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

LUIS SANCHEZ ALMONTE, on behalf of himself and all others similarly situated,	
Plaintiff,	**No: 1:16-cv-00660**
-against-	
MARINA ICE CREAM CORP.; SELINGER ICE CREAM CORP.; FRANK BARONE, individually; MIKE BARONE, JR., individually;	**CLASS ACTION COMPLAINT**
Defendants.	

Plaintiff, Luis Sanchez Almonte, individually and on behalf of all others similarly situated, upon personal knowledge as to himself and upon information and belief as to other matters, alleges as follows:

NATURE OF THE ACTION

1. This lawsuit seeks to recover overtime compensation, unpaid commissions, unlawful deductions, and statutory penalties for Plaintiff and those similarly situated Delivery Route Drivers who worked for Marina Ice Cream Corp. located at 133-14 Jamaica Avenue, Richmond Hill, New York 11418 ("Marina Queens"), 424 East John Street, Lindenhurst, New York 11757 ("Marina Long Island"), 1195 McDonald Avenue, Brooklyn, New York 11230 ("Marina Brooklyn"), and Selinger Ice Cream Corp. located at 3070 Waterbury Avenue, Bronx, New York 10461 ("Marina Bronx") (collectively, "Defendants" or "Marina Ice Cream").

2. Marina Ice Cream Corp. and Selinger Ice Cream Corp. are owned and operated by Frank and Mike Barone, and together do business as "Marina Ice Cream" in New York. Opened in 1983, Marina Ice Cream distributes its ice cream products to New York City, Westchester County, Long Island, and some select parts of northern New Jersey.[1]

3. Defendants have been part of a single integrated enterprise that has jointly employed Delivery Route Drivers at Marina Queens, Marina Brooklyn, Marina Long Island, and Marina Bronx.

4. Defendants are linked together through a central website under the Marina Ice Cream trade name, www.marinaicecream.com, which provides links and contact information to all Marina distribution centers. The website identifies Selinger Ice Cream Corp. as Marina Ice Cream's Bronx distribution center.

5. The Marina Ice Cream website allows users to view offered products in Defendants' inventory, and also directs client inquiries to Mike Barone in its Long Island branch.

6. Marina Ice Cream purchases products from various distributors, and then offers its products in inventory for sale to its clients throughout New York and select parts of New Jersey.

7. Through the use of Delivery Route Drivers in its New York distribution centers, Marina Ice Cream delivers ice cream products to New York grocery stores, private and public businesses, parties, and some of New York's most iconic institutions, such as Yankee Stadium and Madison Square Garden.[2]

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[1] *See* Marina Ice Cream Homepage, available at http://www.marinaicecream.com/Marina_IceCream.html (last accessed January 8, 2016). Defendants previously operated a Marina Ice Cream Distribution center in New Jersey, but closed the location in or around 2014.

[2] *Id.*

8. Marina Ice Cream divides its delivery operations into two divisions: Transport Drivers and Delivery Route Drivers.

9. Marina Ice Cream assigned interstate deliveries to Transport Drivers.

10. Delivery Route Drivers are solely assigned intrastate routes within New York State, and interstate travel does not constitute a natural, integral, or inseparable part of their duties.

11. Delivery Route Drivers are not assigned interstate delivery trips, are not given the same training as Transport Drivers, are not expected to make interstate deliveries, do not "fill in" for Transport Drivers when they are absent, and utilize a separate fleet of vehicles.

12. At all times relevant to this Complaint, Plaintiff and other similarly situated Delivery Route Drivers have been non-exempt employees of Defendants, and are thus entitled to time and one half their regular rate of pay for all hours worked over 40 in a given workweek.

13. Delivery Route Drivers are paid on a solely commission basis. Specifically, Delivery Route Drivers receive a weekly $500 draw from commissions. Defendants then compensate Delivery Route Drivers a 9%-10% commission based on the weekly volume of products delivered to Marina Ice Cream's customers.

14. Defendants do not compensate Plaintiff and similarly situated delivery route drivers any overtime premium for hours worked in excess of 40 in any given workweek.

15. The primary duties of Plaintiff and similarly situated Delivery Route Driver are not making sales. Rather, Plaintiff's and Delivery Route Drivers' primary duties consist of loading products onto delivery trucks, driving delivery trucks, delivering Marina Ice Cream's products, and rearranging the delivered products in customers' showcases and freezers.

16. Delivery Route Driver are not the only contact between Defendants and their customers, do not call on customers and take orders for products, do not make pre-trip sales calls to customers, do not solicit orders from customers' management or those with authority to commit the vendor for purchases, do not call on new prospects for the purposes of making sales, and do not persuade or otherwise call upon existing customers to increase their purchase of Marina Ice Cream's products.

