

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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SANTOS D. COREA, on behalf of himself and	: Case No.:
all others similarly situated,	:
and, RIGOBERTO CALIX, individually,	: <u>COMPLAINT</u>
	:
Plaintiffs,	:
- against -	:
	:
SAMURAI HIBACHI INC.,	:
d/b/a SAMURAI HIBACHI JAPANESE STEAKHOUSE,	:
	:
Defendant.	:
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Plaintiffs Santos D. Corea, on behalf himself and all others similarly situated, and Rigoberto Calix, individually, (hereinafter collectively referred to as “Plaintiffs”) by and through their attorneys Shulman Kessler LLP, complaining of Defendant Samurai Hibachi Inc. d/b/a Samurai Hibachi Japanese Steakhouse (“Defendant”), allege as follows:

**INTRODUCTION**

1. Plaintiffs bring this action seeking monetary damages and affirmative relief based upon Defendant’s violation of the Fair Labor Standards Act of 1938 (hereinafter referred to as “FLSA”), as amended, 29 U.S.C. § 201, *et seq.*, the New York Labor Law (hereinafter referred to as “NYLL” or “N.Y. Lab. Law”), and other appropriate rules, regulations, statutes and ordinances.

**STATEMENT PURSUANT TO LOCAL RULE 9**

2. For purposes of complying with Local Rule 9, Plaintiffs state that they have no corporate parents, subsidiaries or affiliates and that there are no other interested parties.

**JURISDICTION & VENUE**

3. Jurisdiction of the Court over this controversy is based upon 29 U.S.C. § 201, *et seq.*, 28 U.S.C. §§ 1331 and 1337 and the doctrine of supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

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

5. Defendant does business in the State of New York, within the Eastern District of New York, maintaining its principle place of business at 46 Gerard Street, Huntington, New York 11743.

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

**THE PARTIES**

7. Plaintiff Santos D. Corea is a resident of the County of Suffolk, State of New York.

8. At all times relevant to the Complaint, Plaintiff Santos D. Corea 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).

9. Plaintiff Santos D. Corea was employed by Defendant from on or about April 2008 through on or about June 2013.

10. That during the course of his employment with Defendant, Plaintiff Santos D. Corea was a table busser and restaurant laborer.

11. Plaintiff Rigoberto Calix is a resident of the County of Suffolk, State of New York.

12. At all times relevant to the complaint, Plaintiff Rigoberto Calix 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).

13. Plaintiff Rigoberto Calix was employed by Defendant from in or about September 2012 through the present.

14. That during the course of his employment with Defendant, Plaintiff Rigoberto Calix was a table busser and restaurant laborer.

15. Upon information and belief, Defendant was and still is a domestic corporation organized and existing pursuant to the laws of the State of New York.

16. Upon information and belief, Defendant's principal place of business was and still is at 46 Gerard Street, Huntington, New York 11743.

17. Upon information and belief, and at all times hereinafter mentioned, Defendant was and still is engaged in the restaurant business.

18. Upon information and belief, Defendant was and still is doing business as Samurai Hibachi Japanese Steakhouse.

19. At all times hereinafter mentioned, Defendant 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).

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

21. At all times hereinafter mentioned, Defendant employed employees, including Plaintiffs, 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).

22. At all times hereinafter mentioned, Defendant's annual gross volume of sales made or business done is not less than \$500,000.00 within the meaning of 29 U.S.C. § 203(s)(A)(ii).

**FACTS**

23. Plaintiff Santos D. Corea was an employee of Defendant, working under its direct supervision.

24. At all times hereinafter mentioned, Plaintiff Santos D. Corea was required to be paid overtime pay at the statutory rate of 1 and 1/2 times his regular rate of pay after he had worked 40 hours in a workweek.

25. Plaintiff Santos D. Corea worked more than 55 hours in most workweeks in which he was employed by Defendant.

26. Defendant failed to compensate the Plaintiff Santos D. Corea for time worked in excess of 40 hours per week at a rate of at least 1 and 1/2 times his regular hourly rate, throughout the entire term of his employment with Defendant.

27. Plaintiff Rigoberto Calix was an employee of Defendant, working under its direct supervision.

28. At all times hereinafter mentioned, Plaintiff Rigoberto Calix was required to be paid overtime pay at the statutory rate of 1 and 1/2 times his regular rate of pay after he had worked 40 hours in a workweek.

