

PEOPLE OF THE STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL  
LABOR BUREAU

IN THE MATTER OF THE INVESTIGATION OF  
ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL  
OF THE STATE OF NEW YORK OF

AOD No. #15-135

TKNYC, LLC d/b/a PER SE

**ASSURANCE OF DISCONTINUANCE**

In July 2013, the Office of the Attorney General of the State of New York (“OAG” or “Attorney General”) commenced an investigation of TKNYC, LLC d/b/a Per Se (“Per Se Restaurant” or “Per Se”) pursuant to New York Executive Law § 63(12), and examined whether Per Se’s administration of fees designated as “service charges” on customer bills for banquet and private dining services during the 21-month period from January 2011 to September 2012 violated Article 6 (regarding payment of wages), Section 196-d (regarding tip appropriation) of the New York Labor Law (“NYLL”); and New York Codes, Rules, and Regulations (“N.Y.C.R.R.”), Title 12, Chapter II, Subchapter B, Part 146 (“Hospitality Wage Order”). This Assurance of Discontinuance (“AOD”) contains the Attorney General’s Findings in connection with this investigation of Per Se and the relief agreed to by OAG and Per Se (“the Parties”).

**FINDINGS**

**Introduction and Background**

1. TKNYC, LLC is a corporation organized under the laws of the State of Delaware. It owns and operates a restaurant called Per Se Restaurant, located at 10 Columbus Circle, New York, New York.

2. Per Se employs food service workers in New York State. One of the operations of Per Se is to provide private dining and banquet services to its customers.

### **Legal Framework**

3. New York Labor Law § 196-d states that “[n]o employer . . . 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.”

4. In 2008, the New York Court of Appeals decided Samiento v. World Yacht, Inc., which held that § 196-d’s prohibition applied to mandatory service charges on a customer bill or invoice “when it is shown that employers represented or allowed their customers to believe that the charges were in fact gratuities for their employees.” 10 N.Y.3d 70, 81 (2008). The “expectation of the reasonable customer” was the touchstone; the Court looked at whether a “reasonable patron . . . would understand a service charge was being collected in lieu of a gratuity.” Id. at 79. If a reasonable customer would believe that a charge was collected in lieu of a gratuity, then those monies must be turned over to employees.

5. After World Yacht was decided, the New York State Department of Labor enacted a new Hospitality Wage Order (“HWO”), which went into effect on January 1, 2011. The HWO created specific requirements for employers to follow with respect to the administration of mandatory surcharges. In particular, the HWO established a rebuttable presumption that “any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for ‘service’ or ‘food service,’ is a charge purported to be a gratuity.” 12 N.Y.C.R.R. § 146-2.18(b). The HWO also required that employers notify their customers when an administrative charge is *not* purported to be a gratuity by using specific language in customer agreements stating, in

a manner sufficient to ensure that a reasonable customer would understand, that such a charge is not a gratuity and will not be distributed to the employees who provided service to the guests. 12 N.Y.C.R.R. § 146-2.19(a), (b) (c). Under the HWO, the employer has the burden of proving, by clear and convincing evidence, that the notification is sufficient to ensure that a reasonable customer would have understood that such a charge was not purported to be a gratuity. 12 N.Y.C.R.R. § 146-2.19(b).

**Practices Related to Payment of Wages**

6. The OAG’s investigation revealed that at the time the HWO was enacted, Per Se had been applying an additional 20% charge to invoices for its private dining events. In private dining agreements with customers, Per Se referred to this fee as a “service charge.” The relevant section of the agreement reads as follows:

- 5. Service Charges.
  - (a) A service charge of twenty percent (20%) will be added to all food and beverage charges incurred by the Client.

7. Per Se used the fees from this service charge towards the operational revenue of the restaurant, which was used to pay the full range of expenses routinely incurred by Per Se, including cost of goods, rent, marketing, utility, maintenance, and employee wages and benefits, among other things. The fees were not distributed as gratuities to employees working private dining events.

8. The OAG’s investigation did not show that Per Se was aware of the HWO’s new requirements when the HWO went into effect in January 2011. When the HWO went into effect, Per Se did not modify the language in its private dining agreements and invoices to conform with the HWO’s new requirements to explicitly inform customers that the service charge was not exclusively a gratuity but instead was an administrative fee that

went towards the general operation of the restaurant. Thus, a violation of N.Y.L.L. § 196-d and 12 N.Y.C.R.R. § 146-2.19 was found beginning in January 2011.

