SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PEOPLE OF THE STATE OF NEW YORK by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Petitioner,

-against-

U.S. AUTO WASH COMPANY, LLC d/b/a TROPICAL BREEZE CAR WASH, BENNO GMUER, PHILIP GMUER, and GREGORY GMUER,

Respondents.

VERIFIED PETITION

Index No.

IAS Part _____
Assigned to Justice _____

Petitioner, the People of the State of New York, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York ("Attorney General"), as and for his Verified Petition, respectfully alleges:

INTRODUCTION

1. Pursuant to Executive Law § 63(12) ("Section 63(12)"), the Attorney General brings this special proceeding against U.S. AUTO WASH COMPANY, LLC d/b/a Tropical Breeze Car Wash ("Tropical Breeze") and its owner and manager, BENNO GMUER, and managers, PHILIP GMUER and GREGORY GMUER (collectively, "Respondents"), for an egregious pattern of labor law violations that cheated minimum-wage car wash workers out of over $540,000 in wages. Respondents have also cheated New York State ("State") taxpayers by failing to pay their fair share of unemployment insurance and workers' compensation obligations.

2. From at least January 1, 2012, and continuing to the present, Respondents violated the wage-and-hour, record-keeping, and unemployment insurance requirements of New

York Labor Law § 190 et seq. (the "Labor Law"), as well as the New York City Earned Sick Time Act, N.Y.C. Admin. Code. § 20-911 et seq. (the "ESTA") and the New York Workers' Compensation Law, N.Y. Work. Comp. Law § 1 et seq. (the "Workers' Compensation Law"), in the following ways:

- regularly failing to pay proper overtime by not permitting employees to clock in when their time cards neared 40 hours;
- regularly failing to pay for all time worked by requiring employees to wait up to several hours to clock in after they arrived on site and by routinely cutting down time worked to the nearest whole hour increment;
- regularly failing to pay the additional hour of pay required for days during which employees worked longer than 10 hours ("spread-of-hours" pay);
- regularly sending employees home for the day after the employees worked fewer than four hours without paying them for at least four hours of work ("call-in" pay);
- deducting employees' pay for their uniforms, and failing to launder uniforms that employees were required to wear or to pay the uniform maintenance allowance;
- systematically failing to record all employee hours worked;
- failing to provide required notices of employees' rates of pay, and to provide required statements of wages with each paycheck;
- failing to pay all required unemployment insurance contributions by underreporting employees and payroll in required quarterly NYS-45 forms ("NYS-45 Quarterly Returns") submitted to the Department of Taxation and Finance;
- failing to secure adequate workers' compensation coverage by underreporting employees and payroll to their workers' compensation insurance carrier, in violation of the Workers' Compensation Law; and
- failing to provide employees with required paid sick leave.

3. Accordingly, in this Special Proceeding, the Attorney General seeks an order for full relief including an award of damages for unpaid wages and benefits, liquidated damages, statutory penalties, and injunctive relief.

JURISDICTION AND VENUE

4. The Attorney General brings this action pursuant to Section 63(12) and Article 4 of the New York Civil Practice Law and Rules ("C.P.L.R").

5. Venue is proper in the Supreme Court of the State of New York, Kings County, because Tropical Breeze is a New York corporation, Respondents are subject to personal jurisdiction in Kings County, and the events and omissions giving rise to the claims took place in Kings County, New York.

PARTIES

6. Petitioner, the Attorney General, is empowered under Section 63(12) to seek, on behalf of the People of the State of New York, injunctive relief, restitution, and damages for repeated and persistent illegality in the transaction of business in the State of New York. The Attorney General has a principal office in New York County.

7. Respondent Tropical Breeze is a corporation operating a car wash, a gas station, and a convenience store located at 756 Utica Avenue in Brooklyn, New York.

8. Tropical Breeze was incorporated on March 4, 2011, and at all relevant times has been a corporation organized and existing under the laws of the State of New York.

9. Respondent Benno Peter Gmuer ("Benno") is the owner, executive officer, and principal partner of Tropical Breeze.

10. Respondent Philip Gmuer ("Philip") is Benno's son and oversaw operations at Tropical Breeze from in or around early 2014 through at least April 2016.

11. Respondent Gregory Gmuer ("Gregory") is also Benno's son and oversaw operations at Tropical Breeze from in or around March 2011 through 2013.

FACTUAL ALLEGATIONS

A. The Attorney General's Investigation

12. In March 2015, the Attorney General's Office initiated an investigation of Tropical Breeze.

13. The Attorney General served a Subpoena Duces Tecum and Ad Testificandum on Tropical Breeze on May 5, 2015 (the "Tropical Breeze Subpoena").

14. Pursuant to the Tropical Breeze Subpoena, Tropical Breeze designated Amjad Malik ("Malik"), its manager, as a witness and corporate representative to testify on its behalf. Malik appeared at a subpoena hearing conducted by the Attorney General on November 5, 2015.

15. During the course of the investigation, the Attorney General obtained documents and information, including four affidavits, from Tropical Breeze employees.

16. The Attorney General reviewed and analyzed time-keeping and payroll records produced pursuant to the Tropical Breeze Subpoena, in addition to the testimonies of Malik and Tropical Breeze employees, and generated comprehensive analyses for the period of January 1, 2012 to January 1, 2018 (the "Relevant Period").

B. Tropical Breeze Car Wash and Operations

1. Volume of Business and Hours

17. Tropical Breeze's volume of business varies by season, and thus, the number of employees and employee hours varies significantly throughout the year.

18. Tropical Breeze does its highest volume of business during the winter, from approximately the end of December to the end of March (the "busy season"). During the busy season, on a given day, Tropical Breeze employs approximately 27 to 28 employees, who clean

as many as 500 cars in a single day. For a typical day during the busy season, the car wash is open between 12 and 15 hours.

19. Tropical Breeze does its lowest volume of business during the summer (the "slow season"). During the slow season, on a given day, Tropical Breeze employs approximately 20 to 22 employees, who clean approximately 50 to 60 cars daily. For a typical busy day during the slow season, the car wash is open between 11 and 12 hours.

20. Over the course of the Relevant Period, Tropical Breeze employed approximately 150 employees.

21. Regardless of the season, Fridays, Saturdays, and Sundays are the busiest days for Tropical Breeze, while Monday, Tuesday, Wednesday, and Thursday are slower.

22. Regardless of the season, on days when business is slow—usually days when the weather is rainy or cloudy—the car wash opens late or closes early, and only remains open for a few hours.

2. Tropical Breeze Jobs and Employees

23. The majority of Tropical Breeze employees are cleaners, who, among other tasks, are responsible for detailing, vacuuming, brushing, and polishing customers' cars.

24. Cleaners' shifts begin at 7:00 a.m., 9:00 a.m., or 1:00 p.m. and run until the car wash closes between 8:00 to 10:00 p.m. during the busy season and between 5:00 to 7:00 p.m. during the slow season.

25. Respondents also employ cashiers who check out customers for both the car wash and the 24-hour convenience store. Regardless of season, approximately five or six Tropical Breeze employees work as cashiers.

26. Cashiers work approximately 48 hours a week. Because the cashiers also service the 24-hour convenience store, two cashiers work the 7:00 a.m. to 3:00 p.m. shift, two others work the 3:00 p.m. to 11:00 p.m. shift, and another works the 11:00 p.m. to 7:00 a.m. shift.

3. Tropical Breeze Management

Amjad Malik

27. Malik was the on-site manager at Tropical Breeze for the entire Relevant Period. Malik managed many of the day-to-day operations under the supervision of Benno, Philip or Gregory.

Benno Gmuer

28. During the Relevant Period, Benno was the owner, partner, and executive officer of Tropical Breeze. His full name is Benno Peter Gmuer. Benno was an authorized signatory on all Tropical Breeze bank accounts and was authorized to receive process on behalf of the company.

29. In addition to his position at Tropical Breeze, Benno also holds, or has held, executive positions at numerous Swiss and German companies.

30. Benno was involved in hiring and firing employees and observing trainees. Benno helped to set the employees' schedules. He had a role in setting the uniform and uniform maintenance policy. Benno was also responsible for approving or denying employees' paid sick leave requests.

31. Benno shared responsibility for supervising the payroll and compensation of employees and thus participated in reviewing and approving Malik's weekly calculations of workers' hours and wages.

Philip Gmuer

32. Philip was a manager at Tropical Breeze from 2014 until at least early 2016, and worked at the car wash 11 months per year on average.

33. Philip was involved in interviewing and hiring and firing employees, in addition to setting the schedule for employees' shifts and tracking employee attendance. Philip helped to decide what time to open the car wash and what time workers were allowed to clock in.

34. Philip was also involved in calculating employee wages, checking Malik's calculation of employees' hours and wages, and occasionally paying wages to employees. Philip handled uniform distribution and uniform maintenance.

Gregory Gmuer

35. Gregory was a manager at Tropical Breeze from 2011 through 2013.

36. Gregory interviewed prospective employees, distributed wages, and helped to supervise bookkeeping, payroll, and compensation of employees. Gregory was also involved in directing when employees clocked in and out. Gregory participated in uniform distribution and facilities maintenance.

4. Deficient Timekeeping and Payroll Records

37. To track Tropical Breeze employees' time and pay, Respondents used a time card system in which employees use a paper card to clock in each day when the shift began and to clock out when it ended.

38. While there are variations and inconsistences in the information contained on the time cards produced, most time cards contained the following information: (a) the employee's name and pay period end date for the workweek recorded at the top of each time card; (b) time clock-generated clock-in and clock-out times under the time-in and time-out columns; (c)

handwritten numbers on the bottom of each time card, which are Malik's "calculations" of the number of hours worked for which each employee is compensated in a given pay period.

39. Respondents maintained two separate payroll systems: one system for the "on-the-books employees" and one for the "off-the-books employees".

40. Respondents paid all the employees in cash.

41. For on-the-books employees, about one-third of Tropical Breeze's workforce, Tropical Breeze maintained a payroll software system through Paychex that recorded gross and net pay, lawful deductions, and allowances. Respondents provided on-the-books employees with pay statements Paychex generated.

42. For the off-the-books employees – the majority of its employees – Respondents did not maintain records in Paychex, or through any other systematized payroll program. The time cards were the sole record of the hours and wages for these employees, which contained the employees' clock-in and clock-out times, in addition to a handwritten sum of total hours worked in a week.

43. Tropical Breeze kept no records on the taxes, deductions, or net pay for off-the-books employees.

5. Wage Rate and Pay Notice Statements

44. Respondents failed to provide employees with notice of their rates of pay and basis thereof (i.e., whether paid by the hour, shift, day, week, salary, piece, commission, or other) ("Wage Notice").

45. Respondents also failed to furnish off-the-books employees with a proper pay statement ("Payment Statement") for each weekly payment of wages.

C. Unrecorded Time and Unpaid Wages and Benefits

46. At all times during the Relevant Period, the rate of pay for Tropical Breeze non-managerial employees has been the legal minimum wage.

47. Respondents only paid full wages to both on- and off-the-books employees for the sum of hours Malik wrote on each employee's time card.

48. The Attorney General's investigation revealed that Respondents manipulated their time-keeping and payroll system to deprive workers of earned wages and benefits in multiple ways. Malik's handwritten totals did not capture: 1) overtime hours, 2) waiting time, 3) cut down time card hours, 4) spread-of-hours shifts, and 5) call-in days.

49. Tropical Breeze also failed to provide employees with basic required benefits, including reimbursement for uniform costs and earned sick time.

1. Unrecorded and Underpaid Overtime

50. During most of the Relevant Period, Respondents did not consistently record employees' overtime hours.

51. During the busy season, employees work upwards of 75 hours a week. Even during a slow week, employees routinely work more than 40 hours per week.

52. Respondents, and Malik at the Respondents' direction, did not permit employees to clock in as they neared 40 hours of work in a pay period. As a result, employees could not record the time they worked beyond the 40-hour threshold.

53. Respondents paid these unrecorded overtime hours only at each employee's regular hourly rate of pay – not the required overtime premium rate of one-and-half times the regular hourly rate.

54. The Attorney General's analysis estimates that, during the Relevant Period, Tropical Breeze failed to record, and thus underpaid its workforce for, over 16,000 overtime hours.

2. Unrecorded and Unpaid Waiting Time

55. On slow business days, Tropical Breeze expected cleaners to report to work at their scheduled start times, but then regularly required them to wait to clock in. This practice caused cleaners, particularly those working the earliest shift, to work a significant amount of unrecorded, and thus unpaid, hours.

56. For example, cleaners arrived for their shifts at 7 a.m., but Philip regularly directed Malik to wait until 9 a.m. to open the car wash. On these days, Malik did not permit the employees to clock in until 9 a.m., and Respondents never compensated employees for these unrecorded hours of forced waiting time. At times, employees waited up to four hours before being permitted to clock in for a shift.

57. Tropical Breeze failed to record, and pay its workforce for, over 23,000 hours of waiting time.

3. Unpaid Cut Time

58. Tropical Breeze failed to pay cleaners for the hours plainly recorded on their time cards. On each time card, in addition to time-clock-generated clock-in and clock-out times, Malik wrote his "calculation" of the total number of hours employees worked in a given pay period based on the time stamps on the time cards.

59. This handwritten calculation was consistently lower, however, than the actual sum of the time clock-generated hours.

60. In the handwritten calculations, Tropical Breeze primarily cut down the hours employees worked to the nearest whole hour (e.g., 11.5 daily hours was cut down to 11 hours) or more.

61. Tropical Breeze cut over 2,500 hours from cleaners' time cards, and thus failed to pay its workforce for over 2,500 hours.

4. Unrecorded and Unpaid Spread-of-Hours Pay

62. Respondents failed to provide cleaners with an extra hour of pay, as the Labor Law requires, when they worked more than 10 hours a day.

63. Cleaners regularly worked more than 10 hours in a given shift but Tropical Breeze never provided them with spread-of-hours pay.

64. Respondents failed to pay spread-of-hours for over 8,000 shifts.

5. Unrecorded and Unpaid Call-in Pay

65. Respondents also regularly required cleaners to arrive on site for a shift but then sent them home after less than four hours of work.

66. Tropical Breeze did not provide a minimum of four hours of call-in pay to employees on days when it sent the employees home early as the Labor Law requires.

67. Respondents deprived workers of over 2,100 hours of call-in pay.

6. Deductions for Uniform Purchase and Maintenance

68. Tropical Breeze employees bore the costs of their own uniforms. Respondents required employees to wear a uniform of a shirt and a hat in the summer, and an additional sweater or jacket in the winter.

69. For the summer months, Tropical Breeze charged cleaners a deposit of $30.00 for two shirts and one hat. For the winter months, it charged them a deposit of $60.00 for one sweater and one jacket.

70. Tropical Breeze charged cashiers $60.00 for one sweater and two shirts.

71. Respondents deducted the deposits from employees' wages and did not reimburse employees for these costs.

72. Respondents did not cover or reimburse cashiers for any of the uniform laundering or maintenance costs as required by law.

7. Unpaid Sick Leave

73. Respondents denied employees paid sick leave upon employees' request for leave due to illness, injury, health condition, or need for medical diagnosis, care, or treatment of illness, injury, or health condition.

74. After April 2014, when the ESTA went into effect, two Tropical Breeze cleaners, Vicente Cabrera ("Cabrera") and Gerardo Gomez ("Gomez"), regularly worked 40 or more hours a week.

75. In or around November 2016, Cabrera missed three days of work due to illness. He called out sick for those days, but Respondents did not provide him with paid sick leave, even though he had earned the sick time pursuant to the ESTA. As a result, he was not paid for the three days he was out sick.

76. At the time of his request for paid sick leave, Cabrera had accrued at least 36 hours of paid sick time.

77. Between April 2016 and January 2017, Gomez missed approximately five days of work due to illness. Respondents did not provide him with paid sick leave for any of those days,

even though he had earned the time pursuant to the ESTA. As a result, he was not paid for the five days he was out sick.

78. At the time of his requests for paid sick leave, Gomez had accrued at least 60 hours of paid sick time.

D. Tropical Breeze's Misrepresentations to the State

1. Misrepresentations to the Department of Taxation and Finance ("DTF")

79. Respondents significantly misrepresented employee wages and the number of employees on Tropical Breeze's payroll in its NYS-45 Quarterly Filings filed with DTF.

80. Despite the fact that Tropical Breeze employed from 20 to 28 employees throughout the year, Tropical Breeze reported in its NYS-45 Quarterly Filings during the Relevant Period that it employed from 10 to 19 employees.

2. Misrepresentations to the New York State Insurance Fund ("NYSIF")

81. Respondents also significantly misrepresented employee wages and the number of employees on Tropical Breeze's payroll to NYSIF, Tropical Breeze's workers' compensation insurance carrier.

82. In its Application for New York Workers' Compensation and Employers' Liability Insurance, which Benno signed, Tropical Breeze reported only four car wash and convenience store employees, with an annual payroll of $70,000.

FIRST CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW §63(12)
(Non-Payment of Wages, Labor Law § 191)

83. Petitioner re-alleges and incorporates by reference all allegations in all preceding paragraphs.

84. During the Relevant Period, Respondents have been employers within the meaning of Labor Law § 190.

85. Throughout the Relevant Period, employees at Tropical Breeze have been Respondents' employees within the meaning of Labor Law § 190.

86. The provisions of Article 6 of the Labor Law, which governs "Payment of Wages," apply to Respondents and protect Respondents' employees.

87. Labor Law § 191 requires an employer to pay employees in a timely manner for all hours worked.

88. Respondents' practice of routinely not paying cleaners for waiting time by prohibiting employees from clocking in when they reported to work for their scheduled shifts, requiring them remain on site and then to clock in later, and as a result, failing to compensate employees for all hours worked, violated Labor Law § 191 during the Relevant Period.

89. Respondents' practice of routinely cutting cleaners' hours to the next lowest whole-hour increment or more, without similarly rounding up employees' time, and as a result, failing to compensate them for all fractions of hours worked, also violated Labor Law § 191 during the Relevant Period.

90. Respondents' violations of Labor Law § 191 during the Relevant Period constitute repeated illegal acts and illegality in the carrying on, conducting, or transaction of business as defined by New York Executive Law § 63(12).