29. Plaintiff Rigoberto Calix worked more than approximately 55 hours in most workweeks in which he was employed by Defendant.

30. Defendant failed to compensate Plaintiff Rigoberto Calix for time worked in excess of 40 hours per week at a rate of at least 1 and 1/2 times his regular hourly rate, throughout the entire term of his employment with Defendant.

31. Defendant failed to compensate Plaintiff Santos D. Corea at no less than the applicable minimum wage rate.

32. Defendant failed to compensate Plaintiff Rigoberto Calix at no less than the minimum wage rate.

33. Plaintiff Santos D. Corea worked more than 10 hours on most workdays while employed by Defendant.

34. Defendant failed to compensate Plaintiff Santos D. Corea for time worked in excess of 10 hours per day, throughout his employment.

35. Plaintiff Rigoberto Calix worked more than 10 hours on most workdays while employed by Defendant.

36. Defendant failed to compensate Plaintiff Rigoberto Calix for time worked in excess of 10 hours per day, throughout his employment.

37. Defendant failed to pay Plaintiff Santos D. Corea a portion of the overall tip-pool, or customer gratuities, of which he was entitled to, where Defendant led customers to reasonably believe that “service charges” and/or gratuities were intended for workers, and where Plaintiff Santos D. Corea never received tips directly from such customers.

38. Defendant failed to pay Plaintiff Rigoberto Calix a portion of the overall tip-pool, or customer gratuities, of which he was entitled to, where Defendant led customers to reasonably believe that “service charges” and/or gratuities were intended for workers, and where Plaintiff Rigoberto Calix never received tips directly from such customers.

39. Defendant imposed upon Plaintiff Santos D. Corea a tip redistribution scheme to which he never agreed.

40. Defendant imposed upon Plaintiff Rigoberto Calix a tip redistribution scheme to which he never agreed.

41. Defendant willfully disregarded and purposefully evaded recordkeeping requirements of the FLSA and the NYLL by failing to maintain accurate time sheets and payroll records.

42. Defendant failed to furnish Plaintiff Santos D. Corea with an accurate statements of wages listing hours worked, rates paid, gross wages, allowances and deductions taken, and net wages paid.

43. Defendant failed to furnish Plaintiff Rigoberto Calix with an accurate statements of wages listing hours worked, rates paid, gross wages, allowances and deductions taken, and net wages paid.

44. Defendant failed to keep appropriate and accurate payroll and time records as required by federal and state law.

45. Defendant willfully disregarded and purposefully evaded record keeping requirements of the FLSA and the NYLL by failing to maintain accurate time sheets and payroll records.

46. Defendant failed to post appropriate notices informing employees of federal and state laws regarding the requirement to pay overtime premium pay and prevailing wages to its employees.

**COLLECTIVE ACTION CLAIMS**

47. Upon information and belief, there are approximately more than 10 current and former employees that are similarly situated to Plaintiff Santos D. Corea, who have been denied overtime compensation and the minimum wage. Plaintiff Santos D. Corea is representative of those other workers and is acting on behalf of Defendant's current and former employees' interests as well as his own interest in bringing this action.

48. Plaintiff Santos D. Corea seeks 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 himself and the following class of persons:

All persons who give their consent, in writing, to become a party plaintiff and who are or have been employed, by Defendant, at any time during the 3 years prior to the filing of their respective consent forms.

49. Similarly situated former and current employees are readily identifiable and locatable through the use of Defendant's records. These similarly situated employees 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, persons similarly situated to Plaintiff Santos D. Corea, who have been unlawfully deprived of overtime pay and a minimum wage, 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.

**AS AND FOR A FIRST CAUSE OF ACTION ON  
BEHALF OF PLAINTIFFS AND  
THE PUTATIVE FLSA COLLECTIVE CLASS,  
FOR FAILURE TO PAY OVERTIME  
A FLSA VIOLATION**

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

51. Defendant employed Plaintiffs for workweeks longer than 40 hours and willfully failed to compensate Plaintiffs for time worked in excess of 40 hours per week, at a rate of at least 1 and 1/2 times the regular hourly rate, in violation of the requirements of Section 7 of the FLSA, 29 U.S.C. § 207(a)(1).

