UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HENRRY ALCANTARA, JOSE PERALTA, and MAXIMINO ROSA on behalf of themselves and all others similarly situated,	:	Case No.: 15 Civ. 7288
	:	**CLASS AND COLLECTIVE ACTION COMPLAINT**
Plaintiffs,	:	
- against -	:	
BIG CITY YONKERS, INC. d/b/a BIG CITY AUTOMOTIVE WAREHOUSES,	:	
Defendant.	:	

Plaintiffs Henrry Alcantara, Jose Peralta and Maximino Rosa (collectively the "New York Class Representatives") on behalf of themselves and all others similarly situated, by and through their attorneys Shulman Kessler LLP, complaining of the Defendant Big City Yonkers, Inc. d/b/a Big City Automotive Warehouses ("Defendant" or "Big City"), allege as follows as for their Complaint:

PRELIMINARY STATEMENT

1. This lawsuit seeks to recover unpaid overtime and minimum wage compensation for Plaintiffs and their similarly situated co-workers who have worked for Defendant in the State of New York as delivery drivers, based upon Defendant's violation of the Fair Labor Standards Act of 1938 (the "FLSA"), as amended, 29 U.S.C. § 201, *et seq.* and appropriate rules and regulations.

2. This lawsuit also seeks to recover unpaid overtime and minimum wage compensation, based on Defendant's violation of the New York Labor Law ("NYLL" or "N.Y. Lab. Law") and appropriate rules and regulations.

3. Defendant Big City requires its delivery drivers to deliver parts to its stores located throughout the State of New York and the State of New Jersey, as well as to other mechanics, including but not limited to auto body shops, and requires Plaintiffs to work in excess of 40 hours per workweek.

4. Defendant Big City operates a business enterprise consisting of 15 auto parts stores throughout the State of New York and the State of New Jersey.

5. While employed by Defendant, Plaintiffs consistently worked over 40 hours per week without receiving premium overtime pay for all the hours they worked. Throughout the relevant period, it was Defendant's policy to deprive Plaintiffs of all of their earned overtime wages in violation of the FLSA and the NYLL. In order to avoid paying Plaintiffs overtime premiums for all of the hours Plaintiffs worked in excess of 40 per workweek, Defendant misclassified its delivery drivers as exempt employees.

6. While employed by Defendant, Plaintiffs were denied a minimum wage due to the unlawful kick-backs Plaintiffs were required to pay in order to complete their duties for Defendant, including but not limited to expenses related to their vehicle, gasoline, and other travel expenses. Throughout the relevant period, it was Defendant's policy to subject Plaintiffs to kick-backs and thereby deprive Plaintiffs of a minimum wage in violation of the FLSA and the NYLL.

7. Defendant failed to track its delivery drivers' hours worked.

8. Plaintiffs bring this action on behalf of themselves and all similarly situated current and former delivery drivers of Defendant pursuant to the FLSA.

9. Plaintiffs also seek permission to give notice of this action pursuant to 29 U.S.C. § 216(b) to all persons who are presently, or have at any time during the 3 years immediately preceding the filing of this action, worked for Defendant as a delivery driver.

JURISDICTION & VENUE

10. Jurisdiction of the Court over this controversy is based upon 29 U.S.C. § 201, *et seq.*, 28 U.S.C. §§ 1331 and 1337.

11. This Court has jurisdiction over all state law claims brought in this action pursuant to 28 U.S.C. § 1367.

12. Defendant does business throughout the State of New York and a substantial part of the events giving rise to Plaintiffs' claims occurred in the Bronx, Queens, Kings, and Westchester Counties.

13. Plaintiffs performed work for Defendant at its stores located throughout New York and New Jersey.

14. Accordingly, this action properly lies in the Southern District of New York, pursuant to 28 U.S.C. § 1391.

THE PARTIES

Plaintiffs

15. Henrry Alcantara is a resident of Bronx County, State of New York.

16. At all times relevant to this Complaint, Henrry Alcantara was an "employee" within the meaning of Section 3(e) of the FLSA, 29 U.S.C. § 203(e), and N.Y. Lab. Law § 190(2).

