receive one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage required in this Part for any day in which . . . the spread of hours exceeds 10 hours." 12 NYCRR 142-2.4.

Each of the plaintiffs worked shifts of 12 hours per day on each and every day they worked at Indus Valley, and are thus entitled to an additional one hour's pay at the basic minimum hourly wage rate for each such day that they worked. See Matter of Aldeen v Industrial Appeals Bd., supra.

F. Liquidated Damages and Prejudgment Interest

> "If any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of this article, he or she shall recover in a civil action the amount of any such underpayments, together with costs all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total of such underpayments found to be due. Any agreement between the employee, and the employer to work for less than such wage shall be no defense to such action."

Labor Law § 663(1) (emphasis added).

Since the defendants did not appear at the inquest, they did not avail themselves of the opportunity to articulate a good faith basis as to why they believed that the underpayment of wages here actually complied with the Labor Law. Hence, the plaintiffs are each entitled to an award of liquidated damages equal to 100% of the underpayments that are due to them. See

Yu G. Ke v Saigon Grill, Inc., 595 F Supp 2d 240 (SD NY 2008). Additionally, prejudgment interest on the awards for wages that are due must be added to the total of unpaid wages and liquidated damages.

E. Statutory Damages

Labor Law § 195(1)(a) obligates an employer to:

> "provide his or her employees, in writing in English and in the language identified by each employee as the primary language of such employee, at the time of hiring, a notice containing the following information: the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer in accordance with section one hundred ninety-one of this article; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; the telephone number of the employer; plus such other information as the commissioner deems material and necessary."

The statute further provides that:

> "Each time the employer provides such notice to an employee, the employer shall obtain from the employee a signed and dated written acknowledgement, in English and in the primary language of the employee, of receipt of this notice, which the employer shall preserve and maintain for six years. Such acknowledgement shall include an affirmation by the employee that the employee accurately identified his or her primary language to the employer, and that the notice provided by the employer to such employee pursuant to this subdivision was in the language so identified or otherwise complied with paragraph (c) of this subdivision, and shall conform to any additional requirements established by the commissioner with regard to content and form. For all employees who are not exempt from overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by New York state law or regulation, the notice must state the regular hourly rate and overtime rate of pay."

Labor Law § 195(3) obligates an employer to

> "furnish each employee with a statement with every payment of wages, listing the following: the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any,

> claimed as part of the minimum wage; and net wages. For all employees who are not exempt from overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by New York state law or regulation, the statement shall include the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked, and the number of overtime hours worked."

Where an employer fails to provide the notices required by Labor Law § 195(1)(a) within 10 business days of an employee's first day of employment, that employee is entitled to recover $50 for each work week that the violations occurred or continue to occur, not to exceed a total of $2,500, together with costs and reasonable attorneys' fees. See Labor Law § 198(1-b). Where an employer fails to provide the statement or statements required by Labor Law § 195 (3), an employee is entitled to recover $100 for each work week that the violations occurred or continue to occur, not to exceed a total of $2,500, together with costs and reasonable attorneys' fees. See Labor Law § 198(1-d).

The plaintiffs established that the defendants violated Labor Law Labor Law §§ 195(1) (a) and (3) by failing to provide the notices and statements required thereby, and failing to obtain the signatures and maintain the records required thereby. The plaintiffs are thus entitled to recover statutory damages, as provided for in Labor Law §§ 198(1-b) and (1-d).

III. Limitations Period

The limitations period applicable to a minimum wage or overtime claim under the Labor Law is six years. See Labor Law § 663(3). This action was commenced on January 9, 2015. Thus, the plaintiffs seek and are entitled to recover with respect to any claim for unpaid wages asserted herein that accrued on or after January 9, 2009.

IV. Conclusions and Calculation of Damages As To Each Plaintiff

A. Uzzol Dias

Uzzol Dias worked from November 15, 2013, until November 1, 2014, for a total of 50 weeks. He worked every week for 72 hours per week, and was paid $1,200 per week. His "regular" rate of pay was thus $30 per hour, or $1,200 per week ÷ 40 hours per standard work

week. He worked 32 overtime hours every week for 50 weeks. His overtime rate of pay is thus $30 per hour x 1.5, or $45 per hour. He is consequently entitled to recover overtime pay equal to $45 x 32 x 50, or $72,000.

