

MAY 22 2008

BY 

CLASS ACTION COMPLAINT
AND DEMAND FOR JURY TRIAL

Civil Action

No. 08 CV 0378 (C)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CATHERINE GORDON, JAMES SCHAFFER, TERESA
THOMPSON, PAMELA MIKA, JENNIFER
PFENTNER AND DIANA GALDON,

*on behalf of themselves and all other employees
similarly situated,*

Plaintiffs,

v.

KALEIDA HEALTH, JAMES R. KASKIE, DAVID R.
WHIPPLE, MFHS MANAGED CARE, INC., KALEIDA
PROPERTIES, INC., FAMILY PHARMACEUTICALS,
WESTLINK CORPORATION, COMMUNITY MEDICAL
PC, GENERAL PHYSICIANS PC, MILLARD
FILLMORE AMBULATORY SURGERY CENTER,
VISITING NURSING ASSOCIATION OF WESTERN
NEW YORK, INC., VNA HOME CARE SERVICES,
INC., VNA OF WNY, INC., GENERAL HOMECARE,
INC., WATERFRONT HEALTH CARE CENTER, INC.,
KALEIDA HEALTH FOUNDATION, THE WOMEN
AND CHILDREN'S HOSPITAL OF BUFFALO
FOUNDATION, KALEIDA IPA, LLC, KALEIDA MCO,
LLC, GRACE MANOR HEALTH CARE FACILITY,
INC. AND SCHENK PHYSICAL THERAPY, PC,

Defendants.

NATURE OF CLAIM

1. This is a proceeding for declaratory relief and monetary damages to:
redress the deprivation of rights secured to plaintiffs, Catherine Gordon, James
Schaffer, Teresa Thompson, Pamela Mika, Jennifer Pfentner and Diana Galdon
individually, as well as all other employees similarly situated, under the Fair Labor
Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* ("FLSA"); and under the
New York Labor Law.

JURISDICTION AND VENUE

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331, 28

U.S.C. §1343 (3) and (4) conferring original jurisdiction upon this Court of any civil action to recover damages or to secure equitable relief under any Act of Congress providing for the protection of civil rights; under 28 U.S.C. § 1337 conferring jurisdiction of any civil action arising under any Act of Congress regulating interstate commerce; and under the Declaratory Judgment Statute, 28 U.S.C. § 2201.

3. This Court's supplemental jurisdiction of claims arising under New York State Labor Law is also invoked.

4. Venue is appropriate in the Western District of New York since the allegations arose in this district and the plaintiffs reside in this district.

CLASS ACTION ALLEGATIONS

5. The claims arising under New York State Labor Law are properly maintainable as a class action under Federal Rule of Civil Procedure 23.

6. The class action is maintainable under subsections (1), (2) and (3) of Rule 23(b).

7. The class size is believed to be over 50 employees.

8. The Named Plaintiffs, Catherine Gordon, James Schaffer, Teresa Thompson, Pamela Mika, Jennifer Pfentner and Diana Galdon will adequately represent the interests of the class members because they are similarly situated to the class members and their claims are typical of, and concurrent to, the claims of the other class members.

9. There are no known conflicts of interest between the Named Plaintiffs and the other class members.

10. The class counsel, Dolin, Thomas & Solomon LLP, is qualified and able to litigate the class members' claims.

11. The class counsel concentrates its practice in employment litigation, and

its attorneys are experienced in class action litigation, including class actions arising under federal and state wage and hour laws.

12. Common questions of law and fact predominate in this action because the claims of all class members are based on whether defendants' practice of not paying nonexempt employees for all hours worked and/or statutory overtime for hours worked over 40 per week violates New York State Labor Law.