17. Rather, the volume of products sold to Defendants' clients is determined by the customer's amount of sales since the previous delivery. Delivery Route Driver review the inventory sold in customers' freezers to determine the amount to be delivered, obtain the requisite amount from their delivery truck, carry the products to the customer, have a customers' representative sign for the products, and physically load the products into the customers' display and freezer sections.

18. Defendants have also withheld previously promised commissions based on the volume of products delivered. Specifically, Defendants previously paid a 10% commission on products delivered to Delivery Route Drivers. However, beginning in or around late 2013, Defendants unilaterally reduced Delivery Route Drivers' commission from 10% to 9% and did not do so in writing.

19. Defendants have also instituted a policy and practice of applying unlawful deductions onto Plaintiff's and similarly situated Delivery Route Drivers' commission payments.

20. The deductions Defendants automatically apply include, but are not limited to: weekly fees for the use of Defendants' delivery trucks, weekly fees for the parking of Defendants' delivery trucks, and periodic deductions arising from any perceived inventory shortages. Defendants also require Delivery Route Drivers to pay for their weekly gasoline

costs, pay for all parking meters, and pay for all parking tickets incurred in the scope of their employment without any reimbursement.

21. At no time did Plaintiff nor other Delivery Route Drivers agree to the above automatic deductions in writing, and such deductions are solely for the benefit of Defendants.

22. Plaintiff brings this action on behalf of himself and all other similarly situated current and former employees in the position of Delivery Route Drivers who elect to opt into this action pursuant to the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* ("FLSA"), and specifically, the collective action provision of 29 U.S.C. § 216(b), to remedy the violations of the FLSA's overtime provisions.

23. Plaintiff also brings claims on behalf of himself and a class of similarly situated current and former employees who work or worked for Defendants as Delivery Route Drivers in New York pursuant to Rule 23 of the Federal Rules of Civil Procedure to remedy violations of the New York Labor Law ("NYLL") Article 6, §§ 190 *et seq.* and Article 19, §§ 650 *et seq.*, and the supporting New York State Department of Labor Regulations.

THE PARTIES

Plaintiff

Luis Sanchez Almonte

24. Almonte is an adult individual who is a resident of Queens, New York.

25. Almonte has been employed by Defendants at Marina Queens from in or around January 2009 to the present as a Delivery Route Driver assigned to the borough of Manhattan in New York.

26. Almonte is a covered employee within the meaning of the FLSA and NYLL.

27. A written consent form for Almonte is being filed with this Class Action Complaint.

Defendants

28. Defendants jointly employed Plaintiff and similarly situated employees at all times relevant.

29. Each Defendant has had substantial control over Plaintiff's working conditions, and over the unlawful policies and practices alleged herein.

30. Defendants are part of a single integrated enterprise that has jointly employed Plaintiff and similarly situated employees at all times relevant.

31. During all relevant times, Defendants' operations are interrelated and unified.

32. During all relevant times, Defendants have been Plaintiff's employers within the meaning of the FLSA and the NYLL.

Marina Ice Cream Corp.

33. Together with the other Defendants, Marina Ice Cream Corp. has co-owned and/or co-operated all Marina Ice Cream's distribution centers in New York during the relevant time period.

34. Marina Ice Cream Corp is a domestic for profit corporation organized and existing under the laws of New York.

35. Marina Ice Cream Corp.'s DOS Process Address is identified as 133-14 Jamaica Avenue, Richmond Hill, New York 11417, its corporate office and location of its Queens-based distribution center.

36. Marina Ice Cream Corp is co-owned, co-operated, and co-managed by Frank Barone and Mike Barone Jr.

37. At all relevant times, Marina Ice Cream Corp. has maintained control, oversight, and direction over Plaintiff and similarly situated employees, including, but not limited to, hiring, firing, disciplining, timekeeping, payroll, and other employment practices.

38. In this regard, Marina Ice Cream Corp. appears on weekly commission and salary paychecks provided to Plaintiff Almonte.

39. Marina Ice Cream applies the same employment policies, practices, and procedures to all Delivery Route Drivers at Marina Queens, Marina Long Island, Marina Brooklyn, and Marina Bronx.

40. Upon information and belief, at all times relevant Marina Ice Cream Corp. has had an annual gross volume of sales in excess of $500,000.

Selinger Ice Cream Corp.

41. Together with the other Defendants, Selinger Ice Cream Corp. ("Selinger") has co-owned and/or co-operated all Marina Ice Cream's distribution centers in New York during the relevant time period.

42. Selinger is a domestic for profit corporation organized and existing under the laws of New York.

43. Selinger's DOS Process Address is identified as Vaneria & Spanos, 641 Lexington Avenue, New York, New York 10022.

44. Based on information and belief, Selinger is co-owned, co-operated, and co-managed by Frank Barone and Mike Barone Jr.

45. Selinger is identified under Marina Ice Cream's central website as doing business as Marina Ice Cream's Bronx distribution center. The website does not identify any difference in

product lines, product pricing, or contact information for potential clients between Marina Ice Cream Corp. and Selinger.

