STATE OF NEW YORK
COURT OF APPEALS

ARNEL SAMIENTO, et al.,

Plaintiffs-Appellants

-against-

WORLD YACHT INC., et al.,

Defendants-Respondents.

Supreme Court
County of New York
Index No. 117224/05

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AND THE NEW YORK STATE DEPARTMENT OF LABOR AS AMICI CURIAE

ANDREW M. CUOMO
Attorney General of the
State of New York
120 Broadway
New York, New York 10271
(212) 416-8020

BARBARA D. UNDERWOOD
Solicitor General

MICHELLE ARONOWITZ
Deputy Solicitor General

JENNIFER S. BRAND
Labor Bureau Chief

SASHA SAMBERG-CHAMPION
Assistant Solicitor General

SETH KUPFERBERG
DONYA FERNANDEZ
Assistant Attorneys General

of Counsel

MARIA COLAVITO
Counsel
N.Y. State Department of Labor

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PRELIMINARY STATEMENT

This case arises out of a dispute between companies that operate dining cruises and the waitstaff employed by them. The dispute concerns the employers' practice of retaining for themselves certain payments made by patrons, even as the employers actively misled their patrons into believing those payments were gratuities that would be paid over to the waitstaff.

Plaintiffs are current and former waitstaff employed on dining cruises by defendants-respondents World Yacht Inc., World Yacht LLC, World Yacht Limited Partnership, and New York Cruise Lines Inc. (collectively, "World Yacht"). The plaintiffs allege, inter alia, that this practice (1) violates New York Labor Law § 196-d; (2) violates New York's consumer protection law, General Business Law § 349; and (3) constitutes unjust enrichment.

The court below dismissed all three claims. With respect to the labor law claim, the First Department held that the mandatory payments in question were "not in the nature of a voluntary gratuity" and therefore not covered by Labor Law § 196-d (R. iv). It did so with no analysis, relying primarily on its previous decision in Bynog v. Cipriani Group, Inc., 298 A.D.2d 164 (1st Dep't 2002), aff'd on other grounds, 1 N.Y.3d 193 (2003). The First Department also held that the consumer protection claim should be dismissed because plaintiffs had not alleged sufficient injury to themselves and to cruise patrons (R. iv-v). And it held

that the unjust enrichment claim should be dismissed because it was precluded by an oral agreement between the parties (R. v).[1]

The Attorney General of the State of New York ("Attorney General") and the New York State Department of Labor ("Labor Department") submit this brief amici curiae in support of plaintiffs, asking this Court to reinstate all three claims.

First, the First Department mistakenly held that the protections of Labor Law § 196-d do not apply to the charges in this case, notwithstanding that patrons had been led to believe that the charges were gratuities for the waitstaff. Its brief explanation, that the patrons "paid a mandatory service charge that was not in the nature of a voluntary gratuity" (A. iv), suggests that it placed great weight on the fact that the charges at issue were mandatory rather than voluntary. This analysis cannot be squared with the text of the statute, which expressly prohibits an employer from retaining any part of not only a "gratuity," but also "any charge purported to be a gratuity for an employee." Contrary to the First Department's interpretation, the statute by its terms does not distinguish between voluntary gratuities and mandatory charges, but rather focuses on whether an employer has created a

[1] The First Department modified the judgment of Supreme Court, which dismissed plaintiffs' labor law claim only with respect to one of the three types of payments described in the complaint. Supreme Court also found dismissal of the unjust enrichment claim to be improper on the pleadings, because the existence of an agreement between the parties remained an issue of fact.

reasonable expectation that a payment will be distributed to service employees as a gratuity. That a patron's reasonable expectation is the touchstone of Labor Law § 196-d analysis is confirmed by the statute's legislative history, its interpretation by the Labor Department and the federal courts, and a comparison of its wording with that of analogous statutes in other states.

Equally unjustified was the First Department's dismissal of plaintiffs' claim under General Business Law ("GBL") § 349, which bars any "[d]eceptive acts or practices in the conduct of any business" and authorizes a suit by any person "injured by reason of any violation of this section." The First Department held that plaintiffs had failed to plead either adequate injury to the plaintiffs or adequate "injurious deception toward defendants' patrons." (R. iv-v). But the plaintiffs clearly pled injury to themselves, since they alleged that defendants' deceptive practices directly cost them money. They also pled deception of defendants' patrons. The First Department appears to have imposed a requirement that the deception of the patrons must cause monetary injury to the patrons themselves, but this Court has rejected any such requirement. Instead, plaintiffs were required only to plead that defendants engaged in deceptive practices directed at consumers, and they did so.

Finally, the First Department erred in dismissing plaintiffs' unjust enrichment claim on the ground that plaintiffs had

implicitly agreed to the manner in which they were compensated. The complaint does not require this inference, which accordingly cannot be drawn adversely to plaintiffs on a motion to dismiss. Moreover, the First Department failed to recognize that, except in limited circumstances that do not apply here, the protections of the Labor Law cannot be waived. All three claims should be reinstated.

INTEREST OF THE AMICI CURIAE

Both the Attorney General and the Labor Department have important roles in enforcing the Labor Law. The Attorney General, pursuant to his powers under the Executive Law, regularly brings actions and special proceedings to remedy Labor Law violations, including failure to comply with Labor Law § 196-d. The Labor Department, through administrative proceedings, also enforces the requirements of Labor Law § 196-d and other labor laws. In addition, it is authorized to promulgate regulations implementing the Labor Law, including the provision at issue in this case. Finally, both the Attorney General and the Labor Department provide guidance to employers and workers as to the requirements of Labor Law § 196-d. They each have an interest in ensuring that Labor Law § 196-d is properly interpreted and that it remains an effective tool for combating the abusive practices it was intended to end.

In addition, the Attorney General has a vital interest in the proper interpretation of GBL § 349, a broad consumer-protection law that prohibits a wide variety of deceptive practices. This law originally authorized actions to be brought exclusively by the Attorney General, who continues to take a leading role in its enforcement. The Legislature later amended the law to authorize private causes of action such as this one, in order to permit the Attorney General to focus enforcement efforts on cases with a widespread effect. See Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 3 N.Y.3d 200, 205 (2004). By combining private actions with those brought by the Attorney General, and by barring a broad range of deceptive practices aimed at consumers, GBL § 349 deters deceptive practices and protects an open marketplace, in accordance with the Legislature's intent. Unwarranted restrictions on the scope of the deceptive practices barred by GBL § 349 and additional requirements that must be met before a private action can be brought undermine this intent and make it more difficult for the Attorney General to protect consumers.

QUESTIONS PRESENTED

1. Does Labor Law § 196-d, which forbids an employer to "retain any part of a gratuity or of any charge purported to be a gratuity for an employee," apply to a charge that a patron reasonably believes will serve as a gratuity for service employees?

The Appellate Division answered in the negative.

2. May plaintiffs, who received less money in tips from patrons as a result of defendants' misrepresentations to patrons, receive compensation for their injuries under GBL § 349?

The Appellate Division answered in the negative.

3. Should the plaintiffs' unjust enrichment claim be dismissed on the ground that the parties to the case had formed an agreement as to the plaintiffs' compensation, where no such agreement is alleged in the complaint, and where such an agreement would be void as against public policy?

The Appellate Division answered in the affirmative.