17. At all times relevant, Henrry Alcantara was employed by Defendant as a delivery driver.

18. Henrry Alcantara has expressed his consent to make these claims against the Defendant by filing a written consent form, pursuant to 29 U.S.C. § 216(b). (*See* Exhibit A, annexed hereto).

19. Jose Peralta is a resident of Bronx County, State of New York.

20. At all times relevant to this Complaint, Jose Peralta was an "employee" within the meaning of Section 3(e) of the FLSA, 29 U.S.C. § 203(e), and N.Y. Lab. Law § 190(2).

21. At all times relevant, Jose Peralta was employed by Defendant as a delivery driver.

22. Jose Peralta has expressed his consent to make these claims against the Defendant by filing a written consent form, pursuant to 29 U.S.C. § 216(b). (*See* Exhibit A, annexed hereto).

23. Maximino Rosa is a resident of Westchester County, State of New York.

24. At all times relevant to this Complaint, Maximino Rosa was an "employee" within the meaning of Section 3(e) of the FLSA, 29 U.S.C. § 203(e), and N.Y. Lab. Law § 190(2).

25. At all times relevant, Maximino Rosa was employed by Defendant as a delivery driver.

26. Maximino Rosa has expressed his consent to make these claims against the Defendant by filing a written consent form, pursuant to 29 U.S.C. § 216(b). (*See* Exhibit A, annexed hereto).

Defendant

27. Upon information and belief, Defendant Big City was and still is a domestic corporation, authorized to do business pursuant to the laws of the State of New York.

28. Upon information and belief, Defendant Big City maintains control, oversight, and direction over its operations and employment practices.

29. At all times hereinafter mentioned, Defendant Big City was and still is an "employer" within the meaning of Section 3(d) of the FLSA, 29 U.S.C. § 203(d), and N.Y. Lab. Law § 190(3).

30. All of Defendant Big City locations are advertised as a single integrated enterprise on Defendant's website at: http://www.bigcityautomotive.com/news.htm (last accessed Sept. 15, 2015).

31. Defendant Big City employed employees, including Plaintiffs herein, who regularly engaged in commerce or in the production of goods for commerce or in handling, selling or otherwise working on goods and materials which have moved in or been produced for commerce within the meaning of Section 3(b), (g), (i) and (j) of the FLSA, 29 U.S.C. § 203(b), (g), (i), (j), (r) & (s)(A)(i).

32. Defendant Big City's annual gross volume of sales made or business done is not less than $500,000 within the meaning of 29 U.S.C. § 203(s)(A)(ii).

33. At all times hereinafter mentioned, the activities of Defendant Big City constituted an "enterprise" within the meaning of Section 3(r) & (s) of the FLSA, 29 U.S.C. § 203(r) & (s).

34. At all relevant times, Defendant maintained control, oversight, and direction over Plaintiffs and similarly situated employees, including timekeeping, payroll and other employment practices that applied to them.

35. Defendant applied the same employment policies, practices, and procedures to all delivery drivers throughout State of New York, including policies, practices, and procedures with respect to payment of overtime and minimum wage compensation.

FLSA COLLECTIVE ACTION CLAIMS

36. Plaintiffs bring the First and Third Causes of Action, pursuant to the FLSA, 29 U.S.C. § 216(b), on behalf of themselves and all similarly situated persons who work or have worked for Defendant as a delivery driver within the last 3 years and who elect to opt-in to this action.

37. Upon information and belief, there are approximately more than 50 current and former delivery drivers that are similarly situated to Plaintiffs who were denied overtime compensation and a minimum wage by Defendant.

38. Plaintiffs represent other delivery drivers, and are acting on behalf of Defendant's current and former delivery drivers' interests as well as their own interests in bringing this action.

39. Defendant unlawfully required Plaintiffs and all individuals employed as delivery drivers to work in excess of 40 hours per week without paying them overtime compensation at a rate of at least 1 and ½ times their regular hourly rate and the required minimum wage for all hours worked as a result of Plaintiffs being subjected to unlawful kick-backs.

40. Plaintiffs seek to proceed as a collective action with regard to the First and Third Causes of Action, pursuant to 29 U.S.C. § 216(b) on behalf of themselves and the following class of persons:

> All delivery drivers who are currently or have been employed by Defendant (hereinafter referred to as the "FLSA Collective") at any time during the 3 years prior to the filing of their respective consent forms (hereinafter referred to as the "Collective Period").