9. Per Se, on its own, changed the language of its private dining agreements to conform with the HWO in September 2012. For purposes of this AOD, the twenty-one month period from January 2011 to September 2012, during which Per Se's private dining agreements did not comply with the HWO's requirements, is referred to as the "Relevant Period."

10. The OAG's investigation also showed that, during the Relevant Period, members of Per Se's private dining staff responded to some email inquiries of prospective private dining customers by referring to the 20% charge as a charge for "service" or "gratuity."

11. The investigation showed that the wait staff at Per Se are paid anywhere from approximately \$16.60 to \$28.00 an hour, depending on their position. These rates are considerably in excess of the state minimum wage rates which were applicable during the relevant time period. The investigation showed that wait staff at Per Se also received optional gratuities in addition to those amounts and had the opportunity to earn additional compensation by working hours in excess of 40 in a workweek.

12. In approximately September 2012, Per Se, on its own, changed the language of its private dining contracts, invoices, and related documents to explicitly state that the 20% charge is not a gratuity, as the HWO requires. Specifically, the 20% charge was renamed an "operational charge." The new contract language, which complies with the HWO and is still in effect, reads:

5. Other Charges.

(a) An operational charge of twenty percent (20%) will be added to all food and beverage charges incurred by the Client. This is not a gratuity and is subject to 8.875% sales tax. The charge is used to offset operational expenses associated with executing your event.

13. The investigation shows that since at least February 2014, the private dining staff has described the 20% charge in accordance with the requirements of the HWO.

### **PROSPECTIVE RELIEF**

WHEREAS, OAG finds that the practices described above constituted a violation of, *inter alia*, New York Executive Law § 63(12), Article 6 (regarding payment of wages), Sections 196-d (regarding tip appropriation) of the New York Labor Law; and New York Codes, Rules, and Regulations (“N.Y.C.R.R.”), Title 12, Chapter II, Subchapter B, Part 146 (Hospitality Wage Order); and

WHEREAS, Per Se neither admits nor denies OAG’s Findings set forth above; and

WHEREAS, OAG is willing to accept the terms of this AOD pursuant to New York Executive Law § 63(15) and to discontinue its investigation of Per Se; and

WHEREAS, the Parties believe that the obligations imposed by this AOD are prudent and appropriate; and

WHEREAS, Per Se is represented by counsel, Mark Racanelli of O’Melveny & Myers;

IT IS HEREBY UNDERSTOOD AND AGREED, by and between Per Se and OAG that:

### **PERSONS BOUND BY AOD**

14. This AOD binds Per Se Restaurant, located at 10 Columbus Circle, New York, New York, its officers, owners, successors, and assigns, to the extent applicable.

**Compliance with Wage and Hour Law and Other Laws Governing Employment Practices**

15. Per Se hereby acknowledges that it understands and will continue to comply with all applicable federal, state and local laws, including but not limited to the New York Labor Law and the New York Codes, Rules, and Regulations, Title 12. Specifically:

- a. In all documents and correspondence, including but not limited to contracts, menus, bills, and invoices, whether electronic or in paper form, that are provided to private dining and banquet customers and make reference to service, operational, and/or administrative charges, Per Se will continue to include a statement that such charges are not gratuities and will not be distributed as gratuities to the employees who provided services to customers.
- b. The statement shall continue to use ordinary language readily understood that shall appear in a font size similar to surrounding text, but no smaller than a 12-point font.
- c. The statement shall continue to be sufficient to ensure that a reasonable customer will understand that such a charge is not purported to be a gratuity.
- d. If private dining customers ask, in writing or orally, whether any service, operational, or administrative charges are gratuities, Per Se shall continue to respond in the manner set forth in paragraph 12(a).
- e. Per Se shall continue not to advise any customer, orally or in writing, that any service, operational, and/or administrative charge

is “equivalent to a gratuity” or “in lieu of a gratuity” or use other similar language when referring to such charges.