STATEMENT OF THE CASE

A. Statutory Background

Labor Law § 196-d prohibits employers from retaining: (1) "any part of a gratuity"; or (2) "any charge purported to be a gratuity for an employee." It does not prohibit "practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed

to employees" or "the sharing of tips by a waiter with a busboy or similar employee."

General Business Law § 349 declares unlawful all "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." GBL § 349(a). It authorizes private parties, as well as the Attorney General, to bring enforcement actions. The statute permits private actions to be brought by "any person who has been injured by reason of any violation of this section." GBL § 349(h).

B. Factual Background

The following facts are alleged in plaintiffs' complaint and must be taken as true for purposes of this motion to dismiss:

World Yacht operates three types of dining cruises: (1) banquet cruises, (2) general public dining cruises, and (3) special event cruises (R. 33 ¶ 63). On these cruises, it provides luxury dining service, which is comparable to the dining experience offered at New York's highly rated restaurants (R. 32 ¶¶ 56-57). At comparable restaurants, it is customary for patrons to either leave a tip of fifteen to twenty percent of the cost of food and drink, or to pay a service charge of the same amount (R. 21 ¶ 3, 39 ¶ 98, 41 ¶¶ 108-111).

1. Banquet Cruises

On banquet cruises, a patron contracts with World Yacht to charter an entire vessel. World Yacht adds a twenty percent "service charge" to the price charged for food and drink (R. 22 ¶¶ 7-8). It does not collect or pay sales tax on this charge (R. 38-39 ¶¶ 92, 93). Inquiring patrons are told that this service charge is a gratuity or that it is paid to the waitstaff in place of a gratuity (R. 22 ¶¶ 7, 9; 37 ¶ 79). Waitstaff are strictly forbidden to answer customer questions about gratuities (R. 38 ¶ 91). Under all the circumstances, the patrons of World Yacht's banquet cruises are led to believe that the service charge will be distributed to the waitstaff (R. 23 ¶ 12). While patrons are free to leave a gratuity beyond the twenty percent service charge, they rarely do (R. 37-38 ¶ 85).

In fact, none of the "service charge" actually goes to waitstaff (R. 22 ¶ 7). Instead, the waitstaff's sole compensation is a $12-$15 per hour wage, well below what it would be if World Yacht simply passed the service charge along without paying any hourly wage whatsoever (R. 23 ¶ 11; 34-35 ¶¶ 65, 74).

2. Public Dining Cruises

On general public dining cruises, patrons purchase individual tickets either from designated travel and tour ("T & T") groups, or directly from World Yacht (R. 33 ¶ 63). World Yacht tells T & T

groups that a gratuity is included in the ticket price, knowing that this representation will be repeated to patrons (R. 40 ¶¶ 101-102). In addition, patrons often ask World Yacht employees whether a gratuity is included in the ticket price; the employees are instructed to and do tell T & T patrons that it is (R. 40 ¶¶ 103-104). Not surprisingly, T & T patrons rarely leave an additional gratuity (R. 41 ¶ 110).

In fact, World Yacht passes on to its waitstaff only $4 per T & T ticket, the equivalent of a four to seven percent gratuity (R. 34-35 ¶ 70; 41 ¶ 106). This is a fraction of the customary fifteen to twenty percent gratuity, although World Yacht leads T & T patrons to believe, mistakenly, that a customary gratuity is being distributed to waitstaff (R. 41-42 ¶¶ 107-111). The waitstaff's hourly rate for this type of cruise is $5 to $6.50 per hour (R. 35 ¶ 70).

By contrast, non-T & T patrons who buy tickets directly from World Yacht, and who dine alongside T & T patrons, are told in writing by World Yacht that their ticket price is the recommended basis on which to compute a gratuity (R. 40-41 ¶ 105). The gratuities left by these patrons are pooled for distribution among the food service staff (R. 34-35 ¶70).

3. Special Event Cruises

Special event cruises, the third type of cruise, are held on July 4th and New Year's Eve. Tickets to these cruises are sold to individuals at higher prices than is charged for the general public dining cruises (R. 33 ¶ 63). World Yacht tells purchasers of these tickets that an automatic gratuity has been added to the price (R. 42 ¶ 112). However, only a small portion of the purported gratuity is passed along to waitstaff (R. 42 ¶ 113). The hourly wage for special event cruises is similar to that paid for banquet cruises (R. 35 ¶ 74).

Defendants' actions were intended to mislead their patrons and actually did mislead them into believing that a gratuity of customary size would be passed on to the waitstaff. As a result, patrons on the special event cruises did not leave the customary gratuities for the waitstaff that they otherwise would have left (R. 23-24 ¶ 15; 44-45 ¶¶ 124-129).

C. Procedural History

In their complaint, filed on December 5, 2005 (R. 57), plaintiffs brought seven claims (R. 55-57), including (1) that defendants violated Labor Law § 196-d by retaining charges that they had represented to patrons would be distributed to waitstaff as gratuities (R. 36-43); (2) that defendants' misleading representations to patrons violated GBL § 349 and injured the

waitstaff by causing the patrons not to leave the gratuities they otherwise would have left (R. 43-46); and (3) that defendants' conduct constituted unjust enrichment (R. 46-47).

On August 11, 2006, Supreme Court, New York County (Diamond, J.) granted in part and denied in part defendants' partial motion to dismiss[2] (R. 10-13). With respect to the Labor Law § 196-d claim, Supreme Court dismissed the claim as to the banquet cruises, stating that the service charge for such cruises was identical to the charge excluded from the protection of the statute by the First Department's decision in Bynog (R. 11). However, it denied defendants' motion with respect to the other cruises, the patrons of which were told that their payments included a "gratuity" that was distributed to the waitstaff (R. 11-12). The court reasoned that if an employer holds a charge out to customers as a gratuity, that charge should not be deemed "a payment directed to [the employer] for providing service to its customers but, rather, a payment directed to its wait staff" (R. 12). Supreme Court dismissed plaintiffs' General Business Law claim for failure to allege that World Yacht patrons had suffered any harm as a result of defendants' deceptive conduct (R. 12). However, it rejected defendants' argument that the unjust enrichment claim should be dismissed because the parties had agreed to plaintiffs'

[2] Defendants' motion to dismiss did not address plaintiffs' four remaining claims, which allege that defendants violated federal and state wage and hour laws (R. 48-55).

compensation, reasoning that the existence of such an agreement remained a disputed question of fact precluding dismissal on the pleadings (R. 13).

The First Department modified in part and affirmed in part Supreme Court's decision, by order entered April 2, 2007. First, it held that plaintiffs' Labor Law § 196-d claim should have been dismissed in its entirety (R. iii-iv). Relying on Bynog, it reasoned that patrons on all of the relevant cruises "paid a mandatory service charge that was not in the nature of a voluntary gratuity, and thus the failure to remit any of this charge to the waitstaff did not constitute a violation of § 196-d" (R. iv). The First Department found it irrelevant "that certain patrons believed the charge to be in the nature of a gratuity" or that defendants had not charged sales tax on these charges (R. iv). The First Department then upheld Supreme Court's dismissal of the GBL § 349 claim "for failure to allege requisite injury to plaintiffs themselves, as well as injurious deception toward defendants' patrons" (R. iv-v)(internal citations omitted). Finally, it ordered dismissal of plaintiffs' unjust enrichment claim, finding that "the parties had an enforceable oral agreement as to the matter of plaintiffs' compensation" (R. v). The employees have appealed all three rulings to this Court.