41. Defendant was aware or should have been aware that the law required it to pay non-exempt employees, including Plaintiffs and the FLSA Collective, an overtime premium of 1 and ½ times their regular rate of pay for all work-hours Defendant suffered or permitted them to work

in excess of 40 per workweek and that Plaintiffs were deprived of a minimum wage as a result of being subjected to unlawful wage kick-backs by Defendant. Upon information and belief, Defendant applied the same unlawful policies and practices to their delivery drivers throughout the State of New York.

42. The FLSA Collective is readily identifiable and locatable through the use of the Defendant's records. The FLSA Collective should be notified of and allowed to opt-in to this action, pursuant to 29 U.S.C. § 216(b). Unless the Court promptly issues such a notice, the FLSA Collective, who have been unlawfully deprived of overtime pay in violation of the FLSA, will be unable to secure compensation to which they are entitled, and which has been unlawfully withheld from them by Defendant.

FEDERAL RULE OF CIVIL PROCEDURE RULE 23
NEW YORK CLASS ALLEGATIONS

43. Plaintiffs bring the Second, Fourth and Fifth Causes of Action on their own behalf and as a class action, pursuant to Fed R. Civ. P. 23(a) and (b), on behalf of the following class of persons:

> All delivery drivers who are currently, or have been employed by the Defendant, in the State of New York at any time during the 6 years prior to the filing of this Complaint, to the entry of the judgment in the case (hereinafter referred to as the "New York Class" and the "New York Class Period," respectively.)

44. The persons in the New York Class are so numerous that joinder of all members is impracticable. Although, the precise number of such persons is unknown, and facts on which the calculation of that number can be based are presently within the sole control of Defendant.

45. Upon information and belief, the size of the New York Class is at least 100 individuals.

46. The Second, Fourth, and Fifth Causes of Action are properly maintainable as a class action under Fed. R. Civ. Pro. 23(b)(3). There are questions of law and fact common to the New York Class that predominate over any questions solely affecting individual members of the New York Class, including but not limited to:

a. whether Defendant failed to keep accurate time records for all hours worked by the New York Class Representatives and the New York Class;

b. what proof of hours worked is sufficient where an employer fails in its duty to maintain true and accurate time records;

c. whether Defendant failed to pay proper compensation to New York Class Representatives and the New York Class for all work-hours in excess of 40 per workweek in violation of and within the meaning of the N.Y. Lab. Law Article 6, §§ 190 *et seq.* and the supporting New York State Department of Labor Regulations, 12 N.Y.C.R.R. Part 142;

d. whether Defendant failed to pay the proper minimum wage for all hours worked to the New York Class Representatives and the New York Class as a result of the unlawful kick-backs Plaintiffs and Class Members were subjected to by Defendant in violation of N.Y. Lab. Law § 198–b;

e. whether Defendant failed to furnish the New York Class Representatives and New York Class with an accurate statement of, *inter alia*, wages, hours worked, and rates paid as required by N.Y. Lab. Law § 195;

f. whether Defendant failed to furnish the New York Class Representatives and New York Class with the annual notice required by N.Y. Lab. Law § 195;

g. the nature and extent of New York Class-wide injury and the appropriate measure of damages sustained by the New York Class Representatives and the New York Class;

h. whether Defendant acted willfully or with reckless disregarding in its failure to pay the New York Class Representatives and the New York Class; and

i. the nature and extent of class-wide injury and the measure of damages for those injuries.

47. The New York Class Representatives fairly and adequately protect the interests of the New York Class and have no interests antagonistic to the class. The named Plaintiffs are represented by attorneys who are experienced and competent in both class litigation and employment litigation.

48. A class is superior to other available methods for the fair and efficient adjudication of the controversy, particularly in the context of wage-and-hour litigation where an individual plaintiff lacks the financial resources to vigorously prosecute a lawsuit in federal court against the corporate defendant. The damages sustained by individual class members are small, compared to the expense and burden of individual prosecution of this litigation. Class action treatment will obviate unduly duplicative litigation and the possibility of inconsistent judgments.