13. The class action is maintainable under subsections (2) and (3) of Rule 23(b) because the plaintiffs seek injunctive relief, common questions of law and fact predominate among the class members and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

PARTIES

A. Defendants

14. Collectively, defendants Kaleida Health, MFHS Managed Care, Inc., Kaleida Properties, Inc., Family Pharmaceuticals, Westlink Corporation, Community Medical PC, General Physicians PC, Millard Fillmore Ambulatory Surgery Center, Visiting Nursing Association of Western New York, Inc., VNA Home Care Services, Inc., VNA of WNY, Inc., General Homecare, Inc. Waterfront Health Care Center, Inc., Kaleida Health Foundation, The Women and Children's Hospital of Buffalo Foundation, Kaleida IPA, LLC, Kaleida MCO, LLC, Grace Manor Health Care Facility, Inc., Schenk Physical Therapy, PC (collectively, "Kaleida") are related organizations through, for example, common membership, governing bodies, trustees and officers..

15. Kaleida is an enterprise engaged in the operation of a hospital and/or the care of the sick and is a healthcare consortium.

16. Defendants operate over 100 health care facilities and centers and employ approximately 9,500 individuals.

17. Defendants constitute an integrated, comprehensive, consolidated health care delivery system, offering a full continuum of care. Defendants are one of the most integrated health care systems in the northeast United States.

18. For example, defendants collectively allocate funds for capital investments throughout the system and maintain a common financial platform.

19. Further, upon information and belief, defendants' labor relations and human resources are centrally organized and controlled, including defendants' employment of a senior vice president for human resources as part of the senior executive team as well as the maintenance of certain employee benefit plans and online training and continuing education instruction.

20. Upon information and belief, defendants share common management, including oversight and management by a senior executive team and board of directors.

21. Upon information and belief, defendants have common ownership.

22. As such, defendants are the employer (single, joint or otherwise) of the plaintiffs and/or alter egos of each other.

23. James R. Kaskie is the President and Chief Executive Officer of Kaleida.

24. Upon information and belief, including defendants' admissions, Mr. Kaskie's responsibilities include actively managing Kaleida.

25. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern the policies defendants adopt and the implementation of those policies.

26. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern defendants' operations, including functions related to employment, human resources, training, payroll, and benefits.

27. Upon information and belief, due in part to his role as President and Chief Executive Officer, Mr. Kaskie is actively involved in the creation of the illegal policy complained of in this case.

28. Upon information and belief, due in part to his role as President and Chief Executive Officer, Mr. Kaskie actively advises defendants' agents on the enforcement of the illegal policies complained of in this case.

29. Upon information and belief, due in part to his role as President and Chief Executive Officer, Mr. Kaskie actively ensures defendants' compliance or non-compliance with federal law, including the requirements of the FLSA, ERISA and RICO.

30. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern the reviewing and counseling of defendants regarding employment decisions, including hiring and firing of Plaintiffs.

31. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern employees' schedules, hours and standard benefit levels.

32. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern standard pay scales.

33. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern defendants' human resources policies, the resolution issues and disputes regarding policies and their applications, the counsel locations receive regarding human resources issues, and communications with employees about human resources issues and policies.

34. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern defendants' employment and

human resources records, including the systems for keeping and maintaining those records.

35. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern training and education functions across Kaleida.

36. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern the type and scope of training employees must attend as well as any compensation they receive for attending training.

37. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern payroll functions across Kaleida.

38. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern the system for keeping and maintaining employees' payroll records, the timing and method with which payment is conveyed to employees, and the manner and method in which employees receive payroll information including their payroll checks.

39. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern benefit plans across Kaleida.

40. Upon information and belief, in concert with others, Mr. Kaskie has the authority to, and does, make decisions that concern the type and scope of benefits available to employees, the method and manner in which information regarding those plans is conveyed to employees, and the system for keeping and maintaining records related to employees' benefits.

41. Because Mr. Kaskie has authority to hire or fire employees, provide and direct support regarding human resources issues, including the hiring and firing of

Plaintiffs, and control the drafting and enforcement of the policies which govern the hiring and firing of employees, Mr. Kaskie has the power to hire and fire employees.