On May 29, 2007, the First Department granted plaintiffs leave to take an interlocutory appeal to this Court.

ARGUMENT

POINT I

THE CHARGES DESCRIBED IN THE COMPLAINT ARE "CHARGES PURPORTED TO BE A GRATUITY" WITHIN THE MEANING OF LABOR LAW § 196-D

The First Department ruled that each of the charges described in the complaint was "a mandatory service charge that was not in the nature of a voluntary gratuity," and so excluded from Labor Law § 196-d, even though patrons were led to believe that the charges were gratuities (A. iv). To the extent that the First Department meant that Labor Law § 196-d analysis turns in large part on whether the charge at issue is mandatory or voluntary, such a holding would be inconsistent with the statute's plain text, its legislative history, and the interpretation of the agency charged with its enforcement.

Properly interpreted, Labor Law § 196-d covers any charge, whether mandatory or voluntary, that a reasonable customer would have believed would serve as a gratuity to waitstaff. In emphasizing the voluntariness of a payment rather than a customer's expectations, the First Department's ruling significantly narrows the reach of the statute, which is intended to protect both patrons and employees. If Labor Law § 196-d were interpreted to cover only voluntary payments, employers would have license to mislead patrons as to the cost of their meals and how much of their payments will be directed to service employees, in clear contravention of the

statute's text and purpose. This Court should interpret Labor Law § 196-d's clear directive that employers must distribute to employees any "charge purported to be a gratuity for an employee" to mean exactly what it says. It should also reject any argument that the charges at issue here did not have to be distributed to service employees simply because they were incurred at banquets or special events.

Plaintiffs have clearly alleged that patrons of all three types of cruises reasonably believed that the charges at issue were gratuities to be distributed to waitstaff. This is sufficient to state a Labor Law § 196-d claim, and so that claim should be reinstated in its entirety.

A. A Mandatory Service Charge Can Be Covered By The Labor Law.

Neither the plain language nor the legislative history of Labor Law § 196-d can support the First Department's holding that the charges here are not covered by Labor Law § 196-d because they are not "in the nature of a voluntary gratuity." As a remedial statute, Labor Law § 196-d is to be liberally construed. See Matter of Rizzo v. N.Y. State Div. of Hous. & Cmty. Renewal, 6 N.Y.3d 104, 114 (2005). The First Department's cramped interpretation, which suggests that a mandatory charge cannot be covered by the law, does the opposite, narrowing the law's reach in a way that is inconsistent with its text and statutory purpose.

Labor Law § 196-d provides, in relevant part:

> No employer . . . or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. . . . Nothing in this subdivision shall be construed as affecting . . . practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed to employees, nor to the sharing of tips by a waiter with a busboy or similar employee.

The statute forbids employers from retaining "any part" of either (1) "a gratuity"; or (2) "any charge purported to be a gratuity." It treats identically a "gratuity" and a "charge" that purports to be a gratuity, attaching no significance to whether a payment is made voluntarily as a tip or involuntarily in response to a charge. All that is required is that a charge purports, or "seem[s]," to be a gratuity. Black's Law Dictionary 1271 (8th ed. 2004); Webster's II New College Dictionary 900 (Houghton Mifflin Co., 2001) (to "purport" is "[t]o have or present the appearance, often false, of being or intending").

In treating identically a "gratuity" and "any charge purported to be a gratuity for an employee," Labor Law § 196-d recognizes that customers not only expect to pay a gratuity for food service, but reasonably interpret a mandatory service charge as filling that function. See Heng Chan v. Triple 8 Palace, Inc., Civ. No. 03-6048, 2006 U.S. Dist. LEXIS 15780, at *43-*44 (S.D.N.Y. Mar. 31,

2006).[3] In most circumstances, the distinction between leaving a "voluntary" tip of the customary amount – typically 15 to 20 percent – and being charged a "mandatory" gratuity of the same amount is pure semantics from the customer's standpoint. See St. Paul Hilton Hotel v. Comm'r of Taxation, 298 Minn. 202, 204-05 (1974) (observing that the standard "tip" is "so mandated by social custom" that it is "for all practical purposes . . . an expected 'fee' for service").[4]

Accordingly, New York's tip appropriation law is broadly drafted, without regard for formal labels, to bar employers from retaining money that patrons reasonably expect will be directed to employees, and to "prohibit employers from engaging in the deceptive practice" of falsely representing that money will be distributed to waitstaff. Ngan Gung Restaurant v. New York, 183 B.R. 689, 695 (Bankr. S.D.N.Y. 1995).

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[3] Triple 8 Palace was not followed by Hai Ming Lu v. Jing Fong Restaurant, Inc., Civ. No. 06-2657, 2007 U.S. Dist. LEXIS 64832 (S.D.N.Y. Aug. 31, 2007), which felt constrained to follow the First Department's interpretation of the New York Labor Law. Hai Ming Lu expressed no opinion as to the correctness of the First Department's interpretation. See id. at *6-*7.

[4] Further muddying the supposed distinction, it is unclear that a "mandatory" charge can be enforced as mandatory. A New York district attorney recently declined to prosecute for theft of services a patron who failed to pay a purportedly mandatory gratuity, because payment still could be considered discretionary. See Jane Gottlieb, A Mandatory Gratuity Is Just a Tip, and Thus Not Mandatory, A Prosecutor Says, N.Y. Times, Sept. 15, 2004, at B7.

The legislative history confirms that § 196-d applies to the practice of adding a mandatory service charge to a bill. The Budget Report for the bill summarized it as a bill to "prohibit any employer from accepting any part of the gratuities received by an employee or any part of a service charge" (emphasis added), essentially treating "any charge purported to be a gratuity" as a synonym for "service charge."

B. A Patron's Reasonable Belief Determines Whether A Charge Is "Purported To Be A Gratuity."

The First Department got it precisely backwards when it attached little significance to a customer's belief that a service charge will be distributed to the waitstaff. See R. iv; Bynog, 298 A.D.2d at 165. To the contrary, the patrons' reasonable beliefs are the touchstone in determining whether any charge "purport[s] to be a gratuity for an employee." See Heng Chan v. Sung Yue Tung Corp., Civ. No. 03-6048, 2007 U.S. Dist. LEXIS 7770, at *56-*57 (S.D.N.Y. Feb. 1, 2007); cf. United States v. McGuire, 64 F.2d 485, 491 (2d Cir. 1933) (ticket "purport[ed]" to be lottery ticket within meaning of federal statute where "a person who knows how a lottery ticket looks" would think it to be one); United States v. 306 Cases, 55 F. Supp. 725, 726 (E.D.N.Y. 1944) (substance "purport[ed]" to be catsup where it "conveyed the impression, implied and professed outwardly, to the ordinary person that it was

tomato catsup"), aff'd sub nom., Libby, McNeill & Libby v. United States, 148 F.2d 71 (2d Cir. 1945).