46. At all relevant times, Selinger has maintained control, oversight, and direction over Plaintiff and similarly situated employees, including, but not limited to, hiring, firing, disciplining, timekeeping, payroll, and other employment practices.

47. Based on information and belief, Selinger applies the same employment policies, practices, and procedures to all Delivery Route Drivers at Marina Bronx that Marina Ice Cream applies to Delivery Route Drivers in Marina Queens, Marina Brooklyn, and Marina Long Island.

48. Upon information and belief, at all times relevant Selinger has had an annual gross volume of sales in excess of $500,000.

Frank Barone

49. Upon information and belief, Frank Barone is a resident of the State of New York.

50. At all relevant times, Frank Barone has been the co-owner and co-owner of Marina Ice Cream, including Marina Queens, Marina Brooklyn, Marina Long Island, and Marina Bronx.

51. Frank Barone identifies himself as a co-owner of Marina Ice Cream in the company's central website. In this regard, Marina Ice Cream's central website states that "Marina Ice Cream Corp. was opened in 1983 by brothers, Frank & Mike Barone."[3]

52. At all relevant times, Frank Barone has had power over personnel decisions at Marina Ice Cream, including the power to hire and fire employees, set their wages, and otherwise control the terms and conditions of their employment.

[3] Homepage, Marina Ice Cream Corp. Website, *available at* http://www.marinaicecream.com/ (last accessed January 19, 2016).

53. At all relevant times, Frank Barone has had power over payroll decisions at Marina Ice Cream, including the power to retain time and/or wage records.

54. At all relevant times, Frank Barone has been actively involved in managing the day to day operations of Marina Ice Cream and each of its distribution centers.

55. At all relevant times, Frank Barone has had the power to stop any illegal pay practices that harmed Plaintiff and similarly situated employees.

56. At all relevant times, Frank Barone has had the power to transfer the assets and/or liabilities of Marina Ice Cream.

57. At all relevant times, Frank Barone has had the power to declare bankruptcy on behalf of Marina Ice Cream.

58. At all relevant times, Frank Barone has had the power to enter into contracts on behalf of Marina Ice Cream.

59. At all relevant times, Frank Barone has had the power to close, shut down, and/or sell Marina Ice Cream.

60. Frank Barone is a covered employer within the meaning of the FLSA and the NYLL, and at all relevant times, has employed and/or jointly employed Plaintiff and similarly situated employees.

Mike Barone Jr.

61. Upon information and belief, Mike Barone Jr. is a resident of the State of New York.

62. At all relevant times, Mike Barone Jr. has been the co-owner and co-owner of Marina Ice Cream, including Marina Queens, Marina Brooklyn, Marina Long Island, and Marina Bronx.

63. Mike Barone Jr. identifies himself as a co-owner of Marina Ice Cream in the company's central website. In this regard, Marina Ice Cream's central website states that "Marina Ice Cream Corp. was opened in 1983 by brothers, Frank & Mike Barone."[4]

64. At all relevant times, Mike Barone Jr. has had power over personnel decisions at Marina Ice Cream, including the power to hire and fire employees, set their wages, and otherwise control the terms and conditions of their employment. In this regard, Mike Barone Jr. hired Plaintiff.

65. At all relevant times, Mike Barone Jr. has had power over payroll decisions at Marina Ice Cream, including the power to retain time and/or wage records.

66. At all relevant times, Mike Barone Jr. has been actively involved in managing the day to day operations of Marina Ice Cream and each of its distribution centers. In this regard, Marina Ice Cream's central website directs all New York client and ordering inquiries to Mr. Barone Jr.[5]

67. At all relevant times, Mike Barone Jr. has had the power to stop any illegal pay practices that harmed Plaintiff and similarly situated employees.

68. At all relevant times, Mike Barone Jr. has had the power to transfer the assets and/or liabilities of Marina Ice Cream.

69. At all relevant times, Mike Barone Jr. has had the power to declare bankruptcy on behalf of Marina Ice Cream.

70. At all relevant times, Mike Barone Jr. has had the power to enter into contracts on behalf of Marina Ice Cream.

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[4] *Id.*

[5] Vendors, Marina Ice Cream Website, *available at* http://www.marinaicecream.com/Vendors.html (last accessed January 19, 2016).

71. At all relevant times, Mike Barone Jr. has had the power to close, shut down, and/or sell Marina Ice Cream.

72. Mike Barone Jr. is a covered employer within the meaning of the FLSA and the NYLL, and at all relevant times, has employed and/or jointly employed Plaintiff and similarly situated employees.

JURSIDICTION AND VENUE

73. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337, and jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.

74. This Court also has jurisdiction over Plaintiff's claims under the FLSA pursuant to 29 U.S.C. § 216(b).

75. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

76. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this District.

