IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

YASER OMAR, EMMANUEL GARCIA, and CHARLIE GARCIA, Individually and On Behalf of All Others Similarly Situated, **Plaintiffs,** **-against-** **1 FRONT STREET GRIMALDI, INC. d/b/a GRIMALDI'S PIZZERIA, DUMBO RESTAURANT CORP. d/b/a GRIMALDI'S PIZZERIA, SIXTH AVENUE GRIMALDI, INC. d/b/a GRIMALDI's PIZZERIA, 1215 SURF AVE. RESTAURANT CORP. d/b/a GRIMALIDI'S PIZZERIA, and FRANK CIOLLI, Jointly and Severally,** **Defendants.**	**16 Civ. 5824 (LDH) (CLP)**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

Named Plaintiffs Yaser Omar, Emmanuel Garcia and Charlie Garcia (the "Named Plaintiffs") and the opt-in plaintiffs (the "Opt-in Plaintiffs" and, collectively with the Named Plaintiffs and putative class members, "Plaintiffs") worked for Defendants' pizza business as waiters, bussers and counter employees. Throughout their employment, Plaintiffs were paid extremely low rates that fell below the statutory minimum wage and did not receive either overtime premiums when they worked in excess of forty (40) hours per week, which they typically did, or an extra hour of pay at minimum wage when Plaintiffs worked in excess of ten (10) hours per day, as required by the New York Labor Law ("NYLL"). Defendants did not provide Plaintiffs with wage notices or accurate wage statements setting forth the wage and hour information required by the NYLL. Defendants have produced handwritten records of wages paid that support Plaintiffs' testimony, and Defendants' managers have testified to the consistency of pay practices throughout the five (5) New York City locations and the wage and hour violations experienced by all Plaintiffs.

Accordingly, Plaintiffs respectfully submit this memorandum of law in support of their motion for an order certifying Plaintiffs' NYLL claims for failure to provide wage notice and proper wage statements (Counts VI and VII) on behalf of a class defined as: "all individuals employed by Defendants at any of the New York City Grimaldi's locations at any time since October 18, 2010 and throughout the entry of judgment in this case (the "Class Period") who were employed as wait staff, busboys, counter employees, dishwashers, food prep employees, cooks, and pizza makers" (the "Class"); and certifying Plaintiffs' NYLL claims for unpaid minimum wage, overtime premiums and spread-of-hours premiums (Counts III-V) on behalf of a subclass defined as "all individuals employed by Defendants at any of the New York City

Grimaldi's locations at any time since October 18, 2010 and throughout the entry of judgment in this case who were employed as wait staff, busboys and counter employees" (the "Unpaid Wages Subclass"). Plaintiffs also respectfully request that the Named Plaintiffs be appointed representatives for the Classes, that their counsel, Pelton Graham LLC, be appointed as class counsel under Rule 23(g), and that the Court authorize Plaintiffs to send notice to Class Members.[1]

For the reasons set forth below, Plaintiffs' motion should be granted in its entirety.

STATEMENT OF THE CASE

I. Course of Proceedings

This Fair Labor Standards Act (FLSA) collective action and NYLL class action was commenced with the filing of the Class and Collective Action Complaint on October 18, 2016 (the "Complaint"). (Dkt. No. 1). On May 9, 2018, Plaintiffs filed the operative Third Amended Class and Collective Complaint, adding Dumbo Restaurant Corp. as a defendant and correcting the name of Plaintiff Charlie Garcia. (Dkt. No. 44).[2] Defendants 1 Front Street Grimaldi, Inc., Dumbo Restaurant Corp., Sixth Avenue Grimaldi, Inc., 1215 Surf Ave. Restaurant Corp. and Frank Ciolli (collectively, the "Defendants") filed their Answer to the operative complaint on June 29, 2018, denying all material allegations. (Dkt. No. 50).

Plaintiffs allege seven (7) causes of action. (*See* Dkt. No. 44). Counts I and II allege FLSA claims for unpaid minimum wage and unpaid overtime, respectively, on behalf of an FLSA collective. Counts III through VII allege NYLL claims on behalf of a class for: failure to pay to pay minimum wage for all hours worked, in violation of §§ 650, *et seq*. (Count III), failure

[1]If Plaintiffs' Motion is granted, Plaintiffs propose to confer with Defendants on the form of Class Notice and production of Class Member contact information and submit a Proposed Notice to the Court.

[2] Prior amendments removed John Doe defendants and narrowed the scope of the collective and class sought by the Named Plaintiffs (Dkt. No. 17) and substituted former defendant Grimaldi's Luna Park Inc. with Defendant 1215 Surf Ave. Restaurant Corp. (Dkt. No. 29).

to pay overtime for hours worked in excess of forty (40) per week, in violation of §§ 650, *et seq*.[3] (Count IV); failure to pay spread-of-hours premiums for days in which the hourly employees' work day lasted ten (10) or more hours, in violation of N.Y. Comp. Code R. & Regs. tit. 12, §§ 137-1.7 (2010), 146-1.6 (2012) (Count V); failure to provide wage notices on the date of hire or February 1, in violation of NYLL, Article 6, § 195(1)(a) (Count VI); and failure to provide proper wage statements, in violation of NYLL, Article 6, § 195(3) (Count VII).

Pursuant to the parties' consent motion, the Court certified Plaintiffs' FLSA minimum wage and overtime claims as a collective action and authorized notice to be issued to all current and former waiters, bussers, pizza makers, delivery employees, dishwashers and counter employees who worked at Brooklyn Bridge, Sixth Avenue and Coney Island at any time between January 5, 2014 to January 19, 2017. (Dkt. No. 23). Defendants identified a total of thirty-eight (38) employees who met this definition. (Pelton Decl. ¶ 11). Five (5) opt-in plaintiffs joined this action by filing consent to become party plaintiff forms. (*Id.* ¶ 12; Dkt. Nos 5, 8, 10, 24, 26).

The parties have exchanged hundreds of pages of documents. Depositions were taken of Named Plaintiffs Emmanuel Garcia and Charlie Garcia, Defendant Frank Ciolli and managers Robert Tarzia, Gina Peluso and Rushana Shlemin. (Pelton Decl. ¶ 16).