The statute's legislative history confirms that the reasonable expectations of patrons are critical in determining what charges are covered. The drafters of Labor Law § 196-d sought to rectify the "unfair and deceptive practice" of an employer retaining money paid by a patron who "is under the impression that he is giving it to the employee, not to the employer." Mem. of Industrial Commissioner M. P. Catherwood (June 6, 1998), reprinted in Bill Jacket for ch. 1007 (1968), at 4-5 ("Catherwood Mem."). The conduct alleged here is precisely the kind of conduct targeted by Labor Law § 196-d. When defendants mislead patrons into believing that their payments will be distributed to the employees as gratuities in customary fashion, they not only harm the waitstaff but also deceive the patrons, who are led to believe (1) that the establishment is charging less than it actually is for the meal, and (2) that the waitstaff are receiving more than they actually are in gratuities or service charges. For many patrons, the distribution of the service charge is important, as shown by the fact that in this case patrons specifically inquired about it.

Instead of focusing on the reasonable expectations of patrons when paying a charge, the First Department has incorrectly viewed the hourly wages of workers as relevant to the Labor Law § 196-d analysis. Thus, in Bynog it reasoned that because the plaintiffs

in that case were paid a higher hourly wage than other waiters, they already received the benefit of the service charge, and therefore there was no reason to distribute that money to them. But that reasoning misses the point of the statute, which is not to protect a certain level of compensation, but rather to protect the reasonable expectations of the patrons with respect to gratuities — to insure that employees receive any money "purported to be a gratuity," i.e., reasonably believed by patrons to be functioning as a gratuity. Nothing in Labor Law § 196-d authorizes a court to take into account whether the court believes an employer is adequately paying its waitstaff. To the contrary, the Legislature specifically considered and rejected the argument that "as long as the wages of the employee satisfy minimum wage requirements the State should not be concerned about the distribution of tip income." See Catherwood Mem.

Moreover, Bynoq's narrow interpretation of the statute, which seemed aimed to avoid what that court viewed as a windfall to well-paid workers, has had perverse results when applied to the facts of this case, where the plaintiffs are compensated far less generously. The First Department's two cases, when read together, suggest that employers may impose mandatory service charges, discourage tips, and withhold the service charge from their waitstaff, no matter how much the waitstaff are paid. That practice, if given this Court's imprimatur, has the potential to

transform many jobs that currently provide a living wage from a combination of salary and gratuities into minimum wage jobs.[5]

The Labor Department has generally taken the view, consistent with the language and history of Labor Law § 196-d, that whether a charge is "purported to be a gratuity" depends on the reasonable belief of the customer as to its distribution.[6] The Commissioner of Labor is entrusted by statute with promulgating regulations and determining whether employers have failed to comply with a variety of laws, including Labor Law § 196-d. See Labor Law § 218(1). The Labor Department's interpretation of the statute it is charged with enforcing is entitled to deference, and should not be rejected unless "irrational or unreasonable." See Matter of Chesterfield Assocs. v. N.Y. State Dep't of Labor, 4 N.Y.3d 597, 604 (2005) (quoting Matter of Howard v. Wyman, 28 N.Y.2d 434, 438 (1971)).

In opinion letters, the Department has concluded that whether a charge is "purported to be a gratuity" depends on "how the charge is characterized and the reasonable belief of the customer as to its distribution." Op. Letter of March 24, 2000 (Addendum ("Add.")

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[5] For an example of low-paid employees who would be negatively affected by the First Department's rule, see Triple 8 Palace, 2006 U.S. Dist. LEXIS 15780, at *3-*4 (allegations that plaintiffs' hourly wage was the minimum $3.30 permitted with the tip credit, and that the employer still kept much of the fifteen-percent fee added to customers' bills).

[6] The history of the Labor Department's opinions with respect to banquets and other special events is more complex. See infra Point I.D.

11); see Triple 8 Palace, 2006 U.S. Dist. LEXIS 15780, at *21 n.13 (stating that the Labor Department's opinion letters and other statements of policy, "when read as a whole,. . . appear to be concerned not primarily with the details of word choice, but with the impression created in the customers' minds"). Thus, a charge may purport to be a gratuity even if it is not, in fact, a gratuity.

In particular, the Department consistently has said that restaurant patrons, unless told otherwise, expect that mandatory charges denominated "service charges" will be distributed to service employees as gratuities. Accordingly, "[u]nless the customers of the restaurant are expressly advised in writing, on their checks, to the contrary, any fixed 'service charge' imposed on a restaurant check is presumed to be a gratuity and must be distributed in its entirety to the particular employee(s) who served the customer(s) who paid that charge." Op. Letter of August 27, 1999 (Add. 9). This policy has been endorsed by the Department's Industrial Board of Appeals ("IBA"),[7] which has held that establishments wishing to retain a portion or all of "service charges" must make it clear to patrons that they are doing so and

[7] The IBA is an independent board that reviews any rules, regulations, or orders of the Commissioner of Labor. See Labor Law §§ 101-102. The IBA's interpretation, like the Commissioner's, is entitled to considerable deference. See Hudacs v. Frito-Lay, Inc., 90 N.Y.2d 342, 349 (1997) (where the IBA's interpretation "is a rational one, consistent with [the Labor Law's] history and purpose," it should be upheld).

not assume that patrons either are aware of such a practice or "are implicitly agreeable to such behavior."[8] First Republic Corp. of Am. v. Comm'r, No. PR-75-82 (Indus. Bd. Jan. 11, 1984) (R. 66-74, 73); see Sarbro v. Comm'r of Labor, No. PR-17-91 (Indus. Bd. Nov. 13, 1992) (R. 77-81, 80) (service charges "are understood by the patron" to be intended for distribution to the employees that directly provided services), aff'd, 215 A.D.2d 956 (3d Dep't 1995).

C. The Treatment Of Tips Under Other Laws For Other Purposes Has No Application To New York's Gratuity Appropriation Law.

Rather than examining Labor Law § 196-d's text and history, the First Department simply relied on a citation to federal Fair Labor Standards Act ("FLSA") regulations "to the effect that a service charge like that involved here is not a tip." Bynog, 298 A.D.2d at 165 (citing 29 C.F.R. §§ 531.52, 531.55). But these federal regulations do not shed any light on the interpretation of New York's Labor Law § 196-d, for several reasons.

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[8] These Department of Labor opinions refute the defendants' argument, made in the First Department, that the application of Labor Law § 196-d to charges such as are involved in this case would preclude restaurants from following the European servis compris tradition, by which the patron pays a single price for food and service, and does not separately compensate the waitstaff. See Triple 8 Palace, 2006 U.S.Dist. LEXIS 15780, at *15 n.11 (comparing European and American traditions). Employers are free to charge a separate service charge without distributing it to waitstaff, so long as they make clear to their customers that the charge will not function as a gratuity for the waitstaff.

First, while the federal regulations distinguish between "tips" and "service charges," the New York statute expressly covers not only "gratuities" (presumably including "tips"), but also certain charges, namely "any charge purported to be a gratuity for an employee." Had the Legislature intended to limit the reach of Labor Law § 196-d to voluntary "tips" and to exclude all service charges, it would not have expressly included charges which purport to be gratuities though technically they are not.

Second, the federal regulations cited in Bynog distinguish between tips and service charges for a purpose that is utterly irrelevant to the interpretation of New York Labor Law § 196-d. The purpose of this distinction is not to limit, or in any way determine, the compensation received by workers. Instead, the regulations are designed to ensure that more of the money paid to employees by employers is treated as wages and thus subject to, inter alia, Social Security withholding.