COLLECTIVE ACTION ALLEGATIONS

77. Plaintiff brings the First Cause of Action, the FLSA overtime claim, on behalf of himself and all similarly situated current and former Delivery Route Drivers employed by Defendants for a period of three years prior to the filing of this Class Action Complaint and the date of final judgment in this matter, and who elect to opt-in to this action (the "FLSA Collective Members").

78. At all relevant times, Plaintiff and the FLSA Collective Members are and have been similarly situated, have had substantially similar job requirements and pay provisions, and

are and have been subject to Defendants' common practices, policies, and routines with regards to their compensation, including their willful failing and refusing to pay Plaintiff at the legally required overtime rate for all hours worked forty in any given workweek. Plaintiff's claims stated herein are essentially the same as those of the other FLSA Collective Members.

79. All of the work that Plaintiff and the FLSA Collective have performed has been assigned by Defendants, and/or Defendants have been aware of all of the work that Plaintiff and the FLSA Collective have performed.

80. As part of their regular business practices, Defendants have intentionally, willfully, and repeatedly engaged in a pattern, practice and/or policy of violating the FLSA with respect to Plaintiff and the FLSA Collective. These policies and practices include, but are not limited to:

a. Willfully failing to pay Plaintiff and the FLSA Collective overtime wages for hours that they worked in excess of 40 hours per week;

81. Defendants are aware or should have been aware that federal law required them to pay its employees, including Plaintiff and the FLSA Collective, an overtime premium for hours worked in excess of 40 per workweek.

82. Plaintiff and the FLSA Collective have all performed the same primary duties.

83. Defendants' unlawful conduct has been widespread, repeated, and consistent.

84. The First Causes of Action is properly brought under and maintained as an opt-in collective action pursuant to 29 U.S.C. 216(b).

85. The FLSA Collective Members are readily ascertainable.

86. For the purpose of notice and other purposes related to this action, the FLSA Collective Members' names and addresses are readily available from Defendants' records.

87. Notice can be provided to the FLSA Collective Members via first class mail to the last address known to Defendants.

88. In recognition of the services Plaintiff has rendered and will continue to render to the FLSA Collective, Plaintiff will request payment of a service award upon resolution of this action.

CLASS ACTION ALLEGATIONS

89. Plaintiff brings the Second, Third, Fourth, Fifth, and Sixth Causes of Action, NYLL claims, under Rule 23, on behalf of himself and a class of persons consisting of:

> All persons who work or have worked as a Delivery Route Driver and similar employees at Marina Queens, Marina Brooklyn, Marina Long Island, and Marina Bronx in New York between January 28, 2010 through the date of final judgment in this matter (the "Rule 23 Class").

90. Excluded from the Rule 23 Class Members are Defendants, Defendants' legal representatives, officers, directors, assigns, and successors, or any individual who has, or who at any time during the class period has had, a controlling interest in Defendants; the Judge(s) to whom this case is assigned and any member of the Judges' immediate family; and all persons who will submit timely and otherwise proper requests for exclusion from the Rule 23 Class.

91. The members of the Rule 23 Class ("Rule 23 Class Members") are readily ascertainable. The number and identity of the Rule 23 Class Members are determinable from the Defendants' records. The hours assigned and worked, the positions held, and the rates of pay for each Rule 23 Class Member are also determinable from Defendants' records. For the purpose of notice and other purposes related to this action, their names and addresses are readily available from Defendants. Notice can be provided by means permissible under Federal Rule of Civil Procedure 23.

92. The Rule 23 Class Members are so numerous that joinder of all members is impracticable, and the disposition of their claims as a class will benefit the parties and the Court.

93. Based on information and belief, there are more than forty Rule 23 Class Members.

94. Plaintiff's claims are typical of those claims which could be alleged by any Rule 23 Class Member, and the relief sought is typical of the relief which would be sought by each Rule 23 Class Member in separate actions.

95. All the Rule 23 Class Members were subject to the same corporate practices of Defendants, as alleged herein, of failing to pay overtime wages, failure to pay agreed upon commission payments, unlawful deductions from wages, failing to provide proper wage and hour notices, and failing to provide proper wage statements.

96. Plaintiff and the Rule 23 Class Members have all sustained similar types of damages as a result of Defendants' failure to comply with the NYLL.

97. Plaintiff and the Rule 23 Class Members have all been injured in that they have been uncompensated or under-compensated due to Defendants' common policies, practices, and patterns of conduct. Defendants' corporate-wide policies and practices affected all Rule 23 Class Members similarly, and Defendants benefited from the same type of unfair and/or wrongful acts as to each of the Rule 23 Class Members.

98. Plaintiff and other Rule 23 Class Members sustained similar losses, injuries, and damages arising from the same unlawful policies, practices, and procedures.

99. Plaintiff is able to fairly and adequately protect the interests of the Rule 23 Class Members and has no interests antagonistic to the Rule 23 Class Members.