II. Relevant Facts

A. Defendants' New York City Restaurants, Management, and Employees

During the Class Period, Defendants owned, operated and oversaw five (5) Grimaldi's Pizzeria locations throughout New York City (collectively, "Grimaldi's" or the "Grimaldi's Enterprise"). Defendant 1 Front Street Grimaldi, Inc. owned and operated the restaurant, located as of 2011 at 1 Front Street in Brooklyn ("Brooklyn Bridge") until its dissolution in October

[3] The NYLL unpaid minimum wage and overtime claims are identical to the respective FLSA violations asserted in Counts I and II. (Dkt. No. 44).

2016, at which time Defendant Dumbo Restaurant Corp. assumed its operations. (*See* Dkt. Nos. 39-40, 42, 44; Ex. 1 at 56:19-59:11, 78:11-18). Defendant Sixth Avenue Grimaldi, Inc. owns and operates the restaurant located at 656 Sixth Avenue, New York, New York ("Sixth Avenue," also referred to as "Limelight"). (Ex. 1 at 58:11-16). 1215 Surf Ave. Restaurant Corp. owns and operates the restaurant located at 1215 Surf Ave., Brooklyn, New York ("Coney Island"). (*Id.* 59:22-60:7). Frank Ciolli ("Ciolli") also owns, operates and oversees a Grimaldi's located at 242-01 61st Avenue, Douglaston, New York ("Douglaston") and owned, operated and oversaw a Grimaldi's located at 462 Second Avenue, New York, New York ("Second Avenue"). (*Id.* 13:15-19, 52:7-17, 66:9-23).

Defendant Ciolli owns all four active restaurants in the Grimaldi's Enterprise and owned Second Avenue. (*Id.* 13:7-14:4, 52:7-17, 66:9-23). He purchased Brooklyn Bridge, the original and busiest Grimaldi's, which often has a line out the door, in the late 1990s. (*Id.* 12:14-13:10; 15:24-16:2 Ex. 7 at 15:11-16:7). Subsequently, Ciolli opened Douglaston, Sixth Avenue, Coney Island and Second Avenue. (*Supra* at 3-4). Sixth Avenue was closed by the State of New York for non-payment of sales tax for about six (6) weeks starting in April 2014, and Coney Island is being audited for sales tax compliance. (Ex. 1 at 59:22-60:19). Ciolli closed Second Avenue for low sales. (*Id.* 52:7-12, 66:9-18; Ex. 7 at 41:25-42:7). Ciolli frequently visits the restaurants, oversees business and operations, communicates with managers about daily sales numbers, speaks with and oversees employees, handles emergencies, solves problems, and collects cash and business records from the locations. (Exs. 1 at 15:2-17, 92:4-7; 2 at 16:23-18:19, 23:7-14, 33:21-34:7; 6 ¶¶ 4, 14-16; 7 at 16:12-18:25, 26:17-27:8, 28:17-29:6, 50:24-51:8; 8 at 14:12-15:5). Ciolli has the authority to hire, transfer, promote and fire employees and contractors. (Exs. 1 at 15:8-10, 83:2-25, 99:3-9; 2 at 7:2-21; 3 at 45:15-46:3; 4 at 7:5-7; 6 ¶ 5; 7 at 24:7-15, 34:20-

35:15). Ciolli instructs managers in paying for employees' meals. (Exs. 1 at 36:9-15; 4 at 34:2-4; 8 at 26:22-27:6). Ciolli has accountants, in particular Michael Feldman, who talks with the managers and visits the restaurants to perform bookkeeping and tax filing and to collect business records. (Exs. 1 at 17:20-20:6, 92:22-93:14; 2 at 19:9-19; 3 at 30:2-9; 4 at 22:3-25).

The hours of the restaurants vary slightly between locations, days of the week and the season, but generally they are open seven (7) days per week and typically operate from between 10:00 am and 12:00 noon to between 8:00 pm and midnight. (Exs. 1 at 86:12-87:4; 2 at 42:19-43:15; 3 at 31:21-32:6; 4 at 30:6-31:17; 11). For approximately three months, Sixth Avenue was open twenty-four (24) hours per day. (Exs. 1 at 37:20-38:2; 7 at 32:17-33:3). Defendants' employees work in the back of the house as food prep workers, dishwashers, pizza makers and chefs; in the front of the house as bussers, waiters, counter employees and managers. (Exs. 3 at 15:8-17:5; 4 at 9:8-21). Waiters sometimes work at the counter, usually alongside or in the absence of one of the restaurant managers. (Exs. 2 at 26:23-27:9; 3 at 17:6-18, 28:9-10, 50:19-51:11; 7 at 27:21-29:7, 37:16-38:2). During their counter shifts, employees are sometimes referred to as a manager for the day, but they do not perform managerial functions; counter duties include answering phones, cutting pizza, acting as cashiers, and recording business volume and expenses including wages on pieces of paper known as "yellows." (Exs. 2 at 7:11-16, 28:6-15; 3 at 15:16-24; 4 at 36:9-15; 7 at 28:4-29:6, 51:2-18; *see also* Ex. 12).

Many of Grimaldi's managers and some employees have worked for the business for many years and have transferred between locations and trained new employees in Grimaldi's policies and practices, including pay practices. Ms. Peluso, Ciolli's step-daughter, has been a manager at Brooklyn Bridge since Ciolli bought the location and helped Ciolli open Douglaston and Coney Island. (Exs. 1 at 47:9-48:14; 3 at 10:15-11:5, 31:15-17). Mr. Tarzia, manager at

Sixth Avenue, trained at Brooklyn Bridge and helped open Coney Island. (Exs. 1 at 23:23-24:13; 2 at 6:19-8:11, 37:20-38:3). Likewise, Daniel Taormina worked as a manager at Douglaston, Sixth Avenue and Second Avenue and helped open Coney Island. (Exs. 1 at 27:21-29:8; 3 at 10:12-23; 4 at 26:14-27:3; 6 ¶ 2). Rushana Shlemin, manager at Coney Island, trained at Sixth Avenue in anticipation of the opening of Coney Island. (Ex. 4 at 5:10-8:23). As set forth below, employees including the Named Plaintiffs also often worked at multiple locations and assisted the managers in opening new locations and training new employees. (*See also* Ex. 4 at 35:4-14).