49. Further, the New York Class Representatives and the New York Class have been equally affected by Defendant's failure to pay proper wages. Moreover, members of the New York Class still employed by Defendant may be reluctant to raise individual claims for fear of retaliation.

50. Defendant has acted or refused to act on grounds generally applicable to the New York Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class was a whole.

51. Plaintiffs' claims are typical of those of the New York Class. Plaintiffs and the other New York Class members were subjected to Defendant's policies, practices, programs, procedures, protocols and plans alleged herein concerning the failure to pay proper wages and the failure to keep adequate records. Plaintiffs' job duties are typical of those of the class members.

52. A class action is superior to other available methods for the fair and efficient adjudication of this litigation – particularly in the context of wage litigation like the present action,

where individual plaintiffs may lack the financial resources to vigorously prosecute a lawsuit in federal court against a corporate defendant. The members of the New York Class have been damaged and are entitled to recovery as a result of Defendant's common and uniform policies, practices, and procedures. Although the relative damages suffered by individual members of the New York Class are not *de minimis*, such damages are small compared to the expense and burden of individual prosecution of this litigation. In addition, class treatment is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about Defendant's practices.

CLASS-WIDE FACTUAL ALLEGATIONS

53. Plaintiffs and the members of the FLSA Collective and New York Class (collectively "Class Members") have been victims of Defendant's common policy and plan that has violated their rights under the FLSA by requiring delivery drivers to work in excess of 40 hours per week and denying them overtime compensation and a minimum wage for all overtime hours worked. At all times relevant, Defendant's unlawful policy and pattern or practice has been willful.

54. All of the work performed by Class Members was assigned by Defendant and/or Defendant was aware of all the overtime work that Plaintiffs and Class Members performed.

55. Upon information and belief, Defendant has a policy and pattern or practice to require Plaintiffs and Class Members to work in excess of 40 hours per week.

56. Defendant failed to pay Plaintiffs and Class Members time and one half for all hours worked over 40 in a workweek in violation of the FLSA.

57. Defendant received unlawful kick-backs from Plaintiffs and Class Members as a result of failing to requiring Plaintiffs to pay for expenses necessary to complete their duties which

included but were not limited to expenses relating to their vehicle, gasoline, and other travel expenses.

58. Defendant failed to furnish Plaintiffs and Class Members with an accurate statement of, *inter alia*, wages, hours worked, and rates paid as required by NYLL.

59. Defendant failed to furnish Plaintiffs and Class Members with the annual notice required by NYLL.

60. As part of its regular business practice, Defendant intentionally, willfully, and repeatedly engaged in a pattern, practice, and/or policy that violates the FLSA. Defendant's policy and pattern or practice includes but is not limited to:

a. Willfully failing to record all of the time that its employees, including Plaintiffs and Class Members, worked for the benefit of Defendant;

b. Willfully failing to keep payroll records as required by the FLSA and NYLL;

c. Willfully failing to pay its employees, including Plaintiffs and Class Members, overtime wages for all of the hours that they worked in excess of 40 per workweek;

d. Willfully failing to pay its employees, including Plaintiffs and Class Members, a minimum wage for all hours worked per workweek free of any unlawful kick-backs.

61. Defendant was or should have been aware that the FLSA required it to pay its delivery drivers premium overtime pay for all hours worked in excess of 40 per week and to pay Plaintiffs at the minimum wage for all hours worked free of any unlawful kick-backs to Defendant.

62. Defendant's failure to pay Plaintiffs and Class Members overtime wages for their work in excess of 40 hours per week and a minimum wage was willful, intentional, and in bad faith.

63. Defendant's unlawful conduct has been widespread, repeated, and consistent.

INDIVIDUAL FACTUAL ALLEGATIONS

Henrry Alcantara

64. Henrry Alcantara was employed by Defendant from in or about June 2009 until in or about August 2015 as a delivery driver.

65. Henrry Alcantara was an employee of Defendant, working under its direct supervision.

66. Henrry Alcantara reported to various Big City locations for Defendant, including but not limited to: Defendant's Yonkers store, located at 44 Runyon Ave, Yonkers, New York 10710; Defendant's New Rochelle store, located at 11 Cliff Street, New Rochelle, New York 10801; and Defendant's New Jersey store, located at 300 East Elizabeth Avenue, Linden, New Jersey, 07036.