100. Plaintiff is represented by attorneys who are experienced and competent in both

class action litigation and employment litigation and have previously represented many plaintiffs and classes in wage and hour cases.

101. A class action 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 individual class members lack the financial resources to vigorously prosecute a lawsuit against corporate defendants. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of efforts and expense that numerous individual actions engender. Because the losses, injuries, and damages suffered by each of the individual Rule 23 Class Members are small in the sense pertinent to a class action analysis, the expenses and burden of individual litigation would make it extremely difficult or impossible for the individual Rule 23 Class Members to redress the wrongs done to them. On the other hand, important public interests will be served by addressing the matter as a class action. The adjudication of individual litigation claims would result in a great expenditure of Court and public resources; however, treating the claims as a class action would result in a significant saving of these costs. The prosecution of separate actions by individual Rule 23 Class Members would create a risk of inconsistent and/or varying adjudications with respect to the individual Rule 23 Class Members, establishing incompatible standards of conduct for Defendants and resulting in the impairment of the Rule 23 Class Members' rights and the disposition of their interests through actions to which they were not parties. The issues in this action can be decided by means of common, class-wide proof. In addition, if appropriate, the Court can, and is empowered to, fashion methods to efficiently manage this action as a class action.

102. Upon information and belief, Defendants and other employers throughout the

state violate the NYLL. Current employees are often afraid to assert their rights out of fear of direct or indirect retaliation. Former employees are fearful of bringing claims because doing so can harm their employment, future employment, and future efforts to secure employment. Class actions provide class members who are not named in the complaint a degree of anonymity, which allows for the vindication of their rights while eliminating or reducing these risks.

103. This action is properly maintainable as a class action under Federal Rule of Civil Procedure 23(b)(3).

104. Common questions of law and fact exist as to the Rule 23 Class that predominate over any questions only affecting Plaintiff and the Rule 23 Class Members individually and include, but are not limited to, the following:

a. whether Defendants violated NYLL Articles 6 and 19, and the supporting New York State Department of Labor Regulations;

b. whether Defendants employed Plaintiff and the Rule 23 Class Members within the meaning of the NYLL;

c. whether Defendants failed to pay Plaintiff and the Rule 23 Class Members the proper overtime premium for all hours worked in excess of 40 per workweek;

d. whether Defendants failed to pay Plaintiff and the Rule 23 Class Members agreed upon commissions;

e. whether Defendants made unlawful deductions from the wages of Plaintiff and the Rule 23 Class Members, in violation of the NYLL;

f. whether Defendants failed to furnish Plaintiff and the Rule 23 Class Members with accurate wage notices, as required by the NYLL;

g. whether Defendants failed to furnish Plaintiff and the Rule 23 Class Members with accurate statement of earnings, as required by the NYLL;

105. This action is properly maintainable as a class action under Federal Rule of Civil Procedure 23(b)(3).

PLAINTIFF'S FACTUAL ALLEGATIONS

Luis Sanchez Almonte

106. Almonte has been employed by Defendants at Marina Queens from in or around January 2009 to the present as a Delivery Route Driver assigned to the borough of Manhattan in New York.

107. Defendants have not and still do not pay Almonte the proper overtime premium for all of the overtime hours he is suffered and/or permitted to work each workweek.

108. Throughout the duration of his employment at Marina Ice Cream, Almonte received weekly paychecks from Defendants that did not properly record or compensate him for all of the hours that he worked.

109. During his employment, Almonte has generally worked the following schedule, unless he missed time for vacation, sick days or holidays:

a. Monday through Friday, from approximately 7:00 a.m. to generally 6 p.m., with some days requiring work until 7:00 – 8:00 p.m., depending on the day's specific workload; and

b. Saturday shifts from approximately 7:00 a.m. to 2:00 – 3:30 p.m. generally at least once each month.

110. Throughout his employment, Defendants have only paid Almonte on a commission basis. In this regard, Defendants paid Almonte a $500 guaranteed weekly draw contingent upon delivering approximately $5,000 of products, plus a commission based on the volume of products delivered. From his start of employment to approximately late 2013, Almonte received a 10% commission on the volume of products delivered. Beginning in or around late 2013, Defendants reduced this commission rate to 9% of the volume of products

delivered. Almonte was not informed of this reduction in writing, nor did he authorize such a reduction in writing.

111. Throughout his employment, Defendants have not paid Almonte any overtime premium for hours worked in excess of 40 in any given workweek.

112. Almonte, as a Delivery Route Driver, has not and does not make interstate deliveries for Defendants. He has exclusively made deliveries to Defendants' customers in Manhattan.

113. Interstate travel does not constitute a natural, integral or inseparable part of Almonte's duties as a Delivery Route Driver. Almonte is not assigned interstate delivery trips, is not given the same training as Transport Drivers, is not expected to make interstate delivers, would not be called upon to make interstate delivers, does not "fill in" for Transport Drivers when they are absent, and utilizes a separate fleet of vehicles than Transport Drivers.