B. Plaintiffs' Work for Defendants

Plaintiff Emmanuel Garcia worked for Grimaldi's from 2005 through June 2014. (Ex. 7 at 8:9-11). He started at Brooklyn Bridge as a busser and from 2008 worked as a waiter. (*Id.* 8:12-23, 10:18-21). His managers were "Victor," "Chris" and Ms. Peluso, and Defendant Ciolli stopped by several times per week. (*Id.* 10:2-14). In 2010 he was invited by Ciolli to work at Sixth Avenue, where he worked as a waiter and counter employee. (*Id.* 11:18-21, 19:7-8, 23:21-24:15, 27:24-28:4). Several other Brooklyn employees also went to work at Sixth Avenue at this time. (*Id.* 25:12-26:10). One or two years later, he was transferred to Second Avenue, where he continued to performed the same waiter and counter duties. (*Id.* 34:20-35:15). Ms. Peluso helped open Second Avenue and instructed Emmanuel Garcia how to pay employees, along with Ciolli and Mr. Tarzia. (*Id.* 37:3-9). Mr. Taormina helped open and stayed on as a manager. (*Id.* 36:2-37:23). When Second Avenue closed, Emmanuel Garcia returned to Sixth Avenue. (*Id.* 42:8-12).

Plaintiff Charlie Garcia began working for Grimaldi's at Sixth Avenue as a waiter in late April 2010. (Ex. 8 at 8:25-9:14). His managers were "Joe," Mr. Taormina, Hugo Tenizia, and Mr. Tarzia, and he saw Defendant Ciolli and Ms. Peluso on occasion. (*Id.* 13:13-15:5, 22:14-19). In 2012 he was transferred to the new Coney Island location. (*Id.* 10:8-18). His server duties

were largely the same at Coney Island, and he also trained employees including Ms. Shlemin, tipped out servers, and was in charge of cleaning duties. (*Id.* 17:22-18:6). It was his understanding that Coney Island was operated by Defendant Ciolli, Rushana Shlemin, and another individual. (*Id.* 15:23-13). After three or four (3-4) months, he was terminated by Ms. Shlemin and returned to Sixth Avenue, where he continued working as a waiter. (*Id.* 17:10-22, 20:11-21:9).

Plaintiff Yaser Omar worked at Grimaldi's from in January 2011 through August 13, 2016 at Brooklyn Bridge, Sixth Avenue and Second Avenue. (Ex. 9 at No. 12). His managers were Mr. Taormina and Mr. Tarzia. (*Id.* at No. 10).

Each of the Named Plaintiffs worked for a substantial portion of their employment with Grimaldi's without receiving any wages whatsoever, receiving only tips. Emmanuel Garcia and Yaser Omar each worked for well over a year without any non-tip pay. (Exs. 7 at 12:6-14; 9 at Nos. 7, 12, 13). Similar to Ms. Shlemin, Charlie Garcia worked for three (3) months without pay during what he understood to be a training period. (Exs. 4 at 27:4-9; 8 at 10:19-11:10). Likewise, after his training, Opt-in Plaintiff Klajdi Shyti did not receive any wages at all during over three (3) years he worked as a server for Defendants at Coney Island. (Ex. 10 ¶ 5). When the Named Plaintiffs received wages from Defendants, they were paid a flat weekly rate of forty dollars ($40.00) or sixty dollars ($60.00) when they worked as servers (Exs. 7 at 19:17-23 (discussing Brooklyn), 29:10-13 (discussing Sixth Avenue), 39:5-16 (discussing Second Avenue), 42:11-22 (discussing return to Sixth Avenue); 8 at 11:23-12:5, 17:23-25, 24:4-13; 9 at Nos. 7, 12, 13) or an hourly rate of approximately sixteen dollars ($16.00) when they worked on the counter. (Exs. 7 at 29:19-21, 38:7-39:4 ($100 per shift or $200 for double shift for shifts lasting 6 or more

hours); 9 at No. 13). Plaintiffs were typically paid in cash, except as set forth below, and their wage rates remained consistent for each Plaintiff when they transferred between locations. (*Id.*).

Plaintiffs were typically paid off the books in cash, except for limited periods when Emmanuel Garcia and Yaser Omar were placed on the books by Defendants and received paychecks as well as cash. (Ex. 7 at 34:17-19, 56:8-10, 72:12-73:21). Both Plaintiffs testified that the numbers of hours shown on payroll documents were incorrect and that they were not actually permitted to keep the amounts paid to them via check. (Exs. 7 at 70:17-72:25, 74:21-76:6 (Emmanuel Garcia complained about this practice); 9 at No. 12; 13). Emmanuel Garcia was aware that this occurred at both Sixth Avenue and Second Avenue. (Ex. 7 at 71:22-72:5).

Plaintiffs sometimes worked single shifts of between six and eight (6-8) hours but usually worked shifts lasting at least twelve (12) hours, four to six (4-6) days per week, such that they typically worked well in excess of forty (40) hours per week. (Exs. 7 at 13:14-14:11, 20:11-22, 30:5-31:19, 45:13-22, 54:9-20; 8 at 12:12-19, 18:16-19:14, 25:5-8; 9 at No. 12; 10 at ¶¶ 8-9). The exception was during the period when Sixth Avenue was open twenty-four (24) hours per day and shifts were reduced to eight (8) hours so that employees could work "graveyard" shifts; at this time, Plaintiff Charlie Garcia and others resigned due to their low hours and wages. (Exs. 7 at 47:11-22; 8 at 25:9-23, 31:7-32:6). Plaintiffs typically worked longer hours than the restaurants were open, as they were required to arrive an hour before opening to perform side work such as bringing drinks from the basement, cleaning the restaurant, setting up tables, filling ice, preparing take-out bags, performing exterminations, and promoting the restaurant. (Exs. 7 at 14:12-25, 21:6-18, 31:20-32:6; 8 at 9:11-10:7, 12:6-12, 18:2-19:7, 21:14-22:13).

