

JUDGE KARAS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

14 CV 8587

OSCAR GUZMAN,

Plaintiff,

COMPLAINT

-against-

CONCAVAGE MARINE
CONSTRUCTION INC.,
INTERCOASTAL WATER
TRANSPORATION INC.,
NICHOLAS CONCAVAGE and
JOANNE CONCAVAGE,

Defendants.

FILED
U.S. DISTRICT COURT
S.D.N.Y.
2014 OCT 28 AM 11:00

Plaintiff Oscar Guzman (“Plaintiff”), by his attorneys, the Law Offices of Scott A. Lucas, alleges as follows for his Complaint against Defendants Concavage Marine Construction, Inc., Intercoastal Water Transportation, Inc., Nicholas Concavage and Joanne Concavage (“Defendants”):

INTRODUCTION

1. This case involves Defendants’ violations of wage and hour laws and creation of a racially hostile work environment.
2. The wage and hour violations described herein were willful in nature and were carried out systematically in violation of the federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (“FLSA”) and New York Labor Law (“NYLL”) articles 19, § 650, *et seq.*, and 6, § 190, *et seq.* (“NYLL”) and Part 142 of Title 12 of New York’s Codes, Rules and Regulations (“N.Y. Comp. Codes R. & Regs.”).

3. The hostile work environment claims alleged herein arise under 42 U.S.C. § 1981 and the New York State Human Rights Law (N.Y. Executive Law §§ 290, *et seq.*).

JURISDICTION & VENUE

4. This Court has subject matter jurisdiction over Plaintiff's federal claims under 29 U.S.C. § 216(b), 42 U.S.C. § 1981, 28 U.S.C. § 1331 and 28 U.S.C. § 1337, and supplemental jurisdiction over Plaintiff's state claims under 28 U.S.C. § 1367.

5. The events and omissions giving rise to the claims herein occurred in this judicial district. Venue is proper under, *inter alia*, 28 U.S.C. § 1391.

THE PARTIES

6. Plaintiff Oscar Guzman is a resident of the State of New York residing at 27 Ludlow Street, Yonkers, NY 10705.

7. Upon information and belief, Concavage Marine Construction, Inc. is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 87 Fox Island Road, Port Chester, NY 10573.

8. Upon information and belief, Intercoastal Water Transportation, Inc. ("Intercoastal") is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 87 Fox Island Road, Port Chester, NY 10573.

9. Defendant Nicholas Concavage is an individual who, upon information and belief, resides at 95 Hillside Road, Rye, NY 10580.

10. Defendant Joanne Concavage is an individual who, upon information and belief, resides at 95 Hillside Road, Rye, NY 10580.

FACTS

11. Defendants Nicholas and Joanne Concavage, who are husband and wife, own and operate Concavage Marine Construction, Inc. and Intercoastal Water Transportation, Inc. (collectively, “the Company”), the two entities through which they conducted business, employed Plaintiff, and established and maintained the terms and conditions of Plaintiff’s employment.

12. The Company is in the business of constructing, installing and repairing commercial and residential waterfront facilities, including docks, seawalls, boardwalks and marinas.

13. At all material times herein Defendants identified Concavage Marine Construction, Inc. *and* Intercoastal Water Transportation, Inc. as Plaintiff’s employer. By way of example, Defendants: (A) identified Concavage Marine Construction, Inc. as Plaintiff’s employer, *inter alia*, on Plaintiff’s workplace ID and on written workplace rules issued by the Company, and (B) identified Intercoastal Water Transportation, Inc. as Plaintiff’s employer on, *inter alia*, Plaintiff’s paychecks.

14. Both entities operate out of the same office at 87 Fox Island Road in Port Chester, New York.

15. At all material times herein, Nicholas and Joanne Concavage, as the Company’s owners and operators, directly and indirectly exercised significant managerial control over

Plaintiff and other employees, including, without limitation, assigning work, determining compensation, hiring and firing, establishing and implementing work-related policies, and maintaining employment and compensation records.

16. At all material times herein, Nicholas Concavage bore primary responsibility for directing and overseeing the Company's field operations, and Joanne Concavage bore primary responsibility for the daily operation of the Company's office located at 87 Fox Island Road, Port Chester, NY 10573.

17. Upon information and belief, Joanne Concavage is and was at all material times herein the President of Intercoastal Water Transportation, Inc.

18. Joanne Concavage is and was at all material times herein an operator of Intercoastal Water Transportation, Inc.

19. Joanne Concavage is and was at all material times herein a manager of Intercoastal Water Transportation, Inc.

20. Nicholas Concavage is and was at all material times herein an operator of Intercoastal Water Transportation, Inc.

21. Nicholas Concavage is and was at all material times herein a manager of Intercoastal Water Transportation, Inc.

22. Upon information and belief, Nicholas Concavage is and was at all material times herein the President of Concavage Marine.