67. Throughout Henrry Alcantara's employment for Defendant, each workweek he was required to report to work at Big City's Yonkers location from approximately 8:00 a.m. until approximately 7:00 p.m. every Monday through Friday, and from approximately 8:00 a.m. until approximately 6:00 p.m. every Saturday.

68. At all times hereinafter mentioned, Henrry Alcantara was required to be paid overtime pay at the statutory rate of 1 and ½ his regular rate of pay after he worked 40 hours in a workweek for Defendant.

69. During most workweeks between June 2009 and August 2015, Henrry Alcantara worked more than 60 hours per week for Defendant.

70. Defendant failed to compensate Henrry Alcantara for all of the time worked in excess of 40 hours per week at a rate of at least 1 and ½ times his regular hourly rate, throughout the entire term of his employment with Defendant.

71. Henrry Alcantara was required by Defendant to use his own vehicle for deliveries and pay for all travel expenses that were necessary in order for him to complete his duties for Defendant such as expenses related to the maintenance of his vehicle and gasoline.

72. Henrry Alcantara was subjected to improper kick-backs by Defendant as a result of Defendant's failure to reimburse Plaintiff for travel expenses related to his employment for Defendant such as gasoline and violations related to Defendant's EZ pass.

73. Due to the improper kick-backs Henrry Alcantara was subjected to during his employment with Defendant, Defendant failed to compensate Plaintiff the applicable minimum wage for all the hours worked per week.

74. Defendant failed to furnish Henrry Alcantara with an accurate statement of wages listing hours worked, rates paid, gross wages, allowances and deductions taken, and net wages paid.

75. Defendant failed to furnish Henrry Alcantara with a wage notice in 2012 through 2014 as was required by the NYLL.

76. Upon information and belief, Defendant did not keep accurate records of hours worked by Henrry Alcantara.

Jose Peralta

77. Jose Peralta was employed by Defendant from in or about August 2013 until in or about August 2015 as a delivery driver.

78. Jose Peralta was an employee of Defendant, working under its direct supervision.

79. Jose Peralta reported to various Big City locations for Defendant, including but not limited to: Defendant's Yonkers store, located at 44 Runyon Ave, Yonkers, New York 10710; Defendant's New Rochelle store, located at 11 Cliff Street, New Rochelle, New York 10801; and Defendant's New Jersey store, located at 300 East Elizabeth Avenue, Linden, New Jersey, 07036.

80. Throughout Jose Peralta's employment for Defendant, each workweek he was required to report to work at Big City's Yonkers location from approximately 8:00 a.m. until approximately 6:00 p.m. every Monday through Friday, and from approximately 8:00 a.m. until approximately 5:00 p.m. every Saturday.

81. At all times hereinafter mentioned, Jose Peralta was required to be paid overtime pay at the statutory rate of 1 and ½ his regular rate of pay after he worked 40 hours in a workweek for Defendant.

82. During most workweeks between August 2013 and August 2015, Jose Peralta worked more than 55 hours per week for Defendant.

83. Defendant failed to compensate Jose Peralta for all of the time worked in excess of 40 hours per week at a rate of at least 1 and ½ times his regular hourly rate, throughout the entire term of his employment with Defendant.

84. Jose Peralta was required by Defendant to use his own vehicle for deliveries and pay for all travel expenses that were necessary in order for him to complete his duties for Defendant such as expenses related to the maintenance of his vehicle and gasoline.

85. Jose Peralta was subjected to improper kick-backs by Defendant as a result of Defendant's failure to reimburse Plaintiff for travel expenses related to his employment for Defendant such as gasoline and violations related to Defendant's EZ pass.

86. Due to the improper kick-backs Jose Peralta was subjected to during his employment with Defendant, Defendant failed to compensate Plaintiff the applicable minimum wage for all the hours worked per week.

87. Defendant failed to furnish Jose Peralta with an accurate statement of wages listing hours worked, rates paid, gross wages, allowances and deductions taken, and net wages paid.