C. Defendants' Insufficient Timekeeping and Recordkeeping Practices

Defendants operated Grimaldi's on an extremely informal basis, primarily via cash and handwritten records of business volume and expenses. (Exs. 1 at 44:4-45:18; 2 at 41:20-42:13; 3 at 13:9-11, 35:15-36:6; 4 at 8:24-9:7, 19:4-8, 21:15-21, 23:2-18). Throughout all five (5) locations, Defendants did not provide time clocks or any reliable means of tracking employee hours worked. (Exs. 1 at 21:9-22; 2 at 11:15-16; 3 at 19:14-20:5; 4 at 12:19-20, 14:20-21; 5 at No. 15; 6 ¶ 11; 7 at 69:10-70:6). Most employees worked full-time, following schedules set by managers or other wait or kitchen staff. (Exs. 1 at 37:6-13; 2 at 58:2-10, 63:21-64:24; 3 at 19:17-20; 4 at 12:23-25, 36:16-17; 7 at 30:18-21 (discussing Sixth Avenue), 54:6-9). Defendants' managers explained that the numbers of hours worked shown on Defendants' payroll logs do not accurately reflect employees' time worked, as the hours were entered automatically. (Exs. 2 at 49:24-53:13; 3 at 23:22-25:10, 40:23-41:9; *see also supra* at 8). As a result, Defendants have produced no accurate records setting forth the hours worked by Plaintiffs. (Pelton Decl ¶ 14; Ex. 2 at 14:7-10, 44:18; *see also* Ex. 16 at 4).

At all locations, Defendants tracked sales and expenses, including wages paid to Plaintiffs, via "yellows" and similar handwritten records. (Exs. 2 at 14:22-18:24, 20:5-23:17, 35:17-36:9; 3 at 20:15-25, 35:6-20; 4 at 21:15-21; 12). These records provide limited information, however, showing employee first names or nicknames without any indication of the hours worked by each employee, and the "yellows" and schedules produced in discovery were created largely or exclusively at Sixth Avenue and Second Avenue. (Exs. 2 at 19:20-20:6; 3 at 32:15-37:6; 7 at 44:3-14, 46:23-13, 51:24-52:24, 54:4-9). Defendants' printed payroll materials are at the very least unreliable as to wages paid, as Defendants could not confirm that they correctly depict employees' cash wages (Ex. 3 at 13:6-11, 24:12-20), and are in fact meaningless, as Plaintiffs were not permitted to keep their paycheck wages. (*Supra* at 8).

D. Defendants' Wage Notification Policies

Throughout the Grimaldi's Enterprise, Defendants failed to provide accurate notifications to any employees regarding their hourly wage rates, the number of hours they worked per week, and any taking of the tip credit by Defendants. (Ex. 7 at 69:10-71:24). Ciolli and Grimaldi's managers either had no knowledge regarding wage notices or confirmed that they were not provided to employees at the time of their hiring or on any other occasion (Exs. 1 at 22:23-23:8; 2 at 43:18-44:8; 3 at 24:5-11, 27:10-21; 4 at 11:2-10; 6 ¶ 13), and Defendants produced no such materials in discovery. (Pelton Decl. ¶ 15; Exs. 1 at 32:3-10; 5 at No. 9). Likewise, as a result of Defendants' lax timekeeping and recordkeeping practices, no Grimaldi's employees received accurate wage statements with their wages. Employees who were paid off the books in cash received no paystubs or wage statements at any time (Ex. 2 at 30:21-31:4; 4 at 23:2-18), while employees who worked on the books received paychecks and paystubs that showed an inaccurate number of hours and wages paid. (Pelton Decl. ¶ 14; *supra* at 8-9).

E. Defendants' Pay Policies for Front of the House Employees

Defendants' indifference to paying minimum wage, overtime and spread-of-hours was consistent as to all front of the house employees at all locations. Defendant Ciolli testified that he instructed his accountant to comply with all payroll and tax laws and told managers that no employee should work over forty (40) hours but beyond that instruction made no effort to ensure that employees were paid in accordance with federal and state law.[4] (Ex. 1 at 22:6-11, 36:18-37:5). Four (4) managers—who all worked at multiple locations and collectively managed each of the five (5) locations (*supra* at 5-6)—confirmed that pay and recordkeeping practices were similar throughout the Grimaldi's Enterprise, since they were transmitted from the original

[4] Plaintiffs and Defendants however attested that Ciolli contributed significantly to the decision in how employees were compensated. (Exs. 5 at No. 4; 6 ¶ 7; 7 at 37:8-10, 38:23-39:4, 56:20-25; 78:3-16).

Brooklyn Bridge location to the others by managers and employees who opened new locations and trained new employees in Grimaldi's policies and practices. (Exs. 2 at 32:13-16, 35:21-36:21, 45:2-46:25; 3 at 35:17-36:6; 4 at 7:24-8:23; 6 ¶¶ 2, 6 ; *see also* 7 at 25:12-26:4, 36:2-15).

Bussers and waiters received low flat weekly rates, or no wages at all. (*Supra* at 7; *see also* Exs. 2 at 45:2-7; 3 at 25:5-10; 28:7-29:3; 4 at 11:11-18, 25:13-23; 6 ¶ 8). When employees worked the counter (and therefore did not receive tips), they were paid either an hourly rate or a shift rate; the result was the same, as shifts were set and consistent. (Exs. 2 at 13:9-18, 15:17-16:7; 3 at 28:9-18; 4 at 11:19-12:8; *supra* at 7).

Plaintiffs consistently testified that they worked in excess of ten (10) hours per day, often working twelve (12) plus hour shifts from open to close, and over forty (40) hours per week, at each location where they worked. (*Supra* at 8). Defendants confirmed that front of the house employees sometimes worked in excess of forty (40) hours per week, particularly during the busy summer season. (Ex. 2 at 29:16-30:4, 44:13-17). Wages for front of the house employees did not include overtime premiums, as waiter rates were fixed and counter workers were paid straight-time rates regardless of how many hours they worked. (Exs. 2 at 11:6-22, 45:8-12; 4 at 12:19-25, *supra* at 7). Defendants likewise testified that front of the house employees sometimes worked all day and at no time received spread-of-hours compensation consisting of an extra hour's pay at minimum wage. (Ex. 2 at 12:9-14:6, 45:13-16; 4 at 18:2-12).

Front of the house employees experienced the same pay violations regardless of whether they were paid on or off the books. As discussed *supra* at 8-9, the payment of checks to these employees was essentially meaningless, as employees neither worked the number of hours depicted nor received the payment shown. This scheme is consistent with the managers'

testimony as to pay rates for front of the house employees that did not distinguish between employees who were paid on or off the books. (Ex. 2 at 10:25-11:22; 3 at 28:7-23; 6 ¶ 8).