### **Complaint Procedures**

16. Per Se agrees that within forty five (45) days of the full execution of this AOD (“the effective date”), Per Se shall amend its existing internal procedures to allow (a) for employees to complain to Per Se regarding alleged violations of this AOD; and (b) for the investigation and resolution of any complaints regarding alleged violations of this AOD or the New York Labor Law. Per Se agrees to maintain a written log of any such complaints, whether formal or informal, by employees or their representatives. The written log shall include a written record of at least the following information: (a) name of the complainant; (b) nature of the complaint; (c) person to whom the complaint was made; (d) date of complaint; (e) nature of the investigation into the complaint; (f) resolution of the complaint; (g) date of the resolution of the complaint; and (h) the date the resolution was communicated to the complainant. Per Se agrees to maintain this written log for a period of at least three (3) years after the AOD is executed (“the effective period”), to advise the Attorney General within thirty (30) days of receipt of any such complaint, and to provide the Attorney General with the written log entry relating to the complaint within thirty (30) days of the resolution of such complaint.

### **Training**

17. Within thirty (30) days of the effective date, Per Se agrees to train all of its currently employed supervisory personnel and all staff responsible for coordination and/or sales related to Per Se’s private dining and banquet functions (“private dining coordinators”) on the requirements set forth in paragraph 15 of this AOD and the applicable laws. Per Se agrees to train all newly-hired or newly-promoted supervisors and

private dining coordinators within ten (10) business days from their start date of employment on the same topics.

**Posting**

18. Per Se agrees to continue to post all notices for employees as required by law, in English and any other language that Per Se uses to communicate to its employees, including those setting forth employee rights with respect to wage and hour laws and the right to be free from retaliation.

**Recordkeeping**

19. Per Se agrees to create and maintain all AOD-related documents as defined by this AOD for the effective period, provided that Per Se further agrees to comply with the six (6) year recordkeeping requirements as set forth in New York Labor Law and 12 N.Y.C.R.R. Part 146. As defined by this AOD, "AOD-related documents" means documents relating to this agreement used and maintained by Per Se with respect to the employment of individuals by Per Se within the State of New York, including: (a) all documents showing how Per Se explains any administrative, service, and/or operational charges to customers; and (b) the complaint log and any underlying documents relating to the complaint log described in paragraph 16 of this AOD.

**Ongoing Cooperation**

20. Per Se agrees to cooperate with any ongoing requests by the Attorney General for information related to this investigation and to ensure compliance with this AOD.

**Compliance Officer**

21. Within thirty (30) days of the effective date, Per Se agrees to designate an employee or agent, who must have familiarity with this AOD and access to appropriate

resources with respect to the New York Labor Law, the Hospitality Wage Order and the Fair Labor Standards Act, as the "Compliance Officer." This designation is subject to the prior approval of the Attorney General. Such approval shall not be unreasonably withheld. The Compliance Officer must be an employee or agent of Per Se with managerial responsibility over all of Per Se's operations in New York State, including banquet and other services. Should Per Se open any future establishments, the Compliance Officer must also have managerial responsibility over those establishments as well.

22. Within fifteen (15) days of approval by the Attorney General of such designation of the Compliance Officer, Per Se agrees that it shall provide the Attorney General a written description of the Compliance Officer's job responsibilities, and the Compliance Officer shall sign a written certification that s/he has read and understands this AOD and his/her job responsibilities as they relate to the AOD, and has access to appropriate resources with respect to New York Labor Law questions, which responsibilities include but are not limited to (a) creating documents, internal policies, or procedures that the Compliance Officer determines are necessary in order for Per Se to comply with this AOD and the NYLL, and (b) upon receipt of a complaint about a violation of the AOD or the NYLL, conducting confidential interviews, when appropriate, with employees outside of the presence of other employees, managers, or owners.

23. Within thirty (30) days of approval by the Attorney General of the Compliance Officer, the Compliance Officer shall identify any additional actions or internal policies or procedures, beyond those outlined in paragraphs 15 through 20, to the extent that the Compliance Officer determines any are necessary for Per Se to take or adopt in order to comply and assure its ongoing compliance with this AOD. The Compliance

Officer shall also be responsible for preparing and submitting to the Attorney General the documentation set forth in Paragraph 16 of this AOD.

24. Per Se agrees that the Compliance Officer will be responsible for implementing all requirements referenced in paragraphs 15 through 20 of the AOD.

**Penalty for Non-Compliance**

25. If an Attorney General inspection or review of AOD-related documents shows a material violation of paragraphs 15 through 20 of this AOD, Per Se agrees to pay \$2,500 in liquidated damages for each material violation per day for each day the material violation remains uncured, separate and apart from any other penalty or damages associated with the violation, provided that prior to any assessment of liquidated damages Per Se shall be notified of the violation in writing, effective two days after mailing via first class mail, after which Per Se shall have fifteen (15) days to cure the violation. In the event that Per Se fails to cure the violation, the calculation of damages shall begin as of the date the violation first occurred.