91. Respondents' violations of Labor Law § 191 are ongoing.

92. Respondents' violations were not committed in good faith. Respondents did not make a good faith effort during the Relevant Period to learn of or comply with their obligations with respect to paying employees for all hours worked.

93. Because of these violations, Respondents' employees have suffered damages, and are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation, pursuant to Labor Law § 198.

SECOND CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW §63(12)
(Failure To Pay Minimum Wage, Labor Law § 652)

94. Petitioner re-alleges and incorporates by reference all allegations in all preceding paragraphs.

95. During the Relevant Period, Respondents have been employers within the meaning of Labor Law § 651(6).

96. During the Relevant Period, employees at Tropical Breeze have been Respondents' employees within the meaning of Labor Law § 651(5).

97. The provisions of Article 19 of the Labor Law, the Minimum Wage Act, apply to Respondents. Labor Law § 652 requires that Respondents pay their employees a mandated minimum wage for each hour worked.

98. Article 19 of the Labor Law provides for the promulgation of minimum wage orders, which are "regulations . . . appropriate to carry out the purposes of" the Minimum Wage Act. Labor Law § 654. During the Relevant Period, the Minimum Wage Order for Miscellaneous Industries and Occupations, 12 N.Y.C.R.R. § 142 et seq. applied to Respondents' employees.

99. During the Relevant Period, employees at Tropical Breeze have been Respondents' employees within the meaning of 12 N.Y.C.R.R. § 142-1.1.

100. Pursuant to Labor Law § 652, the minimum wage applicable to Tropical Breeze employees has been: (a) $7.25 per hour between July 24, 2009, and December 30, 2013;

(b) $8.00 per hour between December 31, 2013, and December 30, 2014; (c) $8.75 per hour between December 31, 2014, and December 30, 2015; (d) $9.00 per hour between December 31, 2015, and December 30, 2016; and (e) $11.00 per hour on and after December 31, 2016. 12 N.Y.C.R.R. § 142-2.1.

101. Respondents' practice of routinely not paying cleaners for waiting time, by prohibiting employees from clocking in when they reported to work, requiring them to remain on-site and then to clock in later, and as a result, failing to compensate employees for all hours worked, violated the minimum wage provisions of the Labor Law during the Relevant Period.

102. Respondents' practice of routinely cutting cleaners' hours to the nearest whole-hour increment or more, and, as a result, failing to compensate them for all hours worked, also violated the minimum wage provisions of the Labor Law during the Relevant Period.

103. Respondents' violations of Labor Law § 652 during the Relevant Period constitute repeated illegal acts and illegality in the carrying on, conducting, or transaction of business as defined by Section 63(12).

104. Respondents' violations of Labor Law § 652 are ongoing.

105. Respondents' violations were not committed in good faith. Respondents did not make a good faith effort during the Relevant Period to learn of or comply with their obligations with respect to the minimum wage.

106. Because of these violations, Respondents' employees have suffered damages, and are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation, pursuant to Labor Law § 663.

THIRD CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW §63(12)
(Failure To Pay Required Overtime, 12 N.Y.C.R.R. § 142-2.2)

107. Petitioner re-alleges and incorporates by reference all allegations in all preceding paragraphs.

108. Respondents are required to pay their employees for overtime at a rate of one-and-one-half times each employee's regular rate of pay for hours worked in excess of 40 hours in one workweek. Labor Law § 652(2); 12 N.Y.C.R.R. § 142-2.2.

109. Respondents' practices of (a) not permitting employees to clock in when their hours near or reach 40 hours; (b) requiring employees to wait after reporting to work to clock in; and (c) cutting employees' hours to the nearest whole hour increment or more, in addition to violating the nonpayment provisions of Labor Law § 191, also violated the overtime provisions of 12 N.Y.C.R.R. § 142-2.2, because Respondents did not pay one-and-one-half times employees' regular rates of pay for all hours worked over 40 in a given workweek to all of their overtime-eligible employees.

110. Respondents' violations of 12 N.Y.C.R.R. § 146-2.2 constitute repeated illegal acts and illegality in the carrying on, conducting, or transaction of business as defined by Section 63(12).

111. Respondents' violations were not committed in good faith. Respondents did not make a good faith effort during the Relevant Period to learn of or comply with their obligations with respect to overtime wages.

112. Because of these violations, Respondents' employees have suffered damages, and are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation, pursuant to Labor Law § 198.

FOURTH CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW §63(12)
(Failure To Provide Spread-of-Hours Pay, 12 N.Y.C.R.R. § 142-2.4)

113. Petitioner re-alleges and incorporates by reference all allegations in all preceding paragraphs.

114. Pursuant to 12 N.Y.C.R.R. § 142-2.4, Respondents are required to pay the employees in question an additional hour's pay at the basic minimum hourly wage rate for each day in which the time period between the beginning and end of an employee's workday (the "spread-of-hours") exceeded 10 hours.

115. During the Relevant Period, Respondents routinely assigned cleaners to shifts in which the time period between the beginning and ending of the workday exceeded 10 hours. During the Relevant Period, Respondents' employees routinely worked shifts in which the spread-of-hours exceeded 10 hours.

116. Respondents did not pay any additional money to cleaners as spread-of-hours pay during the Relevant Period, in violation of 12 N.Y.C.R.R. § 142-2.4.

117. Respondents' violations of 12 N.Y.C.R.R. § 142-2.4 constitute repeated illegal acts and illegality in the carrying on, conducting, or transaction of business as defined by Section 63(12).

118. Respondents' violations of 12 N.Y.C.R.R. § 142-2.4 are ongoing.

119. Respondents' violations were not committed in good faith. Respondents did not make a good faith effort during the Relevant Period to learn of or comply with their obligations with respect to spread-of-hours pay.

120. Because of these violations, Respondents' cleaners who worked shifts in which the spread-of-hours was greater than 10 hours per day have suffered damages, and are entitled to

recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation, pursuant to Labor Law § 663.

FIFTH CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW §63(12)
(Failure To Provide Call-In Pay, 12 N.Y.C.R.R. § 142-2.3)

121. Petitioner re-alleges and incorporates by reference all allegations in all preceding paragraphs.

122. Respondents are required to pay employees who report to work for a scheduled shift call-in pay at the statutory minimum wage for the lesser of four hours of work or the number of hours in the employee's regularly scheduled shift. 12 N.Y.C.R.R. § 142-2.3.

123. During the Relevant Period, Respondents failed to pay cleaners call-in pay when they were legally entitled to such compensation.

124. Respondents' violations of 12 N.Y.C.R.R. § 142-2.3 constitute repeated illegal acts and illegality in the carrying on, conducting, or transaction of business as defined by Section 63(12).

125. Respondents' violations of 12 N.Y.C.R.R. § 142-2.3 are ongoing.

126. Respondents' violations were not committed in good faith. Respondents did not make a good faith effort during the Relevant Period to learn of or comply with their obligations with respect to call-in pay.

127. Because of these violations, Respondents' cleaners who worked shifts in which they were entitled to call-in pay, but did not receive it, have suffered damages, and are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation, pursuant to Labor Law § 663.

SIXTH CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW §63(12)
(Failure To Provide Wage Notices and Payment Statements, Labor Law §195(1)(a) and (3))

128. Petitioner re-alleges and incorporates by reference all allegations in all preceding paragraphs.

129. Respondents are required to provide each employee with a Wage Notice in writing in English and in the language identified by each employee as the primary language of such employee, at the time of hiring, and annually prior to December 29, 2014, containing, inter alia, the following: the rate or rates of pay and basis thereof; the regular pay day designated by the employer; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business; and the telephone number of the employer. Labor Law § 195(1)(a).

130. Throughout the Relevant Period, Respondents failed to provide Wage Notices pursuant to Labor Law § 195(1)(a).

131. Respondents are also required to furnish each employee with a Payment Statement with every payment of wages, containing, inter alia, the following: the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; deductions; allowances, if any, claimed as part of the minimum wage; net wages; the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked; and the number of overtime hours worked. Labor Law § 195(3).

132. Throughout the Relevant Period, Respondents failed to provide Payment Statements to certain employees in violation of Labor Law § 195(3).

133. Respondents' violations of Labor Law §§ 195(1)(a) and (3) constitute repeated illegal acts and illegality in the carrying on, conducting, or transaction of business as defined by Section 63(12).

134. Respondents' violations of Labor Law §§ 195(1)(a) and (3) are ongoing.

135. Respondents' violations were not committed in good faith. Respondents did not make a good faith effort during the Relevant Period to learn of or comply with their obligations with respect to issuing Wage Notices or Payment Statements.

136. Because of these violations, Respondents' employees have suffered damages, and are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation, pursuant to Labor Law § 198.

SEVENTH CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW §63(12)
(Failure To Provide Uniform Maintenance Pay and to Reimburse for Cost of Uniforms, 12 N.Y.C.R.R. § 142-2.5(c))

137. Petitioner re-alleges and incorporates by reference all allegations in all preceding paragraphs.

138. Employers must reimburse employees in full for the cost of any required uniforms. 12 N.Y.C.R.R. § 142-2.5(c).

139. During the Relevant Period, Respondents required employees to wear a uniform of a shirt and a hat in the summer, and an additional sweater and jacket in the winter.

140. Respondents charged cleaners $90.00 for shirts, hats, sweaters and jackets.

141. Respondents charged cashiers $60.00 for shirts and sweaters.

142. Respondents required their employees to pay a deposit for their required uniforms for which they were not reimbursed.

143. Employers are required to either launder required uniforms or pay employees a weekly amount to cover the cost of laundering the uniforms. 12 N.Y.C.R.R. § 142-2.5(c)(1)(i).

144. Respondents did not reimburse cashiers for laundering costs.

145. The applicable uniform maintenance allowance during the Relevant Period was (a) $9.00 per week from January 1, 2011, through December 31, 2013; (b) $9.95 per week from January 1, 2014, through December 31, 2014; (c) $10.90 per week from January 1, 2015, through December 31, 2015; (d) $11.20 per week from January 1, 2016, through December 31, 2016; and (e) $13.70 per week from January 1, 2017, through the present. 12 N.Y.C.R.R. § 142-2.3(c)(2)-(5).

146. Respondents did not launder or pay cashiers for maintenance of their required uniforms.

147. Therefore, Respondents violated the uniform and uniform maintenance requirements set forth in 12 N.Y.C.R.R. § 142-2.5(c).

148. Respondents' violations of 12 N.Y.C.R.R. § 142-2.5(c) constitute repeated illegal acts and illegality in the carrying on, conducting, or transaction of business as defined by Section 63(12).

149. Respondents' violations of 12 N.Y.C.R.R. § 142-2.5(c) are ongoing.

150. Respondents' violations were not committed in good faith. Respondents did not make a good faith effort during the Relevant Period to learn of or comply with their obligations with respect to uniform maintenance pay.

151. Because of these violations, Respondents' employees who were required to pay a deposit for uniforms, and to maintain uniforms with no uniform maintenance pay have suffered

damages, and are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation, pursuant to Labor Law § 663.

EIGHTH CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW §63(12)
(Failure To Provide Earned Sick Time, N.Y.C.A.C. § 20-913(b))

152. Petitioner re-alleges and incorporates by reference all allegations in all preceding paragraphs.

153. From April 2014 through the present, Respondents have been employers within the meaning of the ESTA § 20-912(g).

154. From April 2014 through the present, employees at Tropical Breeze have been Respondents' employees within the meaning of the ESTA §20-912(f).

155. From April 2014 through the present, Respondents have been required to provide employees with paid sick time at the rate of one hour for every 30 hours worked, up to a maximum of 40 hours of sick time per calendar year. N.Y.C. Admin. Code § 20-913(b).

156. Since April 2014, Respondents have failed to provide paid sick leave to their employees Cabrera and Gomez.

157. Respondents' violations of ESTA § 20-913(b) constitute repeated illegal acts and illegality in the carrying on, conducting, or transaction of business as defined by Section 63(12).

158. Respondents' violations were not committed in good faith. Respondents did not make a good faith effort during the Relevant Period to learn of or comply with their obligations with respect to paid sick leave.

159. Because of these violations, Cabrera and Gomez suffered damages and are entitled to recovery as provided for in the ESTA § 20-924.

NINTH CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW §63(12)
(Failure To Comply with New York Unemployment Insurance Law, Labor Law §§ 570-571)

160. Petitioner re-alleges and incorporates by reference all allegations in all preceding paragraphs.

161. All employers within the state must file NYS-45 Quarterly Returns with the State of New York each calendar quarter. Among other things, employers' unemployment insurance contributions are based upon the employees and wages reported in their NYS-45 Quarterly Returns. Employers who fail to pay the required unemployment insurance contributions are required to pay interest, and, if the failure to pay involves fraud, a penalty. Labor Law §§ 570-571.

162. Respondents repeatedly failed to report all employees and all wages paid on the NYS-45 Quarterly Returns.

163. Respondents' violations of Labor Law § 570-571 constitute fraud and repeated illegal acts and illegality in the carrying on, conducting, or transaction of business as defined by Section 63(12).

164. Upon information and belief, Respondents' violations of Labor Law § 570-571 are ongoing.

165. Respondents' failure to report their employees and wages accurately on NYS-45 Quarterly Returns was knowing and intentional.

166. Respondents, therefore, have violated the unemployment insurance law and should be ordered to submit amended NYS-45 Quarterly Returns to DTF.

TENTH CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW §63(12)
(Failure To Comply with Workers' Compensation Law §§ 3(14-a), 10, 50, 52(1)(d), and 131(1))

167. Petitioner re-alleges and incorporates by reference all allegations in all preceding paragraphs.

168. The Workers' Compensation Law requires employers to secure workers' compensation coverage for all of their employees. N.Y. Work. Comp. Law §§ 3(14-a), 10 and 50.

169. Under the Workers' Compensation Law, an employer is deemed to have failed to properly secure workers' compensation coverage if at any time the employer intentionally and materially understates or conceals payroll, or intentionally and materially misrepresents or conceals information pertinent to the calculation of premium paid to secure compensation. N.Y. Work. Comp. Law § 52(1)(d).

170. In addition, employers must keep accurate employment records of, inter alia, the number and classification of employees, wages paid, and any workplace accidents. N.Y. Work. Comp. Law § 131(1).

171. In their application to obtain workers' compensation coverage, Respondents intentionally and materially underreported the total number of employees and total payroll, and/or materially misrepresented or concealed additional information pertinent to the calculation of premiums.

172. Accordingly, Respondents failed to properly secure workers' compensation coverage.

173. In addition, Respondents failed to keep employment records that satisfied their record-keeping obligations under §131 of the Workers' Compensation Law.

174. Respondents are therefore liable for unpaid insurance premiums, interest on the unpaid premiums at the rate of one percent per month, and penalties under Workers' Compensation Law §§ 52(5) and 131(3).

175. Respondents' violations of Workers' Compensation Law §§ 3(14-a), 10, 50, 52(1)(d), and 131(1) constitute fraud and repeated illegal acts and illegality in the carrying on, conducting, or transaction of business as defined by Section 63(12).

176. Upon information and belief, Respondents' violations of Workers' Compensation Law §§ 3(14-a), 10, 50, 52(1)(d), and 131(1) are ongoing.

177. Respondents' violations were not committed in good faith. Respondents did not make a good faith effort during the Relevant Period to learn of or comply with their obligations with respect to Workers' Compensation Law.

178. Because of these violations, Respondents are liable for both unpaid insurance premiums and penalties under the Workers' Compensation Law §§ 52(5) and 131(3).

ELEVENTH CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW §63(12)
(Failure To Comply with Workers' Compensation Law §§ 95 and 96)

179. Petitioner re-alleges and incorporates by reference all allegations in all preceding paragraphs.

180. The Workers' Compensation Law requires employers who are insured by the NYSIF to maintain accurate payroll records and to allow NYSIF to audit those records. N.Y. Work. Comp. Law § 95.

181. The Workers' Compensation Law also prohibits employers who are insured by NYSIF from knowingly making a false statement or representation for the purpose of obtaining, maintaining or renewing insurance in NYSIF at less than the proper rate for such insurance, or

for the purpose of evading the legal requirement to properly obtain workers' compensation insurance coverage for all employees. N.Y. Work. Comp. Law § 96.

182. Respondents obtained their workers' compensation insurance coverage from NYSIF.

183. Respondents failed to keep payroll records that satisfied their record-keeping obligations under Section 95 of the Workers' Compensation Law.

184. In their application for coverage submitted to NYSIF, Respondents knowingly underreported the total number of employees and total payroll, for the purpose of obtaining and/or maintaining insurance in NYSIF at less than the proper rate and/or for the purpose of evading the legal requirement to properly obtain workers compensation insurance coverage for their employees.

185. Respondents' violations of Workers' Compensation Law §§ 95 and 96 constitute fraud and repeated illegal acts and illegality in the carrying on, conducting, or transaction of business as defined by Section 63(12).

186. Upon information and belief, Respondents' violations of Workers' Compensation Law §§ 95 and 96 are ongoing.

187. Respondents' violations were not committed in good faith. Respondents did not make a good faith effort during the Relevant Period to learn of or comply with their obligations with respect to Workers' Compensation Law.