23. Nicholas Concavage is and was at all material times herein an operator of Concavage Marine.

24. Nicholas Concavage is and was at all material times herein a manager of Concavage Marine.

25. Joanne Concavage is and was at all material times herein an operator of Concavage Marine.

26. Joanne Concavage is and was at all material times herein a manager of Concavage Marine.

27. At all material times herein the Concavages directly and indirectly exercised significant managerial control over the terms and conditions of employment of the Company's employees, including, without limitation, assigning work, determining compensation, imposing discipline, hiring and firing, and, upon information and belief, maintaining employment and compensation records.

28. At all material times herein the Concavages directed, caused and implemented the Company's practice of failing to pay overtime and otherwise failing to abide by the wage and hour laws referenced herein.

29. At all material times herein the Concavages were agents of the Company, and, in doing the things alleged in this Complaint, were acting within the course and scope of such agency.

30. At all times mentioned herein, under federal and New York State law each Defendant was an employer or joint employer in relation to Plaintiff, and Plaintiff was an employee in relation to his joint employers.

31. At all times mentioned herein, the Concavages (and, by extension, their Company) had knowledge of, and directed, controlled and implemented the wage and hour violations alleged herein.

32. Each Defendant has benefited, directly and/or indirectly, from the wage-related underpayments described herein.

33. Defendants are employers and/or joint employers as defined by the laws, statutes and codes referenced in this Complaint.

Defendants' Employment of Plaintiff

34. Plaintiff was hired by Defendants to work as an employee and worked as a full-time employee of Defendants beginning in September 2010.

35. Plaintiff continued working full time for Defendants with rare interruption until a work injury left him unable to work from July 23, 2014 onward.

36. From the inception of Plaintiff's employment through the end of 2013 Plaintiff's rate of pay was \$18 per hour. Thereafter Plaintiff's rate of pay was increased to \$21 per hour.

37. Plaintiff and other employees of Defendants typically worked more than 40 hours week without receiving time-and-a-half for hours in excess of 40. Until the fall of 2012 Defendants paid Plaintiff straight time for the overtime hours he worked.

38. At all material times herein, Defendants also failed to pay Plaintiff for time when he worked late and for time when he worked early for reasons relating to the tide. Plaintiff cannot quantify this extra wholly uncompensated time with precision because Defendants did not use a time clock and did not otherwise record Plaintiff's starting and stopping times. Plaintiff conservatively estimates this additional wholly uncompensated time, which varied from one pay period to the next, to equal, on average, not less than 1.625 hours a week.

39. “[W]hen an employer fails to maintain accurate records ... courts have held that the ‘plaintiffs’ recollection and estimates of hours worked are presumed to be correct.’” *Gunawan v. Sake Sushi Rest.*, 897 F. Supp. 2d 76, 88 (E.D.N.Y. 2012); *See also Padilla v. Manlapaz*, 643 F. Supp. 2d 302, 307 (E.D.N.Y. 2009) (noting that “New York law places a more demanding burden on employers than the FLSA” and quoting NYLL § 196-a, which provides “In such a case [where the employer failed to maintain the statutorily-required records] the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements.”).

The Labor Department Investigation

40. Upon information and belief, either the U.S. or New York Department of Labor visited the Company in or about the late summer or early fall of 2012.

41. Upon information and belief, either the U.S. or New York Department of Labor found that the Company had improperly failed to pay overtime to some of its workforce, including Plaintiff.

42. Defendants never paid Plaintiff overtime for the work he had performed up to the time of the Labor Department investigation, despite their knowledge that Plaintiff was entitled to time-and-a-half for hours worked in excess of 40 per week.

43. Over the next few months Plaintiff began receiving additional payments in the gross amount of \$658.76 which, upon information and belief, totaled \$7,246.36, and were for a portion of the previously unpaid overtime owed to Plaintiff.

44. Following the Labor Department's investigation, Nicholas Concavage showed a piece of paper to Plaintiff and told him he had to sign it if he wanted to continue working.

45. Upon information and belief, the piece of paper had something to do with the back overtime that Defendants owed Plaintiff.

46. Fearful of losing his job, Plaintiff did as he was told and signed the piece of paper, which Nicholas Concavage then took back.

47. As detailed below, the additional payments totaling \$7,246.36 were wholly inadequate to cover Defendants' back liability for unpaid overtime, much less their back liability for liquidated damages, which, as a matter of law, could not be waived. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945).

48. Nor were the untimely partial payments sufficient to eliminate Defendants' liquidated damages liability under NYLL §§ 191, 663(1) and 198(1-a) and N.Y. Comp. Codes R. & Regs. 12 § 142-2.2 and 29 C.F.R. § 778.106.

49. Following the Labor Department's investigation, Defendants began paying Plaintiff time and a half for *some* of the overtime work he performed thereafter.

50. However, During many of these post-Labor Department investigation pay periods Defendants continued paying Plaintiff straight time pay for many of his overtime hours by separately classifying many of those overtime hours under the label "travel" – a pure subterfuge designed to continue evading applicable wage and hour laws.

Defendants' Status as an Enterprise

51. Upon information and belief, Defendants constitute an "enterprise" as that term is defined by 29 U.S.C. § 203(r), in that, at all material times herein, they engaged in related activities performed through unified operation and/or common control for a common business purpose.