88. Defendant failed to furnish Jose Peralta with a wage notice in 2013 and 2014 as was required by the NYLL.

89. Upon information and belief, Defendant did not keep accurate records of hours worked by Jose Peralta.

Maximino Rosa

90. Maximino Rosa was employed by Defendant from in or about June 2014 until in or about August 2014 as a delivery driver.

91. Maximino Rosa was an employee of Defendant, working under their direct supervision.

92. Maximino Rosa reported to various Big City locations for Defendant, including but not limited to: Defendant's Yonkers store, located at 44 Runyon Ave, Yonkers, New York 10710; Defendant's New Rochelle store, located at 11 Cliff Street, New Rochelle, New York 10801; and Defendant's New Jersey store, located at 300 East Elizabeth Avenue, Linden, New Jersey, 07036.

93. Throughout Maximino Rosa's employment for Defendant, each workweek he was required to report to work at the Big City Yonkers location from approximately 8:00 a.m. until approximately 6:00 p.m. every Monday through Friday, and from approximately 8:00 a.m. until approximately 5:00 p.m. every Saturday.

94. At all times hereinafter mentioned, Maximino Rosa was required to be paid overtime pay at the statutory rate of 1 and ½ his regular rate of pay after he worked 40 hours in a workweek for Defendant.

95. During most workweeks between June 2014 and August 2014, Maximino Rosa worked more than 55 hours per week for Defendant.

96. Defendant failed to compensate Maximino Rosa for all of the time worked in excess of 40 hours per week at a rate of at least 1 and ½ times his regular hourly rate, throughout the entire term of his employment with Defendant.

97. Maximino Rose was required by Defendant to use his own vehicle for deliveries and pay for all travel expenses that were necessary in order for him to complete his duties for Defendant such as expenses related to the maintenance of his vehicle and gasoline.

98. Maximino Rose was subjected to improper kick-backs by Defendant as a result of Defendant's failure to reimburse Plaintiff for travel expenses related to his employment for Defendant such as gasoline and violations related to Defendant's EZ pass.

99. Due to the improper kick-backs Maximino Rose was subjected to during his employment with Defendant, Defendant failed to compensate Plaintiff the applicable minimum wage for all the hours worked per week.

100. Defendant failed to furnish Maximino Rosa with an accurate statement of wages listing hours worked, rates paid, gross wages, allowances and deductions taken, and net wages paid.

101. Defendant failed to furnish Maximino Rosa with a wage notice in 2014 as was required by the NYLL.

102. Upon information and belief, Defendant did not keep accurate records of hours worked by Maximino Rosa.

FIRST CAUSE OF ACTION
FLSA – Overtime Wages
(Brought on behalf of Plaintiffs and the FLSA Collective)

103. Plaintiffs reallege and incorporate by reference all allegations in all preceding paragraphs.

104. Plaintiffs and members of the FLSA Collective are non-exempt employees entitled to be paid overtime compensation for all overtime hours worked.

105. Defendant employed Plaintiffs and members of the FLSA Collective for workweeks longer than 40 hours and willfully failed to compensate Plaintiffs for all of the time worked in excess of 40 hours per week, at a rate of at least 1 and ½ times their regular hourly rate, in violation of the requirements of Section 7 of the FLSA, 29 U.S.C. § 207(a) (1).

106. Plaintiffs have expressed their consent to make these claims against the Defendant by filing a written consent form, pursuant to 29 U.S.C. § 216(b).

107. Defendant failed to make a good faith effort to comply with the FLSA with respect to its compensation to Plaintiffs and the FLSA Collective.

108. Because Defendant's violations of the FLSA were willful, a 3 year statute of limitations applies, pursuant to 29 U.S.C. § 255.

109. As a consequence of the willful underpayment of wages, alleged above, Plaintiffs have incurred damages thereby and Defendant is indebted to them in the amount of the unpaid overtime compensation, together with interest, liquidated damages, attorneys' fees, and costs in an amount to be determined at trial.

110. Defendant was or should have been aware that the FLSA required it to pay its delivery drivers premium overtime pay for all hours worked in excess of 40 per week.

111. Defendant's failure to pay Plaintiffs and Class Members overtime wages for their work in excess of 40 hours per week was willful, intentional, and in bad faith.