188. Because of these violations, Respondents are liable for civil damages under the Workers' Compensation Law § 96.

WHEREFORE, Petitioner, the Attorney General of the State of New York, on behalf of the People of the State of New York, requests that this Court issue an Order for the following relief:

(a) finding that Respondents repeatedly violated Articles 6 and 19 of the Labor Law and its implementing regulations at 12 N.Y.C.R.R. § 142 et seq. from January 1, 2012, through the present by failing to pay employees wages for all hours worked, failing to pay proper overtime wages, failing to pay required spread-of-hours pay, failing to pay call-in pay, failing to maintain proper pay records, failing to provide Wage Notices or Payment Statements, and failing to pay employees' uniform costs;

(b) finding that Respondents repeatedly violated the Labor Law's unemployment insurance reporting requirements;

(c) finding that Respondents repeatedly violated the ESTA by failing to pay employees for earned sick time;

(d) finding that Respondents repeatedly violated the Workers' Compensation Law by failing to secure coverage for all employees and by violating reporting and recordkeeping requirements;

(e) finding that Respondents repeatedly engaged in illegal activity in violation of New York Executive Law § 63(12);

(f) awarding unpaid wages in the amount of $542,684, and liquated damages in the amount of $542,684; statutory penalties in the amount of $475,000 for Wage Notice and Pay Statement violations; actual and statutory damages in the amount of $30,743 for Uniform Purchase and Maintenance violations; and actual and statutory damages in the amount of $2,900 for ESTA violations; or in the alternative, awarding unpaid

wages, damages, and penalties in requested updated amounts through the date of judgment;

(g) directing Respondents to produce to the Attorney General: the names and addresses of all employees who worked for Respondents between January 1, 2012 and the date of judgment for the purpose of distributing restitution;

(h) directing Respondents to: (1) transmit the true and correct, amended NYS-45 Quarterly Returns to DTF, with a copy to the Attorney General, and (2) pay all unpaid contributions, interest, and penalties assessed by the New York State Department of Labor;

(i) directing Respondents to: (1) transmit to NYSIF copies of their true and correct, amended NYS-45 Quarterly Returns, together with a copy of the Court's order, with copies to the Attorney General; (2) cooperate fully with any audits by NYSIF; (3) pay all unpaid premiums which NYSIF determines to be due and owing; and (4) pay any damages assessed by NYSIF pursuant to N.Y. Work. Comp. Law § 96(2);

(j) directing Respondents to: (1) transmit to the Workers' Compensation Board copies of their true and correct amended NYS-45 Quarterly Filings, together with a copy of the Court's order, with copies to the Attorney General; and (2) pay any penalties imposed by the Workers' Compensation Board;

(k) permanently enjoining Respondents, their employees, agents and successors from continued violations of the law;

(l) awarding 9 percent statutory prejudgment interest, as provided by Article 50 of the Civil Practice Law and Rules ("CPLR") on all Labor Law violations;

(m) awarding Petitioner attorneys' fees and costs associated with this action in an amount to be determined; and

(n) granting such other and further relief as the Court may deem just and proper.

Dated: New York, New York
January 25, 2018

Respectfully submitted,

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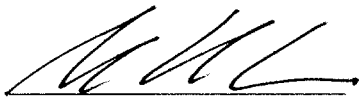
RENIKA MOORE
Chief of Labor Bureau

By: 
MING-QI CHU
JULIE ULMET
SARA HAVIVA MARK
SUSAN CAMERON
Assistant Attorneys General

Verification

STATE OF NEW YORK)
) ss.:
NEW YORK COUNTY)

MING-QI CHU, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Eric T. Schneiderman, Attorney General of the State of New York, and am duly authorized to make this verification.

I have read the foregoing Petition and know the contents thereof, which is to my knowledge true, except as to matters stated to be alleged on information and belief, and as to those matters, I believe them to be true. The grounds of my belief as to all matters stated upon information and belief are investigative materials contained in the files of the Attorney General's office.

The reason this verification is not made by petitioner is that petitioner is a body politic and the Attorney General is its duly authorized representative.

Ming-Qi Chu
Assistant Attorney General
Labor Bureau

Sworn to before me this
25th day of January, 2018

Assistant Attorney General

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

PEOPLE OF THE STATE OF NEW YORK by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Petitioner, -against- U.S. AUTO WASH COMPANY, LLC, d/b/a TROPICAL BREEZE CAR WASH, BENNO GMUER, PHILIP GMUER, and GREGORY GMUER Respondents.	Index No.

MEMORANDUM OF LAW
IN SUPPORT OF VERIFIED PETITION

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January 25, 2018

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I. PRELIMINARY STATEMENT

For more than six years, Respondent U.S. Auto Wash Company, LLC, d/b/a Tropical Breeze Car Wash ("Tropical Breeze") and its owner-managers have systematically cheated over 150 low-wage workers out of hard-earned wages and benefits. Tropical Breeze also systematically cheated the State of New York (the "State") and its taxpayers by underreporting its employee count and failing to pay its fair share of unemployment insurance contributions and workers' compensation premiums. These pervasive violations were not the result of good faith mistakes; they were part of an intentional, long-term effort to underpay both employees and the State. The Office of the New York State Attorney General ("Attorney General" or "Petitioner") brings this lawsuit to stop Tropical Breeze's unlawful scheme and to secure for these car wash workers the wages and benefits they rightfully earned.

Pursuant to Executive Law Section 63(12) ("Section 63(12)"), the Attorney General files this special proceeding against Tropical Breeze; its owner, Respondent Benno Gmuer ("Benno"); and managers, Respondent Gregory Gmuer ("Gregory"), and Respondent Philip Gmuer ("Philip") (collectively, "Respondents"). Since Respondents purchased the car wash in 2011, Tropical Breeze has exploited its largely immigrant workforce by demanding long hours of labor without paying wages at legally-required rates. Tropical Breeze has admitted that it routinely manipulated its time-keeping system to underpay employees for overtime hours, hours spent waiting for the car wash to open, and even hours plainly recorded on the employees' time cards. Tropical Breeze's own records — including payroll summaries and time cards — confirm Respondents' illegal scheme.

Respondents also repeatedly misrepresented the size of their workforce and payroll in order to avoid paying the amount owed for unemployment insurance and workers' compensation

coverage. The majority of Tropical Breeze workers are conspicuously absent from Respondents' state filings and the company's "official" payroll records. Respondents admitted that they illegally maintained two separate payroll systems: one for "on-the-books" employees, who constituted only about a third of the workforce, and another for "off-the-books" employees, who made up the rest.

In light of the evidentiary record, there is no genuine dispute of material fact that Respondents repeatedly violated the New York Labor Law § 190 et seq. (the "Labor Law"); the New York City Earned Sick Time Act, N.Y.C. Admin. Code. § 20-910 et seq. (the "ESTA"); and the New York Workers' Compensation Law, N.Y. Work. Comp. Law § 1 et seq. (the "Workers' Compensation Law"). The admissions by Respondents' designated corporate representative about Tropical Breeze's payroll practices are sufficient, in and of themselves, to establish liability. Additionally, documents from Tropical Breeze's record-keeping system and the testimony of four of its employees provide further evidence of Respondents' systematic violations of state and city law and demonstrate the scope and scale of their violations.

The Attorney General has the authority to prosecute Respondents' repeated violations of law under Section 63(12). Respondents' illegal conduct came at a significant cost to workers and State taxpayers. From January 1, 2012 to January 1, 2018,[1] Respondents unlawfully deprived approximately 150 workers of over $540,000 in unpaid wages, and garnered over 52,000 hours of free labor.[2] Under the Labor Law, the direct, personal involvement of Benno,

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[1] While Petitioner believes that violations are ongoing, the Attorney General's analysis of unpaid wages extends only until January 1, 2018. See infra 3-6.

[2] The Attorney General seeks equitable relief so that the amount of damages owed to the State may be properly calculated. See infra 50-54.

Gregory and Philip — the individual Respondents — in their business's misconduct also renders them personally liable.

Because the Attorney General can establish both liability and damages for unpaid wages and benefits under Section 63(12) beyond material dispute, the Court should grant summary relief in this proceeding.[3] C.P.L.R. § 409(b); Karr v. Black, 55 A.D.3d 82, 86 (1st Dep't 2008).

II. ATTORNEY GENERAL'S INVESTIGATION

The Attorney General initiated an investigation of Tropical Breeze, which is incorporated as "U.S. Auto Wash Company, LLC," in March 2015. (Affirmation in Support of Verified Petition by Sara Haviva Mark dated January 24, 2018 ("Mark Aff.") ¶ 11.) The Attorney General served Tropical Breeze with a Subpoena Duces Tecum and Ad Testificandum on May 5, 2015 (the "Tropical Breeze Subpoena"). (Id.) Tropical Breeze produced documents responsive to the Tropical Breeze Subpoena on June 22, 2015, and in subsequent supplemental productions. (Id. at ¶ 12.) The production included, inter alia, photocopies of time cards showing clock-in and clock-out times for employees from December 2011 through September 2015.[4] (Id.)

Pursuant to subpoena, Tropical Breeze's payroll software company, Paychex, Inc. ("Paychex"), produced additional pay records from March 1, 2011, through May 9, 2016 (the "Paychex records"). (Id. at ¶ 14.) The Paychex records contain data about on-the-books

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[3] While the Attorney General believes that there is no material dispute as to the amount of damages owed, should the Court find any material disputes of fact regarding damages, Petitioner respectfully requests that the Court make a finding of liability for all asserted claims, and order the parties to make additional submissions on the issue of damages.

[4] In general, time cards were produced for December 23, 2011 through September 24, 2015. For that time period, time cards for 24 pay periods were not produced. (Werberg Aff. ¶ 4 n.1.)

employees' gross and net pay,[5] as well as deductions and allowances for each weekly pay period and the total number of hours for which employees were compensated. (Id.)

In addition, the New York State Insurance Fund ("NYSIF"), Tropical Breeze's workers' compensation insurance provider, produced records pursuant to subpoena relating to the company's workers' compensation insurance coverage. (Mark Aff. ¶ 13.) Finally, Capital One Bank U.S.A. ("Capital One") produced records pursuant to subpoena containing account information relating to Tropical Breeze's bank accounts. (Id. at ¶ 15.)

Pursuant to the Tropical Breeze subpoena, the Attorney General took testimony on November 5, 2015, from Tropical Breeze's on-site manager Amjad Malik ("Malik"), whom the company designated as its corporate representative. (Mark Aff. ¶ 16; Mark Aff. Ex. 1 ("Malik Tr.").)

The Attorney General also obtained information from employees at Tropical Breeze, including affidavits from four employees in April 2016. (Mark Aff. ¶¶ 18-21.) Vicente Cabrera ("Cabrera"), Gerardo Gomez ("Gomez") and Antonio Zacatenco ("Zacatenco") worked as cleaners at the car wash. (See Mark Aff. Ex. 2, Cabrera Affidavit dated April 19, 2016 ("Cabrera Aff."), ¶ 6; Mark Aff. Ex. 4, Gomez Affidavit dated April 11, 2016 ("Gomez Aff."), ¶ 6; Mark Aff. Ex. 8, Zacatenco Affidavit dated April 13, 2016 ("Zacatenco Aff."), ¶ 6.) Mauricio Chavez ("Chavez") worked as a cashier at the car wash and convenience store. (Mark Aff. Ex. 8, Chavez Affidavit dated April 20, 2016 ("Chavez Aff."), ¶ 3.)

Gomez, Zacatenco, and Chavez have worked at Tropical Breeze since before Respondents acquired the company in March 2011, and Cabrera began working at Tropical

[5] As further discussed infra 11-12, Respondents did not have pay records other than time cards for off-the-books employees, who constituted approximately two-thirds of the workforce.

Breeze in the fall of 2012. (Cabrera Aff. ¶ 2; Gomez Aff. ¶ 2; Zacatenco Aff. ¶ 2; Chavez Aff. ¶ 2.)

The Attorney General obtained additional affidavits from these four employees in January and February 2017. (See Mark Aff. Ex. 3, Cabrera Supplemental Affidavit dated January 17, 2017 ("Cabrera Supp. Aff."); Mark Aff. Ex. 5, Gomez Supplemental Affidavit dated January 23, 2017 ("Gomez Supp. Aff."); Mark Aff. Ex. 7, Zacatenco Supplemental Affidavit dated January 18, 2017 ("Zacatenco Supp. Aff."); Mark Aff. Ex. 9, Chavez Supplemental Affidavit dated February 3, 2017 ("Chavez Supp. Aff.").) In the supplemental affidavits, the employees confirmed that many of Respondents' violations continued throughout the Attorney General's investigation. (Cabrera Supp. Aff. ¶¶ 1-16; Gomez Supp. Aff. ¶¶ 1-17; Zacatenco Supp. Aff. ¶¶ 1-16; Chavez Supp. Aff. ¶¶ 1-16.)

The Attorney General generated comprehensive analyses of Respondents' time-keeping and payroll practices based on all available evidence. (Mark Aff. Ex. 10, Affidavit of Jonathan Werberg[6] dated January 18, 2018 ("Werberg Aff."), ¶ 3.) While the records produced and testimony taken as part of the Attorney General's investigation sufficiently establish Respondents' liability, the Attorney General's rigorous analyses illustrate in detail the extent of those unlawful practices and establish the basis for Petitioner's reasonable estimation of damages. (See generally Werberg Aff.) See infra 12-20.

[6] The Attorney General's analysis was performed by Jonathan Werberg ("Werberg"), Director of Research & Analytics in the Executive Division of the Office of the New York State Attorney General. Werberg has analyzed data for numerous complex investigations. (Werberg Aff. ¶ 1.)

To calculate the number of unpaid work hours for cleaners, whose schedules varied day-to-day, the Attorney General used a selection of six cleaners' time and pay records[7] (the "Analyzed Group"), and extrapolated these findings to the full Tropical Breeze cleaner workforce.[8] (Werberg Aff. ¶¶ 9-17).

To calculate the number of unpaid work hours for cashiers, whose schedules were relatively constant, the Attorney General assumed, based on Malik's and Chavez's testimony, that these employees worked eight-hour shifts, six days a week. (Werberg Aff. ¶ 8; see Malik Tr. 52-53, 57; Chavez Aff. ¶ 7.)

The Attorney General's analyses focus on the last six years of Respondents' conduct, from January 1, 2012, to January 1, 2018 (the "Relevant Period").[9]

III. FACTUAL ALLEGATIONS

The accompanying Mark Affirmation includes a full statement of all relevant facts. A summary of the most salient facts is given here.

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[7] The three cleaners who submitted affidavits — Cabrera, Gomez and Zacatenco — are included in the Analyzed Group. The other three were selected to provide additional representation of worker demographics, on-the-books or off-the-books status, and work schedules. (Werberg Aff. ¶ 9 n.6.)

[8] As set forth in detail at infra 24-27, where an employer has inadequate records, labor law permits the Court to draw just and reasonable inferences and to approximate damages. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946); see also infra 24-26 (citing additional cases). The Werberg Affidavit explains in detail why the Attorney General's methodology and resulting proposed inferences are just and reasonable from a data-science perspective. (See generally Werberg Aff.)

[9] Based on its investigation, the Attorney General believes that violations are ongoing. (Mark Aff. ¶ 147.)

A. Tropical Breeze Operations

Tropical Breeze is a car wash, convenience store, and gas station located in the East Flatbush neighborhood of Brooklyn, New York.[10] (See Mark Aff. Ex. 14.) The car wash employs between approximately 20 and 28 workers at any given time. (Malik Tr. 47.) Based on the Attorney General's review of Respondents' time cards, Petitioner estimates that Tropical Breeze employed a total of approximately 150 employees during the Relevant Period. (Mark Aff. ¶ 27)

The majority of Tropical Breeze workers are cleaners, who, among other tasks, detail, vacuum, brush and polish the cars. (Malik Tr. 40-46.) Approximately five or six employees work as cashiers for both the car wash and the convenience store. (See Malik Tr. 45, 49; Chavez Aff. ¶ 7.)

Car wash cleaners' shifts begin at 7:00 a.m., 9:00 a.m., or 1:00 p.m. and usually run until the car wash closes between 8:00 to 10:00 p.m. during the busy season, and between 5:00 to 7:00 p.m. during the slow season. (Malik Tr. 55-56; Cabrera Aff. ¶ 7; Gomez Aff. ¶ 7; Zacatenco Aff ¶ 7; Cabrera Supp. Aff ¶ 7; Gomez Supp. Aff. ¶ 7; Zacatenco Supp. Aff ¶ 7.) Cashiers generally work eight hours per shift, from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., or 11:00 p.m. to 7:00 a.m. (Malik Tr. 52-53; Chavez Aff. ¶ 7.) All employees generally work six days per week. (See Malik Tr. 57; Cabrera Aff. ¶ 7; Zacatenco Aff. ¶ 7; Chavez Aff. ¶ 7.)

Tropical Breeze's volume of business varies by season, with the highest volume of business (as many as 500 cars in a single day) and most employees (approximately 28) during the winter, and the lowest volume of business (approximately 50 to 60 cars daily) and fewest

[10] The investigation of Tropical Breeze focused solely on the Tropical Breeze car wash and convenience store, and not on the attached gas station.

employees (approximately 20 to 22) during the summer. (Malik Tr. 47, 50, 156.) Regardless of the season, Friday through Sunday are the car wash's busiest days. (Id. at 25, 50.) On a typical busy day, Tropical Breeze is open between 12 and 15 hours during the winter months, and between 11 and 12 hours during the slower season. (Id. at 50-51.) When the weather is rainy or cloudy, during the busy or slow season, the car wash may not open at all or may only open for a few hours. (Id. at 51.)

B. Tropical Breeze Ownership and Management

In March 2011, Respondents purchased Tropical Breeze car wash, along with the attached gas station and convenience store. (See Mark Aff. Ex. 14.)

As noted, Tropical Breeze designated Malik to serve as its corporate representative to provide testimony pursuant to the Tropical Breeze Subpoena. Malik has been the on-site manager at Tropical Breeze from 2009 through at least 2017. (Malik Tr. 21-22.) Malik, also known to the employees as "John" or "Mr. John," manages many of the day-to-day operations under the supervision of Benno, or one of his sons, Philip or Gregory. (Malik Tr. 16-17, 25-26, 34-35; Cabrera Aff. ¶ 5; Gomez Aff. ¶¶ 4-5; Zacatenco Aff. ¶¶ 4-5; Chavez Aff. ¶¶ 5-6; Cabrera Supp. Aff. ¶ 5; Gomez Supp. Aff. ¶ 5; Zacatenco Supp. Aff. ¶ 5; Chavez Supp. Aff. ¶ 6.)

Malik testified that Benno, Philip or Gregory are present at the car wash "all the time" (Malik Tr. 25), and do "all the paperwork" and "all the bookkeeping" at Tropical Breeze together (id. at 26). Since the Gmuers purchased Tropical Breeze in 2011, at least one of the three family members is almost always on site. (Id. at 27-30.) When none of the Gmuers are on site, Malik regularly contacts them for managerial direction. (Malik Tr. 25, 35-36).

Benno is the owner and President of Tropical Breeze and an experienced entrepreneur. He is listed as the sole executive officer of Tropical Breeze, with the title "President," on the

NYSIF Workers' Compensation and Employers' Liability Application. (See Mark Aff. Ex. 15 at SIF USAW 0207.) On Tropical Breeze's tax returns, he is listed as the sole owner of 50 percent or more of the company, entitled to 100 percent of the company's profits, and identified as the "Tax Matters Partner." (See Mark Aff. Exs. 16-21.) Benno is an authorized signatory on all Tropical Breeze bank accounts (see Mark Aff. Ex. 22) and is authorized to receive process on behalf of the company (see Mark Aff. Ex. 14).