52. At all times mentioned herein, Defendants' employees regularly engaged in interstate commerce in connection with their employment, including, but not limited to: **(A)** handling of goods transported between New York and Connecticut, which are then sold and installed in interstate commerce, across state lines; **(B)** interstate purchases, sales and marketing of goods and materials used in connection with the operation of a marine construction facility and the operation of an office; **(C)** handling transactions that involve the interstate banking, finance and insurance systems; and **(D)** transacting business across state lines via interstate telephone calls, emails, faxes, courier deliveries, and the U.S. Mail.

53. At all times mentioned herein, Defendants employed employees in and about their business premises in handling, selling, or otherwise working on goods and materials, including,

but not limited to, goods and materials used in connection with the operation of a marine construction facility (including metals, woods, stone, adhesives, etc.), documents, electronic files and other materials which had moved in or been produced for commerce by other persons.

54. At all times mentioned herein the annual dollar volume of business of Defendants was \$500,000 or more, and Defendants had at least two employees engaged in commerce.

FIRST CAUSE OF ACTION

UNPAID OVERTIME IN VIOLATION OF THE FLSA

55. Plaintiff incorporates paragraphs 1 – 54 by reference as if fully set forth herein.

56. At all times mentioned herein, Defendants failed to comply with the FLSA, in that Defendants frequently required and permitted Plaintiff to work more than 40 hours per week, but provision was not made by Defendants to pay Plaintiff at the rate of one and one-half times the regular rate for the hours worked in excess of the hours provided for in the FLSA (29 U.S.C. § 207); *See also* 29 C.F.R. § 778.106 (requiring timely payment of overtime).

57. Defendants did not pay Plaintiff one and one-half times his regular rate of pay for the hours worked in excess of 40 hours per week during the overtime work weeks referenced in the chart set forth herein.

58. There was never any agreement between Plaintiff and Defendants to compensate Plaintiff for overtime work.

59. Defendants are and were at all material times herein fully aware that Plaintiff worked more than 40 hours per week without receiving (and without timely receiving) the legally mandated overtime compensation for the overtime hours referenced in the chart below.

60. Upon information and belief, Defendants are and were at all relevant times herein aware that overtime pay is mandatory for non-exempt employees who work more than 40 hours per week.

61. The estimates in the chart set forth herein are based on the overtime amounts listed in Plaintiff's earnings statements (except for the six earnings statements that Plaintiff does not have [*i.e.*, for the periods ending 7/15/11, 10/23/11, 4/22/12, 5/5/13 and 6/30/13], for which estimates have been provided), plus an average of 1.625 hours of weekly time that was not recorded in Plaintiff's earnings statements.

Defendants' Wage and Hour Violations Were Willful

62. Defendants' wage and hour violations were deliberate, calculated and willful.

63. Defendants' willfulness can be inferred from several sources, including, without limitation: **(A)** Defendants' payment of no overtime premium whatsoever for the first two years of Plaintiff's employment; **(B)** Defendants' threat – *after* the Labor Department investigation – to fire Plaintiff if he didn't sign a piece of paper which, upon information and belief, falsely purported to address the substantial unpaid overtime owed to Plaintiff; **(C)** Defendants' decision – *after* the Labor Department investigation – to disguise part of Plaintiff's overtime hours as purportedly exempt "travel" time and to pay Plaintiff straight time pay for such hours; **(D)** Defendants' practice of paying Plaintiff and other workers no wage whatsoever for a portion of the time they worked; **(E)** Defendants' decision, upon information and belief, to selectively deprive overtime compensation to Latino employees from Latin America, while paying same to white employees born in the United States; **(F)** Defendants' systemic violations of applicable record-keeping laws (not recording Plaintiff's starting and stopping times, not [upon information

and belief] complying with obligations to post notices concerning employee rights under the FLSA and New York law as set forth herein, etc.); and (G) Defendants' routine violation of numerous other work-related laws and regulations, including, without limitation, causing "willful and serious workplace safety violations" (for which the Company was heavily fined by OSHA in November 2013), using coercion and deceit to limit workers' compensation claims and the amounts paid to employees (such as Plaintiff, who was told by Nicholas Concavage to lie about the fact that he was injured at work) in connection with such claims, and systemic violation of basic sanitary laws (including not having any bathroom that non-management employees were allowed to use, resulting in unsanitary conditions in and near the Byram River).

Equitable Tolling

64. The FLSA and analogous state laws require employers to post notices explaining wage and hour requirements. *See* 29 C.F.R. § 516.4; N.Y. Comp.Codes R. & Regs. 12 § 142–2.8.

65. NYLL § 195 also requires that employees be given (in the employees' primary language) written notice of their pay rates, overtime rates, and other information.