114. Almonte is a non-exempt employee and is entitled to time and one half his regular rate of pay for all hours worked in excess of 40 per workweek.

115. Almonte's primary duties are not that of making sales. Rather, Almonte delivers Defendants' products to their clients in Manhattan and replenishes the inventory sold by the customers. The products delivered are determined by the amount of sales since the previous delivery.

116. Further, Almonte is not the only contact between Defendants and their customers, does not call on customers and take orders for products, does not make pre-trip sales calls to customers, does not solicit orders from customers' management or those with authority to commit the vendor for purchases, does not call on new prospects for the purposes of making

sales, and does not persuade or otherwise call upon exiting customers to increase their purchase of Marina products.

117. At Almonte's start of employment, Defendants had agreed to pay a 10% commission based on products delivered to customers. Beginning in or around late 2013, Defendants unilaterally reduced the commissions paid to Almonte from 10% to 9% of products delivered. Almonte did not agreed to this reduction in commission, and such reduced commission payments were not paid in accordance with the agreed terms of his employment or in writing.

118. Defendants have made deductions from Almonte's wages that were not in accordance with the provisions of any law, rule or regulation, and that were not expressly authorized by Almonte nor made for his benefit.

119. Beginning in or around 2010, Defendants have made consistent automatic deductions of $100 per week from Almonte's pay in order to use Defendants' delivery trucks.

120. Beginning in or around 2010, Defendants made consistent automatic deductions of $100 per week from Almonte's pay in order to park Defendants' delivery trucks at their parking lot at Marina Queens.

121. Defendants also made automatic deductions from Almonte's pay for perceived shortages in inventory. Defendants would account for inventory shortages periodically, and would automatically deduct any shortages from Almonte's pay. As means of an example, Almonte was deducted approximately $700 for perceived inventory shortages in 2013.

122. Defendants also consistently required Almonte to pay for his own fuel for use in Defendants' delivery trucks. On average, Almonte spent between $125 - $140 per week on fuel for Defendants' delivery truck. Defendants did not reimburse Almonte for these expenses.

123. Defendants also consistently required Almonte to pay for his own parking meters while making deliveries in the scope of his employment. On average, Almonte spent between $30-$36 per week on parking meters. Defendants did not reimburse Almonte for these expenses.

124. Defendants also consistently required Almonte to pay for any parking tickets incurred while making deliveries in the scope of his employment. Defendants did not reimburse Almonte for these expenses.

125. Defendants failed to furnish Almonte with proper annual wage notices required by the NYLL.

126. Defendants failed to furnish Almonte with accurate statements of wages as required by NYLL, Article 6, § 195(3), containing the 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.

FIRST CAUSE OF ACTION
Fair Labor Standards Act – Overtime Wages
(Brought on Behalf of Plaintiff and the FLSA Collective)

127. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

128. Defendants have engaged in a widespread pattern, policy, and practice of violating the FLSA, as detailed in this Class Action Complaint.

129. At all relevant times, each of the Defendants have been, and continue to be, an employer engaged in interstate commerce and/or in the production of goods for commerce, within the meaning of FLSA, 29 U.S.C. § 203. At all relevant times, each Defendant has employed "employee[s]," including Plaintiff and the FLSA Collective Members.

130. The overtime wage provisions set forth in the FLSA, 29 U.S.C. §§ 201 *et seq.*, and the supporting federal regulations, apply to Defendants and protect Plaintiff and the FLSA Collective Members.

131. Plaintiff and the FLSA Collective Members worked in excess of forty hours the majority of the weeks worked in the relevant time period.

132. Plaintiff and the FLSA Collective Members at all times relevant have been non-exempt employees of Defendants.

133. Defendants willfully failed to pay Plaintiff and the FLSA Collective Members one-and-one-half times their regular rate of pay for all work in excess of forty hours per workweek.

134. Defendants' unlawful conduct, as described in this Amended Class Action Complaint, has been willful and intentional. Defendants were aware or should have been aware that the practices described herein were unlawful. Defendants have not made a good faith effort to comply with the FLSA with respect to the compensation of Plaintiff and the FLSA Collective Members.

135. Because Defendants' violations of the FLSA have been willful, a three-year statute of limitations applies, pursuant to 29 U.S.C. §§ 201 *et seq*.

136. As a result of Defendants' violations of the FLSA, Plaintiff and the FLSA Collective Members have been deprived of overtime compensation in amounts to be determined at trial, and are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation pursuant to 29 U.S.C. §§ 201 *et seq*.

SECOND CAUSE OF ACTION
New York Labor Law – Overtime Wages
(Brought on Behalf of Plaintiff and the Rule 23 Class)

137. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

138. The overtime wage provisions of Article 19 of the NYLL and its supporting regulations apply to Defendants, and protect Plaintiff and the members of the Rule 23 Class.