In addition to his position at Tropical Breeze, Benno also holds, or has held, executive positions at numerous Swiss and German companies. Within the past year, he has been on the Board of Directors of Hess Management AG, a real estate business with assets in Switzerland and Germany, which recently had merged at a value of approximately $21 million. Also within the past year, he has served on the Board of Directors, and was previously Chief Executive Officer, of SBS Schifffahrt AG, a shipping line on Lake Constance, a popular European vacation destination in the Northern Alps. Gmuer was also a Member of the Board of Directors of Lion AG, Kreuzlingen, another real estate company, which recently merged for approximately $34 million. (Mark Aff. Ex. 13, Affidavit of Lucas Chizzali ("Chizzali Aff."), ¶¶ 4-9.)

Notwithstanding Benno's involvement in other international business ventures, Malik explained that Benno is involved in running the Tropical Breeze business. Benno was present at the car wash for approximately two to three weeks every two months. (Malik Tr. 27.) During the Relevant Period, he was involved in hiring and firing employees and observing trainees. (Id. at 30-33; 140.) Benno helped to set the employees' schedules for when to clock in and out. (Id. at 58-59, 146-48, 152-53; Cabrera Aff. ¶ 3; Gomez Aff. ¶ 3; Chavez Aff. ¶ 4.) He had a role in setting the uniform and uniform maintenance policy (Malik Tr. 131-35) and was also responsible for approving or denying employee paid sick leave requests (id. at 58).

Benno shared responsibility for supervising the payroll and compensation of employees (Malik Tr. 26, 64, 67, 93-94, 125), and thus participated in reviewing and approving Malik's weekly calculations of workers' hours and wages (id. at 93-94, 95, 125).

During the Relevant Period, Philip and Gregory were also responsible for managing the business. (Malik Tr. 27-30, 35.) Philip was a manager at Tropical Breeze from 2014 until at least early 2016 and worked at the car wash 11 months per year on average. (Id. at Tr. 28-30.)

Philip was involved in interviewing, hiring and firing employees (Malik Tr. 30-33, 140), in addition to setting the schedule for employees' shifts and tracking employee attendance (id. at 17, 33-34, 155). Like Benno, Philip helped to decide what time to open the car wash and what time workers were allowed to clock in. (Id. at 147-48; Gomez Aff. ¶ 4; Chavez Aff. ¶ 5.)

Philip was also involved in calculating employee wages, checking Malik's calculation of employees' hours and wages, and occasionally paying wages to employees. (Malik Tr. 64, 67, 93-95, 113, 125.) Finally, Philip handled the uniform distribution and uniform maintenance. (Id. at 131, 133-35.)

Before Philip took on a more substantial role in running the car wash, Gregory managed the business with Benno from 2011 through 2013. Gregory helped interview prospective employees (id. at 31), distribute wages (id. at 113), and supervise bookkeeping, payroll and compensation of employees (id. at 26, 67, 113). Gregory was also involved in directing when employees clocked in and out. (Gomez Aff. ¶ 4; Chavez Aff. ¶ 5.) Gregory additionally had a role in uniform distribution and facilities maintenance. (Malik Tr. 34-35, 133-35.)

C. Tropical Breeze's Time-Card and Payroll System

To track Tropical Breeze employees' time and pay, Respondents purported to use a standard time-card system in which employees used a paper card to clock in each day when their shift began and to clock out when it ended. (Malik Tr. at 59-60) Respondents instructed employees as to when they could clock in and out. See infra 12-17.

Respondents maintained two separate payroll systems: one "official" system for on-the-books employees through Paychex and another for off-the-books employees. (Malik Tr. 99-100.) Respondents paid all employees in cash. (Malik Tr. 63, 113; Cabrera Aff. ¶ 11; Gomez Aff. ¶ 12; Zacatenco Aff. ¶ 11; Chavez Aff. ¶ 11.)

For on-the-books employees, about one-third of Tropical Breeze's workforce, Tropical Breeze maintained a payroll software system through Paychex that recorded gross and net pay, lawful deductions, and allowances. (Malik Tr. 60-63; see, e.g., Mark Aff. Ex 23.) Respondents provided on-the-books employees with the statements Paychex generated or "pay stubs" but paid them in cash, not by check. (Malik Tr. 60-63; see, e.g., Mark Aff. Ex 23.) On-the-books employees did not, however, receive any notices of their wage rates ("Wage Notices") when they were hired or at any point thereafter, as the Labor Law requires. (Mark Aff. ¶ 78.)

For the off-the-books employees — the majority of its employees — Respondents did not maintain records in Paychex, or through any other systematized payroll program. (Malik Tr. 100-01.) Physical time cards, which contained only the employees' clock-in and clock-out times in addition to a handwritten sum of total hours worked in a week, were the sole record of payroll information for these employees. (See Mark Aff. Ex ¶¶ 73, 75, 82.) Tropical Breeze kept no records of the taxes, deductions, or net pay for off-the-books employees. (Id.) Off-the-books

employees also did not receive Wage Notices or any weekly payment statements ("Payment Statements") as the Labor Law requires. (Id. at ¶¶ 78, 80.)

D. Unrecorded Time and Unpaid Wages and Benefits

Since Respondents purchased Tropical Breeze in 2011, the promised rate of pay for Tropical Breeze non-managerial employees has been the legal minimum wage. (Malik Tr. 31; Cabrera Aff ¶ 8; Gomez Aff. ¶ 9; Chavez Aff. ¶ 8.) Respondents only paid full wages to both on- and off-the-books employees for the sum of hours Malik wrote on each employee's time card (Malik Tr. 64, 111-13; Cabrera Aff. ¶¶ 10-12; Gomez Aff. ¶¶ 11-13; Zacatenco Aff. ¶¶ 10-12; Chavez Aff. ¶¶ 10-12),[11] which, Malik testified, should have been a total of all the time during which the employee was clocked in each week (Malik Tr. 60-62, 66-67, 84-87; see, e.g., Mark Aff. Ex. 11).

However, Respondents manipulated this compensation system to deprive workers of earned wages and benefits in multiple ways. Tropical Breeze prevented employees from recording on their time cards the hours they worked during overtime shifts and waiting for the car wash to open. It failed even to compensate employees fully for all of the hours plainly recorded on the employees' time cards. Tropical Breeze also did not provide employees with additional wages for excessively long or short shifts as the Labor Law requires.

1. Unrecorded and Underpaid Overtime

During the majority of the Relevant Period, Respondents sought to hide records of their employees' overtime hours in an attempt to avoid paying full overtime rates. Malik admitted

[11] For overtime hours that the time cards did not capture, Respondents paid employees only partial wages. See infra 12-14. For waiting time that the time cards did not capture, Respondents did not pay any wages. See infra 15-17.

that during the busy season, employees worked upwards of 75 hours a week, and that even during a slow week, employees routinely worked more than 40 hours per week. (Malik Tr. 56-57.) In their affidavits, employees stated that they typically worked six days a week and usually worked between 8 and 12 hours per day. (Cabrera Aff. ¶ 7; Gomez Aff. ¶ 7; Zacatenco Aff. ¶ 7; Chavez Aff. ¶ 7.)

To evade their overtime obligations, Respondents removed employees' time cards as they neared 40 hours of work in a pay period so that employees could not record the time they worked beyond the 40-hour threshold. Malik described this scheme:

> Q. We were just talking about when a worker reaches 40 hours, correct?
> A. Right.
> Q. Did you say that Philip sometimes takes the time card after the worker reaches 40 hours?
> A. Yes.
> Q. What does he do with the time card?
> A. Bring it in the office.
> Q. And he leaves it in the office?
> A. Yeah.
> Q. But the worker no longer has access to his time card?
> A. No.

(Malik Tr. 154.) Since Tropical Breeze fully compensated both on- and off-the-books employees only for the hours written on the time cards, see supra 12, the workers were not properly paid for the unrecorded hours.

Employees also testified that, until April 2016, Respondents did not permit them to clock in after they reached 40 hours of work. (Cabrera Aff. ¶ 12; Gomez Aff. ¶ 13; Zacatenco Aff. ¶ 12; Chavez Aff. ¶12.) Tropical Breeze paid these unrecorded overtime hours only at each employee's regular hourly rate of pay — not the required overtime premium rate of one-and-one-half times his regular hourly rate. (Cabrera Aff. ¶ 12; Gomez Aff. ¶ 13; Zacatenco Aff. ¶ 12; Chavez Aff. ¶ 12.)

The patterns that emerge from the Attorney General's review of Tropical Breeze's time card records are consistent with workers' testimony that they were frequently not permitted to clock in toward the end of the workweek. The Tropical Breeze workweek begins Friday and ends the following Thursday. (Malik Tr. 59.) As a result, Respondents typically removed employees' time cards on Tuesdays, Wednesdays, and most dramatically, on Thursdays, as employees approached 40 hours of work. The Attorney General's "Held Card Overtime Hours Graph" shows the total number of the five Analyzed Group employee time cards[12] for 2014 sorted by days of the week (i.e., which days of the week the time cards recorded the employees as working). (Werberg Aff. ¶ 16(c)(iv); Mark Aff. Ex. 12.) The graph reflects that employees logged time on their time cards more than twice as often on Fridays, Saturdays, Sundays, and Mondays, than they did on Thursdays, the last day of the workweek.[13] But, as Malik testified, the volume of business does not differ significantly Monday through Thursday. (Malik Tr. 51.)

The Attorney General's analysis concludes that, during the Relevant Period, Tropical Breeze underpaid its cleaners for at least 9,049 overtime hours and underpaid its cashiers for at

[12] Only five of the six employees in the Analyzed Group were scheduled to work Wednesday and Thursday shifts. (Werberg Aff. ¶ 16(c)(i) n.11.) Because the Attorney General could not distinguish whether time cards for the sixth employee, who was not regularly scheduled to work on those two days, had been unlawfully held, or whether the employee simply did not work on those days, the Attorney General used only five employees for this analysis. (Id.)

[13] The graph reflects that, collectively, the employees worked 179 Friday shifts, 177 Saturday shifts, 173 Sunday shifts and 177 Monday shifts in 2014. Starting on Tuesdays, however, the number of time card hours gradually, then sharply, declined—the time cards recorded employees as working only 122 Tuesday shifts, 110 Wednesday shifts, and then only 83 Thursday shifts, the last day of the workweek when employees are mostly likely to have exceeded 40 hours of work. (Mark Aff. Ex. 12; Werberg Aff. ¶ 16(c)(iv).)

least 7,200 overtime hours.[14] (Werberg Aff. ¶ 22.) For cleaners, the Attorney General's analysis used the time cards of five Analyzed Group employees as a basis to calculate the number of underpaid overtime hours denied the rest of the cleaner workforce from January 1, 2012 to April 30, 2016.[15] (Id. at ¶ 21.) For cashiers, the Attorney General assumed, based on Malik's and Chavez's testimony (Malik Tr. 52-53, 57; Chavez Aff. ¶¶ 7, 12), that the employees worked eight hours a day, six days a week, and were thus underpaid for eight hours of overtime weekly from January 1, 2012 to February 15, 2015 (Werberg Aff. ¶ 22; Chavez Aff. ¶ 10).

2. Unrecorded and Unpaid Waiting Time

On slow business days, Tropical Breeze directed cleaners to report to work at their scheduled start times but wait until later in the day to clock in. This practice caused the employees, particularly those working the earliest shift, to work a significant amount of unrecorded, and thus unpaid, hours.[16]

Malik admitted that sometimes, for example, cleaners arrived for their shifts at 7:00 a.m., but Respondents regularly directed them to wait until 9:00 a.m. to open the car wash. (Malik Tr. 51-52). On these days, Malik did not permit the employees to clock in until 9:00 a.m., instead of

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[14] In order to determine the extent of liability and damages for unpaid overtime, the Attorney General's analysis identified time cards for employees in the Analyzed Group for weeks where the last recorded workday within a pay period was Tuesday or earlier, and where the employee was not regularly scheduled to have a day off on Wednesday or Thursday. (Werberg Aff. ¶ 16(c)(i-ii).) The analysis then attributed to the employee the difference in hours as if they worked the full six days that pay period, at the average daily hours worked for other days in the same pay period. (Id.)

[15] Respondents denied the five workers in the Analyzed Group a total of at least 1,832 hours of overtime pay. (See Werberg Aff. ¶¶ 16(c)(v), 20.)

[16] Because cashiers worked a regular schedule of 48 hours per week (see Malik Tr. 52-53, 57; Chavez Aff. ¶ 7), the Attorney General does not seek to recover relief for unpaid waiting time on behalf of these employees.

7:00 a.m., and Respondents never compensated employees for these two unrecorded hours of forced waiting time. (Id. at 52, 58, 147-48.) By Malik's own admission, on some days, employees could wait up to three hours before being permitted to clock in. (Id. at 147.)

As Malik testified:

> A. . . . . Like I mentioned, sometimes car wash open late, so [the employees] show up to work 7:00, and sometimes Philip decided, don't open. Leave it right now, hour, two hours, sometimes three hours, to clear up [the weather]. And business starts, but worker is there. Worker wants to punch. And I tell, if Philip not there, I make a phone call, what I do.
>
> Q. So you ask Philip what to do?
>
> A. Yes, of course. I can't tell, go open 7:00, because he is the boss. I have to listen to him. Even he come 8:00, I am 7:00, so I call him, listen, tell everybody to wait. I am going at that time so.
>
> Q. So the workers come in at seven, for example, a cloudy day, you call Philip, and he says open at 9:00?
>
> A. Right.
>
> Q. And what time -- on that day, what time do the workers punch, 7:00 or 9:00?
>
> A. Nine.

(Id. at 147-48.)

Likewise, cleaners consistently testified that, on slow days, Tropical Breeze directed them to wait to clock in, for anywhere from 30 minutes to 4 hours, and that they were not paid for this time. (Cabrera Aff. ¶ 10; Gomez Aff. ¶ 11; Zacatenco Aff. ¶ 10.) Respondents did not produce any pay records for these hours that contradict the employee testimony. (Mark Aff. ¶ 75.)

In addition to employee testimony, the Attorney General's analysis of time card records also illustrates that, on many occasions, employees' clock-in times were significantly later than their scheduled arrival time. (Werberg Aff. ¶ 16(b).) The Attorney General's analysis[17]

[17] The analysis found evidence of waiting time violations in Analyzed Group time cards by identifying days where there was a significant discrepancy between the employee's scheduled

calculated that during the Relevant Period, Tropical Breeze failed to record, and thus failed to pay its cleaner workforce for, at least 23,332 hours of waiting time. (Id. at ¶ 21.) The analysis used the time cards and payroll records of the six cleaners in the Analyzed Group and extrapolated the findings to the rest of the cleaner workforce.[18] (Id.)

3. Unpaid Cut Time

Tropical Breeze even failed to pay cleaners fully for the hours plainly recorded on their time cards. On each time card, in addition to time-clock-generated clock-in and clock-out times, Malik wrote his "calculation" of the total number of hours each employee worked in a given pay period based on the time stamps on the time cards.[19] (Malik Tr. 84-87.) However, this handwritten calculation was consistently lower than the actual sum of the time-clock-generated hours. Malik admitted that Respondents had a practice of rounding the time employees work each pay period to the nearest whole hour increment. (Id. at 89-92.)

The Attorney General found that, in the vast majority of the time cards analyzed, Tropical Breeze cut hours worked down to the nearest whole hour,[20] resulting in routine failures to pay employees for all hours worked. (See Werberg Aff. ¶ 16(a)(i).) The Attorney General's review

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start time (i.e., when the employee arrived for his shift) and the time the employee was permitted to clock in (i.e., when the wait time concluded). (Werberg Aff. ¶ 16(b)(i-iii).)

[18] Respondents deprived the six workers in the Analyzed Group at least 2,887 hours of waiting time pay. (See Werberg Aff. ¶ 16(b)(iv).)

[19] Because cashiers worked a regular schedule of 48 hours per week (see Malik Tr. 52-53, 57; Chavez Aff. ¶ 7), the Attorney General does not seek to recover relief for unpaid cut time on behalf of these employees.

[20] The Attorney General compared the time clock's computer-generated hours to Malik's handwritten hours for all of the time cards for the six Analyzed Group employees from January 2012 to September 2015. (Werberg Aff. ¶¶ 4, 16(a)(iv-v).)

of time cards shows that when Malik altered the sum of employees' hours, he cut time from the time cards in 67 percent of cases, and added hours in only 33 percent. (Id. at ¶ 16(a)(i-ii).) In over 40 percent of the time cards analyzed, the cut time for a particular day was greater than 30 minutes. (Id. at ¶ 16(a).) By contrast, the time added for a particular day was greater than 30 minutes in only 7 percent of all time cards analyzed. (Id. at ¶ 16(a)(ii).)

The Attorney General's analysis, which calculated cut time by comparing the weekly total of hours based on clock-in and clock-out times with Respondents' handwritten weekly totals, concluded that Respondents cut a total of approximately 2,548 hours from cleaners' time cards. The analysis used the time cards of the six cleaners in the Analyzed Group to estimate the cut hours for the cleaner workforce.[21] (Werberg Aff. ¶ 21.)

4. Unrecorded and Unpaid Call-in Time and Spread-of-Hours Pay

Respondents failed to provide cleaners with an extra hour of pay when they worked more than 10 hours a day ("spread-of-hours" pay), as the Labor Law requires. Employees generally work six days a week, and Malik testified that, during the busy season, they worked, at times, between 70 and 75 hours per week.[22] (Malik Tr. 54-57.) The cleaners testified that Respondents did not compensate them over and above straight-time pay when the employees worked more than 10 hours. (Cabrera Aff. ¶ 16; Gomez Aff. ¶ 17; Zacatenco Aff. ¶ 17.) Respondents provided no records showing that they paid spread-of-hours pay. (Mark Aff. ¶ 75.)

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[21] Respondents deprived the six workers in the Analyzed Group of at least 390 hours of pay for cut time. (See Werberg Aff. ¶¶ 16(a)(vi), 20.)