66. With respect to the notice of pay rates, overtime rates, etc. mandated by NYLL § 195, and the posted notice of Plaintiff's wage and hour rights mandated by 29 C.F.R. § 516.4 and N.Y. Comp.Codes R. & Regs. 12 § 142–2.8, Defendants, upon information and belief, failed provide such notice either in English or in Spanish (Plaintiff's primary language), *see* NYLL § 195(1)(a), and, upon information and belief, failed to post such notice in the Company's office (which is often locked or otherwise inaccessible to non-management employees) until after the Labor Department investigated the Company in late-Summer or early fall of 2012.

67. Plaintiff was only in the Company office on about 5-6 occasions over the course of four years, and only noticed a wage and hour poster being there after the Labor Department investigation, and would have likely noticed if a wage and hour poster had been visibly posted there before then.

68. Moreover, the employment culture at Defendants' premises was such that inquiries by employees concerning their rights would be viewed by Defendants with outright hostility and disapproval.

69. Prior to the Labor Department investigation Plaintiff had no idea that he was entitled to time and a half for working more than 40 hours per week.

70. By hiring foreign-born Latino workers with limited proficiency in English, not apprising them of their rights, and regularly displaying hostility towards them if they made anything resembling an inquiry about the conditions of their employment, Defendants were able to effectively ensure that this component of Defendants' workforce would remain ignorant of their wage and hour rights and that the systemic wage and hour violations alleged herein would continue unchecked.

71. Such unscrupulous practices place law-abiding businesses – which pay their employees legally-mandated overtime – at a competitive disadvantage.

72. “[F]ailure to comply with the regulatory obligation to disclose the existence of a cause of action ... is the type of concealment that entitles plaintiff to equitable tolling of the statute of limitations.” *Saunders v. City of New York*, 594 F. Supp. 2d 346, 359 (S.D.N.Y. 2008), quoting *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 324 (2d Cir. 2004).

73. Accordingly, “the failure to post the required notice equitably tolls the statute of limitations unless and until an employee has actual notice of his rights.” *Iglesia-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363 (S.D.N.Y. 2007).

74. As a result, Defendants cannot avail themselves of whatever statute of limitations defense may have otherwise been available to them had they complied with their obligations to notify Plaintiff of his wage and hour rights.

75. Accordingly, Defendants are liable for unpaid overtime and liquidated damages under the FLSA and NYLL (*see* Second Cause of Action) in amounts not less than the following:

Period Ending	OT hours Listed on check	OT Owed for Straight Time Pay (1/2 of \$18 [\$9] * reported OT hours worked)	Additional Estimated OT Hours Not Listed on Paystub	OT owed for unreported additional OT hours (\$18 * 1.5 * unreported OT hours)	FLSA liquidated damages	NYLL Liquidated Damages: 25% until 4/8/11; 100% thereafter, <i>Sanchez v. Viva Nail N.Y. Inc.</i> , 2014 WL 869914, at *5 (E.D.N.Y. Mar. 4, 2014).	TOTALS
9/24/2010	20	\$180	1.625	\$44	\$224	\$56	\$324
10/1/2010	10	\$90	1.625	\$44	\$134	\$33	\$211
10/8/2010	20	\$180	1.625	\$44	\$224	\$56	\$324
10/15/2010	20	\$180	1.625	\$44	\$224	\$56	\$324
10/22/2010	20	\$180	1.625	\$44	\$224	\$56	\$324
10/29/2010	30	\$270	1.625	\$44	\$314	\$78	\$436
11/5/2010	30	\$270	1.625	\$44	\$314	\$78	\$436
11/12/2010	20	\$180	1.625	\$44	\$224	\$56	\$324
11/19/2010	20	\$180	1.625	\$44	\$224	\$56	\$324
11/26/2010	20	\$180	1.625	\$44	\$224	\$56	\$324
12/3/2010	10	\$90	1.625	\$44	\$134	\$33	\$211
12/10/2010	30	\$270	1.625	\$44	\$314	\$78	\$436
12/17/2010	20	\$180	1.625	\$44	\$224	\$56	\$324
12/24/2010	10	\$90	1.625	\$44	\$134	\$33	\$211

12/31/2010							
1/7/2011	10	\$90	1.625	\$44	\$134	\$33	\$211
1/14/2011	10	\$90	1.625	\$44	\$134	\$33	\$211
1/21/2011							
1/28/2011	20	\$180	1.625	\$44	\$224	\$56	\$324
2/4/2011							
2/11/2011							
2/18/2011							
2/25/2011							
3/4/2011	20	\$180	1.625	\$44	\$224	\$56	\$324
3/11/2011	10	\$90	1.625	\$44	\$134	\$33	\$211
3/18/2011	20	\$180	1.625	\$44	\$224	\$56	\$324
3/25/2011	20	\$180	1.625	\$44	\$224	\$56	\$324
4/1/2011	10	\$90	1.625	\$44	\$134	\$33	\$211
4/8/2011	20	\$180	1.625	\$44	\$224	\$56	\$324
4/15/2011	30	\$270	1.625	\$44	\$314	\$314	\$672
4/22/2011	30	\$270	1.625	\$44	\$314	\$314	\$672
4/29/2011	30	\$270	1.625	\$44	\$314	\$314	\$672
5/6/2011	30	\$270	1.625	\$44	\$314	\$314	\$672
5/13/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
5/20/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
5/27/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
6/3/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
6/10/2011	30	\$270	1.625	\$44	\$314	\$314	\$672
6/17/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
6/24/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
7/1/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
7/8/2011	10	\$90	1.625	\$44	\$134	\$134	\$312
7/15/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
7/22/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
7/29/2011	10	\$90	1.625	\$44	\$134	\$134	\$312
8/5/2011	10	\$90	1.625	\$44	\$134	\$134	\$312
8/19/2011	10	\$90	1.625	\$44	\$134	\$134	\$312
8/21/2011	15	\$135	1.625	\$44	\$179	\$179	\$402
8/28/2011	10	\$90	1.625	\$44	\$134	\$134	\$312
9/2/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
9/9/2011		\$0		\$0	\$0	\$0	\$0
9/18/2011	20	\$180	1.625	\$44	\$224	\$224	\$492