139. At all times relevant Plaintiff and the Rule 23 Class have been non-exempt employees of Defendants.

140. Defendants have failed to pay Plaintiff and the members of the Rule 23 Class overtime wages to which they have been entitled under the NYLL and the supporting New York state Department of Labor Regulations – at a rate of 1.5 times their regular rate of pay – for all hours worked in excess of 40 per workweek.

141. Defendants have failed to keep, make, preserve, maintain, and furnish accurate records of time worked by Plaintiff and the members of the Rule 23 Class.

142. Through their knowing or intentional failure to pay Plaintiff and the members of the Rule 23 Class overtime wages for hours worked in excess of 40 hours per week, Defendants have willfully violated the NYLL, Article 19, §§ 650 *et seq.*, and the supporting New York State Department of Labor Regulations.

143. Due to Defendants' violations of the NYLL, Plaintiff and the members of the Rule 23 Class are entitled to recover from Defendants their unpaid overtime wages, liquidated damages, as provided for by the NYLL, reasonable attorneys' fees, costs, and pre-judgment and post-judgment interest.

THIRD CAUSE OF ACTION
New York Labor Law Article 6 – Unpaid Commissions
(Brought on Behalf of Plaintiff and the Rule 23 Class)

144. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

145. At all times relevant, Plaintiff and the members of the Rule 23 Class have been employees within the meaning of NYLL §§ 190, *et seq.*, and any supporting New York State Department of Labor regulations.

146. At all times relevant, Defendants have been employers within the meaning of NYLL §§ 190, *et seq.*, and any supporting New York State Department of Labor regulations.

147. The wage payment provisions of Article 6 of the NYLL and any supporting New York State Department of Labor Regulations apply to Defendants and protect Plaintiff and the Rule 23 Class.

148. Defendants failed to pay Plaintiff and the Rule 23 Class commissions earned in accordance with the agreed upon terms of their employment.

149. By Defendants' knowing or intentional failure to pay earned commissions to Plaintiff and the Rule 23 Class, Defendants have willfully violated NYLL Article 6, § 191(1)(c).

150. Defendants also violated NYLL Article 6, § 191(1)(c) by failing to reduce to writing the agreed terms of employment between Defendants and Plaintiff and the Rule 23 Class, and failing to furnish Plaintiff and the Rule 23 Class with an accurate statement of earnings.

151. Due to Defendants' violations of the NYLL, Plaintiff and the Rule 23 Class are entitled to recover from Defendants their unpaid wages, liquidated damages, as provided for by NYLL Article 6 § 198, reasonable attorneys' fees, costs, and pre-judgment and post-judgment interest.

FOURTH CAUSE OF ACTION
New York Labor Law – Unlawful Deductions
(Brought on Behalf of Plaintiff and the Rule 23 Class)

152. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

153. Defendants made unlawful deductions from the wages of Plaintiff and the Rule 23 Class Members.

154. The deductions Defendants made from the wages of Plaintiff and the Rule 23 Class were not expressly authorized in writing by Plaintiff and the Rule 23 Class, and were not for the benefit of Plaintiff and the Rule 23 Class.

155. Defendants' unlawful deductions include, but are not limited to: weekly charges for the use of Defendants' delivery trucks, weekly charges for the parking of Defendants' delivery trucks, and periodic deductions due to any perceived inventory shortages.

156. Defendants also mandated that Plaintiff and the Rule 23 Class pay fuel costs required to use Defendants' delivery trucks, and did not reimburse Plaintiff and the Rule 23 Class for these expenses.

157. Defendants also required Plaintiff and the Rule 23 Class to pay parking meter fees incurred in the scope of their employment, and did not reimburse Plaintiff and the Rule 23 Class for these expenses.

158. By Defendants' knowing or intentional effort to make deductions from the wages of Plaintiff and the Rule 23 Class, Defendants have willfully violated NYLL Article 6, § 193.

159. Due to Defendants' violations of the NYLL, Plaintiff and the Rule 23 Class are entitled to recover from Defendants their unpaid wages, liquidated damages, as provided for by

NYLL Article 6 § 198, reasonable attorneys' fees, costs, and pre-judgment and post-judgment interest.

FIFTH CAUSE OF ACTION
New York Labor Law – Failure to Provide Proper Annual Wage Notices
(Brought on behalf of Plaintiff and the Rule 23 Class)

160. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

161. Defendants have willfully failed to furnish Plaintiff and members of the Rule 23 Class with annual wage notices as required by NYLL, Article 6, § 195(1), in English or in the language identified by each employee as their primary language, at the time of hiring, and on or before February first of each subsequent year of the employee's employment with the employer, a notice containing: the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; the regular pay day designated by the employer in accordance with NYLL, Article 6, § 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.