52. The complete records concerning the number of hours worked by Plaintiffs as well as the compensation Plaintiffs received in workweeks in which excess hours were worked are in the exclusive possession and control of Defendant, and as such, Plaintiffs are unable to state at this time the exact amount due and owed to them.

53. Plaintiffs have expressed their consent to make these claims against Defendant by filing a written consent form, pursuant to 29 U.S.C. § 216(b). (*See* Exhibit A, annexed hereto).

54. 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 and liquidated damages, in an amount to be determined at trial.



**AS AND FOR A SECOND CAUSE OF ACTION ON**  
**BEHALF OF PLAINTIFFS**  
**FOR FAILURE TO PAY OVERTIME**  
**A NYLL VIOLATION**

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

56. Defendant employed Plaintiffs for workweeks longer than 40 hours and willfully failed to compensate Plaintiffs for the time worked in excess of 40 hours per week, at a rate of at least 1 and 1/2 times the regular hourly rate, in violation of the requirements of NYLL.

57. The complete records concerning the number of hours worked by Plaintiffs, as well as the compensation Plaintiffs received in workweeks in which excess hours were worked, are in the exclusive possession and control of Defendant, and as such, Plaintiffs are unable to state at this time the exact amount due and owed to them

58. By the course of conduct set forth above, Defendant has violated N.Y. Lab. Law § 650, *et seq.*; 12 N.Y.C.R.R. § 146-1.4.

59. At all times herein mentioned, Defendant had a policy and practice of refusing to pay overtime compensation to Plaintiffs.

60. Defendant's failure to pay overtime compensation to Plaintiffs was willful within the meaning of N.Y. Lab. Law §§ 198 and 663.

61. 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 from Defendant's unlawful and willful conduct as the Court deems just and proper.

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

**AS AND FOR A THIRD CAUSE OF ACTION**  
**ON BEHALF OF PLAINTIFFS**  
**AND THE PUTATIVE FLSA COLLECTIVE CLASS,**  
**FOR FAILURE TO PAY MINIMUM WAGE,**  
**A FLSA VIOLATION**

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

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

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

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

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

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

69. 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 wages, together with interest and liquidated damages, in an amount to be determined at trial.

**AS AND FOR AN FOURTH CAUSE OF ACTION ON**  
**BEHALF OF PLAINTIFFS**  
**FOR FAILURE TO PAY MINIMUM WAGE,**  
**A NYLL VIOLATION**

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

71. At all times relevant to this action, the state minimum wage was \$7.15 per hour on or after January 1, 2007; and \$7.25 per hour on or after July 24, 2009; as codified by N.Y. Lab. Law § 652(1); 12 N.Y.C.R.R. § 146-1.2.

72. 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.*

73. Due to Defendant's NYLL violations, Plaintiffs are entitled to recover from Defendant their unpaid regular wages, liquidated damages, reasonable attorneys' fees, and costs of this action pursuant to N.Y. Lab. Law § 663(1).

**AS AND FOR A FIFTH CAUSE OF ACTION ON**  
**BEHALF OF PLAINTIFFS,**  
**FOR VIOLATION OF THE SPREAD OF HOURS WAGE ORDER**  
**OF THE NEW YORK COMMISSIONER OF LABOR**  
**A NYLL VIOLATION**

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

75. Defendant failed to pay Plaintiffs 1 additional hour pay at the basic minimum wage rate before allowances for each day Plaintiffs' spread of hours exceeded 10 hours in a workday, in violation of N.Y. Lab. Law §§ 190, *et seq.* & 650, *et seq.*, as codified by 12 N.Y.C.R.R. § 146-1.6.

76. Defendant failed to pay Plaintiffs in a timely fashion, as required by Article 6 of the NYLL.

77. Defendant's failure to pay Plaintiffs an additional hour pay for each day Plaintiffs' spread of hours exceeded 10 hours was willful within the meaning of N.Y. Lab. Law § 663.

78. As a result of the foregoing, Plaintiffs have been injured and Defendant has profited thereby, in an amount to be proven at trial.