Dias worked 6 days per week for 50 weeks, for a total of 300 days, and on each one of those days he worked more than 10 hours. The minimum wage rate was $7.15 per hour from November 15, 2013, until December 30, 2013, during which time Dias worked 41 shifts exceeding 10 hours per day. He is thus entitled to "spread-of-hours" compensation for that period of time, calculated as one hour at minimum wage for each of those shifts, or $293.15. The minimum wage rate was $8.00 per hour from December 31, 2013, until November 1, 2014, during which time Dias worked 259 shifts exceeding 10 hours per day. He is thus entitled to "spread-of-hours" compensation for that period of time, calculated as one hour at minimum wage for each of those shifts, or $2,072. Dias is consequently entitled to total "spread-of-hours" compensation in the sum of $2,365.15.

Since the total amount of Dias's unpaid wages comes to $74,365.15, Dias is entitled to an award of liquidated damages in that amount as well.

Dias is entitled to recover statutory damages in the sum of $2,500 pursuant to Labor Law § 191(1-b), calculated at $50 per week for 50 weeks, and an additional $2,500 pursuant to Labor Law § 191(1-d), calculated as the lesser of $100 per week for 50 weeks or $2,500. He is thus entitled to a total award of statutory damages in the sum of $5,000.

Dias is accordingly entitled to a total award of $153,730.30, plus prejudgment interest at the statutory rate from November 15, 2013.

B. Mohammed Jamil

Mohammed Jamil worked from December 1, 2009, until January 9, 2015, for a total of 265 weeks. He worked every week for 72 hours per week, and was paid $1,050 per week. His "regular" rate of pay was thus $26.25 per hour, or $1,050 per week ÷ 40 hours per standard work week. He worked 32 overtime hours every week for 265 weeks. His overtime rate of pay is thus $26.25 per hour x 1.5, or $39.38 per hour. He is consequently entitled to recover overtime pay equal to $39.38 x 32 x 265, or $333,900.00.

Jamil worked 6 days per week for 265 weeks, for a total of 1,590 days, and on each one of those days he worked more than 10 hours. The minimum wage rate was $7.15 per hour from December 1, 2009, until December 30, 2013, during which time Dias worked 1,272 shifts exceeding 10 hours per day. He is thus entitled to "spread-of-hours" compensation for that period of time, calculated as one hour at minimum wage for each of those shifts, or $9,094.80. The minimum wage rate was $8.00 per hour from December 31, 2013, until December 30, 2014, during which time Jamil worked 309 shifts exceeding 10 hours per day. He is thus entitled to "spread-of-hours" compensation for that period of time, calculated as one hour at minimum wage for each of those shifts, or $2,472.00. The minimum wage rate was $8.75 per hour from December 31, 2014, until January 9, 2015, during which time Jamil worked 9 shifts. He is thus entitled to "spread-of-hours" compensation for that period of time, calculated as one hour at minimum wage for each of those shifts, or $78.75. Jamil is consequently entitled to total "spread-of-hours" compensation in the sum of $11,645.55.

Since the total amount of Jamil's unpaid wages comes to $345,545.55, Jamil is entitled to an award of liquidated damages in that amount as well.

Jamil is entitled to recover statutory damages in the sum of $2,500 pursuant to Labor Law § 191(1-b), calculated as the lesser of $50 per week for 265 weeks or $2,500, and an additional $2,500 pursuant to Labor Law § 191(1-d), calculated as the lesser of $100 per week for 265 weeks or $2,500. He is thus entitled to a total award of statutory damages in the sum of $5,000.

Jamil is accordingly entitled to a total award of $696,091.10, plus prejudgment interest at the statutory rate from December 1, 2009.

C. Shubon Kantidas

Shubon Kantidas initially worked from March 1, 2012, until December 30, 2013, for a total of 96 weeks, during which time he worked every week for 72 hours per week, and was paid $150 per week, which was below the minimum wage rate then applicable. He then worked from December 31, 2013, until December 30, 2014, for a total of 52 weeks, during which time he worked every week for 72 hours per week, and was paid $270 per week, which was below the minimum wage rate then applicable. Thereafter, he worked from December 31, 2014, until

January 9, 2015, for a total of 1.5 weeks, during which time he worked every week for 72 hours per week, and was paid $270 per week, which was below the minimum wage rate then applicable. Since the minimum wage rate was $7.15 per hour from March 1, 2012, until December 30, 2013, Kantidas should have been paid $286 per week for his first 40 hours of work each week during that period. Since the minimum wage rate was $8.00 per hour from December 31, 2013, until December 30, 2014, Kantidas should have been paid $320 per week for his first 40 hours of work each week during that period. Since the minimum wage rate was $8.75 per hour from December 31, 2014, until January 9, 2015, Kantidas should have been paid $350 per week for his first 40 hours of work each week during that period. Kantidas was thus underpaid the sums of $136 per week for the 96 weeks between March 1, 2012, and December 31, 2013, or $13,056; $50 per week for the 52 weeks between January 1, 2014, and December 30, 2014, or $2,600; and $80 per week for the 1.5 weeks from December 31, 2014, until January 9, 2015, or $120. Consequently, Kantidas is entitled to recover the total sum of $15,776 for regular wages that were required to be paid at the minimum wage rate.