42. Because Mr. Kaskie has authority to establish work schedules and/or conditions of employment, provide and direct support regarding human resources issues, including work schedules and/or conditions of employment, control the drafting and enforcement of the policies which govern employees' schedules and/or conditions of employment, establish the type and scope of training employees receive, and administer employees' benefit programs, including standard benefit levels and the type and scope of benefits available to employees, Mr. Kaskie supervises and controls employees' work schedules and/or conditions of employment.

43. Because Mr. Kaskie has authority to establish employees' rate and method of payment and centrally control payroll functions, including standard pay scales, the provision of payroll information, and the timing of payment, Mr. Kaskie determines the rate and method of employees' payment.

44. Because Mr. Kaskie has authority with respect to defendants' centralized records, including a database regarding employees' employment records, and systems for keeping and maintaining payroll, benefits, and other employment-related records, Mr. Kaskie maintains employees' employment records.

45. Because Mr. Kaskie provides day-to-day support regarding human resources issues, including employees' work schedules and/or conditions of employment, controls the drafting and enforcement of the policies which govern employees' schedules and/or conditions of employment, and administers employees' benefit programs, he is affirmatively, directly, and actively involved in operations of the defendants' business functions, particularly in regards to the employment of Plaintiffs.

46. Because Mr. Kaskie is actively involved in the creation of the illegal policies complained of in this case, actively advises defendants' agents on the enforcement of the illegal policies complained of in this case and actively ensures defendants' compliance or non-compliance with federal law, including the requirements of the FLSA, ERISA and RICO, he actively participates in the violations complained of in this action.

47. Based upon the foregoing, Mr. Kaskie is liable to Plaintiffs because of his active role in operating the business, his status as an employer, or according to federal and state common law.

48. David R. Whipple has been the Senior Vice President of Human Resources of Kaleida.

49. Upon information and belief, Mr. Whipple has been responsible for, provides direction and control over, and has been authorized to direct all aspects of human resources functions across Kaleida.

50. Upon information and belief, due in part to his role of overseeing human resources, training and education, and payroll and commission services, in concert with others, Mr. Whipple has been actively involved in the creation of the illegal policy complained of in this case.

51. Upon information and belief, due in part to his role of overseeing human resources, training and education, and payroll and commission services, in concert with others, Mr. Whipple actively advised defendants' agents on the enforcement of the illegal policy complained of in this case.

52. Upon information and belief, due in part to his role of overseeing human resources, training and education, and payroll and commission services, in concert with others, Mr. Whipple actively ensured defendants' compliance or non-compliance

with federal law, including the requirements of the FLSA, ERISA and RICO.

53. Upon information and belief, Mr. Whipple, in concert with others, has been actively involved in reviewing and counseling defendants regarding employment decisions, including hiring and firing of Plaintiffs.

54. Upon information and belief, Mr. Whipple, in concert with others, has been actively involved in decisions that set employees' schedules, hours and standard benefit levels.

55. Upon information and belief, Mr. Whipple, in concert with others, has been actively involved in decisions that set standard pay scales.

56. Upon information and belief, Mr. Whipple, in concert with others, has been actively involved in the determination and drafting of human resources policies, the resolution of issues and disputes regarding policies and their application, the counseling locations receive regarding human resources issues, and communications with employees about human resources issues and policies.

57. Upon information and belief, Mr. Whipple, in concert with others, has been actively involved in defendants' employment and human resources records, including the systems for keeping and maintaining those records.

58. Upon information and belief, Mr. Whipple, in concert with others, has been actively involved in training and education functions across Kaleida.

59. Upon information and belief, Mr. Whipple, in concert with others, has been actively involved in determining the type and scope of training employees must attend as well as any compensation they receive for attending training.

60. Upon information and belief, Mr. Whipple, in concert with others, has been actively involved in payroll functions across Kaleida.

61. Upon information and belief, Mr. Whipple, in concert with others, has

been actively involved in the system for keeping and maintaining employees' payroll records, the timing and method with which payment is conveyed to employees, and the manner and method in which employees receive payroll information including their payroll checks.