**AS FOR THE SIXTH CAUSE OF ACTION**  
**ON BEHALF OF PLAINTIFFS**  
**FOR UNLAWFUL TIP RETENTION**

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

80. At all times relevant, Plaintiffs have been employees within the meaning of the N.Y. Lab. Law §§ 190, *et seq.*, and supporting New York State Department of Labor Regulations

81. At all times relevant, Defendant has been an employer within the meaning of the N.Y. Lab. Law §§ 190, *et seq.*, and supporting New York Department of Labor Regulations.

82. The wage payment provisions of Article 6 of the NYLL and the supporting New York State Department of Labor Regulations apply to Defendant and protect Plaintiffs.

83. Defendant unlawfully demanded or accepted, directly or indirectly, part of the gratuities received by and/or intended for Plaintiffs in violation of N.Y. Lab. Law § 196-d and supporting New York State Department of Labor Regulations.

84. Defendant unlawfully retained part of the gratuities earned by Plaintiffs in violation of N.Y. Lab. Law § 196-d and supporting New York State Department of Labor Regulations.

85. Due to Defendant's violations of the NYLL, Plaintiffs are entitled to recover from Defendant their unpaid tips, liquidated damages, reasonable attorneys' fees and costs of the action, and pre-judgment and post-judgment interest.

**AS FOR THE SEVENTH CAUSE OF ACTION**  
**ON BEHALF OF PLAINTIFFS FOR VIOLATION OF NOTICE AND**  
**RECORD-KEEPING REQUIREMENTS**

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

87. Defendant failed to provide Plaintiffs notice as required by N.Y. Lab. Law § 195, in English or in the language identified by Plaintiffs as their primary language, containing Plaintiffs' 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 and 12 N.Y.C.R.R. § 146-2.2.; 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.

88. Defendant failed to provide Plaintiffs 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.

89. Due to Defendant's violations of N.Y. Lab. Law §§ 195, Plaintiffs are entitled to damages of fifty dollars for each workweek that Defendant failed to provide Plaintiffs with a wage notice, or a total of twenty-five hundred dollars, and damages of one hundred dollars for each workweek that Defendant failed to provide Plaintiffs with accurate wage statements, or a total of

twenty-five hundred dollars, as provided for by N.Y. Lab. Law § 198, reasonable attorneys' fees, costs, and injunctive and declaratory relief.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, individually and on behalf of all other similarly situated persons, seek the following relief:

- a. That, at the earliest possible time, Plaintiffs be allowed to give notice of this collective action, or that the Court issue such notice, to Collective Members. Such notice shall inform them that this action has been filed, of the nature of the action, and of their right to join this lawsuit;
- b. Unpaid overtime, minimum wages, and liquidated damages pursuant to the FLSA;
- c. Unpaid overtime, minimum wages, spread-of-hours pay, and liquidated damages pursuant to the NYLL;
- d. Designation of Plaintiff Santos D. Corea as class representative and counsel of record as Class Counsel;
- e. Pre-judgment and post judgment interest;
- f. Judgment against Defendant that its FLSA violations were willful;
- g. Damages of fifty dollars to Plaintiffs for each workweek that Defendant failed to provide Plaintiffs with a wage notice, or a total of twenty-five hundred dollars, as provided for by N.Y. Lab. Law § 198;
- h. Damages of one hundred dollars for Plaintiffs for each workweek that Defendant failed to provide Plaintiffs with accurate wage statements, or a total of twenty-five hundred dollars, as provided for by N.Y. Lab. Law § 198;
- i. Issuance of a declaratory judgment that the practices complained of in this action are unlawful under N.Y. Lab. Law § 190 *et seq.*;
- j. An injunction requiring Defendant to pay all statutorily required wages pursuant to the NYLL;

- k. Reasonable attorneys' fees and costs of the action; and
- l. Such other relief as this Court shall deem just and equitable.

Dated: Melville, New York  
July 26, 2013

**SHULMAN KESSLER LLP**

By: /s/ Troy L. Kessler

Troy L. Kessler, Esq.

Marijana Matura, Esq.

Ilan Weiser, Esq.

*Attorneys for Plaintiffs and the*

*Putative FLSA Collective Class*

510 Broadhollow Road, Suite 110

Melville, New York 11747

Telephone: (631) 499-9100