SECOND CAUSE OF ACTION
NYLL – Unpaid Overtime
(Brought on behalf of Plaintiffs and the members of the New York Class)

112. Plaintiffs reallege and incorporate by reference all allegations in all preceding paragraphs.

113. Defendant employed Plaintiffs and members of the New York Class for workweeks longer than 40 hours and willfully failed to compensate Plaintiffs and the New York Class for all of the time worked in excess of 40 hours per week, at a rate of at least 1 and ½ times their regular hourly rate, in violation of the requirements of NYLL.

114. By the course of conduct set forth above, Defendant has violated N.Y. Lab. Law § 650, *et seq.*; 12 N.Y.C.R.R. Part 142-2.2.

115. Defendant failed to keep, make, preserve, maintain and furnish accurate records of time worked by Plaintiffs and Class Members.

116. Defendant has a policy and practice of refusing to pay overtime compensation for all hours worked to Plaintiffs and the New York Class.

117. Defendant's failure to pay overtime compensation to Plaintiffs and the New York Class was willful within the meaning of N.Y. Lab. Law § 663.

118. As a consequence of the willful underpayment of wages, alleged above, Plaintiffs have incurred damages thereby and Defendant is indebted to them in the amount of the unpaid overtime compensation and such other legal and equitable relief due to Defendant's unlawful and willful conduct, as the Court deems just and proper.

119. Plaintiffs seek recovery of liquidated damages, attorneys' fees, and costs to be paid by Defendant as provided by the NYLL.

THIRD CAUSE OF ACTION
FLSA- Failure to Pay Minimum Wage
(Brought on behalf of Plaintiffs and the FLSA Collective)

120. Plaintiffs, on behalf of themselves and the FLSA Collective, reallege and incorporate by reference all allegations in all preceding paragraphs.

121. At all relevant times, Plaintiffs were Defendant's employees within the meaning of 29 U.S.C. § 203(e)(1).

122. At all relevant times, Defendant was Plaintiffs' employer within the meaning of 29 U.S.C. § 203(d).

123. At all relevant times, Plaintiffs and Defendant were engaged in commerce and/or the production of goods for commerce within the meaning of 29 U.S.C. § 206(a).

124. At all relevant times, the applicable federal minimum wage is codified by 29 U.S.C. § 206(a)(1).

125. Defendant violated Plaintiffs' rights to receive their wages free and clear of all "kick-backs," as codified by 29 C.F.R. § 531.35, as a result of Defendant requiring Plaintiffs and members of the New York Class to pay for expenses required for the performance of their work for Defendant.

126. Defendant willfully failed to pay Plaintiffs the minimum wages for all hours worked, in violation of FLSA, 29 U.S.C. § 206(a).

127. Defendant required Plaintiffs and members of the New York Class to pay for all tools required for the completion of their duties for Defendant, including, but not limited to: maintenance of vehicle; gasoline; and violations related to Defendant's EZ Pass.

128. As a consequence of the willful underpayment of wages, alleged above, Plaintiffs have incurred damages thereby and Defendant is indebted to them in the amount of the unpaid minimum wage, together with interest and liquidated damages, in an amount to be determined at trial.

FOURTH CAUSE OF ACTION
NYLL- Failure to Pay Minimum Wage
(Brought on behalf of Plaintiffs and the members of the New York Class)

129. Plaintiffs reallege and incorporate by reference all allegations in all preceding paragraphs.

130. At all times relevant to this action, the state minimum wage was $7.25 per hour on and after July 24, 2009; $8.00 per hour on or after December 31, 2013; and $8.75 per hour on and after December 31, 2014, as codified by NYLL § 652(1); 12 N.Y.C.R.R. § 142-2.1.

131. Defendant willfully violated Plaintiffs' rights by failing to pay Plaintiffs the minimum wage for all hours of work performed each week, in violation of N.Y. Lab. Law § 650 *et seq.*

132. Defendant violated Plaintiffs' rights to receive their wages free and clear of all "kick-backs," as codified by N.Y. Lab. Law § 198–b, as a result of Defendant requiring Plaintiffs and members of the New York Class to pay for expenses required for the performance of their work for Defendant.