ARGUMENT

I. THIS COURT SHOULD EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFFS' STATE LAW CLAIMS

Before turning to Plaintiffs' arguments in favor of certifying Plaintiffs' NYLL claims as a class action, it is first appropriate to address the Court's jurisdiction over those claims. Title 28 U.S.C. § 1367 allows a district court to exercise supplemental jurisdiction over a state law claim where the claim is "so related [to the federal claims] that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). For purposes of that section, claims "form part of the same case or controversy" if they "derive from a common nucleus of operative fact," *Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234, 245 (2d Cir. 2011), and "would ordinarily be tried in one judicial proceeding." *MMT Sales, Inc. v. Channel 53 Inc.*, No. 92-cv-7207, 1993 U.S. Dist. LEXIS 18208, at *4 (S.D.N.Y. Dec. 27, 1993) (*quoting Promisel v. First American Artificial Flowers Inc.*, 943 F.2d 251, 254 (2d Cir. 1991)). District courts generally exercise discretion in favor of supplemental jurisdiction where "considerations of judicial economy, convenience and fairness to litigants" weigh in favor of hearing the state law claims at the same time as the federal law claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Here, Plaintiffs' NYLL unpaid minimum wage and overtime claims challenge the very same policy and practice as their federal FLSA claims – Defendants' practice of failing to pay minimum wage for all hours worked and overtime premiums for all hours worked in excess of forty (40) in a given workweek. These claims are identical in every respect except the applicable statute of limitations and they clearly form part of the same case or controversy. Plaintiffs'

NYLL spread-of-hours, wage statement and wage notice claims, while not identical to the FLSA claims, nevertheless arise out of the same common nucleus of operative facts – *i.e.*, Defendants' pay practices with respect to their employees – and involve the same payroll records and pay policy evidence such that those claims would ordinarily be tried in the same judicial proceeding as the overtime claims. Accordingly, all of Plaintiffs' state law claims form part of the "same case or controversy" as Plaintiffs' federal claim making the exercise of supplemental jurisdiction over those claims appropriate.

Moreover, none of the exceptions to the exercise of supplemental jurisdiction set forth in §1367(c) apply. Plaintiffs' state law claims do not raise a "novel or complex issue of [s]tate law." *Smith & Wollensky*, 659 F.3d at 246 (holding that NYLL provisions regarding tip sharing and spread of hours claims do not raise novel or complex issues). "Rather, the spread of hours claim will hinge on factual findings of (1) whether class members had workdays lasting more than ten hours and (2) whether [defendants] paid class members an extra hour's pay at the New York minimum wage when their workdays lasted more than ten hours." *Id*. (citing N.Y. Comp. Codes R. & Regs. tit. 12, § 137-1.7 (2010)). These are the same pay practices records relevant to the unpaid minimum wage and overtime claims, and all of Plaintiffs' claims will be proven based on Defendants' records of payments made to employees including Plaintiffs and deposition testimony. It is for these same reasons that the Plaintiffs' NYLL claims do not "substantially predominate" over their FLSA claims under §1367(c)(2). *Id.*, 659 F.3d at 246-47. As for the other exceptions to exercising supplemental jurisdiction, section 1367(c)(3) is not applicable here because the Court has not dismissed any claims over which it has original jurisdiction, and this case presents no "exceptional circumstances" or "compelling reasons" for the Court to decline jurisdiction under section 1367(c)(4). *Id.*, 659 F.3d at 247-50.

Considerations of judicial economy, convenience and fairness to litigants counsel in favor of trying both claims that turn on the legality of Defendants' challenged compensation policies, FLSA and NYLL, in one action. In these circumstances, exercise of supplemental jurisdiction over the NYLL claims is appropriate, as courts in New York have routinely recognized. *Id.* at 245 (approving widespread practice in FLSA claims of exercising supplemental jurisdiction over related NYLL claims); *Ramirez v. HJS Carwash, Inc.*, No. 11-cv-2664, 2013 U.S. Dist. LEXIS 51344 (E.D.N.Y. April 9, 2013) (in FLSA action exercising supplemental jurisdiction over NY minimum wage, overtime and spread of hours claims).

II. THIS COURT SHOULD CERTIFY PLAINTIFFS' NYLL CLAIMS AS A RULE 23(b)(3) CLASS ACTION

A party seeking class certification has the burden of demonstrating that its requirements are satisfied. *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 291 (2d Cir. 1999). However, Rule 23 should be given a "liberal rather than restrictive construction," and "the Second Circuit's general preference is for granting rather than denying class certification." *Lin v. Benihana N.Y. Corp.*, No. 10-cv-1335, 2012 U.S. Dist. LEXIS 186526, at *11 (S.D.N.Y. Oct. 23, 2012). Any "doubts about whether Rule 23 has been satisfied should be resolved in favor of certification." *Meyers v. Crouse Health Sys.*, 274 F.R.D.404, 412 (N.D.N.Y. 2011).

When considering a motion for class certification, the court must accept the allegations in the complaint as true. *See, e.g., Meyer v. United States Tennis Ass'n*, 297 F.R.D. 75, 82 (S.D.N.Y. 2013). The Court may also "consider material outside the pleadings in determining whether to certify a class," but it "must not consider or resolve the merits of the claims of the purported class." *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85 (S.D.N.Y. 2011). On a Rule 23 motion, "the ultimate question is not whether the plaintiffs… will prevail on the merits but rather whether they have met the requirements of Rule 23." *Gortat v. Capala Bros.*,

257 F.R.D. 353, 362 (E.D.N.Y. 2009).

"Courts in this Circuit have displayed 'a preference for granting rather than denying class certification.'" *Morris v. Alle Processing Corp*., No. 08-cv-4874, 2013 U.S. Dist. LEXIS 64534, at *5 (E.D.N.Y. 2013) (quoting *Gortat*, 257 F.R.D. at 361); *see Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997). Moreover, courts in this Circuit "routinely certify class action[s] in FLSA matters so that New York State and federal wage and hour claims are considered together." *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 163 (S.D.N.Y. 2008) (collecting cases); *see also Mendez v. Radec Corp*., 260 F.R.D. 38, 54 (W.D.N.Y. 2009).