62. Upon information and belief, Mr. Whipple, in concert with others, has been actively involved in benefit plans across Kaleida.

63. Upon information and belief, Mr. Whipple, in concert with others, has been actively involved in determining the type and scope of benefits available to employees, the method and manner in which information regarding those plans is conveyed to employees, and the system for keeping and maintaining records related to employees' benefits.

64. Because Mr. Whipple had authority to hire or fire employees, provided and directed support regarding human resources issues, including the hiring and firing of employees, and controlled the drafting and enforcement of the policies which govern the hiring and firing of employees, Mr. Whipple had the power to hire and fire employees.

65. Because Mr. Whipple had authority to establish work schedules and/or conditions of employment, provided and directed support regarding human resources issues, including work schedules and/or conditions of employment, controlled the drafting and enforcement of the policies which govern employees' schedules and/or conditions of employment, established the type and scope of training employees receive, and administered employees' benefit programs, including standard benefit levels and the type and scope of benefits available to employees, Mr. Whipple supervised and controlled employees' work schedules and/or conditions of employment.

66. Because Mr. Whipple had authority to establish employees' rate and method of payment and centrally control payroll functions, including standard pay scales, the provision of payroll information, and the timing of payment, Mr. Whipple determined the rate and method of employees' payment.

67. Because Mr. Whipple had authority with respect to defendants' centralized records, including a database regarding employees' employment records, and systems for keeping and maintaining payroll, benefits, and other employment-related records, Mr. Whipple maintained employees' employment records.

68. Because Mr. Whipple provided day-to-day support regarding human resources issues, including employees' work schedules and/or conditions of employment, controlled the drafting and enforcement of the policies which govern employees' schedules and/or conditions of employment, and administered employees' benefit programs, he has been affirmatively, directly, and actively involved in operations of defendants' business functions, particularly in regards to the employment of Plaintiffs.

69. Because Mr. Whipple has been actively involved in the creation of the illegal policies complained of in this case, actively advised defendants' agents on the enforcement of the illegal policies complained of in this case and actively ensured defendants' compliance or non-compliance with federal law, including the requirements of the FLSA, ERISA and RICO, Mr. Whipple actively participated in the violations complained of in this action.

70. Based upon the foregoing, Mr. Whipple is liable to Plaintiffs because of his active role in operating the business, his role in the violations complained of in this action, his status as an employer, or otherwise according to federal and state common law.

B. Plaintiffs

Named Plaintiffs

71. At all relevant times, Catherine Gordon, James Schaffer, Teresa Thompson, Pamela Mika, Jennifer Pfentner and Diana Galdon were employees under the FLSA and the New York Labor Law, employed within this District and reside within this District.

Class Members

72. The Class Members are those employees of defendants who were suffered or permitted to work by defendants and not paid their regular or statutorily required rate of pay for all hours worked.

73. Specifically, the Class Members are those individuals who:

- a. were suffered or permitted to work by Kaleida; were subject to Kaleida's Break Deduction Policy that, by default, deducted non-compensable "break" time from the compensable time used to calculate the individuals' pay; performed work and were entitled to compensation during the unpaid "break period;" and not receive their full compensation because of the Break Deduction Policy; and/or
- b. Kaleida suffered or permitted to perform work before and/or after the end of their scheduled shift but were not paid for performing such work as a result of defendants' policies, practices and/or time recording system (the "Unpaid Preliminary and Postliminary Work Policy"); and/or
- c. Kaleida suffered or permitted to attend compensable training but who did not receive compensation for such training (the "Unpaid Training Policy").

FACTUAL BACKGROUND

74. Kaleida is the largest health care provider in Western New York.

75. Throughout its facilities and centers, Kaleida maintains the Break Deduction Policy.

76. In particular, the Break Deduction Policy is an automatic payroll policy,

practice and/or system which automatically makes deductions from Class Members pay.

77. Hourly employees working at Kaleida's facilities and centers, including its nurses, licensed practical nurses, aides and other health care workers, perform compensable work for the time that is taken from the employees' pay under the Break Deduction Policy.