Kantidas worked 32 overtime hours every week for 149.5 weeks. His overtime rate of pay for the 96 weeks from March 1, 2012, until December 30, 2013, is the $7.15 per hour minimum wage x 1.5, or $10.73 per hour, the overtime rate of pay for the 52 weeks from December 31, 2013, until December 30, 2014, is the $8.00 per hour minimum wage x 1.5, or $12.00 per hour, and the overtime rate of pay for the 1.5 weeks from December 31, 2014, until January 9, 2015, is the $8.75 per hour minimum wage x 1.5, or $13.13 per hour. He is thus entitled to recover overtime pay in the sums of $32,962.56 from March 1, 2012, until December 30, 2013 ($10.73 x 32 x 96), $19,968.00 from December 31, 2013, until December 30, 2014 ($12.00 x 32 x 52), and $630.24 from December 31, 2014, until January 9, 2015 ($13.13 x 32 x 1.5), for a total award of $53,560.80 in unpaid overtime compensation.

Kantidas worked 6 days per week for 149.5 weeks, for a total of 897 days, and on each one of those days he worked more than 10 hours. The minimum wage rate was $7.15 per hour from March 1, 2012, until December 30, 2013, during which time Kantidas worked 576 shifts exceeding 10 hours per day. He is thus entitled to "spread-of-hours" compensation for that period of time, calculated as one hour at minimum wage for each of those shifts, or $4,118.40. The minimum wage rate was $8.00 per hour from December 31, 2013, until December 30, 2014, during which time Kantidas worked 312 shifts exceeding 10 hours per day. He is thus entitled to "spread-of-hours" compensation for that period of time, calculated as one hour at

minimum wage for each of those shifts, or $2,496.00. The minimum wage rate was $8.75 per hour from December 31, 2014, until January 9, 2015, during which time Kantidas worked 9 shifts. He is thus entitled to "spread-of-hours" compensation for that period of time, calculated as one hour at minimum wage for each of those shifts, or $78.75. Kantidas is consequently entitled to total "spread-of-hours" compensation in the sum of $6,693.15.

Since the total amount of Kantidas's unpaid wages comes to $76,029.95, he is entitled to an award of liquidated damages in that amount as well.

Kantidas is entitled to recover statutory damages in the sum of $2,500 pursuant to Labor Law § 191(1-b), calculated as the lesser of $50 per week for 149.5 weeks or $2,500, and an additional $2,500 pursuant to Labor Law § 191(1-d), calculated as the lesser of $100 per week for 149.5 weeks or $2,500. He is thus entitled to a total award of statutory damages in the sum of $5,000.

Kantidas is accordingly entitled to a total award of $157,059.90, plus prejudgment interest at the statutory rate from March 1, 2012.

D. Naresh Molhotra

As relevant here, Naresh Molhotra worked from from January 9, 2009, until December 31, 2013, for a total of 259 weeks, during which time he worked every week for 72 hours per week, and was paid $170 per week, which was below the minimum wage rate then applicable. He then worked from January 1, 2014, until September 30, 2015, for a total of 91 weeks, during which time he worked every week for 72 hours per week, and was paid $350 per week, which was at or above the minimum wage rate then applicable. Since the minimum wage rate was $7.15 per hour from January 9, 2009, until December 30, 2013, Molhotra should have been paid $286 per week for his first 40 hours of work each week during that period. Molhotra was thus underpaid the sum of $116 per week for the 259 weeks between January 9, 2009, and December 31, 2013, or $30,044. Consequently, Molhotra is entitled to recover that sum for regular wages that were required to be paid at the minimum wage rate.