Plaintiffs seek to certify (1) the NYLL wage statement and wage notice claims on behalf of the Class and (2) the minimum wage, overtime and spread-of-hours claims on behalf of the Unpaid Wages Subclass. As demonstrated by the facts above and as set forth below, the Classes easily satisfy the requirements of Rule 23(a) and (b)(3).

A. Rule 23(a)(1): Numerosity

A class must be "so numerous that joinder of all members is impracticable." F.R.C.P. 23(a)(1). In the Second Circuit, "numerosity is presumed at… 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir.1995), but the precise number of class members need not be established. *See Lewis v. Alert Ambulette Serv. Corp.*, No. 11-cv-442, 2012 U.S. Dist. LEXIS 6269, at *23 (E.D.N.Y. Jan. 19, 2012). "Determination of practicability depends on all the circumstances surrounding a case, not on mere numbers." *In Re Beacon Assocs. Litig.*, 282 F.R.D. 315, 326 (S.D.N.Y. 2012). "Relevant considerations include judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members." *Id*.

Plaintiffs have created a preliminary class list of over eighty (80) Class Members, based on the 216(b) list, information from document discovery, and information supplied by deponents. (Ex. 14). Plaintiffs confirmed positions for approximately fifty (50) of these employees using deposition testimony, Department of Labor materials and patterns of wage payment shown on the "yellows." (*E.g.*, Exs. 2 at 16:9-18, 25:4-27:2; 7 at 44:12-45:8, 48:3-25, 51:24-53:5; 12; 15). These numbers likely underestimate the Class size, in light of Ms. Peluso's testimony that approximately twenty (20) people currently work at Brooklyn Bridge, Mr. Tarzia's estimate that over fifty (50) individuals currently work at all five (5) locations, Opt-in Plaintiff Shyti's declaration that eight or nine (8-9) new waiters worked at Coney Island each summer in addition to eight (8) kitchen employees, and the testimony of Ms. Shlemin regarding high turnover at Coney Island. (Exs. 2 at 33:2-15; 3 at 23:4-6; 4 at 32:13-33:8; 10 ¶¶ 4, 6). For these reasons, the Class easily meets the numerosity threshold. *See, e.g., Poplawski v. Metroplex on the Atlantic, LLC*, No. 11-cv-3765, 2012 U.S. Dist. LEXIS 46408, at *15 (E.D.N.Y. April 2, 2012) ("Precise quantification of class members is not necessary, so long as plaintiffs reasonably estimate the number to be substantial.") (citing *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993)).

The documents and testimony in this matter also indicate that in excess of forty (40) individuals worked in front of the house positions during the Class Period. The "yellows" identify at least some of the individuals who worked as waiters and bussers, as they were consistently paid less than one hundred dollars ($100.00) per week. (Ex. 12; *supra* at 7, 11). In fact, the true number of front of the house employees appearing on the "yellows" is almost certainly higher, as many waiters also worked as counter employees and received somewhat higher wages when they worked a counter shift. (*Supra* at 7, 11). The individuals on this list worked primarily for Brooklyn Bridge and Sixth Avenue, as the "yellows" and Department of

Labor materials pertained primarily to those locations. (*Supra* at 16). Using the limited information and records currently available, Plaintiffs have identified thirty-two (32) distinct individuals who worked primarily at two (2) of the five (5) locations, and Opt-in Plaintiff Shyti and Ms. Shlemin testified that at least as many waiters worked at Coney Island throughout the Class Period, amounting to at least fifty-eight (58) front of the house employees at three (3) of the five (5) locations. (*Supra* at 16). Relying on "reasonable inference drawn from the available facts" and "common sense assumptions," it is clear that the Unpaid Wages Subclass exceeds forty (40) members. *Moreira v. Sherwood Landscaping, Inc.*, No. 13-cv-2640, 2015 U.S. Dist. LEXIS 43919, at *17 (E.D.N.Y. Mar. 31, 2015) (collecting cases).

While Plaintiffs are unable to establish the precise number of members of the Class and the Subclass, it is clear that, spanning five (5) locations and over six (6) years, both exceeded forty (40). As such, numerosity is satisfied.

B. Rule 23(a)(2): Common Questions

To merit class certification, claims must "depend upon a common contention ... of such a nature that it is capable of class wide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011). "Commonality does not mean that all issues must be identical as to each member, but it does require that plaintiffs identify some unifying thread among the members' claims that warrant[s] class treatment." *Garcia v. Pancho Villa's of Huntington Village, Inc.*, 281 F.R.D. 100, 105 (E.D.N.Y. 2011). Even a single common question is sufficient to meet the commonality requirement. *Wal-mart Stores*, 131 S.Ct. at 2556. Where the question of law involves "standardized conduct of the defendant... a common nucleus of operative fact is typically presented and the commonality requirement... is usually met." *Lewis*, 2012 U.S. Dist. LEXIS 6269, at *25. For this reason, "commonality is usually satisfied in wage

cases 'where the plaintiffs allege that defendants had a common policy or practice of unlawful labor practices." *Chime v. Peak Sec. Plus, Inc.*, 137 F. Supp. 3d 183, 208 (E.D.N.Y. 2015).

In this instance, Defendants' NYLL wage notification violations were common among the Class and Defendants' NYLL unpaid wages violations were common among the Unpaid Wages Subclass. Specifically, the testimony of all deponents confirms that Defendants failed to provide wage notices, failed to provide wage statements to off the books employees, and that the payroll materials and paychecks purporting to show hourly rates and hours worked by on the books employees were incorrect and generated automatically. Defendants produced one (1) wage statement, which is inaccurate as discussed *supra* at 8-9, and zero (0) wage notices required by the NYLL. (Pelton Decl. ¶ 14). Plaintiffs have also alleged, and even at this stage provided ample evidence in support, that Defendants failed to pay front of the house employees minimum wage for all hours worked, failed to pay overtime premiums, and failed to pay spread-of-hours premiums when these individuals worked in excess of ten (10) hours per day, as they often did. While Defendants employed slightly different pay practices for waiters and counter employees, this difference is of no import, as counter employees typically worked primarily as waiters, and in any event received wages below minimum wage that did not include overtime premiums or spread-of-hours premiums. Defendants' managers testified to Defendants' total lack of timekeeping and informal recordkeeping and affirmed that employees did not receive minimum wage, overtime or spread-of-hours premiums.