[22] Because cashiers worked a regular schedule of eight hours per shift (see Malik Tr. 52-53, 57; Chavez Aff. ¶ 7), the Attorney General does not seek to recover relief for unpaid spread-of-hours on behalf of these employees.

The Attorney General's analysis shows that during the Relevant Period, Respondents never paid their cleaners spread-of-hours pay. (Werberg Aff. ¶ 16(d)(i).) The analysis identified shifts where employees in the Analyzed Group worked longer than 10 hours[23] and determined, based on Tropical Breeze's pay records, that Respondents did not pay employees spread-of-hours wages for those shifts. (Id. at ¶ 16(d)(i).) Using the Analyzed Group to estimate violations for the rest of the workforce,[24] the Attorney General concluded that Respondents failed to pay spread-of-hours for approximately 8,379 shifts. (Id. at ¶ 21.)

On certain occasions, particularly on days when the weather was rainy or cloudy, Respondents also required cleaners to arrive on site for a shift but then sent them home after less than four hours of work.[25] (Malik Tr. 51-52, 147-48.) Several employees also confirmed that Tropical Breeze did not provide a minimum of four hours of pay to employees on days when it sent the employees home early ("call-in pay"), which the Labor Law requires. (Cabrera Aff. ¶ 17; Gomez Aff. ¶ 18; Zacatenco Aff. ¶ 18.)

The Attorney General's analysis of the pay records similarly shows that on days when Analyzed Group employees worked less than four hours, Respondents did not compensate them for the four-hour minimum. (Werberg Aff. ¶ 16(e)(i).) The analysis identified shifts where Analyzed Group employees worked less than four hours and determined that Respondents

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[23] The Attorney General calculated hours worked by adding the hours on the employee's time card and, where relevant, the amount of time the employee spent waiting for Tropical Breeze to open. (Werberg Aff. ¶ 16(d)(ii).)

[24] Respondents deprived the six Analyzed Group workers spread-of-hours pay for 1,655 shifts. (Werberg Aff. ¶¶ 16(d)(iii), 20.)

[25] Because cashiers worked a regular schedule of eight hours per shift (see Malik Tr. 52-53, 57; Chavez Aff. ¶ 7), the Attorney General does not seek to recover relief for unpaid call-in pay on behalf of these employees.

categorically failed to pay the employees for the full four hours of call-in time. (Id. at ¶ 16(e)(i-ii).) The analysis concluded that, based on the patterns in the Analyzed Group,[26] Respondents deprived cleaners of 2,160 hours of call-in pay. (Id. at ¶ 21.)

5. Deductions for Uniform Purchase and Maintenance

Tropical Breeze employees must bear the costs of their own uniforms. Respondents required employees to wear a uniform consisting of a shirt and a hat in the summer, and an additional sweater and jacket in the winter. (Malik Tr. 131-33; Cabrera Aff. ¶ 20; Zacatenco Aff. ¶ 20; see Mark Aff. Ex. 24 (receipt for uniform deduction).) For the summer months, Tropical Breeze charged cleaners a deposit of $30 for two shirts and one hat (Cabrera Aff. ¶ 20; Gomez Aff. ¶ 21; Zacatenco Aff. ¶ 20), and for the winter months, it charged them a deposit of at least $60 for one sweater and one jacket (See, e.g., Malik Tr. 133-34; Cabrera Aff. ¶ 20; Gomez Aff. ¶ 21; Zacatenco Aff. ¶ 20), for a total of $90 per person. For cashiers, Tropical Breeze charged $60 for one sweater and two shirts. (Chavez ¶ 16.) Respondents deducted the amounts from employees' wages and did not reimburse them. (Cabrera Aff. ¶ 20; Gomez Aff. ¶ 21; Zacatenco Aff. ¶ 20; Chavez Aff. ¶ 16.)

Respondents also did not reimburse cashiers[27] for any of the uniform laundering or maintenance costs as required by law. (Cabrera Aff. ¶ 20; Gomez Aff. ¶ 21; Zacatenco Aff. ¶ 20.)

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[26] Respondents deprived the six workers in the Analyzed Group at least 359 hours of call-in pay. (Werberg Aff. ¶¶ 16(e)(iii), 20.)

[27] Malik testified that, unlike cashiers, cleaners have access to an on-site laundry machine. (Malik Tr. 133-134.)

6. Unpaid Sick Leave

Respondents did not provide employees with any compensated sick time. Two employees testified that they requested sick leave in 2016 and 2017. Cabrera and Gomez had both been working over 40-hour weeks every week at Tropical Breeze since 2006 and 2012, respectively, and had thus both accrued over 40 in earned sick leave per year under ESTA.[28] (Cabrera Aff. ¶ 12; Cabrera Supp. Aff. ¶ 10; Gomez Aff. ¶ 13; Gomez Supp. Aff. ¶ 10.)

In or around November 2016, Cabrera missed three days of work due to illness. He contacted Malik to call out sick for those days, but Respondents did not provide him with paid sick leave. (Cabrera Supp. Aff. ¶ 16.) Between April 2016 and January 2017, Gomez missed approximately five days of work due to illness. Respondents similarly did not provide him with paid sick leave. (Gomez Supp. Aff. ¶ 17.)

Employees testified that Respondents' illegal denial of wages and benefits continued until at least early 2017 and there is no evidence that these practices have changed. (Cabrera Supp. Aff. ¶¶ 8-16; Gomez Supp. Aff. ¶¶ 8-16; Zacatenco Supp. Aff. ¶¶ 8-16; Chavez Supp. Aff. ¶¶ 8-16.)

E. Respondents' Payroll Misrepresentations to the State

Respondents did not report the majority of their employees (particularly the off-the-books employees) to the State either on their tax or workers' compensation insurance forms. In Tropical Breeze's NYS-45 quarterly filings ("NYS-45 Quarterly Returns") with the New York State Department of Taxation and Finance ("DTF"), from which the State Department of Labor

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[28] ESTA provides that employees accrue one hour of paid sick leave for every 30 hours worked and can accrue up to 40 hours of sick leave per year. Employees may also carry over up to 40 hours of earned sick time from year to year. See infra 55-56.

("DOL") calculates employers' required unemployment insurance contributions, Respondents chronically underreported the number of employees working at Tropical Breeze. (Mark Aff. ¶ 145.)

While Malik testified that Tropical Breeze employed 20 to 28 workers (Malik Tr. 47-49, 100, 115-17, 124), Respondents misrepresented these numbers year after year. In its NYS-45 Quarterly Returns, Tropical Breeze reported:

- From 11 to 18 employees in 2012 (Mark Aff. Ex. 25);
- From 10 to 12 employees in 2013 (Mark Aff. Ex. 26); and
- From 13 to 19 employees in 2014 (Mark Aff. Ex. 27).

Respondents also significantly misrepresented employee wages and the number of employees on Tropical Breeze's payroll to NYSIF, Tropical Breeze's workers' compensation insurance carrier. In its Application for New York Workers' Compensation and Employers' Liability Insurance, which bears Benno's signature, Tropical Breeze reported only four car wash and convenience store employees and an annual payroll of $70,000. (Mark Aff. Ex. 15 at SIF USAW 0205.)

IV. STATUTORY AND LEGAL FRAMEWORK

Pursuant to Section 63(12), the Attorney General has authority to investigate and prosecute[29] violations of federal, state, and local laws, including the Labor Law, pursuant to Section 63(12). See, e.g., People v. Frink Am., Inc., 2 A.D.3d 1379, 1380-81 (4th Dep't. 2003) (violations of the Labor Law are actionable under Section 63(12)); State v.

[29] The Attorney General's power to investigate and prosecute pursuant to Section 63(12) includes the authority to issue subpoenas for documents and testimony prior to the filing of any court proceeding as was done in this case.

Winter, 121 A.D.2d 287, 288-89 (1st Dep't 1986) (Attorney General may enforce local laws through Section 63(12) standing).

The Attorney General may bring an action pursuant to Section 63(12) through a special proceeding. C.P.L.R. Section 409(b) provides that, in a special proceeding, "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment." Accordingly, "a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment[.]" Karr, 55 A.D.3d at 86. On summary judgment, the movant must "tender . . . evidentiary proof in admissible form" sufficient to establish violations as matter of law. Zuckerman v. City of N.Y., 49 N.Y.2d 557, 562 (1980) (citing C.P.L.R. § 3212(b)). The burden then shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to so do." Id. at 560. "[B]are allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion." Matter of Fin. Guar. Ins. Co., 39 Misc. 3d 208, 210 (Sup. Ct. N.Y. Cnty. 2013) (citing Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978)). In a special proceeding, summary relief is appropriate and an evidentiary hearing is unnecessary where the party opposing the motion does not submit evidence sufficient to raise a material issue of fact. See Fin. Guar. Ins., 39 Misc. 3d at 210-11.

V. ARGUMENT

There is no genuine dispute of material fact that Respondents repeatedly violated 1) the Labor Law; 2) the Earned Sick Time Act; and 3) the Workers Compensation Law. Where a party's own admissions and business records indisputably show repeated illegal acts, a summary

determination that there are no triable issues of fact is warranted and the Court should enter judgment for the Attorney General. See C.P.L.R. § 409(b) ("The court shall make a summary determination . . . to the extent that no triable issues of fact are raised."); Section 63(12) (Attorney General may bring a summary proceeding for repeated illegal acts); Frink Am., Inc., 2 A.D.3d at 1380-81 (same).

A. The Court Should Grant Summary Judgment and Award Damages for Labor Law Violations

1. The Burden Shifting Framework Under the Labor Law

Under the Labor Law,[30] the petitioner has the initial "burden of proving that [employees] performed work for which [they] were not properly compensated" in an action for unpaid wages and liquidated damages. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946); Kalloo, 977 F. Supp. 2d at 200 ("Plaintiffs must prove by a preponderance of the evidence that defendants did not adequately compensate employees as required by the FLSA and the [Labor Law]."). Given the remedial nature of the Labor Law, the statute must be "construed broadly to effectuate its purpose." Scholtisek v. Eldre Corp., 697 F. Supp. 2d 445, 467 (W.D.N.Y. 2010) (citing Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)).

Where an employer's records of hours worked and wages paid are inaccurate, incomplete, or otherwise inadequate, it is well settled that the petitioner "has carried [its] burden if [it] proves that [employees have] in fact performed work for which [they were] improperly

[30] Courts interpret the standard for liability under the Labor Law identically to its federal counterpart, the Fair Labor Standards Act ("FLSA"). Kalloo v. Unlimited Mech. Co. of N.Y., 977 F. Supp. 2d 187, 200 (E.D.N.Y. 2013); Aponte v. Modern Furniture Mfg. Co., LLC, No. 14 Civ. 4813 (ADS) (AKT), 2016 WL 5372799, at *11 (E.D.N.Y. Sept. 26, 2016) (applying same standard for liability for unpaid wage violation under the Labor Law and the FLSA).

compensated and if [it] produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Mt. Clemens Pottery, 328 U.S. at 687; see also Bae v. Indus. Bd. of App., 104 A.D.3d 571, 572 (1st Dep't 2013) (affirming Labor Law liability for back pay where employer failed to keep accurate and contemporaneous records); Kalloo, 977 F. Supp. 2d at 200, 203-04 (where employers failed to keep written records of overtime payments made to employees, court drew "just and reasonable" inference as to amount and extent of work performed by employees using timesheets and employee testimony). In such cases, while the petitioner must establish his claims with "at least some credible evidence," his burden "is not high," "so it is possible . . . to meet this burden through estimates based on [the employee]'s recollection." Kalloo, 977 F. Supp. 2d at 200.

After the Petitioner establishes that the employer did not properly compensate employees, the burden then shifts to Respondents "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from" the record before the court. Mt. Clemens Pottery, 328 U.S. at 687. Where Respondents fail to present such evidence, "the court may then award damages to the [Petitioner], even though the result be only approximate." Id. at 688; Labor Law § 196-a (where an employer failed "to keep adequate records . . . the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."); Kalloo, 977 F. Supp. 2d at 200 ("[Labor Law] mirrors the FLSA with regard to the burden of proof where an employer has failed to keep proper employment records.").

2. The Attorney General Can Prove Labor Law Violations by Just and Reasonable Inference

The Attorney General can carry its burden of proof in its Labor Law claims by showing "the amount and extent" of work employees performed "as a matter of just and reasonable

inference." Mt. Clemens Pottery, 328 U.S. at 687; Kalloo, 977 F. Supp. 2d at 200. Where an employer fails to maintain complete and accurate employment records as required by law, "[the] solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty . . . ." Mt. Clemens Pottery, 328 U.S. at 687; Hy-Tech Coatings v. N.Y. State Dep't of Labor, 226 A.D.2d 378, 379 (2d Dep't 1996).

There is no dispute that Respondents' pay records fall short of Labor Law obligations. The Labor Law requires the employer to establish, and maintain for at least six years, weekly pay records that include, among other information, the number of hours worked daily and weekly by employees, and net wages paid, with gross wages and any deductions. See Labor Law § 195; 12 N.Y.C.R.R. § 142-2.6(a)(4), (6), (7), (9). The Labor Law also requires the employer to keep track of identifying information for each employee. See Labor Law § 195; 12 N.Y.C.R.R. § 142-2.6(a)(1), (2), (3) (requiring employee's name and address, social security number, and wage rate).

For the majority of Tropical Breeze workers — the off-the-books employees — Respondents kept track of employee hours and pay through the time cards alone, which reflected only the employee's name, the time the employee clocked in and out, and Respondents' handwritten totals of the employee's weekly hours and wages. (See Mark Aff. Ex. 11; Malik Tr. 100-01.) The time cards provide a fraction of the identifying information that the Labor Law requires; there is no information on net wages, deductions, address, or wage rate. (See Mark Aff. Ex. 11.) More significantly, the time cards fail to reflect substantial amounts of each employee's working hours, including overtime and waiting time hours. See supra 12-17.

Respondents produced no evidence that they maintained any records reflecting all the hours worked, wage rates, net wages, or payroll deductions for off-the-books employees. (Mark Aff. ¶¶ 73, 75, 82.)

For the on-the-books employees, Respondents additionally kept electronic payroll records through Paychex. (Malik Tr. 60-63.) While the Paychex records contained more personal employee information, such as the name, birthdate, and social security number, the records did not include any additional information about the employee's hours. (See, e.g., Mark Aff. Ex. 23.) The Paychex records simply reflect Malik's handwritten weekly totals of employee hours and wages, and thus do not capture the full extent of hours worked. (Malik Tr. 64 (both on- and off-the-books employees are paid based on Malik's handwritten totals on time cards).) See supra 12-17.

Respondents produced no other documents showing how they kept track of employee hours and wages. (Mark Aff. ¶ 75) Malik confirmed that Tropical Breeze primarily used time cards and Paychex records for its payroll system.[31] (Malik Tr. 99-102.)

Accordingly, due to Respondents' lack of accurate and contemporaneous work and pay records, the Attorney General may meet its burden of proof by raising a reasonable inference that Respondents violated the Labor Law.

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[31] Although Malik and the employees mentioned daily attendance sheets or a "log book," Respondents have produced no such documents. (See Malik Tr. 102-04; Cabrera Aff. ¶ 12; Gomez Aff. ¶ 13; Zacatenco Aff. ¶ 12; Chavez Aff. ¶ 12; Mark Aff. ¶ 75.) The daily attendance sheet referenced in Malik's subpoena hearing was a single example the Attorney General obtained from an employee, not from Respondents.

3. Respondents Repeatedly Failed To Pay Employees for All Hours Worked

The Labor Law mandates that employers pay employees full wages for all of the time they spend working. See Labor Law § 191; see also Guan Ming Lin v. Benihana Nat. Corp., 275 F.R.D. 165, 172 (S.D.N.Y. 2011) ("New York wage laws require employers to pay hourly employees for all of their hours worked; thus, employers are prohibited from requiring employees to perform uncompensated, or 'off-the-clock,' work."). Respondents failed to meet this fundamental requirement to pay workers for all hours on the job.

Respondents only paid employees full wages for the sum of hours Malik wrote on each employee's weekly time card. (Malik Tr. 64, 111-13; Cabrera Aff. ¶¶ 10-12; Gomez Aff. ¶¶ 11-13; Zacatenco Aff. ¶¶ 10-12; Chavez Aff. ¶¶ 10-12.) By manipulating when employees clocked in and out, however, Respondents minimized the hours the time cards recorded. See 28-34. By cutting the calculation of each employee's weekly time down to the nearest hour, Respondents further reduced the amount of time for which employees were compensated. See infra 34-35. By ignoring laws that governed compensation for excessively long or short shifts, Respondents deprived workers of full payment for workdays that either extended past 10 hours or fell short of 4 hours. Thus, as described more fully below, Respondents' payment scheme failed to compensate employees for, or even record, a substantial proportion of i) overtime hours; ii) the time employees spent on Tropical Breeze premises waiting for the business to open; iii) the time Respondents deliberately cut from the time cards; iv) spread-of-hours pay; and v) call-in pay.

a. The Attorney General Has Met Its Burden for Unpaid Wage Claims

i. Respondents Failed To Pay Required Overtime Rates

New York's Minimum Wage Act is a remedial statute, seeking to safeguard the "health and well-being of the people of this state" and protect New Yorkers from "wages insufficient to provide adequate maintenance for themselves and their families." Labor Law § 650. The law

sets a minimum hourly dollar amount, which has increased over time during the Relevant Period, from $7.25 per hour to its current hourly rate of $11.00. See Labor Law § 652(2).[32] Manual workers, such as car wash employees, must be paid all wages for all hours worked weekly. See Labor Law § 191(1)(a). The applicable regulations also require that the employer pay overtime wages at one-and-one-half times an employee's regular rate of pay for hours worked in excess of forty hours in one workweek. See Minimum Wage Order for Miscellaneous Industries and Occupations ("Miscellaneous Wage Order"), 12 N.Y.C.R.R. § 142-2.2.

By confiscating employees' time cards as the employees approached the overtime threshold of 40 hours of work per week, Respondents violated their obligations under the Miscellaneous Wage Order. Malik admitted that Tropical Breeze employees worked 70 or more hours weekly during the busy season, but that employees could not log their overtime hours. (Malik Tr. 56, 154.) Employees also testified that Respondents did not permit them to clock in after they had already worked in excess of 40 hours that week. (Cabrera Aff. ¶ 12; Gomez Aff. ¶ 13; Zacatenco Aff. ¶¶ 12, 17; Chavez Aff. ¶ 12.) According to employee affidavits, Respondents rarely recorded overtime hours, and, even when Tropical Breeze did record these hours, employees never received pay at the required time-and-a-half overtime rate. (Cabrera Aff. ¶ 12; Gomez Aff. ¶ 13; Zacatenco Aff. ¶¶ 12, 17; Chavez Aff. ¶ 12.)