133. Plaintiffs and the New York Class were required by Defendant to use their own vehicles for deliveries and pay for all expenses related to their vehicle including maintenance, gasoline, and violations related to Defendant's EZ Pass.

134. Due to Defendant's NYLL violations, Plaintiffs and the New York Class are entitled to recover from Defendant their unpaid regular wages, liquidated damages, reasonable

attorneys' fees, and costs of this action pursuant to NYLL § 663(1).

FIFTH CAUSE OF ACTION
NYLL – Notice and Record-Keeping Requirement Violation
(Brought on behalf of Plaintiffs and the members of the New York Class)

135. Plaintiffs reallege and incorporate by reference herein all allegations in all preceding paragraphs.

136. Defendant failed to supply Plaintiffs and members of the New York Class with an accurate statement of wages as required by N.Y. Lab. Law § 195, containing 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; hourly rate or rates of pay and overtime rate or rates of pay if applicable; the number of hours worked, including overtime hours worked if applicable; deductions; and net wages.

137. Defendant failed to supply Plaintiffs and members of the New York Class notice as required by N.Y. Lab. Law § 195, in English or in the language identified by Plaintiffs as their primary language, containing Plaintiffs' rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; hourly rate or rates of pay and overtime rate or rates of pay if applicable; the regular pay day designated by the employer in accordance with N.Y. Lab. Law § 191; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; the telephone number of the employer; plus such other information as the commissioner deems material and necessary.

138. Due to Defendant's violations of N.Y. Lab. Law § 195, Plaintiffs and members of the New York Class are each entitled to damages of $50 for each workweek that Defendant failed

to provide a wage notice, or a total of $2,500 per class member, and damages of $100 for each workweek that Defendant failed to provide accurate wage statements, or a total of $2,500 per class member, as provided for by N.Y. Lab. Law § 198, reasonable attorneys' fees, costs, and injunctive and declaratory relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, seek for the following relief:

A. That, at the earliest possible time, Plaintiffs be allowed to give notice to the FLSA Collective, or that the Court issue such notice, to all persons who are presently, or have at any time during the 3 years immediately preceding the filing of this suit, up through and including the date of this Court's issuance of court-supervised notice, been employed by Defendant as delivery drivers, or similarly situated positions. Such notice shall inform them that this civil action has been filed, of the nature of the action, and of their right to join this lawsuit if they believe they were denied proper wages;

B. Unpaid overtime pay, minimum wages, and an additional and equal amount as liquidated damages pursuant to the FLSA and the supporting United States Department of Labor regulations;

C. Unpaid overtime pay, minimum wages, and liquidated damages permitted by law pursuant to the NYLL and the supporting New York State Department of Labor Regulations;

D. Statutory damages, as provided for by N.Y. Lab. Law § 198, for Defendant's violations of the notice and recordkeeping requirements pursuant to N.Y. Lab. Law § 195;

E. Certification of this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

F. Designation of Plaintiffs Henrry Alcantara, Jose Peralta and Maximino Rosa as representatives of the Rule 23 Class, and counsel of record as Class Counsel;

G. Pre-judgment interest and post-judgment interest as provided by law;

H. Appropriate equitable and injunctive relief to remedy violations, including but not necessarily limited to an order enjoining Defendant from continuing their unlawful practices;

I. Attorneys' fees and costs of the action;

J. Issuance of a declaratory judgment that the practices complained of in this action are unlawful under N.Y. Lab. Law § 190 *et seq.*;

K. An injunction requiring Defendant to cease the unlawful activity described herein pursuant to N.Y. Lab. Law § 190 *et seq.*;

L. Appropriate monetary relief for lost wages, as provided for by FLSA § 216(b) and NYLL § 215(d);

M. Liquidated damages relating to lost wages, as provided for by FLSA § 216(b) and NYLL § 215(d);

N. Reasonable incentive awards for Plaintiffs to compensate them for the time they spent attempting to recover wages for the Class and for the risks they took in doing so; and

O. Such other relief as this Court shall deem just and proper.

Dated: Melville, New York
September 15, 2015

Respectfully submitted,

By: */s/ Troy L. Kessler*
Troy L. Kessler

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