As a result, all members of the Class raise the same legal issues: (1) whether Defendants failed to provide accurate wage statements; and (2) whether Defendants failed to give its hourly employees wage notices on the date of hire and on February 1 of each year thereafter. The members of the Unpaid Wages Subclass likewise raise common legal issues: (1) whether

Defendants failed to pay minimum wage for all hours worked; (2) whether Defendants failed to pay 1.5 times employees' effective hourly rates for overtime hours worked over forty (40) in a given workweek; and (3) whether Defendants failed to pay spread-of-hours pay for each day's labor with a spread of hours greater than ten (10). There are also common legal questions susceptible to common answers regarding whether or not these common policies are illegal under the NYLL. Thus, the class more than satisfies the common question requirement. *See Smith & Wollensky*, 659 F.3d at 252 (upholding FLSA/NYLL class action and finding common questions satisfied where all NYLL claims derived from the same policy of defendants).

The extent of the common questions presented by the classes will be addressed in more detail in the discussion of Rule 23(b)(3) "predominance" inquiry. *See Morangelli v. Chemed Corp.*, 275 F.R.D. 99, 106 (E.D.N.Y. 2011) (combining 23(a)(2) commonality and 23(b)(3) predominance requirements into one analysis); *see also Moore v. Paine Webber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002).

C. Rule 23(a)(3): Typicality

"Typicality requires that 'the claims of the class representatives be typical of those of the class, and is therefore satisfied when each member's claim arises from the same course of events, and each class member makes similar legal arguments to prove defendants' liability.'" *Myers v. Hertz Corp.*, No. 02-cv-4235, 2007 U.S. Dist. LEXIS 53572, at *18 (E.D.N.Y. July 24, 2007) (*quoting Marisol A.*, 126 at 376). However, "[t]ypicality 'does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claims as to that of other members of the proposed class.'" *Damassia*, 250 F.R.D. at 158 (quoting *Caridad*, 191 F.3d at 293).

Here, the Plaintiffs and the prospective class and subclass "were subject to the same general employment scheme," *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 204 (S.D.N.Y. 2006), and their claims are all based on "the same course of events and legal theory." *Damassia*, 250 F.R.D. at 158. The Named Plaintiffs and Opt-in Plaintiffs have collectively worked at four (4) of the five (5) restaurants, while Defendants' managers including Mr. Taormina collectively worked at all five (5) locations. (*Supra* at 5-6). Plaintiffs' claims for minimum wage, overtime, spread-of-hours and failure to provide wage statements and wage notices are typical of the claims of the other members of their respective classes. Indeed, the claims are largely similar among all Class Members because Defendants' managers and employees so frequently trained or worked for a time at one location before moving on to another location, often helping to open new locations, where they established essentially the same timekeeping, wage notification and pay policies. If these challenged payroll practices were unlawful as to Plaintiffs, they were unlawful as to all members of the Class making Plaintiffs' claims typical of the classes.

D. Rule 23(a)(4): Adequacy of Representation

The Rule 23(a)(4) adequacy requires that the class representative must "be part of the class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents," *Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007), and "representatives must have no interests conflict with the class." *Lewis*, 2012 U.S. Dist. LEXIS 6269, at *30. "Only a fundamental conflict will defeat the adequacy of representation requirement." *Id*. In addition, class counsel must be "qualified, experienced and able to conduct the litigation." *Lin*, 2012 U.S. Dist. LEXIS 186526, at *24.

Here, the Plaintiffs are members of the classes they seek to represent and have the same interests as the Class Members. The Named Plaintiffs and all Class Members experienced wage

notification violations as a result of Defendants' management and operations policies, while Plaintiffs and the Unpaid Wages Subclass suffered lost wages from the unlawful pay practices that consistently deprived these workers of minimum wage, overtime wages, spread-of-hours pay, accurate wage statements and wage notices. There are no conflicts between Plaintiffs and the classes that would preclude them from vigorously representing the Class Members. Any defenses to Plaintiffs' legal arguments for minimum wage, overtime, spread-of-hours, failure to provide accurate wage statements and failure to provide wage notices would be common to all Class Members because they were all paid pursuant to the same corporate policies of the Grimaldi's Enterprise. As such, Plaintiffs will be able to adequately represent the interests of all Class Members in this action.

Finally, as set forth above and in the enclosed declaration of Brent E. Pelton, class counsel is experienced in handling large, multi-party actions and is fully qualified to pursue this action. Therefore, both prongs of the adequacy inquiry – qualification of the class representatives and qualification of class counsel – are easily met.

E. Rule 23(b)(3): Common Questions Predominate

The requirement that common questions predominate tests whether the proposed classes "are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). Predominance is satisfied when "resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore*, 306 F.3d at 1252; *see also In re Nassau County Strip Search Cases*, 461 F.3d 219, 228 (2d Cir. 2006). Class members aggrieved by a single policy of the defendant who rely on a legal theory common to all victims of that policy

necessarily satisfy the predominance requirement. *See Lewis*, 2012 U.S. Dist. LEXIS 6269, at *36 (predominance satisfied where plaintiffs allege defendants' uniform policy of denying overtime and spread-of-hours); *Lin*, 2012 U.S. Dist. LEXIS 186526, at *28 (predominance satisfied for spread-of-hours and wage statement claim). That is precisely the case here.

1. Common Questions Predominate With Respect to Liability for Plaintiffs' Claims.

Plaintiffs' claims are all based on policies of Defendants that are alleged to be uniform with respect to the Class and Subclass, as set forth *supra* at 8-11. These uniform policies will be established through generalized proof applicable to the Class as a whole including the testimony of Ciolli and his managers, documents including "yellows," and the testimony of representative employees. Once those uniform policies are established, the only remaining issue is whether those policies violate the New York Labor Laws, a legal question common to the entire Class and Subclass. There are no individual questions raised with respect to liability for the NYLL claims. Common questions not only predominate but are the only questions presented.