78. Kaleida understands and requires that its employees do not sacrifice patient care in order to take their meal breaks and that they therefore perform work during their meal breaks. In fact, Kaleida's expectations of its employees in that regard would be consistent with its employees' dedication to providing health care service, even if that means performing work during their meal breaks.

79. Further, Kaleida suffers or permits employees to perform work before their shifts begin or after their shifts end without compensation.

80. In addition, employees attend compensable training sessions but Kaleida fails to pay employees for their attendance at such training.

81. Even though Kaleida knows its employees are performing such work, Kaleida fails to compensate its employees for such work.

82. Defendants' practice is to be deliberately indifferent to these violations of the statutory wage and overtime requirements.

83. Through the paystubs and payroll information it provided to employees, Kaleida deliberately concealed from its employees that they did not receive compensation for all the work they performed and mislead them into believing they were being paid properly.

84. Further, by maintaining and propagating the illegal policies, defendants deliberately misrepresented to plaintiffs that they were being properly paid for time

worked, even though plaintiffs were not receiving pay for all time worked.

85. When questioned by employees about the Break Deduction Policy, the defendants affirmatively stated that the employees could not be paid for such time, even though defendants knew such time was compensable.

86. The defendants engaged in such conduct and made such statements to conceal from the plaintiffs their rights and to frustrate the vindication of the employees' state and federal rights.

87. As a result, employees were unaware of their claims.

88. All class members are subject to the Break Deduction Policy and are not fully compensated for work they perform during breaks.

89. Class members are also subject to the Unpaid Preliminary and Postliminary Work Policy and Unpaid Training Policy and are not fully compensated for all work performed pursuant to such policies.

90. In addition, if plaintiffs' hours had been properly calculated, the time spent working through the breaks, performing work before and/or after their shifts and/or training often included work that should have been calculated at premium overtime rates.

91. This failure to pay overtime as required by the FLSA and the New York Labor Law is willful.

92. Among the relief sought, plaintiffs seek injunctive relief to prevent Kaleida from continuing the illegal policy and practice perpetuated pursuant to the Break Deduction Policy, the Work Beyond Schedule Policy and the Training Policy.

93. By entering into an employment relationship, defendants and each Class Member entered into a contract for employment, including implied contracts and/or express contracts such as collective bargaining agreements.

94. Each such contract included an implied or express term that defendants agreed to fulfill all of their obligations pursuant to applicable state and federal law, including payment for all time worked and overtime at time and one-half for time worked over 40 hours in a week.

95. Defendants willfully breached the express and/or implied contract terms by failing to pay Class Members for all of the time Class Members worked and by failing to pay Class Members their regular or statutorily required rate of pay for all hours worked.

96. Both unwritten contracts for at-will employment and written contracts between Class Members (or their agents) and defendants contained an implied covenant of good faith and fair dealing, which obligated defendants to perform the terms and conditions of the employment contract fairly and in good faith and to refrain from doing any act that would violate any state or federal law governing the employment relationship or any act that would deprive Class Members of the benefits of the contract.

97. Defendants breached the implied covenant of good faith and fair dealing by failing to pay Class Members the wages and overtime that was due to Class Members.

98. At all relevant times, defendants had and continued to have a legal obligation to pay Class Members all earnings and overtime due. The wages belong to Class Members as of the time the labor and services were provided to defendants and, accordingly, the wages for services performed are the property of the Class Members.

99. In refusing to pay wages and overtime to Class Members, defendants knowingly, unlawfully and intentionally took, appropriated and converted the wages and overtime earned by Class Members for defendants' own use, purpose and benefit.

At the time the conversion took place, Class Members were entitled to immediate possession of the amount of wages and overtime earned. As a result, Class Members have been denied the use and enjoyment of their property and have been otherwise damaged in an amount to be proven at trial. This conversion was willful, oppressive, malicious, and fraudulent and/or done with conscious disregard of the rights of the Class Members. This conversion was concealed from Class Members.