The Attorney General's analysis of employees' time cards further corroborates that, before April 2016, Respondents removed time cards at or around 40 hours in order to cheat employees out of their overtime pay. The Held Card Overtime Hours Graph reveals a precipitous drop in the number of employee work hours recorded toward the end of each pay

[32] The Labor Law incorporates increases to the federal minimum wage, which went up to $7.25 on July 24, 2009. See Labor Law § 652(1); 29 U.S.C. § 206.

period in 2014; employees recorded work hours more than twice as often on the first four days of the workweek than they did on Thursdays, the last day. (Werberg Aff. ¶ 16(c)(iv).)

The Attorney General's analysis, which is based on data from five Analyzed Group employees, estimates that during the Relevant Period, Tropical Breeze failed to record, and thus underpaid its cleaner workforce for, at least 9,049 overtime hours. (Werberg Aff. ¶ 21.) This kind of representative approach is reasonable and consistent with Malik's testimony that Respondents' pay practices extended to their entire workforce. See Reich v. S. New Eng. Telecoms. Corp., 121 F.3d 58, 66-68 (2d Cir. 1997) (accepting from U.S. Department of Labor representational testimony from 2.5% of the workforce to establish liability and wages owed for uncompensated work time and collecting cases addressing representational testimony); Monroe v. FTS USA, LLC, 860 F.3d 389, 408 (6th Cir. 2017) ("sister circuits overwhelmingly recognize the propriety of using representative [evidence] to establish a pattern of violations that include similarly situated employees who did not testify"; collecting cases from the First, Second, Third, and Fourth Circuits); see also Kalloo, 977 F. Supp. 2d at 193-97 (awarding damages under Labor Law based upon employee testimony); Islam v. Hossain, 44 Misc. 3d 1216(A) (Table), 2014 WL 3764338, at *8 (N.Y. Civ. Ct., July 11, 2014) ("[a]n employee may make a credible estimation of their hours and wages due."). Based on Malik's and Chavez's testimony of cashier schedules, the Attorney General estimates that Tropical Breeze failed to fully pay cashiers for 7,200 overtime hours. (Werberg Aff. ¶ 22.)

Petitioner has presented overwhelming evidence, including Respondents' own admissions and documents as well as employee testimony, that Respondents failed to fully compensate workers for overtime work. Accordingly, the Court should find that the Attorney General has met its burden to establish the extent and amount of overtime violations as a matter

of just and reasonable inference. Mt. Clemens Pottery, 328 U.S. at 687; Kalloo, 977 F. Supp. 2d at 200.

ii. Respondents Failed To Compensate Employees for Required Waiting Time

Respondents failed to compensate cleaners for time employees spent waiting to clock in. The U.S. Supreme Court has held that the workweek includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." Mt. Clemens Pottery, 328 U.S. at 691. This applies not only to the time that an employee is involved in productive work, but also to waiting time, if the employee was "engaged to wait." Skidmore v. Swift, 323 U.S. 134, 136-37 (1944). An employee is engaged to wait when the "time is spent predominantly for the employer's benefit." Armour & Co. v. Wantock, 323 U.S. 126, 132-34 (1944); Moon v. Kwon, 248 F. Supp. 2d 201, 229-30 (S.D.N.Y. 2002) ("Time that an employee spends waiting for work assignments is compensable if the waiting time is spent 'primarily for the benefit of the employer and his business.'" (quoting Owens v. Local No. 169, Ass'n of W. Pulp & Paper Workers, 971 F.2d 347, 350 (9th Cir. 1992)).[33] The Moon court clarified that "when [the employee's] periods of inactivity are 'unpredictable . . . [and] usually of short duration,' and the employee 'is unable to use the time effectively for his own purposes,'" then such wait time is for the benefit of the employer "even if 'the employee is

[33] Although the cases cited involve FLSA claims, the definition of "employ" under the FLSA and the Labor Law are virtually identical. Compare 29 U.S.C. § 203(g) (defining "employ" as "to suffer or permit to work"), with Labor Law § 2(7) (defining "employed" as "permitted or suffered to work"). Moreover, New York courts have employed the FLSA analysis regarding compensable waiting time in evaluating liability for claims brought under the Labor Law. See Nickle v. Astramed Physician, P.C., No. 11-CV-3753 MKB, 2013 WL 782370, at *3 (E.D.N.Y. Feb. 28, 2013). Thus, the courts' analyses of compensable waiting time under the FLSA are also applicable to claims brought under the Labor Law.

allowed to leave the premises or the job site during such periods of inactivity.'" 248 F. Supp. 2d at 229 (quoting 29 C.F.R. § 785.15).

Respondents regularly expected cleaners to arrive at work at their scheduled shift time but then required employees to wait to clock in if business was slow, particularly during days when bad weather affected business. Malik testified that, while employees arrived for their shifts at 7:00 a.m., Tropical Breeze, on several occasions, did not permit them to clock in until 9 a.m. (Malik Tr. 147-48.) Cleaners also testified that on certain days when business was slow, Tropical Breeze required them to wait to clock in periods ranging from 30 minutes to 4 hours, and that they were not paid for this time. (Cabrera Aff. ¶ 10; Gomez Aff. ¶ 11; Zacatenco Aff. ¶ 10.) The Attorney General's analysis, which compared employees' scheduled start time with the time they clocked in, confirms that Tropical Breeze failed to pay employees for the time they spent waiting to clock in. (Werberg Aff. ¶ 16(b).)

There is no material dispute that the time Tropical Breeze employees spent waiting to clock in was for the benefit of the employer. On these occasions, employees were on stand-by until the Respondents decided to commence operations for the day. (See Cabrera Aff. ¶ 10; Gomez Aff. ¶ 11; Zacatenco Aff. ¶ 10.) Respondents alone benefit from having a group of employees ready to begin washing cars at any time Respondents desired. Employees indisputably were restricted in the types of activities they could engage in, as they did not know when the car wash would open for business and so remained on the premises. (See Cabrera Aff. ¶ 10; Gomez Aff. ¶ 11; Zacatenco Aff. ¶ 10.) As the Supreme Court stated in Wantock, "[r]efraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity." 323 U.S. at 133. Because Tropical Breeze

employees were unable to meaningfully use the time for their own purposes, the law requires that they be compensated for this time. See Moon, 248 F. Supp. 2d at 230.

Based on information from the six Analyzed Group employees, the Attorney General estimates that during the Relevant Period, Tropical Breeze failed to record, and pay its cleaner workforce for, at least 23,332 hours of waiting time. (Werberg Aff. ¶ 21.) See supra 30-31.

Through Malik's admissions, the discrepancies in Respondents' own records, testimony from employees, and the Attorney General's own analysis, Petitioner has met its burden to show, as a matter of just and reasonable inference, that Respondents failed to pay employees for thousands of hours of waiting time in violation of the Labor Law. See Mt. Clemens Pottery, 328 U.S. at 687-88; Bae, 104 A.D.3d at 571.

Moreover, Respondents' failure to record waiting time further undercounted employees' overtime hours because the omission of these hours artificially depressed employees' total weekly hours. (Werberg Aff. ¶ 17.) This further violates the overtime provisions of the Miscellaneous Wage Order.[34] See 12 N.Y.C.R.R. § 142-2.2. See generally Guan Ming Lin, 275 F.R.D. at 172, 175-76 (allegations that employer required delivery workers to clock out of

[34] The Attorney General's analysis took Malik's handwritten total hours worked for six sample employees and multiplied their total hours by the appropriate minimum or overtime rate. That total amount was then compared to the actual wages paid as written on their time cards. The difference between the Attorney General's calculated wage total and actual wages Respondents paid showed that Respondents underpaid their employees by approximately 390 hours for the Relevant Period. These miscalculated wages violate the Labor Law's recordkeeping requirements. See Labor Law § 195. However, for the purposes of the damages calculation, the Attorney General's analysis relied on more accurate estimates of hours worked that included unrecorded waiting time and overtime, therefore correcting for these miscalculations in estimating unpaid wages, and so did not add separate damages for miscalculated hours as well. (See Werberg Aff. ¶ 16(f) n.14.)

electronic time-keeping system before their last delivery of the day support claims for violation of both minimum wage and overtime provisions).

iii. Respondents Illegally Cut Time Logged on Employee Time Cards

In addition to depriving workers of wages for unrecorded overtime and waiting hours, Respondents failed to pay cleaners fully even for the time plainly recorded on their time cards. Tropical Breeze's practice of regularly cutting time from employees' time cards further violates Labor Law obligations.

An employer is only permitted to round employee hours down if the practice does not, in the aggregate, cause the forfeiture of wages. Thus, where an employer's rounding practice systematically rounds down in favor of the employer, instead of rounding up in favor of the employee, it is unlawful. See Ackerman v. N.Y. Hosp. Med. Ctr. of Queens, 127 A.D.3d 794, 794, (2d Dep't 2015) (upholding unpaid wage claim based on employer's primarily-downward rounding practice); Eyles v. Uline, Inc., No. 4:08 Civ. 577-A, 2009 WL 2868447, at *4 (N.D. Tex. Sept. 4, 2009), aff'd, 381 F. App'x 384 (5th Cir. 2010) (granting summary judgment to plaintiff for FLSA wage claims based on defendant's rounding practice that primarily benefited employer); Austin v. Amazon.Com, Inc., No. C09-1679 (JLR), 2010 WL 1875811, at *1 (W.D. Wash. May 10, 2010) (plaintiff stated FLSA wage claim where he alleged that employer's rounding policy "almost exclusively works to [employer's] advantage"); Gonzalez v. Farmington Foods, Inc., 296 F. Supp. 2d 912, 933 (N.D. Ill. 2003) (rounding practices are only permissible under FLSA if there are no "major discrepancies between the actual hours worked by employees . . . and the hours for which employees are paid.").

Because Respondents' downward rounding practice primarily benefitted Tropical Breeze to the detriment of workers, it violates the obligation to pay employees for all hours worked. Malik admitted that Respondents had a practice of rounding the time cleaners worked each pay

period to the nearest whole hour increment. (Malik Tr. 89-92.) The Attorney General found not only that Respondents' rounding practice cut employee hours in the vast majority of time cards analyzed, but also that the practice cut time in greater increments than it added time. Respondents cut hours from time cards 67 percent of the time while they added hours to the time cards only 33 percent of the time. (Werberg Aff. ¶ 16(a)(i-ii).) Approximately 40 percent of Analyzed Group time cards showed that the cut time for a particular day was greater than 30 minutes, while only seven percent showed added time was greater than 30 minutes. (Id.)

The Attorney General estimates, based on the Analyzed Group data, that Tropical Breeze cut at least 2,548 employee work hours. (Werberg Aff. ¶ 21.) See supra 30-31.

Malik's admission about Tropical Breeze's rounding practices, in addition to the inconsistency between time-clock totals and handwritten totals on employee time cards, establish as a matter of just and reasonable inference that Respondents illegally cut the amount of time that time cards recorded and thus failed to pay employees for all hours worked. See Mt. Clemens Pottery, 328 U.S. at 687-88; Bae, 104 A.D.3d at 571.

iv. Respondents Failed To Pay Employees Required Spread-of-Hours Pay

Respondents violated their obligation to pay cleaners for spread-of-hours during extended shifts. Under the Labor Law, employers must pay employees one additional hour of pay at the basic minimum hourly rate if the beginning and end of an employee's workday, which the Miscellaneous Wage Order refers to as the "spread-of-hours," exceeds 10 hours. See 12 N.Y.C.R.R. § 142-3.4.[35] Employers must compensate employees for spread-of-hours over and above any payment for overtime compensation. Id.

[35] The Miscellaneous Wage Order explains that the "spread-of-hours for any day includes working time plus time off for meals plus intervals off duty." 12 N.Y.C.R.R. § 142-2.18.

Cleaners testified that they often worked in excess of 10 hours per day, especially during the busy season. (Cabrera Aff. ¶¶ 7, 16; Gomez Aff. ¶¶ 7, 17; Zacatenco Aff. ¶¶ 7, 17.) Malik's testimony supports the employees' account. Malik admitted that, during the busy season, employees worked from 70 to 75 hours weekly (Malik Tr. 56), even though they were scheduled to work six days per week (id. at 57), thus averaging more than 11 hours a day.

The Attorney General's analysis of the time card and Paychex records shows that during the Relevant Period, Respondents did not pay spread-of-hours pay to any of their cleaners. (Werberg Aff. ¶ 16(d)(i).) Using the Analyzed Group to estimate violations for the rest of the cleaner workforce, the Attorney General concluded that Respondents failed to pay spread-of-hours for approximately 8,379 shifts. See supra 30-31.

As a matter of just and reasonable inference, the Attorney General has met its burden of proof to show that Respondents repeatedly failed to pay spread-of-hours wages to cleaners. See Yu G. Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 261 (S.D.N.Y. 2008).

v. Respondents Failed To Pay Employees Required Call-in Pay

Under the Labor Law's "call-in pay" provision, an employee who, by request or permission of the employer, reports for work must be paid for at least four hours, or the number of hours in the employee's regularly scheduled shift, whichever is less, at the required minimum hourly wage. See 12 N.Y.C.R.R. § 142-2.3. As Malik admitted, when the weather is rainy or cloudy, the car wash may be open for only a few hours, or not open at all. (Malik Tr. 51-52, 58-59, 147-48; Cabrera Aff. ¶ 17; Zacatenco Aff. ¶ 18.) The cleaners confirmed that on these occasions, they were sent home early without the full pay for a four-hour shift. (Cabrera Aff. ¶¶ 7, 17; Gomez Aff. ¶¶ 8, 18; Zacatenco Aff. ¶¶ 7, 18.)

The Attorney General's analysis of the time cards and Paychex records similarly shows Respondents never provided employees with additional pay to meet the four-hour minimum. [36] (Werberg Aff. ¶ 16(e)(i).) The analysis concluded that, based on the patterns in the Analyzed Group, Respondents deprived cleaners of 2,160 hours of call-in pay. (Id. at. ¶ 21). See supra 30-31.

b. Respondents Cannot Meet Their Responsive Burden for Unpaid Wage Claims

Because the Attorney General has met its burden to show that Respondents failed to pay employees properly for all hours worked, the burden of proof then shifts to Respondents to "come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from" the record before this court. Mt. Clemens Pottery, 328 U.S. at 687; Labor Law § 196-a (where an employer failed "to keep adequate records . . . the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements"). Respondents cannot satisfy this burden.

As discussed above, Respondents' own corporate representative plainly admitted to the overtime, waiting time, and cut time violations. See supra 28-34. Malik's testimony also corroborates the Attorney General's findings that Respondents violated their spread-of-hours and call-in pay obligations. See supra 35-39. Respondents are not permitted to submit additional affidavits that contradict Malik's previous admissions. See Hill v. Country Club Acres, Inc., 134

[36] Because Tropical Breeze workers are all scheduled for shifts longer than four hours, see supra 7, the Labor Law requires that Respondents pay four hours of call-in pay. See 12 N.Y.C.R.R. § 142-2.3.

A.D.3d 1267, 1268 (3d Dep't 2015) ("a party cannot create an issue of fact by submitting a self-serving affidavit that contradicts prior sworn testimony") (internal quotation omitted); Garcia v. Jesuits of Fordham, Inc., 6 A.D.3d 163, 166 (1st Dep't 2004) (refusing to consider on summary judgment motion allegations in party's affidavit that contradicted prior testimony).

Respondents also cannot identify any documents to meet their burden of proof. Under subpoena obligation to produce records reflecting the time employees worked and the pay employees received, Respondents produced only employee time cards and Paychex records. (Mark Aff. ¶ 75.) Malik testified that these two kinds of records were the primary documents Respondents maintained to track employee hours and wages. (Malik Tr. 100-01; see also id. at 111-12.) The time card and Paychex records confirm the existence of Respondents' scheme to deliberately undercount employees' hours. (See Werberg Aff. ¶¶ 9-17.) Indeed, these documents form the basis for the Attorney General's analysis of Respondents' liability under the unpaid wage claims. (See id.) In the absence of supporting testimonial or documentary evidence, Respondents cannot raise any genuine dispute of material fact that they, in fact, paid employees for the unrecorded overtime, waiting time, cut time, spread-of-hours, and call-in hours. See Kalloo, 977 F. Supp. 2d at 200 (employer cannot meet burden where it "concede[s] that [it] did not keep written records of overtime payments made."). Summary judgment must thus be granted on the Attorney General's unpaid wage claims.

c. The Attorney General's Unpaid Wage Calculations

Because the Attorney General has proven the amount and extent of uncompensated work the employees performed, Respondents are liable for the "amount of underpayments, even though the results may be approximate[.]" Hy-Tech Coatings, 226 A.D.2d at 379; Ramirez v. Comm'r of Labor of State of N.Y., 110 A.D.3d 901, 901 (2d Dep't 2013) (same).

The Attorney General's analysis determined the total number of uncompensated hours for the Analyzed Group by 1) adding the handwritten sum of hours on the time card to the previously unrecorded overtime, waiting time, cut time, spread-of-hours, and call-in hours[37]; 2) calculating, based on the new sum, the correct amount of straight time and overtime pay employees should have received; and 3) subtracting the amount Respondents actually paid employees. (Werberg Aff. ¶ 17.)

The analysis then extrapolated the Analyzed Group damages to the rest of the cleaner workforce and concluded that Respondents owed an approximate total of $515,504 in unpaid wages. (Id. at ¶ 21.) The analysis also concluded that Respondents owed an approximate total of $27,180 to cashiers for underpaid overtime. (Id. at ¶ 22.)