9/25/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
10/2/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
10/9/2011	30	\$270	1.625	\$44	\$314	\$314	\$672
10/16/2011	30	\$270	1.625	\$44	\$314	\$314	\$672
10/23/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
10/30/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
11/6/2011	30	\$270	1.625	\$44	\$314	\$314	\$672
11/13/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
11/20/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
11/27/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
12/4/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
12/11/2011	20	\$180	1.625	\$44	\$224	\$224	\$492
12/18/2011	10	\$90	1.625	\$44	\$134	\$134	\$312
12/25/2011	10	\$90	1.625	\$44	\$134	\$134	\$312
1/1/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
1/8/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
1/15/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
1/22/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
1/29/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
2/5/2012	60	\$540	1.625	\$44	\$584	\$584	\$1,212
2/12/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
2/19/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
2/26/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
3/4/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
3/11/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
3/18/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
3/25/2012	30	\$270	1.625	\$44	\$314	\$314	\$672
4/1/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
4/8/2012	30	\$270	1.625	\$44	\$314	\$314	\$672
4/15/2012	30	\$270	1.625	\$44	\$314	\$314	\$672
4/22/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
4/29/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
5/6/2012	30	\$270	1.625	\$44	\$314	\$314	\$672
5/13/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
5/20/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
5/27/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
6/3/2012	20	\$180	1.625	\$44	\$224	\$224	\$492
6/10/2012	20	\$180	1.625	\$44	\$224	\$224	\$492

6/17/2012	30	\$270	1.625	\$44	\$314	\$314	\$672
6/24/2012	15	\$135	1.625	\$44	\$179	\$179	\$402
7/1/2012	5	\$45	1.625	\$44	\$89	\$89	\$222
7/8/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
7/15/2012		\$0		\$0	\$0	\$0	\$0
7/22/2012		\$0		\$0	\$0	\$0	\$0
7/29/2012		\$0		\$0	\$0	\$0	\$0
8/5/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
8/12/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
8/19/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
8/26/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
8/31/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
9/2/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
9/9/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
9/16/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
9/23/2012		\$0		\$0	\$0	\$0	\$0
9/30/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
10/7/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
10/14/2012		\$0		\$0	\$0	\$0	\$0
10/21/2012		\$0		\$0	\$0	\$0	\$0
10/28/2012		\$0		\$0	\$0	\$0	\$0
11/4/2012		\$0		\$0	\$0	\$0	\$0
11/11/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
11/18/2012		\$0		\$0	\$0	\$0	\$0
11/25/2012	7	\$63	1.625	\$44	\$107	\$107	\$258
12/2/2012	11	\$99	1.625	\$44	\$143	\$143	\$330
12/9/2012		\$0		\$0	\$0	\$0	\$0
12/16/2012	14	\$126	1.625	\$44	\$170	\$170	\$384
12/23/2012	13	\$117	1.625	\$44	\$161	\$161	\$366
12/30/2012	10	\$90	1.625	\$44	\$134	\$134	\$312
1/6/2013		\$0		\$0	\$0	\$0	\$0
1/12/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
1/20/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
1/27/2013							
2/3/2013							
2/10/2013							

2/17/2013							
2/24/2013							
3/3/2013	5.5	\$50	1.625	\$44	\$93	\$93	\$231
3/10/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
3/17/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
3/24/2013							
3/31/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
4/7/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
4/14/2013		\$0	1.625	\$44	\$44	\$44	\$132
4/21/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
4/28/2013	6	\$54	1.625	\$44	\$98	\$98	\$240
5/5/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
5/12/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
5/19/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
5/26/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
6/2/2013	6	\$54	1.625	\$44	\$98	\$98	\$240
6/9/2013	5	\$45	1.625	\$44	\$89	\$89	\$222
6/16/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
6/23/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
6/30/2013	7	\$63	1.625	\$44	\$107	\$107	\$258
Sub-Totals		\$18,095		\$5,353	\$23,447	\$19,855	\$48,655

Minus \$7,246 in partial repayments	(\$7,246)
Total	\$41,409

SECOND CAUSE OF ACTION

UNPAID OVERTIME IN VIOLATION OF THE NYLL

76. Plaintiff incorporates paragraphs 1 – 75 by reference as if fully set forth herein.

77. Defendants failed to comply with, *inter alia*, N.Y. Comp.Codes R. & Regs. 12 § 142–2.2 and NYLL §§ 191, 663(1) and 198(1-a), in that Plaintiff, a manual worker, worked for Defendants in excess of the maximum hours provided by State law, but provision was not made by Defendants to pay him at the rate of 1½ times the regular rate for the hours worked in excess of 40 hours per week.