Under federal law, the minimum wage that an employer must pay to an employee can be reduced based on the tips that the employee receives. See 29 C.F.R. § 531.50(a). However, these tips are not considered part of the employee's "cash wage" and do not count toward the employer's reduced minimum wage obligation. 29 U.S.C. § 203(m). The employer may only take a "tip credit" against his minimum wage obligation with respect to a "tip," i.e., "a sum presented by a customer as a gift or gratuity in recognition of

some service performed for him," C.F.R. § 531.52, and not for a "compulsory charge for service . . . even if distributed by the employer to his employees." C.F.R. § 531.55(a). Instead, service charges are treated as gross revenues received by the employer and paid out to the employee as "wages." Id. § 531.55(b). As a result, employers must pay Social Security taxes on these sums, increasing the employees' eventual Social Security benefits. See United States v. Indianapolis Athletic Club, Inc., 818 F. Supp. 1250, 1251-52 (S.D. Ind. 1993).

These regulations recognize that service charges may be quite similar to gratuities in practice, when collected by an employer and distributed to employees, but they characterize them differently so as to enlarge the pool of "wages" subject to Social Security tax.[9] The distinction between "tips" and "service charges" ensures that if an employer distributes a service charge to employees, he must also make certain Social Security payments for the benefit of the employees. The federal regulations are not meant to address whether the employer must make that distribution in the first place. Both the federal regulatory scheme and Labor

[9] Moreover, this distinction now has little of the practical significance that it once did even for purposes of identifying the moneys on which employment taxes must be paid. In 1987, Congress amended the tax code to bring tip income within the category of employee "remuneration" on which employees must pay tax. See 26 U.S.C. § 3121(q); United States v. Fior D'Italia, 536 U.S. 238, 252-55 (2002) (Souter, J., dissenting) (describing the new accounting of tips).

Law § 196-d are designed to protect and extend benefits to workers. It would be ironic if a federal regulatory scheme designed to expand the protection of workers under federal law were used to reduce their protection under state law.

Third, the strict line between tips and service charges drawn by the federal regulations for minimum wage calculation and social security tax purposes has not been adopted as a general principle of state law. For example, a New York sales tax regulation treats a mandatory service charge as a gratuity exempt from sales taxation so long as it is "specifically designated as a gratuity." 20 N.Y.C.R.R. § 527.8(l)(2); see Matter of La Cascade, Inc. v. State Tax Comm'n, 91 A.D.2d 784 (3d Dep't 1982). Similarly, a New York Labor Department regulation defining remuneration for purposes such as disability insurance treats a mandatory service charge as a gratuity, stating that where a restaurant "adds to each patron's bill a definite service charge for the benefit of his employees," the value of "gratuities or tips" received by restaurant service workers includes, inter alia, "the total amount of such service charge." 12 N.Y.C.R.R. § 480.4.

Thus, in other contexts a mandatory service charge is treated as a gratuity. Indeed, restaurants themselves often call mandatory charges "gratuities." See, e.g., Pritsker v. Brudnoy, 389 Mass. 776, 777 (1983). For these reasons, and because in any case Labor Law § 196-d covers not only voluntary "tips" or "gratuities" but

also any "charge purported to be a gratuity," the scope of § 196-d cannot be determined by reference to the FLSA tip regulations. To equate the coverage of the two would ignore both the critical difference in the wording of the respective provisions and the reasons why those provisions were worded as they were.

For similar reasons, defendants' reliance on Weinberg v. D-M Restaurant Corp., 53 N.Y.2d 499 (1981), in the court below was misplaced. Weinberg drew a sharp distinction between mandatory and voluntary payments for checking a coat, holding that a mandatory payment but not a voluntary payment should be considered a "fee" or "charge" under the terms of GBL § 201 so as to entitle the coat's owner to sue the restaurant that lost the coat for the coat's full value. See id. at 505-06. The distinction drawn in Weinberg between mandatory and voluntary payments is irrelevant here for two reasons. First, as noted above, § 196-d does not cover only true gratuities, which are arguably voluntary, but also "any charge purported to be a gratuity," which may be mandatory. Thus, the statute itself attaches no significance to the distinction. Second, Weinberg added that it drew the distinction between voluntary and mandatory payments in the context of "a statute not at all concerned with the compensation of the employee or the taxes payable to the State, but rather with whether the employer in permitting gratuities to be paid to the employee has exacted a fee or charge," thereby subjecting the employer to attendant

liabilities. Id. at 507 (emphasis in original). Thus, far from deciding this controversy in defendants' favor, Weinberg suggests that a different result might be appropriate in the context of a statute "concerned with the compensation of the employee," such as the statute at issue in this case.

D. A Banquet Charge, Like Any Charge, Can Purport To Be A Gratuity

The final sentence of § 196-d, which pertains to banquets and other special events, does not support the First Department's conclusion that the statute does not apply to the charges here; rather, it specifically refutes such a conclusion. This sentence is a narrow savings clause that exempts the established practice at banquets and special events whereby "a fixed percentage of the patron's bill is added for gratuities which are distributed to employees" (emphasis added). This sentence confirms that, unless specifically exempted, a mandatory charge is subject to the requirements of Labor Law § 196-d; if this were not so, the savings clause would have no function. At the same time, it does not render banquets wholly exempt from the ambit of § 196-d. Rather, it excludes from the mandate of the statute only the particular practice of collecting service charges and distributing them to employees in a manner different from the manner prescribed by Labor Law § 196-d.

The legislative history of this sentence makes this clear. The hotel industry asked for its inclusion so that the industry could continue its practice of aggregating the mandatory gratuities received at such functions and then distributing the total among all waitstaff "engaged on the function." Without this language, the industry feared, Labor Law § 196-d would force employers to distribute the mandatory charge collected for each meal to the waitstaff who personally served the customer in question, rather than distributing it more broadly. See Letter from New York State Hotel & Motel Association, Inc. (May 21, 1968), reprinted in Bill Jacket for ch. 1007 (1968), at 11-13. As the Labor Department has explained, the banquet clause was enacted for "practical reasons," in recognition of the fact that, in the context of banquets and special functions, "the employer must receive the tip, but must then distribute it to the employees for whom it was intended." Op. Letter of April 5, 2002 (Add. 12).

The banquet clause does not exempt employers from honoring the reasonable expectations of patrons with respect to charges levied at banquets and special functions, and the Department has never read it to do so. For example, "[i]f the employer's agents lead the patron who purchases a banquet or other special function to believe that the contract price includes a fixed percentage as a gratuity, then that percentage of the contract price must be paid in its entirety to the waiters, busboys and 'similar employees' who

work at that function, even if the contract makes no reference to such a gratuity." Opinion of March 26, 1999 (Add. 5).

Before 1995, the Department enforced the law in the same manner with respect to banquets and individual restaurant meals. In both settings, it presumed that a mandatory service charge gave the appearance of being a gratuity and thus must be distributed to waitstaff "unless a service charge is clearly identified in writing as not being a gratuity" (R. 103). By memorandum dated June 1, 1995, the Department reversed its presumption as to a banquet patron's understanding of the term "service charge," with the result that the employer need not distribute such a charge (R. 103). It applied this banquet presumption only to charges specifically termed "service charges," and not to mandatory charges called "gratuities" or to bills for a fixed amount "including gratuities." See Op. Letter of March 20, 1998 (Add. 2). In effect, the Department began presuming for evidentiary purposes that patrons at banquets and special events did not expect mandatory charges denominated "service charges" to be distributed to the waitstaff, and thus employers could retain those charges.