4. Respondents Failed To Comply With Wage Notice and Payment Statement Requirements

In addition to the unpaid wage claims, Respondents also failed to satisfy their Wage Notice and Pay Statement obligations under New York Labor Law. The state legislature enacted Labor Law § 195, the Wage Theft Prevention Act, to "better protect workers' rights" by giving "workers the means to ensure that they are paid the wages to which they are legally entitled." New York Bill Jacket, 2010 S.B. 8380, Ch. 564, at 9 (Justification), 4 (signing statement of Governor Paterson); see also id. at 8 (the Commissioner of Labor stated "[e]mployees often . . . have no way to calculate whether the wages and benefits they receive are correct because they are not informed adequately, in a language they can comprehend, of their rate of pay and how

[37] The "unrecorded" time refers to employee working hours that Malik's handwritten sums did not capture. These hours, as a result, were not properly compensated. See supra at 28 for overtime; 31 for waiting time; 34 for cut time; 35 for spread-of-hours; and 36 for call-in hours.

their pay is calculated."). The Wage Theft Prevention Act also "dramatically" increased penalties in an effort to deter non-compliance with the various provisions of the law. Id. at 9 (Justification).

The Labor Law requires employers to provide each employee with a Wage Notice containing specific information about the employer and the employee's rate of pay[38] at the time of hire.[39] Labor Law § 195(1)(a). Employers are also required each pay period to provide a Payment Statement containing information about how each payment was calculated.[40] Labor Law § 195(3).

Off-the-books employees testified that they never received Wage Notices or Payment Statements. (Cabrera Aff. ¶ 19; Gomez Aff. ¶ 20; Zacatenco Aff. ¶ 19; Chavez Aff. ¶ 15.) While on-the-books employees received Paychex records (Malik Tr. 60-63; see Mark Aff. Ex. 23), which satisfy the requirements for Payment Statements, they did not receive Wage Notices. (Mark Aff. ¶ 78.) Tropical Breeze failed to produce any evidence that it created or provided

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[38] The Wage Notice must contain, inter alia, the rate or rates of pay; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; and the telephone number of the employer. Labor Law § 195(1)(a).

[39] Between April 9, 2011 and December 29, 2014, the Labor Law required employers to provide these notices annually. Labor Law § 195(1)(a) (2014).

[40] The Payment Statement must contain, inter alia, the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; and net wages; the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked, and the number of overtime hours worked. Labor Law § 195(3).

Wage Notices to any of the employees or Payment Statements to the off-the-books employees. (Id. at ¶¶ 78. 80.) There is thus no genuine material dispute that Respondents repeatedly failed to provide proper Wage Notices or Payment Notices under the Labor Law, and summary judgment should be granted on these claims. See Yu G. Ke, 595 F. Supp. 2d at 261.

Pursuant to Labor Law § 198(1-d), the penalty for violating the Wage Notice and Payment statement requirements for employees working between November 15, 2011, and December 28, 2014, is $50 per week with a statutory cap of $2,500 per employee. For employees hired after December 28, 2014, the Labor Law imposes a $50 fine for each day that the employer fails to provide a proper Wage Notice or Payment Statement, with a statutory cap of $5,000 per employee. Based on the number of employees during the Relevant Period, the Attorney General estimates that total damages and penalties for failure to provide Wage Notices and Payment Statements are approximately $475,000. (Werberg Aff. ¶¶ 19(a)(iii), 19(b)(iii).)

5. Respondents Failed To Comply with Uniform Purchase and Maintenance Requirements

Under the Miscellaneous Wage Order, an employer must reimburse employees in full for the cost of any required uniforms no later than the time of the employees' next scheduled pay period. See 12 N.Y.C.R.R. § 142-2.5(c). Because car wash workers must be paid weekly, see Labor Law § 191(1)(a), Tropical Breeze had a one-week deadline to reimburse employees for their uniforms.

Respondents admitted that all employees were required to wear a uniform. (Malik Tr. 131-33.) The employees, both cleaners and cashiers, all testified that they bore the costs of these mandatory shirts, jackets, sweaters and hats, and that they were never reimbursed for their uniforms, let alone within a week of purchase. (Cabrera Aff. ¶ 2, 20; Gomez Aff. ¶ 2, 21;

Zacatenco Aff. ¶ 2, 20; Chavez Aff. ¶ 2, 16; see e.g., Mark Aff. Ex. 24, Uniform Deduction (subtracting $12.50 from an employee's wages).)

Employers must also either launder uniforms or pay employees a weekly amount (the "uniform maintenance allowance") to cover the cost of laundering the uniforms. See 12 N.Y.C.R.R. § 142-2.5(c)(1)(i). Respondents and employees confirmed that cashiers had to launder their uniforms themselves and did not receive any uniform maintenance allowance. (Malik Tr. 133-34; see also Chavez Supp. Aff. ¶ 14.)

Respondents produced no evidence that they reimbursed employees for uniform purchase at all or within the one-week deadline. (Mark Aff. ¶ 132.) Because no material dispute of fact exists regarding Respondents' failure to comply with the Labor Law's uniform purchase and maintenance requirements, summary judgment should be granted.

The Attorney General's analysis, which accounts for both the $90 uniform purchase fee for cleaners and $60 for cashiers and the weekly statutory uniform maintenance allowance for cashiers,[41] concluded that Respondents owe all employees during the Relevant Period a total of approximately $30,743. (Werberg Aff. ¶¶ 18, 24.)

6. The Court Should Award Damages for Labor Law Violations

a. The Court Should Award Damages for Unpaid Wages and Expenses

Section 63(12) permits courts to order an award of damages upon a showing by the Attorney General in a special proceeding of "any separate and distinct fraudulent or illegal

[41] The statutory uniform maintenance allowance changed over the course of the Relevant Period: January 2011-December 2013: $9.00 per week; January 2014-December 2014: $9.95 per week; January 2015-December 2015: $10.90 per week; January 2016-December 2016: $11.20 per week; and January 2017-present: $13.70 per week. See 12 N.Y.C.R.R. § 142-2.5(c).

conduct or act which affects more than one person." State v. Solil Mgmt. Corp., 128 Misc. 2d 767, 773 (Sup. Ct. N.Y. Cnty.), aff'd without opinion, 114 A.D.2d 1057 (1st Dep't 1985) (injunction, restitution and damages remedies available). The evidence shows Respondents' practices affected approximately 150 employees and violated the Labor Law over a period of at least six years.[42] See Labor Law § 198(3) (statute of limitations for Labor Law claims is six years); Nunez v. Francis Deli Grocery, No. 13 CIV. 4894 (ER) (KNF), 2015 WL 1963630, at *5 (S.D.N.Y. Apr. 30, 2015) (same).

The Court should award the Attorney General the amount of unpaid wages and expenses Respondents owe to their employees. Frink Am., Inc., 2 A.D.3d at 1380 (awarding back pay and unreimbursed expenses in Section 63(12) proceeding for Labor Law violations); People v. New Majority Holdings, LLC, No. 452487/2014, 2015 WL 5834208, at *3 (Sup. Ct. N.Y. Cnty. Mar. 4, 2015) (same).

Based on the Attorney General's calculations, the total damages for unpaid wages, Wage Notice and Payment Statement violations, and unreimbursed uniform expenses is approximately $1,048,427. (Werberg Aff. ¶ 24.)

b. The Court Should Award Liquidated Damages

The Court should also award the Attorney General liquidated damages for Respondents' Labor Law violations. See New Majority Holdings, LLC, 2015 WL 5834208, at *3 (awarding

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[42] Pursuant to Section 63(12), courts customarily order restitution to all victims of illegality even where they are not all identified at the time of the order. See, e.g., State v. Midland Equities of New York, Inc., 117 Misc. 2d 203, 208 (Sup. Ct. N.Y. Cnty. 1982); People v. General Elec. Co., 302 A.D.2d 314,316 (1st Dep't 2003); People v. Telehublink Corp., 301 A.D.2d 1006, 1007 (3d Dep't 2003); State v. Scottish-Am. Ass'n, Inc., 52 A.D.2d 528, 529 (1st Dep't) appeal dismissed, 39 N.Y.2d 1057 (1976); State v. Mgmt. Transition Res., Inc., 115 Misc.2d 489, 492 (Sup. Ct. N.Y. Cnty. 1982); State v. Hotel Waldorf-Astoria Corp., 67 Misc.2d 90, 92 (Sup. Ct. N.Y. Cnty. 1971); State v. Bevis Indus. Inc., 63 Misc.2d 1092 (Sup. Ct. N.Y. Cnty. 1970).

liquidated damages in Section 63(12) proceeding for Labor Law violations). Because of the egregiousness of Respondents' violations, and continuation of many of these violations throughout the Attorney General's investigation, the Court should award liquidated damages in the standard amount of 100% of the employees' unpaid wages in the amount of $542,684. See Labor Law § 198.

The Labor Law provides that liquidated damages are available "unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." Id. This "good faith" standard for liquidated damages mirrors the longstanding "good faith" affirmative defense available to employers under the FLSA, under which "an employer must show that it took active steps to ascertain the dictates of the [law] and then act to comply with them." Barfield v. N.Y. City Health & Hosps. Corp., 537 F.3d 132, 150 (2d Cir. 2008) (internal quotation omitted); see Kalloo, 977 F. Supp. 2d at 206 (applying same good faith standard under FLSA and Labor Law). The burden "is a difficult one," and "double damages are the norm and single damages the exception." Barfield, 537 F.3d at 150 (emphasis added) (quoting Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 142).

Respondents cannot meet the good faith standard. There is no evidence that Respondents, who are sophisticated business owners and managers, see infra 48-49, took any active steps to comply with the Labor Law. Indeed, Respondents illegally maintained two sets of payroll records and deliberately undercounted employees' working hours in order to avoid complying with their legal obligations to their employees and to the State. See supra 25-27. See Yu G. Ke, 595 F. Supp. 2d at 261 (employers do not meet good faith standard when they exhibit "knowing and deliberate disregard for their legal obligations"). Further, Respondents continued these unlawful practices during the Attorney General's investigation, a time when they were

indisputably on notice of their legal obligations. (See Cabrera Supp. Aff. ¶¶ 1-17; Gomez Supp. Aff. ¶¶ 1-17; Zacatenco Supp. Aff. ¶¶ 1-17; Chavez Supp. Aff. ¶¶ 1-17.) Accordingly, the Court should award liquidated damages in the amount of $542,684. (See Werberg Aff. ¶ 24.)

c. The Court Should Award Prejudgment Interest and Attorneys' Fees

An award of prejudgment interest and attorneys' fees is also proper. See New Majority Holdings, LLC, 2015 WL 5834208, at *3 (awarding prejudgment interest in Section 63(12) proceeding for repeated Labor Law violations). Labor Law § 198(1-a) authorizes prejudgment interest "as required under the civil practice law and rules." See Reilly v. Natwest Mkts. Group Inc., 181 F.3d 253, 265 (2d Cir. 1999) (awarding wages, liquidated damages under Labor Law, and prejudgment interest). The prejudgment interest rate is 9%, N.Y. C.P.L.R. § 5004, and where "damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." Id. § 5001(b). Typically, in unpaid wage cases, prejudgment interest is calculated from the midpoint of the employee's employment through the filing date. See, e.g., Ting Yao Lin v. Hayashi Ya II, Inc., No. 08 Civ. 6071(SAS)(AJP), 2009 WL 289653, at *7 (S.D.N.Y. Jan. 30, 2009), report and recommendation adopted sub nom. Yao Lin v. Hayashi Ya II, Inc., No. 08 Civ. 6071S(AS) (AJP), 2009 WL 513371 (S.D.N.Y. Feb. 27, 2009). Upon determining a sum certain of underpayments, interest should be awarded consistent with the requirements of the Labor Law and the C.P.L.R.

Additionally, Respondents are liable for attorneys' fees in an amount to be determined by the Court. See Labor Law §§ 198, 663. See also Francois v. Mazer, 523 F. App'x 28, 29 (2d Cir. 2013) ("[r]easonable attorney's fees and costs are awarded as a matter of right to a prevailing plaintiff in an action under the FLSA or [Labor Law].").

d. Benno, Philip, and Gregory Gmuer Are Individually Liable as Employers

i. Liability Standard as an Employer under the Labor Law

The Labor Law defines an employer as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." Labor Law § 190(3). New York courts construing the Labor Law's definition of "employer" for purposes of individual liability use the same "economic reality" test developed by the Second Circuit in FLSA cases, which defines "employer" broadly. See Rodriguez v. Metro. Cable Commc'ns., Inc., No. 21517/2008, 2011 WL 6738850, at *9-10 (N.Y. Sup. Ct. Queens Cnty. July 26, 2011) (because "the definition of 'employ' is the same under New York State and federal law . . . the test for determining whether an entity or person is an 'employer' is the same under New York State and federal law.").

Under the "economic reality" test, "the overarching concern is whether the alleged employer possessed the power to control the workers in question . . . with an eye to the 'economic reality' presented by the facts of each case." Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 139 (2d Cir. 1999) (internal citations omitted). "[E]conomic reality is determined based upon all the circumstances," and "any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition." Id. (emphasis in original). Relevant factors in assessing individual liability include, but are not limited to, whether the alleged employer had the power to hire and fire employees, supervised and controlled employee work schedules or conditions of employment, determined the rate and method of payment, and maintained employment records. See Bonito v. Avalon Partners, Inc., 106 A.D.3d 625, 626 (1st Dep't 2013); Pugliese v. Actin Biomed LLC, 2012 NY Slip Op 31566[U], at *10-11 (Sup. Ct., N.Y. Cnty. June 7, 2012); Herman, 172 F.3d at 139. No single factor is dispositive, because the test turns on the totality of the circumstances. See Herman, 172 F.3d at 139.

New York and federal courts routinely find that the owners and shareholders of small- and medium-sized businesses with limited degrees of control over the operations, including personnel matters, are individually liable as employers under the Labor Law. See, e.g., Herman, 172 F.3d at 140 (finding an individual who was the board chairman, officer, and 50% owner of company an employer even though he rarely dealt with employees directly, but exercised control over the employees who supervised the class of workers subject to the wage and hour violations); Birnbaum LLC v. Park, 2013 NY Slip Op 33372(U), at *12-13 (Sup. Ct., N.Y. Cnty. Jan. 24, 2013) (employer with power to hire and fire, set wage rates, and control employee schedules individually liable under Labor Law); Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 186, 192-93 (S.D.N.Y. 2003) (individual owner-officers who exercised operational management of company were employers under Labor Law even though they did not directly supervise workers day-to-day and even though another company was also an employer); Lopez v. Silverman, 14 F. Supp. 2d 405, 412-13 (S.D.N.Y. 1998) (finding president and sole shareholder with authority to hire and fire employees, make business decisions, and negotiate pay rates individually liable under Labor Law).

ii. Individual Liability Standard Under Section 63(12)

Corporate officers are also individually liable under Section 63(12) for illegality in which they personally participated. People v. Apple Health & Sports Clubs, Ltd., Inc., 80 N.Y.2d 803, 807 n.2 (1992) (affirming grant of summary judgment for Attorney General on issue of chief executive officer's individual liability under Section 63(12) based on actual knowledge and personal participation in fraudulent activities); Frink Am., Inc., 2 A.D.3d at 1381 (corporate officer who "participated in or had actual knowledge of" violations of Labor Law was personally liable under Section 63(12) and observing that "because [Section] 63(12) allows the Attorney General to seek relief against 'any person,' there is no impediment to imposing personal liability

against a corporate officer . . . if it is established that he personally participated in or had actual knowledge of the fraud or illegality"); People v. Am. Motor Club, Inc., 179 A.D.2d 277, 284-85 (1st Dep't 1992) (no need for hearing before imposing liability under Section 63(12) on corporation's president who personally participated in the illegal business). It is not relevant whether someone intentionally engages in unlawful activities "in good faith, [for,] even if believable, [it] is irrelevant as to the question of the illegality of the act and to the question of further violations." Lefkowitz v. E.F.G. Baby Prods., 40 A.D.2d 364, 367 (3d Dep't 1973).

iii. Benno Gmuer Is Individually Liable for the Labor Law Violations and Under Section 63(12)

Benno Gmuer easily meets the requirements for individual liability under the Labor Law and Section 63(12). He is indisputably Tropical Breeze's owner, major partner (holding a 99 percent share), and executive officer. (Mark Aff. Exs. 16-21.) In addition to his corporate executive role in Tropical Breeze, Benno oversees the management and operation of Tropical Breeze. When Benno is on-site at Tropical Breeze, he is personally involved in hiring applicants and supervising trainees, firing employees, handling or approving car wash repairs and maintenance, and approving or denying employee sick pay. (Malik Tr. 30, 58, 140.)

Moreover, Benno has been directly involved in the Labor Law violations at issue. Benno helped calculate the wages owed to employees (Malik Tr. 64) and was involved in reviewing and approving Malik's calculations of employees' hours and wages (id. at 93-95, 125), removing employees' time cards, and deciding to pay overtime hours at regular wage rates (id. at 152-53). He also participated in setting the uniform and uniform maintenance policy. (Id. at 131, 135.) He shared responsibility for deciding or approving which employees are paid on-the-books and which are paid off-the-books. (Id. at 26, 64, 67, 93-94, 125.) Given Benno's involvement in payroll and payroll reporting, he clearly had knowledge of, and bears significant responsibility

for, overtime, waiting time, cut-down time, call-in pay and spread of hours pay, as well as Wage Notice and Pay Statement violations.

As the sole executive officer who exercises extensive control over Tropical Breeze operations, its employees, and the unlawful pay practices that led to employee underpayments, Benno should be held individually liable under the Labor Law and Section 63(12) for his conduct as an employer during the Relevant Period.

iv. Philip and Gregory Gmuer Are Also Individually Liable for the Labor Law Violations and Under Section 63(12)

Along with Benno, Philip and Gregory Gmuer have separately and jointly managed Tropical Breeze, and their respective managerial involvement is more than sufficient to support liability under the economic reality test. Malik testified that Philip and Gregory directly supervised him and that both Gmuer sons have managed Tropical Breeze during periods when Benno was traveling. (Malik Tr. 27-28.) Malik also testified that both sons worked with their father when Benno was on-site. (Id. at 25-26.)