78. Defendants are therefore liable under New York law for unpaid (and untimely paid) overtime.

79. In addition to their liability for unpaid overtime under the FLSA and New York law and their liability for compensatory liquidated damages under the FLSA, Defendants, for their willful violations of New York law, are liable under NYLL §§ 191, 663 and 198(1-a) for a penalty equal to: (A) 25% of the unpaid (or untimely paid) wages from September 2010 to April 9, 2011; and (B) 100% of the unpaid (or untimely paid) wages from April 9, 2011 (the date on which the liquidated damages penalty provisions of NYLL §§ 663 and 198(1-a) were amended) onward.

80. “Liquidated damages under the [New York] Labor Law ... are punitive in nature. They ‘constitute a penalty’ to deter an employer’s willful withholding of wages due.” *Lanzetta v. Florio's Enterprises, Inc.*, 08 CIV. 6181 DC, 2011 WL 3209521, at *5 (S.D.N.Y. July 27, 2011) (Chin, J.), quoting *Reilly v. NatWest Mkts. Grp. Inc.*, 181 F.3d 253, 265 (2d Cir.1999).

81. “Because of the different purposes the two forms of liquidated damages serve, plaintiff may recover under both statutes without obtaining an impermissible double

recovery.” *Lanzetta v. Florio's Enterprises, Inc.*, 08 CIV. 6181 DC, 2011 WL 3209521, at *5 (S.D.N.Y. July 27, 2011) (Chin, J.) (citing cases).

82. Accordingly, for willfully violating N.Y. Comp.Codes R. & Regs. 12 § 142–2.2, Defendants are also liable for the payment of liquidated damages under NYLL §§ 663 and 198(1-a).

83. The Wage Theft Protection Act, effective April 9, 2011, provides for liquidated damages at the rate of 100% of the amounts owed from April 9, 2011 onward. NYLL §§ 663 and 198(1-a).

84. Accordingly, as set forth in the chart contained under Plaintiff’s First Cause of Action, Plaintiff is entitled to liquidated damages under the NYLL *in addition to* the liquidated damages recoverable under the FLSA (which, unlike NYLL liquidated damages, do not serve a punitive function). *See Mendez v. Casa Blanca Flowers, Ltd.*, 12-CV-5786 ENV JMA, 2014 WL 4258943, at *4-5 (E.D.N.Y. July 8, 2014) (awarding 100% liquidated damages under FLSA and separately awarding 100% liquidated damages under NYLL), *report and recommendation adopted*, 12-CV-5786 ENV JMA, 2014 WL 4258988 (E.D.N.Y. Aug. 27, 2014); *Tackie v. Keff Enterprises LLC*, 14-CV-2074 JPO, 2014 WL 4626229, at *5 (S.D.N.Y. Sept. 16, 2014) (same); *Yuquilema v. Manhattan's Hero Corp.*, 13-CV-461 WHP JLC, 2014 WL 4207106 (S.D.N.Y. Aug. 20, 2014) (awarding 100% liquidated damages under FLSA, and separately awarding liquidated damages under NYLL of 100% for post-April 9, 2011 period and 25% for pre-April 9, 2011 period), *report and recommendation adopted*, 13CV461, 2014 WL 5039428 (S.D.N.Y. Sept. 30, 2014); *Sanchez v. Viva Nail N.Y. Inc.*, 12-CV-6322 ADS ARL, 2014 WL 869914, at *5 (E.D.N.Y. Mar. 4, 2014) (same); *Berrezueta v. Royal Crown Pastry Shop, Inc.*, 12-CV-4380 FB RML, 2013 WL 6579799, at *5 (E.D.N.Y. Dec. 16, 2013) (same); *Garcia v. Giorgio's Brick*

Oven & Wine Bar, 11 CIV. 4689 LLS FM, 2012 WL 3339220 (S.D.N.Y. Aug. 15, 2012) (same), *report and recommendation adopted*, 11 CIV. 4689 LLS, 2012 WL 3893537 (S.D.N.Y. Sept. 7, 2012) (same); *Angamarca v. Pita Grill 7 Inc.*, 11 CIV. 7777 JGK JLC, 2012 WL 3578781, at *8 (S.D.N.Y. Aug. 2, 2012) (same); *Hernandez v. P.K.L. Corp.*, 12-CV-2276 NG RML, 2013 WL 5129815, at *6 (E.D.N.Y. Sept. 12, 2013) (same).