As recently as 2003, the Department joined the Attorney General in a filing before this Court that explained that either evidentiary presumption is rebuttable. It stated that a "wide range of evidence" is always "probative" of whether a service charge purports to be a gratuity. See Brief of the State of New

York as Amicus Curiae in Bynog v. Cipriani Group, Inc., dated September 23, 2003, at 36 (Add. 59). It acknowledged that a contrary interpretation would not comport with the text of Labor Law § 196-d (Add. 59).[10]

Thus, in the banquet context as well as in other contexts, decisive weight must be given to a patron's reasonable expectations. There is no reason to believe that, in the banquet context alone, an employer may retain service charges that patrons reasonably expect will be distributed to service employees. The complaint alleges that cruise patrons were affirmatively misled into believing that charges denominated "service charges" would be distributed to service employees as gratuities (e.g., R. 37 ¶ 79). This allegation states a claim under Labor Law § 196-d sufficient to survive a motion to dismiss.

E. A Comparison With Other States' Statutes Confirms That Labor Law § 196-d Reaches Mandatory Charges That A Customer Would Reasonably Expect To Be Distributed to Waitstaff As A Gratuity.

Several other states have enacted analogous statutes that similarly bar employers from confiscating tips intended for

[10] Subsequent opinions of the Department are at tension with the views expressed in the Bynog brief. The Labor Department is currently reviewing its enforcement policies regarding gratuities. It intends to draft and promulgate a regulation in the near future that will provide more specific guidance to workers and employers by more clearly defining what does and does not constitute a charge "purported to be a gratuity."

waitstaff. An examination of these statutes confirms that Labor Law § 196-d should be construed to cover mandatory charges that customers reasonably expect to be given to service employees as gratuities.

A number of states besides New York have tip appropriation statutes that include a phrase analogous to the term "charge purported to be a gratuity for an employee." These statutes are worded in a variety of ways, but they all aim at the same problem — deception of patrons as to the disposition of certain charges — and they all either establish that customer expectation is paramount or simply require that "service charges" be distributed to service employees. For example, Massachusetts requires distribution to waitstaff of "any fee designated as a service charge, tip, gratuity, or a fee that a patron or other customer would reasonably expect to be given to a wait staff employee, service employee, or service bartender in lieu of, or in addition to, a tip." Mass. Gen. Laws ch. 149, § 152A. Similarly, Minnesota requires distribution of any "obligatory charge . . . which might reasonably be construed by the guest, customer, or patron as being a payment for personal services rendered by an employee." Minn. Stat. § 177.23, subd. 9.[11] That every other state with a tip

[11] See also Hawaii Rev. Stat. § 481B-14 ("Any hotel or restaurant that applies a service charge for the sale of food or beverage services shall distribute service charge directly to its employees as tip income or clearly disclose to the purchaser of the (continued...)

appropriation statute that requires the distribution of more than "tips" and "gratuities" themselves would apply its law to the charges at issue here simply confirms that, when enacting the phrase "charge purported to be a gratuity," the New York Legislature had in mind mandatory charges that customers would reasonably expect to be given to employees as gratuities.[12]

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[11](...continued)
services that the service charge is being used to pay for costs or expenses other than wages and tips of employees."); Mont. Code Ann. § 39-3-201(6)(b) (defining "service charge" as "an arbitrary fixed charge added to the customer's bill by an employer in lieu of a tip" and requiring that such charge must be distributed to waitstaff); Tenn. Code Ann. § 50-2-107(a)(1) (providing that any charge "denominated as a 'service charge,' 'tip,' 'gratuity,' or otherwise, which amount is customarily assumed to be intended for the employee or employees who have served the customer . . . shall be paid over to or distributed" to such employees); Owens v. Univ. Club of Memphis, No. 02A01-9705-cv-00103, 1998 Tenn. App. LEXIS 688, at *32-*33 (Ct. App. Tenn. Oct. 15, 1998) (stating that relevant question pursuant to Tennessee's statute is not what the charge is called, but what the customers' reasonable expectations are); see also N.H. Rev. Stat. Ann. § 279:26-b (eff. June 29, 2007), available at 2007 NH ALS 263, at *118-*119 (providing that a "tip," which is "the property of the employee receiving the tip," includes both money "given" by a customer or money "added as a gratuity or service charge to a customer's bill, in recognition of service performed").

[12] Other states' tip statutes simply require the distribution of "tips" and/or "gratuities" without further defining those terms. See, e.g., Cal. Lab. Code § 351 ("No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron . . . ."); Nev. Rev. Stat. § 608.160(1)(a) (making it unlawful for employer to "[t]ake all or part of any tips or gratuities bestowed upon his employees); Wyo. Stat. § 27-4-507(a) ("Tips and gratuities received by an employee or employees shall be the sole property of such employee or employees and not payable in whole or in part to the employer or any other person."). None have received judicial or administrative construction as to the question posed by this case,
(continued...)

Only Kentucky's tip statute facially excludes application to defendants' practices, and in so doing it demonstrates the language that the New York Legislature would have used had it wanted to accomplish the results that flow from the First Department's construction. Kentucky's law precludes an employer from requiring an employee to "remit to the employer any gratuity." See Ky. Rev. Stat. Ann. § 337.065(1). It then defines the term "gratuity" as "voluntary monetary contribution." Id. § 337.065(2). Kentucky's statute thereby appears to exclude mandatory service charges from its coverage.

The First Department has interpreted New York's tip statute as the equivalent of Kentucky's, permitting an employer to add a separate "service charge" line to a patron's bill, represent to the patron that this money is to be paid to the employees serving the patron, and then keep the money. But because New York, like other states, requires the sharing not only of gratuities but also of other similar charges, New York's law should be read consistently with the laws of those other states, and not with the idiosyncratic law of Kentucky.

Examination of the laws of other states also confirms that Labor Law § 196-d should be read to cover service charges in the

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[12](...continued)
so it is possible that they, too, require the distribution to waitstaff of mandatory charges that patrons reasonably believe will be distributed to waitstaff.

banquet context, and that its sentence pertaining to banquets and special functions simply provides that employers may distribute such charges more widely. By regulation, Minnesota has achieved precisely the same policy, providing that where "more than one direct service employee provides direct service to a customer or customers in a given situation such as banquets, cocktail and food service combinations, . . . [dividing gratuities] among the direct service employees is not a violation [of the tip statute]." See Minn. R. 5200.0080(8). Massachusetts simply makes clear that its tip statute applies to "banquet facilities" just as it does to "restaurants" and any "other place where prepared food and or beverages are served." Mass. Gen. Laws ch. 149, § 152A(a). In contrast, Tennessee's statute states that it "does not apply to bills for food or beverage served in a banquet, convention or meeting facility segregated from the public-at-large, except such facilities that are on the premises of a private club." Tenn. Code Ann. § 50-2-107(a)(3). Presented with this choice, New York's Legislature has chosen to enact Minnesota's policy, not Tennessee's.

Accordingly, Labor Law § 196-d requires the distribution to employees of a mandatory service charge that is reasonably understood by patrons to be a gratuity for waitstaff, and the courts below improperly dismissed the claim brought under that statute.