100. Defendants have received financial gain at the expense of Class Members.

101. Defendants have received that financial gain under such circumstances that, in equity and good conscience, defendants ought not to be allowed to profit at the expense of Class Members.

102. Defendants' willful failure to pay overtime wages for work performed for defendants has unjustly enriched defendants to the detriment of Class Members.

103. Defendants willfully violated their obligations by failing to pay Class Members for the reasonable value of the services performed by Class Members for defendants.

104. Defendants, through their corporate publications and through statements of their agents, represented that wages would be paid legally and in accordance with defendants' obligations pursuant to applicable federal and state laws.

105. Defendants, however, at all times intended to violate applicable federal and state laws by failing to pay Class Members their regular or statutorily required rate of pay for all hours worked.

106. These misrepresentations were material to the terms of Class Members' employment contracts, and Class Members relied on the misrepresentations in agreeing to accept and continue employment with defendants. This reliance was reasonable, as Class Members had every right to believe that defendants would abide

by their obligations pursuant to applicable federal and state law.

107. When defendants hired Class Members, they represented to Class Members that they would be fully compensated for all services performed, as more fully set forth above.

108. There was no reasonable basis for defendants to believe these representations because defendants had a continuing practice and policy of failing to pay their employees their regular or statutorily required rate of pay for all hours worked.

109. Class Members relied upon defendants' representations by performing work and services for defendants. This reliance was reasonable, as Class Members had every right to believe that defendants would abide by their obligations pursuant to applicable federal and state law.

110. Defendants also failed to make, keep and preserve adequate and accurate records of the employment of Class Members concerning their wages, hours and other conditions of employment.

111. More specifically, the records kept by defendants failed to adequately and accurately disclose, among other things, hours worked each work day, the total hours worked each work week and/or the total overtime compensation for each work week.

112. Defendants sponsor pension plans (the "Plans") for its employees.

113. Defendants failed to keep accurate records of all time worked by Class Members. By failing to keep such records, defendants' records are legally insufficient to determine benefits.

114. Defendants failed to credit or even investigate crediting overtime pay as compensation used to determine benefits to the extent overtime may be included as compensation under the Plans. Defendants, while acting as fiduciaries exercising

discretion over the administration of the Plans, breached their duties to act prudently and solely in the interests of Plans' participants by failing to credit them with all of the hours of service for which they were entitled to be paid, including overtime to the extent overtime may be included as compensation under the Plans, or to investigate whether such hours should be credited. Under ERISA, crediting hours is a fiduciary function, independent of the payment of wages, necessary to determine participants' participation vesting and accrual of rights.

115. As used in this Complaint, "mailed" means: (1) placing in any post office or authorized depository for mailed matter, any matter or thing to be delivered by the United States Postal Service; (2) causing to be deposited any matter or thing to be delivered by any private or commercial interstate carrier; (3) taking or receiving therefrom any such matter or thing; and/or (4) knowingly causing to be delivered by any such means any such matter.

116. Plaintiffs allege that Defendants devised, intended to devise, and carried out a scheme to cheat Plaintiffs out of their property and to convert Plaintiffs' property, including their wages and/or overtime pay (the "Scheme"). Defendants' Scheme consisted of illegally, willfully and systematically withholding or refusing to pay Plaintiffs their regular or statutorily required rate of pay for all hours worked in violation of federal law, as described previously in this Complaint.

117. Defendants' Scheme involved the employment of material misrepresentations and/or omissions and other deceptive practices reasonably calculated to deceive Plaintiffs. The Scheme involved depriving Plaintiffs of their lawful entitlement to wages and overtime.

118. In executing or attempting to execute the Scheme and to receive the financial benefits of the Scheme, defendants repeatedly mailed payroll checks, either

directly to Plaintiffs or between defendants' business locations. These mailings occurred on a regular basis and more than 100 such mailings occurred in the last 10 years.