Each son's level of involvement has varied over time, but both played an active role during the Relevant Period. Gregory primarily served as a manager from in or around March of 2011 through 2013, and Philip took over this role from in or around 2014 until at least early 2016. (Malik Tr. 28-30.) Both Philip and Gregory were involved in hiring Tropical Breeze employees (id. at 30-33); supervising bookkeeping, payroll and compensation of employees (id. at 26, 64, 67, 93-95, 113, 125); enforcing a waiting-time policy whereby employees were required to wait to clock in and were not compensated for this time (id. at 147; Gomez Aff. ¶ 4; Chavez Aff. ¶ 5); enforcing policies for overtime pay that resulted in underpaying employees for overtime hours worked (Malik Tr. 118, 150-54; Cabrera Aff. ¶ 12); and directing or approving facilities maintenance and repairs (Malik Tr. 34-35). In addition to those managerial duties,

Phillip also fired employees (id. at 140); helped set employee work schedules and tracked their attendance (id. at 34, 155); and administered Tropical Breeze's uniform policy (id. at 131-34).

Philip and Gregory's broad managerial authority and involvement in Labor Law violations renders them individually liable. See Yu G. Ke, 595 F. Supp. 2d at 265 (friend of owner-employer who did not set pay but disciplined, fired, monitored worker schedules, and engaged in alleged violations found to be employer under the Labor Law); Birnbaum, 2013 NY Slip Op 33372(U), at *12-13; Ansoumana, 255 F. Supp. 2d at 186, 192-93.

As a result, Gregory should be held individually liable under the Labor Law and Section 63(12) for his conduct as an employer from 2012 to 2014, and Philip should be held individually liable under the Labor Law and Section 63(12) from 2014 to early 2016.

B. The Court Should Grant Summary Judgment and Award Equitable Relief for Unemployment Insurance Law Violations

All New York employers must file NYS-45 Quarterly Returns with DTF and DOL. Employers are also required to pay unemployment insurance contributions based on information reported in the NYS-45 Quarterly Returns, including, among other things, the number of employees and total wages paid. See Labor Law § 570(1).

Throughout the Relevant Period, Respondents regularly underreported the number of employees and total wages paid on the NYS-45 Quarterly Returns in violation of the unemployment insurance provisions of the Labor Law. See Labor Law §§ 570-571 (the "Unemployment Insurance Law"). While Malik testified that Tropical Breeze employed between 20 and 28 employees at any given time during the Relevant Period (Malik Tr. 47, 116), Respondents reported to the State that Tropical Breeze employed between 10 and 19 employees in its various quarterly filings during the Relevant Period (Mark Aff. Exs. 25-27).

Accordingly, Respondents cannot raise a genuine issue of fact that they violated unemployment insurance contribution requirements. Respondents' deliberate and illegal system of keeping two sets of payroll records — one for on-the-books employees and one for off-the-books employees — to conceal the real number of Tropical Breeze employees also supports a conclusion that their underreporting was fraudulent, not mere oversight. See supra 26-27, 37-39; see also Labor Law § 570(4) (employers subject to harsher penalties if "any deficiency is due to fraud with intent to avoid payment of contributions to the fund.").

In order for the State to accurately calculate the amount Respondents owe for unpaid unemployment insurance violations, the Court should order Respondents to file true and correct amended NYS-45 Quarterly Returns with DTF. The agency may then forward the NYS-45 Quarterly Returns to DOL, which can calculate Tropical Breeze's unpaid unemployment insurance contributions resulting from its misrepresentations by determining: (a) Tropical Breeze's contribution rate as previously calculated by the Department of Labor; (b) the annual wages paid to each of Tropical Breeze's employees who had not previously been included on its NYS-45 Quarterly Returns; and (c) the applicable statutory cap on taxable wages for the relevant time period. (Mark Aff. ¶ 144); see also Labor Law § 570(1) (setting rates for unemployment insurance fund contributions); § 577 (setting additional rates applicable to certain employers); § 581 (same). Under the Unemployment Insurance Law, DOL may also calculate interest and fraud penalties to be added to the unpaid contributions. Labor Law § 570(3), (4).

Ordering such affirmative relief is within this Court's authority. Section 63(12) empowers courts to grant wide-ranging equitable relief to redress fraudulent or illegal conduct and enjoin future improper conduct. See People v. Apple Health & Sports Club, Ltd., 80 N.Y.2d 803 (1992); People v. Court Reporting Inst., Inc., 240 A.D.2d 413, 414 (2d Dep't 1997); People

v. Abortion Info. Agency, 69 Misc. 2d 825, 830 (Sup. Ct. N.Y. Cty. 1971), aff'd, 37 A.D.2d 142 (1st Dep't 1972). The Court's injunctive powers under Section 63(12) are also extremely broad, and "[a]n application by the Attorney General for remedial orders under [Section 63(12)] is addressed to the sound judicial discretion of the court." State v. Princess Prestige Co., 42 N.Y.2d 104, 108 (1977).

Accordingly, the Attorney General requests that the Court direct Respondents to (1) transmit the true and correct, amended NYS-45 Quarterly Returns to DTF, with a copy to the Attorney General, and (2) pay all unpaid contributions, interest, and penalties assessed by DOL.

C. The Court Should Grant Summary Judgment and Order Equitable Relief for Workers' Compensation Law Violations

The Workers' Compensation Law was enacted to address the inequities that historically existed between employers and employees when workers suffer injuries on the job. See Rheinwald v. Builders' Brick & Supply Co., 168 A.D. 425, 426-27 (3d Dep't 1915). As a basic requirement, the Workers' Compensation Law obligates employers to secure workers' compensation coverage for all employees. See N.Y. Work. Comp. Law §§ 3(14a), 10, 50, 54(4); Raynor v. Landmark Chrysler, 18 N.Y.3d 48, 53 (2011). Like the Labor Law, the Workers' Compensation Law is remedial in character and "should be liberally construed so as to effectuate the economic and humanitarian objects of the act." Simpson v. Glen Aubrey Fire Co., 86 A.D.2d 909, 910 (3d Dep't 1982).

Through their fraudulent practices, Respondents evaded their responsibility to secure coverage for all of their workers. An employer is deemed to have failed to secure coverage for employees when it "intentionally and materially understates or conceals payroll, or . . . information pertinent to the calculation of premium paid to secure [coverage]." N.Y. Work. Comp. Law § 52(1)(d). In its Application for New York Workers' Compensation and

Employers' Liability Insurance, Tropical Breeze reported only four car wash and convenience store employees, with an annual payroll of $70,000.[43] (Mark Aff. Ex. 15 at SIF USAW 0205.) Respondents' statements in the Application are significant misrepresentations: Respondents admitted that Tropical Breeze employed between 20 and 28 employees at any given time and their own records show that they paid hundreds of thousands of dollars in wages each year. See supra 7-8, 12. By failing to make accurate disclosures, Respondents underpaid their NYSIF premiums for Tropical Breeze employees, thus cheating the State out of required insurance payments.[44] See Simmons v. Moss, 191 A.D.2d 944, 945 (3d Dep't 1993) (employer deemed to have failed to secure workers' compensation where it did not accurately report the full extent of employees' work hours).

Additionally, the Workers' Compensation Law requires Tropical Breeze to keep accurate records of certain enumerated information. N.Y. Work. Comp. Law § 131(1). Because Tropical Breeze obtained its policy from NYSIF, the state-owned workers' compensation carrier, it had a separate legal obligation to maintain accurate payroll records and to allow NYSIF to audit those records. § 95.[45] As discussed supra at 25-27, Respondents' "official" payroll records

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[43] The number of employees Respondents reported to NYSIF is inconsistent even with the 10 to 19 employees disclosed on their NYS-45 Quarterly Returns and the employees that appear on the Paychex records. See supra 27, 50.

[44] Respondents produced no documents showing any supplemental disclosures to NYSIF correcting the false statements they made. (See Mark Aff. ¶ 145.)

[45] The NYSIF policy premium is based on an estimated payroll at the beginning of the policy period and adjusted at the end of the policy period based on "the actual expenditure of wages." Work. Comp. Law § 92(1), (3).

misrepresented the number of employees Tropical Breeze employed, the amount of wages Respondents paid employees, and the amount of time employees worked.

There is no dispute of material fact that Respondents intentionally and materially concealed relevant payroll information and violated the record-keeping requirements of the Workers' Compensation Law. In order to calculate the unpaid workers' compensation insurance premiums resulting from Tropical Breeze's misrepresentations, NYSIF will need to determine the proper premiums based on total wages paid, total number of employees, and other underwriting factors, for the relevant time period. (See Mark Aff ¶ 146.) Accordingly, the Attorney General requests that the Court order Respondents to: (1) transmit to NYSIF copies of its true and correct, amended NYS-45 Quarterly Returns, together with a copy of the Court's order, with copies to the Attorney General; (2) cooperate fully with any audits by NYSIF; (3) pay all unpaid premiums which NYSIF determines to be due and owing; and (4) pay any damages assessed by NYSIF pursuant to Workers' Compensation Law § 96(2).

The Workers' Compensation Law further provides that where an employer has failed to properly secure workers' compensation insurance and failed to keep true and accurate records, the Workers' Compensation Board chair (the "Board") may impose penalties. §§ 52(5), 131(3). Accordingly, the Attorney General further requests that the Court order Respondents to: (1) transmit to the Board copies of its amended, corrected NYS-45 Quarterly Filings, together with a copy of the Court's order, with copies to the Attorney General; and (2) pay any penalties imposed by the Board. Ordering such affirmative relief is within the Court's authority in a Section 63(12) proceeding. See supra 51-52.

D. The Court Should Grant Summary Judgment and Award Damages for Earned Sick Time Act Violations

Tropical Breeze failed to pay employees for the sick leave to which they were entitled. The ESTA, which went into effect in April 2014, provides that "all employers shall provide a minimum of one hour of sick time for every thirty hours worked by an employee." N.Y.C. Admin. Code § 20-913(b). Under the statute, an employee can accrue up to 40 hours of sick leave per year. Id. Therefore, any employee working a regular schedule of over 30 hours per week should accrue the 40-hour maximum of sick leave every year. An employee can also carry over up to 40 hours of earned sick time from year to year. Id. at § 20-913(h).

Two employees testified that Respondents denied them pay for requested sick time. Cabrera and Gomez both worked full time at over 40 hours per week since the law took effect in April 2014. (Cabrera Aff. ¶ 7; Cabrera Supp. Aff. ¶ 7; Gomez Aff. ¶ 7; Gomez Supp. Aff. ¶ 7.) When Cabrera took three sick days in November 2016 (Cabrera Supp. Aff. ¶ 16), he had thus accumulated over 36 hours of paid sick leave. See N.Y.C. Admin Code § 20-913(b). Similarly, between April 2014 and April 2016, Gomez accrued more than 60 hours of sick leave. Id. When Gomez took off a total of five days between April 2016 and January 2017 (Gomez Supp. Aff. ¶ 17), therefore, his sick time balance should have covered his pay during his absence. See N.Y.C. Admin. Code § 20-913(b). Respondents did not, however, compensate either employee for leave. (Cabrera Supp. Aff. ¶ 16; Gomez Aff. ¶ 22; Gomez Supp. Aff. ¶ 17.) There is thus no genuine dispute of fact that Respondents violated the ESTA by denying two employees requested sick days.[46]

[46] With respect to the ESTA claims, the Attorney General's alleged facts focus solely on Tropical Breeze's ESTA violations with respect to Cabrera and Gomez. The investigation did not extend

Under Section 63(12), the Court can award the Attorney General the damages Respondents owe to the employees for repeated violation of the ESTA. See supra 42-43. The statute provides for a two-year limitations period, NYC Admin. Code § 20-924(b), and provides that, in the event that an employee takes but is unlawfully denied compensation for sick time, the employer shall pay three times the wages that should have been paid or $250, whichever is greater. N.Y.C. Admin. Code § 20-924(d). The statute also imposes a maximum of $500 in civil penalties on employers for first time violations.

The Attorney General estimates that Tropical Breeze owes Cabrera and Gomez $2,400 for the eight days of unpaid sick leave and owes $500 in civil penalties.

E. The Court Should Grant Additional Equitable and Injunctive Relief

Finally, the Attorney General requests that Respondents be enjoined from continued violations of the Labor Law, the Earned Sick Time Act, and the Workers' Compensation Law. Where a party has engaged in repeated illegal conduct, courts regularly grant injunctive relief. See generally Frink Am., Inc., 2 A.D.3d at 1381 ("[T]he Attorney General may seek injunctive relief for a violation of Labor Law article 6 in an appropriate case."); Mgmt. Transition Res., 115 Misc. 2d at 492 (enjoining defendant from continuing to operate fraudulent and unlicensed employment agency in violation of Article 11 of the General Business Law); Apple Health & Sports Clubs, 80 N.Y.2d at 807 (enjoining continued operation of health club due to ongoing violations of Article 30 of the General Business Law). Here, the evidence plainly demonstrates that Respondents have engaged in widespread violations of some of New York's most

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to deficiencies in Respondents' sick leave policy more generally, and in this summary proceeding the Attorney General limits its request for liability and relief under the ESTA to these two employees.

fundamental labor laws. Respondents' conduct compels the relief sought by the Attorney General.

During the Relevant Period, as Respondents' corporate designee admitted under oath, they failed to pay their employees required wages, failed to provide required paid sick leave, and failed to comply with New York's unemployment insurance and workers' compensation obligations. Each instance of Respondents' violation of the Labor Law and its regulations constitutes a separate violation, meaning that Respondents violated these laws each time they failed to pay proper wages, overtime, spread-of-hours, call-in pay and uniform maintenance pay. See Labor Law § 191(1) (wages must be paid on, at least, a weekly basis); 12 N.Y.C.R.R. § 142-2.9 (overtime must be paid for each workweek); 12 N.Y.C.R.R. § 142-2.5(c) (employers must pay uniform maintenance every week).

Moreover, Respondents continued to engage in repeated violations of law well after Respondents were fully aware of the Attorney General's investigation and the Attorney General's concerns that they had failed to comply with relevant labor laws. (Mark Aff. ¶ 147; Cabrera Supp. Aff. ¶¶ 8-16; Gomez Supp. Aff. ¶¶ 8-16; Zacatenco Supp. Aff. ¶¶ 8-16; Chavez Supp. Aff. ¶¶ 8-16.) Supplemental affidavits from Respondents' employees indicate that many of these violations continued, such as failure to compensate for the full extent of overtime, waiting time, spread-of-hours pay, call-in pay, failure to pay weekly uniform maintenance allowance, and failure to provide wage notices or paid sick leave. (Cabrera Supp. Aff. ¶¶ 8-16; Gomez Supp. Aff. ¶¶ 8-16; Zacatenco Supp. Aff. ¶¶ 8-16; Chavez Supp. Aff. ¶¶ 8-16.) In light of Respondents' history of violations and failure to come into compliance even once they were

on notice of the Attorney General's investigation, there is every reason to believe that Respondents' unlawful conduct will continue absent injunctive relief from this Court.[47]

VI. CONCLUSION

For the foregoing reasons, the Court should make a summary determination in Petitioner's favor on all causes of action and issue an order:

(a) finding that Respondents repeatedly violated Articles 6 and 19 of the Labor Law and the implementing regulations at 12 N.Y.C.R.R. § 142 et seq. from January 1, 2012 through the present by failing to pay employees wages for all hours worked; failing to pay proper overtime wages; failing to pay required spread-of-hours pay; failing to pay call-in pay; failing to maintain proper pay records; failing to provide proper wage notices or statements of wage payments; and failing to pay employees uniform maintenance pay;

(b) finding that Respondents have violated the Labor Law's unemployment insurance reporting requirements;

(c) finding that Respondents repeatedly violated the ESTA by failing to pay employees for earned sick time;

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[47] Courts even provide injunctive relief where, unlike here, the respondent has discontinued the fraudulent or illegal acts. See State v. Midland Equities of N.Y., Inc., 117 Misc. 2d 203, 206 (Sup. Ct. N.Y. Cnty. 1982) (granting injunction in spite of respondents' arguments that unlawful activity had ceased because "[v]oluntary discontinuance of improper or illegal activity is no assurance that such activity will not be resumed" (citing State v. Person, 75 Misc. 2d 252, 253 (Sup. Ct. N.Y. Cnty. 1973))); State v. Hotel Waldorf-Astoria Corp., 67 Misc. 2d 90, 91-92 (Sup. Ct. N.Y. Cnty. 1971) (issuing permanent injunction and observing that "although the [unlawful practice] was discontinued after an inquiry by the petitioner, this in no way restricts the court from restraining the practice").

(d) finding that Respondents repeatedly violated the Workers' Compensation Law by failing to secure coverage for all employees and by violating reporting and recordkeeping requirements;

(e) finding that Respondents repeatedly engaged in illegal activity in violation of New York Executive Law § 63(12);

(f) awarding unpaid wages in the amount of $542,684 and liquated damages in the amount of $542,684; statutory penalties in the amount of $475,000 for Wage Statement and Pay Notice violations; actual and statutory damages in the amount of $30,743 for Uniform Purchase and Maintenance violations; and actual and statutory damages in the amount of $2,900 for ESTA violations;

(g) directing Respondents to produce to the Attorney General: the names and addresses of all employees who worked for Respondents between January 1, 2012 to January 24, 2018 for the purpose of distributing restitution;

(h) directing Respondents to: (1) transmit the true and correct, amended NYS-45 Quarterly Returns to DTF, with a copy to the Attorney General, and (2) pay all unpaid contributions, interest, and penalties assessed by DOL;

(i) directing Respondents to: (1) transmit to NYSIF copies of its true and correct, amended NYS-45 Quarterly Returns, together with a copy of the Court's order, with copies to the Attorney General; (2) cooperate fully with any audits by NYSIF; (3) pay all unpaid premiums which NYSIF determines to be due and owing; and (4) pay any damages assessed by NYSIF pursuant to Workers' Compensation Law § 96(2);

(j) order Respondents to: (1) transmit to the Board copies of its amended, corrected NYS-45 Quarterly Filings, together with a copy of the Court's order, with copies to the Attorney General; and (2) pay any penalties imposed by the Board;

(k) permanently enjoining Respondents, their employees, agents and successors from continued violations of the law;

(l) awarding 9% statutory prejudgment interest, as provided by Article 50 of the Civil Practice Law and Rules on all Labor Law violations;

(m) awarding Petitioner attorneys' fees and costs associated with this action in an amount to be determined; and

(n) granting such other and further relief as the Court may deem just and proper.

Dated: New York, New York
January 25, 2018

Respectfully submitted,

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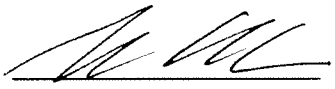
By: 
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