POINT II

PLAINTIFFS ALLEGE SUFFICIENT DECEPTION AND INJURY TO SUPPORT A CLAIM FOR CONSUMER FRAUD UNDER GBL § 349

The First Department also erred in dismissing plaintiffs' claim that World Yacht's practices violated GBL § 349, which bars any "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." GBL § 349(a). The First Department found that plaintiffs had failed to allege "injurious deception" to consumers or the requisite injury to themselves sufficient to support the claim. Both conclusions are incorrect.

The first conclusion rests on a mistaken view of the applicable law, because GBL § 349 does not require "injurious deception" of consumers. Rather, an action under GBL § 349(h) requires only that: (1) the challenged practice be "consumer-oriented"; (2) the act be "misleading in a material way"; and (3) the plaintiff (not necessarily the consumer) have suffered concrete injury as a result. Stutman v. Chemical Bank, 95 N.Y.2d 24, 29 (2000). Here, the complaint's allegations describe a practice that is deceptive to consumers and misleads them in a material way. GBL § 349(h) permits plaintiffs, who have been concretely injured as a result of defendants' deceptive practices, to sue without a showing that specific consumers have been injured.

The second conclusion is belied by the face of the complaint. Plaintiffs clearly allege that they were directly injured by

defendants' false statements, in that patrons failed to directly pay a customary gratuity in reliance on the defendants' representations that certain charges would be distributed to service employees in lieu of such a gratuity (e.g., R. 44-45 ¶¶ 124-129).

A. General Business Law § 349 Bars Defendants' Deceptive Practice Without A Showing Of Concrete Injury To Consumers

By its terms, GBL § 349(a) is extremely broad, barring any deceptive acts or practices in the conduct of any business or the furnishing of any service. It applies to "virtually all economic activity, and [its] application has been correspondingly broad" Karlin v. IVF Am., Inc., 93 N.Y.2d 282, 290 (1999) (citations omitted). The statute's broad and flexible wording "'provide[s] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State.'" Id. at 291 (quoting Mem. for the Dep't of Law to the Governor, reprinted in 1963 N.Y. Legislative Annual, at 105). It seeks to secure an "honest market place" where "trust," not deception, prevails. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25 (1995) (citation omitted).

The challenged act or practice must be "consumer-oriented," which this Court has defined as conduct that is not "unique to the

parties" to the case, but rather has a "broader impact on consumers at large." Id. It also must be "misleading in a material way," which means that it is "likely to mislead a reasonable consumer acting reasonably under the circumstances." Stutman, 95 N.Y.2d at 29 (quotation marks omitted). However, it "need not reach the level of common-law fraud to be actionable." Id. There is no requirement that any consumer have relied on the deceptive practice in entering into any transaction. Id. at 30.

The complaint alleges that World Yacht affirmatively made representations to consumers that were likely to mislead reasonable patrons and did mislead actual patrons. For example, World Yacht affirmatively told its banquet cruise patrons and otherwise led them to believe, falsely, that a twenty-percent "service charge" would be remitted to plaintiffs as a gratuity (R. 22 ¶ 9). It similarly led patrons of its general public dining and special event cruises to believe, falsely, that their ticket prices included a gratuity to the waitstaff of the customary amount (R. 40 ¶¶ 101-104; 42 ¶¶ 112-113). World Yacht's policy, on all its cruises, of misleading patrons into believing that their payments included a customary gratuity for waitstaff affects numerous consumers and falls well within the consumer-oriented ambit of GBL § 349. This practice is deceptive and to consumers, who expect their payments to be directed to the waitstaff, not to the

employer. Indeed, the Legislature has specifically concluded as much in enacting Labor Law § 196-d. See Point I, supra.

The First Department found that plaintiffs' claim failed in part because they did not plead "injurious deception toward defendants' patrons" (R. iv-v) (citing Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, 56 (1999)). The court did not explain what would constitute "injurious deception" of consumers — a requirement found nowhere in GBL § 349 or the cases interpreting that statute. If the court believed that pecuniary injury to consumers is required, it was mistaken, because a GBL § 349 claim does not require a showing of pecuniary injury suffered by consumers as a result of reliance on defendants' misrepresentations. A plaintiff need not show pecuniary injury to anyone — either himself or the consuming public — to make out a GBL § 349 claim, though lack of pecuniary injury to himself may limit damages. Stutman, 95 N.Y.2d at 29. And consumer reliance on a misrepresentation is not an element of a GBL § 349 claim, although the First Department has repeatedly and erroneously held that it is. See Stutman, 95 N.Y.2d at 30 & n.1 (noting First Department's repeated application of "an incorrect standard in section 349 cases, imposing a reliance requirement when in fact there is none").

To be sure, an action under GBL § 349 requires a showing that defendants' deceptive actions with respect to consumers caused

"some harm to the public at large," Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264 (2d Cir. 1995), but such harm need not take the form of pecuniary injury to consumers, or even consumer reliance on the misrepresentation. Rather, as noted above plaintiff need only show that the deceptive conduct was "likely to mislead a reasonable consumer acting reasonably under the circumstances." Stutman, 95 N.Y.2d 24 at 29 (internal quotation marks omitted). It is sufficient that the deception concern a matter of public interest, i.e., a matter that would be of concern to the reasonable consumer.

The misrepresentations alleged in the complaint here satisfy both the requirement of public harm and the requirement of being misleading to a reasonable consumer. Misrepresentations to consumers as to how workers are paid harm the public interest and undermine the "honest marketplace," see State v. Feldman, 210 F. Supp. 2d 294, 302 (S.D.N.Y. 2002). Reasonable consumers care whether workers receive the customary gratuities — as evidenced by the fact that consumers in this case asked about the subject and defendants felt the need to mislead them.[13] Deceptive conduct towards consumers that not only impedes consumers' informed decision-making but also violates the Labor Law is sufficiently

[13] In recognition of the consumer interest in labor practices, companies are barred by federal law, as well as the laws of various states, from making various misleading statements as to their workforces. See Kasky v. Nike, Inc., 27 Cal. 4th 939, 964 (2002).

"contrary to the public interest" as to constitute a violation of GBL § 349. See Securitron, 65 F.3d at 264.

Small cannot support the First Department's holding, because that case turned on what injury is sufficient to confer standing on a plaintiff, and not what harm is sufficient to define a deception prohibited by GBL § 349. These two issues are virtually identical when the plaintiff is the consumer, as in Small, but not when the plaintiff injured by the misrepresentation is someone other than the consumer, as in this case. In Small, plaintiffs alleged that they would not have bought cigarettes from defendants had they known of the cigarettes' addictive properties. They sought a refund of the purchase price of the cigarettes, and disclaimed any recovery for injuries caused by the very addictive qualities that, they alleged, would have caused them not to buy the cigarettes if better informed. Under plaintiffs' theory, this Court held, the alleged deception would be "both act and injury." 94 N.Y.2d at 56. By disclaiming any recovery for injuries caused by the deception, plaintiffs had eliminated any "connection between the misrepresentation and any harm from, or failure of, the product." Id. The only injury to themselves was the entirely abstract one of having been deprived of the ability to make "free and informed choices," id., and that was not "a legally cognizable injury," id. at 57.