85. Based upon the foregoing, Defendants are liable for unpaid overtime and liquidated damages under N.Y. Comp. Codes R. & Regs. 12 § 142-2.2 and NYLL §§ 663 and 198(1-a) as set forth above.

THIRD CAUSE OF ACTION

DISCRIMINATION AND HOSTILE WORK ENVIRONMENT IN VIOLATION OF 42 U.S.C. § 1981

86. Plaintiff incorporates the allegations of paragraphs 1 - 85 herein by reference.

87. At all material times herein, during the periods when Defendants failed to pay overtime premiums they selectively withheld time and a half for overtime hours worked to Plaintiff and other Latino employees, while, upon information and belief, paying time and a half to white employees.

88. Upon information and belief, Defendants selectively withheld overtime compensation from Latino employees because Defendants perceived them as being more vulnerable, easier to control, and easier to abuse with impunity.

89. Plaintiff was also subjected to a hostile and abusive work environment for most of his employment.

90. Defendants' hostility was motivated, at least in part, by Plaintiff's race (Latino/Hispanic).

91. By way of example, speaking in anger and in Plaintiff's presence, Nicholas Concavage referred to Plaintiff, who is from El Salvador, as "**Fucking Mexican**" and "**you fucking Mexican motherfucker**" on two to three occasions, including one time in or about 2013 when he screamed it while operating a crane at 87 Fox Island Road.

92. On one such occasion, Plaintiff replied, in words or substance, "*I'm not Mexican, and what you're saying is not nice,*" but Concavage did not respond.

93. Nicholas Concavage (this time speaking in a joking rather than angry manner) also referred to Plaintiff and other Latino workers as "**fucking Spanish guys**" while speaking to crew members in Plaintiff's presence in or about 2012 or early 2013.

94. Nicholas Concavage angrily also told Plaintiff to "**Go back to your Country**" on two or three occasions.

95. In Plaintiff's presence, Nicholas Concavage also called an African-American co-worker (Oral Joseph) "**nigger**" in 2012, prompting the co-worker to punch Concavage in the face. Defendants' use of derogatory racial terms against minorities is also significant because they support Plaintiff's theory of the case and further demonstrate the hostility of Plaintiff's work environment. *Sprint/ United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 128 S.Ct. 1140, 1147 (2008); *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 (2d Cir. 2000).

96. If the owner of a large corporation used such racial and ethnic epithets against minority employees he would be excoriated, both in public and in the courts, and few would even question whether he should be held liable for creating a hostile work environment. The outcome should be no different simply because the offender is the owner of a smaller

corporation, or because the targets of such racial and ethnic epithets happen to be relatively low wage workers who come from modest backgrounds. Indeed, if anything, low wage workers who come from modest backgrounds need at least as much protection from such behavior as high profile employees, as the latter typically have more resources and are better able to assert their rights effectively.

97. Nicholas Concavage took advantage of the cultural differences between himself and Plaintiff and other foreign born Latino workers by conducting himself in an intimidating, coercive and threatening manner calculated to make them, and which did make them, submissive, fearful and unquestioning and to dissuade them from making any complaints. *Zhao v. State Univ. of N.Y.*, 472 F. Supp. 2d 289, 313 (E.D.N.Y. 2007) (facially neutral evidence can also support a hostile work environment claim where it is consistent with either a discriminatory or non-discriminatory motive).

98. By way of example, and not by way of limitation, when Plaintiff went to the hospital in 2013 with an arm injury that happened at work, he asked Nichols Concavage for the health insurance information, and Concavage criticized Plaintiff for informing the hospital that he was injured at work. As a result, Plaintiff did not apply for workers compensation. Plaintiff was out of work two weeks until his arm got better. Upon returning to work, Plaintiff asked Nicholas Concavage if he could pay Plaintiff for one week of vacation so that he would have income for one of the two missed weeks. Concavage replied that he could not do that because Plaintiff had not even been working at the Company for one year, a statement that was clearly false. By contrast, upon information and belief, Defendants had already paid the white employees their vacation time. Defendants then delayed the payment to Plaintiff of the subject "vacation" pay until December.

99. Nicholas Concavage's discrimination against Plaintiff caused him to look down on Plaintiff and discount what Plaintiff had to say. As a result, at least in part, of this distorted view of Plaintiff's worth, Concavage failed to wait for the required signal from Plaintiff when he (Concavage) was operating a crane, which, in turn, caused Plaintiff to injure his knee. (It is noted here that the New York State Worker's Compensation Law does not bar an employee from suing his employer under federal civil rights laws. *See Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1190 (2d Cir.1987)).

100. While Plaintiff suffered a number of adverse employment actions, a plaintiff need not show an adverse employment action to prevail on his hostile work environment claim. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 106 (2002) (actionable harassment is "not limited to economic or tangible discrimination, and ... covers more than terms and conditions in the narrow contractual sense."); *Feingold v. New York*, 366 F.3d 138, 150 (2d Cir. 2004) (The conditions of employment only need to be "altered for the worse" ... "The environment need not be 'unendurable' or 'intolerable.'").