162. Through their knowing or intentional failure to provide Plaintiff and members of the Rule 23 Class with the annual wage notices required by the NYLL, Defendants have willfully violated NYLL, Article 6, §§ 190 *et seq.*, and the supporting New York State Department of Labor Regulations.

163. Due to Defendants' willful violations of NYLL, Article 6, § 195(1), Plaintiff and members of the Rule 23 Class are entitled to statutory penalties of fifty dollars for each day that Defendants failed to provide Plaintiff and members of the Rule 23 Class with proper annual

wage notices, or a total of five thousand dollars each, reasonable attorneys' fees, costs, and injunctive and declaratory relief, as provided for by NYLL, Article 6, § 198(1-b).

SIXTH CAUSE OF ACTION
New York Labor Law – Failure to Provide Proper Wage Statements
(Brought on behalf of Plaintiff and the Rule 23 Class

164. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

165. Defendants have willfully failed to furnish Plaintiff and the members of the Rule 23 Class with statements with every payment of wages as required by NYLL, Article 6, § 195(3), containing: the 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.

166. Through their knowing or intentional failure to provide Plaintiff and the members of the Rule 23 Class with the wage statements required by the NYLL, Defendants have willfully violated NYLL, Article 6, §§ 190 *et seq.*, and the supporting New York State Department of Labor Regulations.

167. Due to Defendants' willful violations of NYLL, Article 6, § 195(3), Plaintiff and the members of the Rule 23 Class are entitled to statutory penalties of two hundred fifty dollars for each workweek that Defendants failed to provide Plaintiff and the members of the Rule 23 Class with proper wage statements, or a total of five thousand dollars each, reasonable attorneys' fees, costs, and injunctive and declaratory relief, as provided for by NYLL, Article 6, § 198(1-d).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, collectively and on behalf of all other similarly situated persons, prays for the following relief:

A. That, at the earliest possible time, Plaintiff be allowed to give notice of this collective action, or that the Court issue such notice, to all Delivery Route Drivers who are presently working at, or who have worked at any time during the six years immediately preceding the filing of this suit, up through and including the date of this Court's issuance of court-supervised notice, at Marina Ice Cream Corp., Selinger Ice Cream Corp., and their various distribution centers. 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 compensation, and an additional and equal amount as liquidated damages pursuant to the FLSA and the supporting United States Department of Labor Regulations;

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

D. Designation of Plaintiff as representative of the Rule 23 Class and counsel of record as Class Counsel;

E. Payment of a service award to Plaintiff, in recognition of the services he has rendered and will continue to render to the FLSA Collective and Rule 23 Class;

F. Issuance of a declaratory judgment that the practices complained of in this Class Action Complaint are unlawful under the NYLL, Article 6, §§ 190 *et seq.*, NYLL, Article 19, §§ 650 *et seq.*, and the supporting New York State Department of Labor Regulations;

G. Unpaid overtime compensation, owed commissions, and unlawful deductions of wages, along with liquidated damages and interest, as permitted by law pursuant to the NYLL and the supporting New York State Department of Labor Regulations;

H. Statutory penalties of fifty dollars for each day that Defendants failed to provide

Plaintiff with proper annual wage notices, or a total of five thousand dollars each, as provided for by NYLL, Article 6 § 198;

I. Statutory penalties of two hundred fifty dollars for each workweek that Defendants failed to provide Plaintiff and the members of the Rule 23 Class with proper wage statements, or a total of five thousand dollars each, as provided for by NYLL, Article 6 § 198;

J. Prejudgment and post-judgment interest;

K. An injunction requiring Defendants to pay all statutorily required wages and cease the unlawful activity described herein pursuant to the NYLL;

L. Reasonable attorneys' fees and costs of the action; and

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

* * *

Dated: New York, New York
January 28, 2016

Respectfully submitted,

/s/ Brian S. Schaffer
Brian S. Schaffer

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Attorneys for Plaintiffs and the Putative Class

FAIR LABOR STANDARDS ACT CONSENT

1. I consent to be a party plaintiff in a lawsuit against MARINA ICE CREAM CORP. and/or related entities and individuals in order to seek redress for violations of the Fair Labor Standards Act, pursuant to 29 U.S.C. § 216(b).

2. By signing and returning this consent form, I hereby designate FITAPELLI & SCHAFFER, LLP ("the Firm") to represent me and make decisions on my behalf concerning the litigation and any settlement. I understand that reasonable costs expended on my behalf will be deducted from any settlement or judgment amount on a pro rata basis among all other plaintiffs. I understand that the Firm will petition the Court for attorney's fees from any settlement or judgment in the amount of the greater of: (1) the "lodestar" amount, calculated by multiplying reasonable hourly rates by the number of hours expended on the lawsuit, or (2) 1/3 of the gross settlement or judgment amount. I agree to be bound by any adjudication of this action by a court, whether it is favorable or unfavorable.

Signature

Luis Sanchez Almonte

Full Legal Name (Print)