Thus, Small says nothing about the deception of consumers required to satisfy GBL § 349(a), and simply holds that a plaintiff "is not an injured person with standing" to sue under GBL § 349(h) if his only injury is the abstract one of having been deceived. Melino v. Equinox Fitness Club, 6 A.D.3d 171, 172 (1st Dep't 2004) (no injury caused by term in health club contract that was misleading as to how much money would be refunded upon cancellation where plaintiff had no plans to cancel); see, e.g., Baron v. Pfizer, 42 A.D.3d 627 (3d Dep't 2007) (no injury in having been prescribed drug for use not approved by federal regulators without allegation that drug either caused plaintiff harm or was ineffective for prescribed use); Donahue v. Ferolito, Vultaggio & Sons, 13 A.D.3d 77, 78 (1st Dep't 2004) (deceptive representation that beverage would have health benefits not injurious where plaintiffs neither alleged that price was inflated nor that their health was adversely affected). Small has no application here, where, as discussed further below, plaintiffs have alleged concrete, monetary damage to themselves, directly caused by defendants' deceptive conduct toward consumers. No more is required to make out a GBL § 349 claim.

B. Plaintiffs Alleged Sufficient Injury to Themselves to Establish Standing To Bring a GBL § 349(h) Claim

The First Department also erred in holding that plaintiffs had failed to allege the requisite injury to themselves to confer upon them standing to bring a suit under GBL § 349(h). Plaintiffs allege that defendants' deceptive practices toward consumers directly caused them monetary harm, in that consumers did not leave the customary gratuities that they would have left if not deceived. This suffices to confer upon them standing for a GBL § 349(h) claim.

GBL § 349(h) authorizes "any person" injured "by reason of any violation of this section" to sue for injunctive relief and damages. Claims under GBL § 349(h) need not be brought by the deceived consumer nor by "someone standing in the shoes of a consumer." Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA, Inc., 344 F.3d 211, 218 (2d Cir. 2003). Rather, a plaintiff need only establish that he or she has been injured "by reason of" defendant's deceptive practices toward consumers. Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA, Inc., 3 N.Y.3d 200, 207 (2004) ("Blue Cross")(citing Securitron, 65 F.3d at 264) (allowing a corporation to use GBL § 349 to halt a competitor's deceptive consumer practices); see, e.g., Excellus Health Plan, Inc. v. Tran, 287 F. Supp. 2d 167, 180 (W.D.N.Y. 2003) (permitting competitor to sue); Capitol Records, Inc. v. Wings Digital Corp., 218 F. Supp. 2d 280, 286 (E.D.N.Y. 2002) (same).

The breadth of the standing conferred by GBL § 349(h), like the breadth of the deceptive conduct prohibited, is intentional. As originally enacted in 1970, GBL § 349 authorized only the Attorney General to bring an action. Karlin, 93 N.Y.2d at 291. However, "the broad scope of section 349, combined with the limited resources of the Attorney General, [made] it virtually impossible for the Attorney General to provide more than minimal enforcement." Id. 291 (citation omitted). To supplement the Attorney General's enforcement powers, the Legislature amended GBL § 349 in 1980 to create a private right of action. Id. This change was intended to "encourage private enforcement of these consumer protection statutes, add a strong deterrent against deceptive business practices and supplement the activities of the Attorney General in the prosecution of consumer fraud complaints." Mem. of Gov. Carey, 1980 N.Y. Legis. Ann., at 147. The broad private right of action allows the Attorney General to "focus on those cases that have a widespread effect" while individuals prosecute other actions. Blue Cross, 3 N.Y.3d at 205 (citing Mem. of Atty Gen. (June 10, 1980), at 2, reprinted in Bill Jacket for ch. 346 (1980)).

The First Department did not explain why plaintiffs' allegations of injury to themselves were insufficient. Its conclusion is puzzling, since the complaint is replete with allegations that the defendants' deceptive practices cost plaintiffs considerable money, not simply by failing to pass monies

actually paid by consumers on to plaintiffs, but also by dissuading patrons who would otherwise have left tips in the customary amount from doing so (e.g., R. 45 ¶¶ 126-129).

Blue Cross, the only case cited by the First Department on this point, lends no support to the ruling. In that case, a health insurer sued tobacco companies for injuries suffered by smokers, for which injuries the insurer had compensated the smokers. This Court held that, under standard principles of subrogation, the claim had to be brought by the smokers, not by the health insurer, whose injury was derivative of the smokers'. It reiterated the general rule that any "actually (nonderivatively) injured party" could sue under GBL § 349(h): "We hold simply that what is required is that the party actually injured be the one to bring suit." 3 N.Y.3d at 208. Here, the plaintiffs allege direct and concrete injury caused by defendants' conduct, and so Blue Cross has no application other than to reaffirm plaintiffs' standing to sue.

POINT III

THE UNJUST ENRICHMENT CLAIM SHOULD BE REINSTATED

The First Department incorrectly dismissed plaintiffs' unjust enrichment claim on the ground that "the parties had an enforceable oral agreement as to the matter of plaintiffs' compensation" (R. v). Its reasoning was flawed in two respects.

First, as the trial court correctly stated (R. 13), the existence of such an oral agreement was not established for purposes of this motion to dismiss. The complaint did not describe such an agreement or create a necessary inference that one existed, nor do plaintiffs concede that one existed. On a motion to dismiss, the pleading "is to be afforded a liberal construction," with plaintiff given "the benefit of every possible favorable inference." Leon v. Martinez, 84 N.Y.2d 83, 87 (1994). The nature of any understanding that formed between plaintiffs and defendants as to how plaintiffs would be compensated is a question that is left unanswered by the complaint and must be addressed after factual development.

Second, under the circumstances alleged in the complaint, any contractual or quasi-contractual agreement between the parties to a course of dealing that violates Labor Law § 196-d is void as against public policy. Agreements that waive or modify protections provided by the Labor Law are recognized only if "the legislative purpose is not undermined" thereby, for example if "substitute provisions . . . have been arrived at through good-faith negotiation to meet the exigencies of the affected industry." Matter of Am. Broadcasting Cos. v. Roberts, 61 N.Y.2d 244, 247 (1984). There are no indications from the complaint that any good-faith negotiation occurred, the complaint specifically alleges that the plaintiffs did not receive compensation equivalent to what they

would have received had the Labor Law been followed (e.g., R. 23 ¶ 11). Moreover, far from creating an inevitable inference that these modifications of the Labor Law addressed an industry exigency, the complaint specifically alleges that defendants failed to follow prevailing industry norms.

Accordingly, the First Department's reliance on the existence of an implied agreement between the parties was erroneous, and the unjust enrichment claim should be reinstated.

CONCLUSION

For the foregoing reasons, the First Department's opinion should be reversed, and the plaintiffs' claims pursuant to Labor Law § 196-d and GBL § 349(h) and for unjust enrichment reinstated.

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New York, NY

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York

By: _____
Sasha Samberg-Champion
Assistant Solicitor General
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-6229

BARBARA D. UNDERWOOD
Solicitor General

MICHELLE ARONOWITZ
Deputy Solicitor General

JENNIFER S. BRAND
Labor Bureau Chief

SASHA SAMBERG-CHAMPION
Assistant Solicitor General

SETH KUPFERBERG
DONYA FERNANDEZ
Assistant Attorneys General

of Counsel

MARIA COLAVITO
Counsel
N.Y. State Department of Labor

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