**MONETARY PAYMENT**

26. Per Se agrees to pay Five Hundred Thousand Dollars (\$500,000.00) (“the Settlement Funds”) in resolution of the Attorney General’s investigation, which will be paid directly to employees in the following manner:

- a. Within thirty (30) days after execution of this AOD, Per Se shall create a list of employees and former employees entitled to restitution (the “Eligible Employees”) and a formula for the payment amount each Eligible Employee will receive (the “Formula”). The list of Eligible Employees and Formula are subject to prior approval by the OAG.

- b. Within thirty (30) days after the OAG's approval of the list of Eligible Employees and the Formula, as described in paragraph 24(a), above, and after making reasonable efforts to determine the address of each Eligible Employee, Per Se will send a payment in the form of a check payable to each Eligible Employee whose address has been determined for his or her share of the Settlement Funds pursuant to the Formula. Each payment will be accompanied by a letter from Per Se explaining the payment, a sample of which is set forth as Exhibit A hereto. Within ten (10) business days of sending a letter and payment to an Eligible Employee as described herein, Per Se shall provide the OAG with documentation sufficient to demonstrate that such a payment has been made.
- c. To the extent that Per Se is unable to determine the address of an Eligible Employee through reasonable efforts, it shall place a notice on Per Se's website regarding this AOD and which instructs employees who worked from January 2011 through September 2012 to contact Per Se to determine whether they are Eligible Employees entitled to restitution under this AOD. Such a notice, if posted after Per Se has undertaken reasonable efforts to obtain the addresses of Eligible Employees, shall be sufficient to satisfy Per Se's obligation to locate Eligible Employees under this section of the AOD.

- d. If, after the foregoing efforts, Per Se is unable to locate any Eligible Employee or a payment is returned, Per Se shall provide OAG with the last known address, telephone number, date of birth and Social Security number of the relevant Eligible Employee.
- e. If, for whatever reason, any Eligible Employee does not cash his or her check within two years after the payment is sent or Per Se attempted to locate the Employee, either because (i) the check was returned, or (ii) Per Se was unable to determine the Eligible Employee's address, Per Se shall void any check and send the payment amount for the relevant Eligible Employee to the Office of Unclaimed Funds, Office of the New York State Comptroller.

**Confessions of Judgment**

27. Per Se agrees to execute an Affidavit of Confession of Judgment ("Confession of Judgment") (attached hereto as Exhibit B) in the sum of \$600,000.00 ("Principal Amount") (which reflects the total amount of the Settlement Funds plus a 20% penalty in the event of default) for failure to pay the Monetary Payment on a timely basis. The Confession of Judgment shall be held in escrow by OAG and may only be filed if Per Se does not comply with its obligations as set forth in paragraph 26 of this AOD.

28. In the event OAG files the Confession of Judgment due to a default by Per Se under this AOD, the Principal Amount shall be reduced by the amount of any payments that have been paid under this AOD.

29. Within five (5) days after Per Se sends checks to Eligible Employees pursuant to paragraph 26 of this AOD and provides evidence to the OAG that it has set

aside any Settlement Funds remaining after checks have been issued to Eligible Employees, OAG shall return to Per Se the Confession of Judgment.

### MISCELLANEOUS

30. OAG has agreed to the terms of this AOD based on, among other things, the representations made to OAG by Per Se and Per Se's counsel and OAG's own factual investigation as set forth in the Findings above. To the extent that any material representations are later found to be inaccurate or misleading, this AOD is voidable by OAG in its sole discretion.

31. This AOD will expire three (3) years after the effective date, except that the Attorney General may, in its sole discretion, extend the AOD term upon a determination that Per Se has not materially complied with this AOD, which non-compliance the Attorney General will discuss and attempt to resolve with Per Se in good faith before making such determination.

32. If the AOD is voided or breached, Per Se agrees that any statute of limitations or other time-related defenses applicable to the subject of the AOD and any claims arising from or relating thereto are tolled from and after the date of this AOD. In the event the AOD is voided or breached, Per Se expressly agrees and acknowledges that this AOD shall in no way bar or otherwise preclude the Attorney General from commencing, conducting, or prosecuting any investigation, action, or proceeding, however denominated, related to the AOD, against Per Se, or from using in any way statements, documents, or other materials produced or provided by Per Se prior to or after the date of this AOD.