101. Defendants subjected Plaintiff to unwelcome harassment based on ancestry, ethnicity and race.

102. Defendants' harassment of Plaintiff had the purpose or effect of unreasonably interfering with Plaintiff's work performance by creating an intimidating, hostile, and offensive working environment.

103. Defendants' hostile and discriminatory conduct as aforesaid on the basis of Plaintiff's ancestry, ethnicity and race created a hostile work environment and deprived Plaintiff of an equal right to the making, performance, modification, and termination of her at will

employment contract, and to the benefits, privileges, terms, and conditions of said contractual relationship. *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 68 (2d Cir. 2000) (42 U.S.C. § 1981 applies to at-will employment arrangements).

104. The unwelcome conduct alleged herein was severe enough to create an objectively hostile work environment and Plaintiff perceived it as such.

105. Said unwelcome conduct was also pervasive enough to create a hostile work environment, and Plaintiff perceived it as such.

106. Said unwelcome speech and conduct was also sufficiently frequent and ongoing throughout the duration of Plaintiff's employment as to constitute a continuing violation.

107. Defendants are liable under 42 U.S.C. § 1981 for their actionable conduct as aforesaid. In this regard, it is noted that Joanne Concavage did not directly participate in the harassing behavior. However, liability is sought against her as well based on her status as a joint employer and as someone with at least constructive if not actual knowledge of the types of hostile behaviors that her husband engaged in.

108. As a result of Defendants' conduct as aforesaid, Plaintiff has suffered diminished employment-related compensation (*e.g.*, withheld overtime, in contrast to white employees), physical injury, and has and will continue to suffer the type of mental stress and disturbance that would be expected under the circumstances, together with other incidental and consequential damages and expenses, all in an amount to be determined at trial.

109. In committing the acts alleged herein, Defendants acted in a calculated, outrageous and malicious manner with intent, oppression, malice, wanton disregard and indifference for Plaintiff's protected civil rights.

110. Such conduct implicates compelling public interests, including the public's interest in maintaining access to the legal system and the public's interest in deterring unlawful discrimination against, and exploitation of, racial and ethnic minorities and low wage workers. Accordingly, Defendants should be assessed punitive damages in an amount sufficient to adequately punish Defendants and to deter Defendants and other employers from engaging in such illegal and immoral conduct in the future.

FOURTH CAUSE OF ACTION

DISCRIMINATION AND HOSTILE WORK ENVIRONMENT IN VIOLATION OF THE NEW YORK STATE HUMAN RIGHTS LAW

111. Plaintiff incorporates paragraphs 1 - 110 herein.

112. Each of the Defendants is and was at all material times herein: **(A)** a "person" under NYSHRL § 292(1); and **(B)** an "employer" under NYSHRL § 292(5).

113. The New York State Human Rights Law (N.Y. Executive Law § 290, *et seq.*) makes it unlawful for any employer or an employee or agent thereof, because of an individual's race to discriminate against such individual in compensation or in terms, conditions or privileges of employment. *See, e.g.*, N.Y. Exec. Law § 296(1)(a).

114. The New York Executive Law “provide[s] a cause of action for a hostile work environment premised on race-based employment discrimination and [] is evaluated under the same framework as Title VII cases.” *Early v. Wyeth Pharm., Inc.*, 603 F. Supp. 2d 556, 578 (S.D.N.Y. 2009) (citations omitted).

115. NYSHRL § 296(1)(a) provides that it “shall be an unlawful discriminatory practice [f]or an employer ..., because of the ... race, ... color [or] national origin ... of any individual, ... to discriminate against such individual in compensation or in terms, conditions or privileges of employment.” N.Y. Exec. Law § 296(1)(a).

116. NYSHRL § 296(6) provides for “aiding and abetting” liability for § 296(1)(a) violations, explaining that “[i]t shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article or to attempt to do so.” N.Y. Exec. Law § 296(6). As the person principally responsible for running the office and administrative aspects of the business, Joanne Concavage was, upon information and belief, involved in assembling the payroll-related information from which discriminatory paychecks would be generated (*i.e.*, withholding overtime premiums from Latino employees, while, upon information and belief, paying such premiums to white employees).

117. Defendants subjected Plaintiff to discrimination and unwelcome harassment based on his ancestry, race, ethnicity and national origin. As a result, Plaintiffs have been damaged in an amount to be determined at trial, and Defendants should be held liable for types of damages (including punitive damages) referenced in Plaintiff’s third cause of action.

CONCLUSION

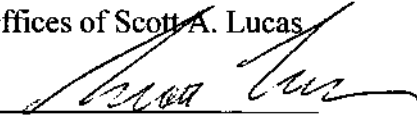
WHEREFORE, Plaintiff respectfully requests judgment as set forth herein on Plaintiff's first and second causes of action, and in an amount to be determined at trial on Plaintiff's third and fourth causes of action, together with attorney's fees, costs, disbursements and prejudgment interest (to the extent recoverable).

Dated: New York, New York
October 27, 2014

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