Because common questions predominate in cases, like this one, that challenge the legality of an employers pay practices under NYLL, courts routinely certify such actions for class treatment. *See e.g., Lewis*, 2012 U.S. Dist. LEXIS 6269 (certifying joint FLSA/NYLL Rule 23 class action for unpaid overtime, minimum wage, spread of hours and deductions claims).

2. Common Questions Predominate With Respect To Damages.

Like liability, damages for the Class and Subclass can easily be established through generalized proof including "yellows" and representative testimony. While establishing hours worked may require individual testimony, "it is well-settled that individualized damages calculations do not defeat predominance." *Johnson v. Brennan*, No. 10-cv-4712, 2011 U.S. Dist. LEXIS 105775, at *18 (S.D.N.Y. Sept. 16, 2011). Indeed, unpaid wage class actions "will

necessarily involve calculations for determining individual class member damages, and the need for such calculations do not preclude class certification." *Shabazz v. Morgan Funding Corp.*, 269 F.R.D. 245, 250-51 (S.D.N.Y. 2010). Defendants' failure to track employees' hours worked does not hinder class certification, as "there is no indication that any [employee] would use some particular kind of evidence specific only to him or her in order to prove what hours they worked" or that "these individualized damages inquiries would predominate over generalized liability issues affecting the whole class." *Lassen v. Hoyt Livery, Inc.*, No. 13-cv-1529, 2014 U.S. Dist. LEXIS 129784, at *34 (D. Conn. Sept. 17, 2014). Further, the Court is authorized to grant class status as to liability only, should the court deem that a more reasonable approach. *In re Nassau County Strip Search*, 461 F.3d at 226-27.

As damages will be calculated from common proof and will require modest individual testimony, common questions predominate Plaintiffs' claims for damages.

F. Rule 23(b)(3): Superiority

Rule 23(b)(3) sets out four factors bearing on the question of superiority: (1) the extent to which the class members have an interest in individually controlling the prosecution of their claims; (2) the extent and nature of any litigation concerning the controversy already begun by class members; (3) the desirability of concentrating the litigation in one forum; and (4) the likely difficulties in managing the class action. All four of these factors favor certification of the Class.

(1) The class members have no interest in individually controlling the prosecution of their claims. In many cases, the amount of damages at issue is not large enough to make individual actions feasible, and "the costs of maintaining separate actions would be prohibitive." *Meyers*, 274 F.R.D. at 418. Pursuing individual actions may also be difficult for the class members because many of them are immigrants who may lack familiarity with the American legal system.

Ansoumana, 201 F.R.D. at 85-86. Also, since many of the putative class members are current employees of Defendants, a determination of superiority is warranted due to the "possibility that employees would be dissuaded from pursuing individual claims by fear of reprisal." *Guzman v. VLM, Inc.*, No. 07-cv-1126, 2008 U.S. Dist. LEXIS 15821, at *25 (E.D.N.Y. Mar. 2, 2008).

(2) A search on PACER reveals no pending FLSA or NYLL claims against Defendants and Plaintiffs are aware of no such cases. While a DOL investigation resulted in a finding that unpaid overtime was owed to certain kitchen employees at Brooklyn Bridge between April 14, 2011 and May 3, 2014 (Ex. 16), the present Action encompasses a different and broader scope of claims. As a result, litigating the common issues raised by this case on behalf of the classes will achieve the judicial economy that Rule 23 was designed to promote.

(3) Given that the evidence necessary to establish liability (*i.e.*, the "yellows" and party testimony) is the same whether this action is tried as an individual or class action, it is clearly desirable for efficiency and judicial economy to concentrate all of the claims in one forum. Class adjudication is far superior to the filing of dozens of separate actions all raising the same questions and offering the same evidence regarding the nature and legality of Defendants' pay policies. The superiority of class treatment is particularly great here because many of the claims of the class members arise in the Eastern District of New York. As a result, class treatment will avoid the filing of dozens of identical claims in the same court.

(4) There are no manageability problems inherent in certifying NYLL Rule 23 classes in conjunction with an FLSA collective action. In *Smith & Wollensky*, the Second Circuit affirmed class certification of the combined FLSA/NYLL action, explaining that any "'conflict' between the opt-in procedure under the FLSA and the opt-out procedure under Rule 23 is not a proper reason to decline [supplemental] jurisdiction" over an NYLL claim or to decline to certify an

NYLL claim as a class action." 659 F.3d at 249. Class actions relying on a single state's law are well-suited to class treatment. *See Indergit v. Rite Aid Corp.*, 293 F.R.D. 632, 658 (S.D.N.Y. 2013) (no manageability concerns for approximately 300 class members in New York state).

Denying class certification on manageability grounds is "disfavored" and "should be the exception rather than the rule." *Willix v. Healthfirst, Inc.*, No. 07-cv-1143, 2009 U.S. Dist. LEXIS 114818, at *13 (E.D.N.Y. Dec. 3, 2009) (*quoting In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001)). Accordingly, a class action is a superior method of adjudicating this case.

III. PLAINTIFFS' COUNSEL SHOULD BE APPOINTED AS CLASS COUNSEL

As class counsel must fairly and adequately represent the class, in making this appointment, the Court must consider: (i) the work counsel has done in identifying or investigating potential claims in this action; (ii) counsel's experience in handling class actions and complex litigation and the claims asserted; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to the representation. Fed. R. Civ. P. 23(g)(A).

Plaintiffs' counsel, Pelton Graham LLC, meets all the relevant criteria. Pelton Graham LLC is highly experienced in complex wage and hour litigation, and specifically litigation defending the rights of New York food service employees. (*See* Pelton Decl. ¶¶ 3, 5). Additionally, Plaintiffs' counsel is willing and able to commit the necessary resources to represent the Rule 23 Classes, and has already done substantial work identifying, investigating, and litigating Plaintiffs' claims. (*Id*. ¶ 6). Courts in this Circuit have found Plaintiffs' counsel to be adequate class counsel in wage and hour class actions in similar cases. (*Id*. ¶¶ 8-9). Consequently, the Rule 23(g) requirements are satisfied by the appointment of Pelton Graham as class counsel.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court issue an Order certifying Plaintiffs' proposed class pursuant to Rule 23 of the Federal Rules of Civil Procedure with respect to Plaintiffs' NYLL claims, together with such other and further relief as the Court may deem just and proper.

Dated: New York, New York
June 29, 2018

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