119. The payroll checks were false and deceptive because they misled Plaintiffs about the amount of wages to which they were entitled, as well as their status and rights under the FLSA. Plaintiffs relied to their detriment on the misleading payroll checks that defendants mailed and those misleading documents were a proximate cause of Plaintiffs' injuries.

120. Defendants' predicate acts of mailing the misleading payroll checks in furtherance of their Scheme constitute a pattern of conduct unlawful pursuant to 18 U.S.C. § 1961(5) based upon both the relationship between the acts and continuity over the period of time of the acts. The relationship was reflected because the acts were connected to each other in furtherance of the Scheme. Continuity was reflected by both the repeated nature of the mailings during and in furtherance of the Scheme and the threat of similar acts occurring in the future. The threat was reflected by the continuing and ongoing nature of the acts.

121. Defendants' predicate acts were related, because they reflected the same purpose or goal (to retain wages and overtime pay due to Plaintiffs for the economic benefit of defendants and members of the enterprise); results (retention of wages and overtime pay); participants (defendants and other members of the enterprise); victims (Plaintiffs); and methods of commission (the Scheme and other acts described in the Complaint). The acts were interrelated and not isolated events, since they were carried out for the same purposes in a continuous manner over a substantial period of time.

122. At all relevant times, in connection with the Scheme, defendants acted

with malice, intent, knowledge, and in reckless disregard of Plaintiffs' rights.

123. Each of the Plaintiffs is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964.

124. Each defendant is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1962(c).

125. Defendants were members of an "enterprise" under 18 U.S.C. §§ 1961(4) and 1962(a), which was engaged in or the activities of which affected interstate and foreign commerce.

126. Each defendant received income from a pattern of conduct unlawful under RICO, in which defendants participated through continuous instances of providing Plaintiffs with misleading documents which defendants mailed and upon which Plaintiffs relied to their detriment.

127. Plaintiffs were injured in their business and property under 18 U.S.C. § 1964(c) by reason of defendants' commission of conduct which was unlawful under RICO.

FIRST CAUSE OF ACTION
FLSA

128. Plaintiffs reallege the above paragraphs as if fully restated herein.

129. Defendant willfully violated their obligations under the FLSA and are liable to plaintiffs.

SECOND CAUSE OF ACTION
New York Labor Law

130. Plaintiffs reallege the above paragraphs as if fully restated herein.

131. Defendant willfully violated their obligations under the New York Labor Law and are liable to plaintiffs.

THIRD CAUSE OF ACTION
Breach of Contract

132. Plaintiffs reallege the above paragraphs as if fully restated herein.

133. Defendants willfully violated their obligations under the common laws and states laws of New York.

134. As a direct and proximate cause of defendants' breach of their contracts with Class Members, Class Members have suffered damages.

FOURTH CAUSE OF ACTION
Breach of Implied Covenant of Good Faith and Fair Dealing

135. Plaintiffs reallege the above paragraphs as if fully restated herein.

136. Defendants willfully violated their obligations under the common laws and states laws of New York.

137. As a direct and proximate cause of defendants' breach of the implied covenant of good faith and fair dealing, Class Members have suffered damages.

FIFTH CAUSE OF ACTION
Conversion

138. Plaintiffs reallege the above paragraphs as if fully restated herein.

139. Defendants willfully violated their obligations under the common laws and states laws of New York.

140. As a result of defendants' actions, Class Members were damaged and are entitled to all funds converted by defendants with interest thereon, all profits resulting from such conversion, and punitive or exemplary damages.

SIXTH CAUSE OF ACTION
Unjust Enrichment/Restitution

141. Plaintiffs reallege the above paragraphs as if fully restated herein.

142. As a result of defendants' conduct, the common laws and state laws of New York imply a contract obligating defendants to make restitution to Class Members, in the amount by which, in equity and good conscience, defendants have been unjustly enriched.