Molhotra worked 32 overtime hours every week for 350 weeks. His overtime rate of pay for the 259 weeks from January 9, 2009, until December 30, 2013, is the $7.15 per hour

minimum wage x 1.5, or $10.73 per hour, the overtime rate of pay for the 52 weeks from December 31, 2013, until December 30, 2014, is the $8.00 per hour minimum wage x 1.5, or $12.00 per hour, and the overtime rate of pay for the 39 weeks from December 31, 2014, until September 30, 2015, is the $8.75 per hour minimum wage x 1.5, or $13.13 per hour. He is thus entitled to recover overtime pay in the sums of $88,930.24 from January 9, 2009, until December 30, 2013 ($10.73 x 32 x 259), $19,968 from December 31, 2013, until December 30, 2014 ($12.00 x 32 x 52), and $16,386.24 from December 31, 2014, until September 30, 2015 ($13.13 x 32 x 39), for a total award of $125,284.48 in unpaid overtime compensation.

Molhotra worked 6 days per week for 350 weeks, for a total of 2,100 days, and on each one of those days he worked more than 10 hours. The minimum wage rate was $7.15 per hour from January 9, 2009, until December 30, 2013, during which time Molhotra worked 1,554 shifts exceeding 10 hours per day. He is thus entitled to "spread-of-hours" compensation for that period of time, calculated as one hour at minimum wage for each of those shifts, or $11,111.10. The minimum wage rate was $8.00 per hour from December 31, 2013, until December 30, 2014, during which time Molhotra worked 312 shifts exceeding 10 hours per day. He is thus entitled to "spread-of-hours" compensation for that period of time, calculated as one hour at minimum wage for each of those shifts, or $2,496.00. The minimum wage rate was $8.75 per hour from December 31, 2014, until September 30, 2015, during which time Molhotra worked 234 shifts. He is thus entitled to "spread-of-hours" compensation for that period of time, calculated as one hour at minimum wage for each of those shifts, or $2,047.50. Molhotra is consequently entitled to total "spread-of-hours" compensation in the sum of $15,654.60.

Since the total amount of Molhotra's unpaid wages comes to $170,983.08, he is entitled to an award of liquidated damages in that amount as well.

Molhotra is entitled to recover statutory damages in the sum of $2,500 pursuant to Labor Law § 191(1-b), calculated as the lesser of $50 per week for 350 weeks or $2,500, and an additional $2,500 pursuant to Labor Law § 191(1-d), calculated as the lesser of $100 per week for 350 weeks or $2,500. He is thus entitled to a total award of statutory damages in the sum of $5,000.

Molhotra is accordingly entitled to a total award of $346,966.16, plus prejudgment interest at the statutory rate from January 9, 2009.

E. Jasinto Povo

Jasinto Povo worked from January 1, 2009 until March 14, 2010, for a total of 60 weeks, during which time he worked every week for 72 hours per week, and was paid $260 per week, which was below the minimum wage rate then applicable. Since the minimum wage rate was $7.15 per hour from January 1, 2009 until March 14, 2010, Povo should have been paid $286 per week for his first 40 hours of work each week during that period. Povo was thus underpaid the sum of $26 per week for the 60 weeks between January 9, 2009, and December 31, 2013, or $1,560. Consequently, Povo is entitled to recover that sum for regular wages that were required to be paid at the minimum wage rate.

Povo worked 32 overtime hours every week for 60 weeks. His overtime rate of pay for the 60 weeks from January 1, 2009 until March 14, 2010, is the $7.15 per hour minimum wage x 1.5, or $10.73 per hour. He is thus entitled to recover the sum of $20,601.60 from January 1, 2009 until March 14, 2010 ($10.73 x 32 x 60), in unpaid overtime compensation.

Povo worked 6 days per week for 60 weeks, for a total of 360 days, and on each one of those days he worked more than 10 hours. The minimum wage rate was $7.15 per hour from January 1, 2009 until March 14, 2010, during which time Povo worked 360 shifts exceeding 10 hours per day. He is thus entitled to "spread-of-hours" compensation for that period of time, calculated as one hour at minimum wage for each of those shifts, or $2,574.00.

Since the total amount of Povo's undpaid wages comes to $24,735.60, he is entitled to an award of liquidated damages in that amount as well.

Povo is entitled to recover statutory damages in the sum of $2,500 pursuant to Labor Law § 191(1-b), calculated as the lesser of $50 per week for 60 weeks or $2,500, and an additional $2,500 pursuant to Labor Law § 191(1-d), calculated as the lesser of $100 per week for 60 weeks or $2,500. He is thus entitled to a total award of statutory damages in the sum of $5,000.

Povo is accordingly entitled to a total award of $54,471.20, plus prejudgment interest at the statutory rate from January 9, 2009.