33. No representation, inducement, promise, understanding, condition, or warranty not set forth in this AOD has been made to or relied upon by Per Se in agreeing to this AOD.

34. Per Se represents and warrants, through the signature below, that the terms and conditions of this AOD are duly approved, and execution of this AOD is duly authorized. Per Se and its agents or employees agree not to take any action or make any statement denying, directly or indirectly, the propriety of this AOD or expressing the view that this AOD is without factual basis. Nothing in this paragraph affects Per Se's (i) testimonial obligations or (ii) right to take legal or factual positions in defense of litigation or other legal proceedings to which NYAG is not a party. This AOD is not intended for use by any third party in any other proceeding and is not intended, and should not be construed, as an admission of liability by Per Se.

35. This AOD may not be amended except by an instrument in writing signed on behalf of all the parties to this AOD.

36. This AOD shall be binding on and inure to the benefit of the parties to this AOD and their respective successors and assigns, provided that no party, other than the Attorney General, may assign, delegate, or otherwise transfer any of its rights or obligations under this AOD without the prior written consent of the Attorney General.

37. In the event that any one or more of the provisions contained in this AOD shall for any reason be held to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the Attorney General such invalidity, illegality, or unenforceability shall not affect any other provision of this AOD.

38. To the extent not already provided under this AOD, Per Se agrees, upon request by the Attorney General, to provide all documentation and information necessary for the Attorney General to verify compliance with this AOD.

39. All notices, reports, requests, and other communications to any party pursuant to this AOD shall be in writing and shall be directed as follows:

From Per Se to the Attorney General:

New York State Office of the Attorney General, Claudia Henriquez, Labor Bureau,  
120 Broadway, 26th Floor, New York, New York 10271-0332

or

[claudiahenriquez@ag.ny.gov](mailto:claudiahenriquez@ag.ny.gov).

From the Attorney General to Per Se:

Mark Racanelli, O'Melveny & Myers LLP, 7 Times Square, New York, New York  
10036 or

[mracanelli@omm.com](mailto:mracanelli@omm.com)

Any changes in the person to whom communications should be specifically directed shall be made in writing in advance of the change.

40. Acceptance of this AOD by the OAG shall not be deemed approval by the OAG of any of the practices or procedures referenced herein, and Per Se agrees not to make any representation to the contrary.

41. Pursuant to Executive Law § 63(15), evidence of a violation of this AOD shall constitute *prima facie* proof of violation of the applicable law in any action or proceeding thereafter commenced by the OAG.

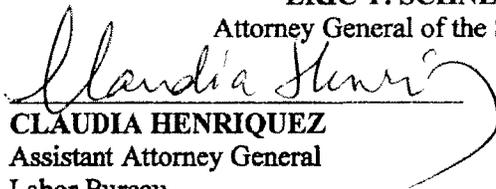
42. If a court of competent jurisdiction determines that Per Se has breached this AOD, Per Se agrees to pay to the Attorney General the cost, if any, of such determination and of enforcing this AOD, including without limitation legal fees, expenses, and court costs.

43. The Attorney General finds the relief and agreements contained in this AOD appropriate and in the public interest. The Attorney General is willing to accept this AOD pursuant to Executive Law § 63(15), in lieu of commencing a statutory proceeding. This AOD shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

44. Nothing contained herein shall be construed so as to deprive any person of any private right under the law.

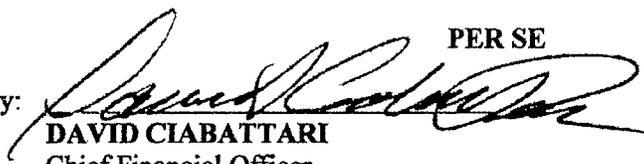
IN WITNESS WHEREOF, this AOD is executed by the parties hereto on July 2 2015.

**ERIC T. SCHNEIDERMAN**  
Attorney General of the State of New York

By:   
**CLAUDIA HENRIQUEZ**  
Assistant Attorney General  
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Phone: (212) 416-8686  
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Dated: July 2, 2015

PER SE

By:   
**DAVID CIABATTARI**  
Chief Financial Officer  
10 Columbus Circle  
New York, New York 10107  
Phone: (707) 295-8177  
Fax: (707) 944-87548754  
Dated: July 1, 2015