143. As a direct and proximate cause of defendants' actions, Class Members have suffered damages.

SEVENTH CAUSE OF ACTION

Quantum Meruit

144. Plaintiffs reallege the above paragraphs as if fully restated herein.

145. Defendants willfully violated their obligations by failing to pay Class Members for the reasonable value of the services performed by Class Members for defendants under the common laws and the state laws of New York and are liable to Class Members under quantum meruit.

146. As a direct and proximate cause of defendants' failure to pay Class Members for the reasonable value of services performed by Class Members for defendants, Class Members suffered damages.

EIGHTH CAUSE OF ACTION

Fraud and Deceit

147. Plaintiffs reallege the above paragraphs as if fully restated herein.

148. Defendants willfully violated their obligations by committing fraud against Class Members under the common laws and the state laws of New York and are liable to Class Members.

149. As a direct and proximate cause of the fraud committed by defendants, Class Members did not receive the statutorily mandated wages for overtime and suffered damages.

NINTH CAUSE OF ACTION

Misrepresentation

150. Plaintiffs reallege the above paragraphs as if fully restated herein.

151. Defendants willfully violated their obligations under the common laws and the state laws of New York by misrepresenting to Class Members that they would be fully compensated for all services performed and are liable to Class Members.

152. As a direct and proximate result of defendants' negligent misrepresentation, Class Members suffered damages.

TENTH CAUSE OF ACTION

ERISA—Failure to Keep Accurate Records

153. Plaintiffs reallege the above paragraphs as if fully restated herein.

154. Class Members bring these claims under 29 U.S.C. § 1132(a)(3), which confers on plan participants the right to bring suit to enjoin any violation of ERISA § 1059(a)(1).

155. Defendants failed to keep accurate records of all time worked by Class Members. By failing to keep such records, defendants' records are legally insufficient to determine benefits. Defendants failed to keep records "sufficient to determine the benefits due or which may become due" under the terms of the Plan as required by ERISA § 209(a)(1), 29 U.S.C. § 1059(a)(1).

ELEVENTH CAUSE OF ACTION

ERISA—Breach of Fiduciary Duty

156. Plaintiffs reallege the above paragraphs as if fully restated herein.

157. Defendants breached their fiduciary duties under 29 U.S.C. § 1104(a)(1).

TWELFTH CAUSE OF ACTION

RICO

158. Plaintiffs reallege the above paragraphs as if fully restated herein.

159. Plaintiffs bring these claims under 18 U.S.C. § 1964(c), which confers on private individuals the right to bring suit for any injury caused by a violation of 18 U.S.C. § 1962.

160. Defendants' conduct, and the conduct of other members of the enterprise, injured Plaintiffs by refusing to pay their regular or statutorily required rate of pay for all hours worked. Defendants conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity, by devising a Scheme to obtain Plaintiffs' property by means of false or fraudulent representations, at least some of which were made in the misleading payroll checks which defendants mailed.

THIRTEENTH CAUSE OF ACTION
Estoppel

161. Plaintiffs reallege the above paragraphs as if fully restated herein.

162. Defendants are estopped from asserting statute of limitations defenses against plaintiffs.

WHEREFORE, plaintiffs demand judgment against defendants in their favor and that they be given the following relief:

- (a) an order preliminarily and permanently restraining defendants from engaging in the aforementioned pay violations;
- (b) an award of the value of plaintiffs' unpaid wages, including fringe benefits;
- (c) liquidated damages under the FLSA equal to the sum of the amount of wages and overtime which were not properly paid to plaintiffs;
- (d) an award of reasonable attorneys' fees, expenses, expert fees and costs incurred in vindicating plaintiffs' rights;
- (e) an award of pre- and post-judgment interest; and
- (f) such other and further legal or equitable relief as this Court deems to be just and appropriate.

JURY DEMAND

Plaintiff demands a jury to hear and decide all issues of fact.

Dated: May 22, 2008

DOLIN, THOMAS & SOLOMON LLP

By:



J. Nelson Thomas, Esq.

Attorney for Plaintiffs

693 East Avenue

Rochester, New York 14607

Telephone: (585) 272-0540

nthomas@theemploymentattorneys.co

m