V. Joint and Several Liability

Pursuant to the FLSA, an employer includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 USC. § 203(d). "The statutory standard for employer status under the [Labor Law] is nearly identical to that of the FLSA." Hernandez v. JRPAC, Inc., supra, 2016 WL 3248493, *22; see also Khurana v JMP USA, Inc., 2017 US Dist LEXIS 52063 (ED NY, Apr. 5, 2017); Switzoor v SCI Engineering, P.C., 2013 U.S. Dist. LEXIS 129994, 2013 WL 4838826 (SD NY, Sep. 11, 2013). Further, "an employer may include an individual owner who exercises a sufficient level of operational control in the company's employment of employees." Kalloo v Unlimited Mech. Co. of NY, Inc., 977 F Supp 2d 187, 201 (ED NY 2013), citing Irizarry v Catsimatidis, 722 F3d 99 (2nd Cir. 2013).

In determining whether an individual is an employer for purposes of imposing joint and several liability upon that individual with a corporation or limited liability company, courts consider "whether the individual: '(1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" Gillian v Starjem Rest. Corp., 2011 US Dist. LEXIS 115833, 2011 WL 4639842, *4 (SD NY, Oct. 4, 2011); see Donovan v Agnew, 712 F2d 1509 (1st Cir. 1983); Keun-Jae Moon v. Joon Gab Kwon, 248 F Supp 2d 201 (SD NY 2002). In light of the default of the individual defendants Lakhvir Singh and Phuman Singh, the plaintiffs' allegations in the complaint are sufficient to hold those defendants jointly and severally liable with the corporate defendant for unpaid wages, statutory and liquidated damages, prejudgment interest, and attorneys' fees. See Changxing Li v Kai Xiang Dong, supra.

VI. Attorneys' Fees

In their submissions, the plaintiffs request that their application for an award of attorneys' fee be granted, with the assessment of the appropriate amount to be made on separate papers. The court grants this request for relief, and refers that issue to a referee to hear and report.

VII. Conclusion

The court concludes that:

(a) the plaintiff Uzzol Dias is entitled to recover, from the defendants PS Brothers Gourmet, Inc., doing business as Indus Valley, Lakhvir Singh, and Phuman Singh, jointly and severally, the sum of $153,730.30, plus prejudgment interest at the statutory rate from November 15, 2013,

(b) the plaintiff Mohammed Jamil entitled to recover, from the defendants PS Brothers Gourmet, Inc., doing business as Indus Valley, Lakhvir Singh, and Phuman Singh, jointly and severally, the sum of $696,091.10, plus prejudgment interest at the statutory rate from December 1, 2009,

(c) the plaintiff Shubon Kantidas is entitled to recover, from the defendants PS Brothers Gourmet, Inc., doing business as Indus Valley, Lakhvir Singh, and Phuman Singh, jointly and severally, the sum of $157,059.90, plus prejudgment interest at the statutory rate from March 1, 2012,

(d) the plaintiff Naresh Molhotra is entitled to recover, from the defendants PS Brothers Gourmet, Inc., doing business as Indus Valley, Lakhvir Singh, and Phuman Singh, jointly and severally, the sum of $346,966.16, plus prejudgment interest at the statutory rate from January 9, 2009,

(e) the plaintiff Jasinto Povo is entitled to recover, from the defendants PS Brothers Gourmet, Inc., doing business as Indus Valley, Lakhvir Singh, and Phuman Singh, jointly and severally, the sum of $54,471.20, plus prejudgment interest at the statutory rate from January 9, 2009,

(f) the plaintiffs are entitled to an award of attorneys' fees, and the issue of the appropriate amount of that award will be referred to a Judicial Hearing Officer or referee to hear and report.

Accordingly, it is hereby,

ORDERED that Clerk shall enter judgment in favor of the plaintiffs and against the defendants in accordance with the sums specified in (a) through (f) above plus attorneys fees as calculated by a Judicial Hearing Officer ("JHO") or Special Referee, and it is further,

ORDERED that a JHO/ Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

1. the appropriate amount due to the plaintiffs as an award of a reasonable attorneys' fee;

and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/ supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above, and it is further,

ORDERED that counsel shall immediately consult one another and counsel for plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, and it is further,

ORDERED that the plaintiffs shall serve a proposed accounting within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiffs' papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion, and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

This constitutes the Decision and Order After Inquest of the court.

Dated: August 18, 2017

NANCY M. BANNON, JSC