

Plaintiffs respectfully submit this memorandum of law in support of their motion for a corrective notice and a temporary restraining order. Without the relief Plaintiffs request, retaliation and intimidation by Defendants will cause Plaintiffs and their co-workers irreparable harm.

### **PRELIMINARY STATEMENT**

Defendants' have responded aggressively to complaints about labor law violations by punishing workers who requested they be paid overtime in compliance with the law. These tactics serve a single aim: dissuade workers from asserting their rights.

There is nothing subtle about the Defendants' tactics. The Defendants have fired at least three workers who complained about labor law violations and subjected others to punitive treatment on the job. Without prompt Court intervention, this policy of retaliation will continue to the degradation of plaintiffs protected right to work a forty hour work week and be justly compensated for hours worked in excess.

### **STATEMENT OF FACTS**

#### **I. Plaintiffs' Protected Activities**

On the morning of August 20, 2007 there was a labor action outside of the warehouse where many of the Plaintiffs work.<sup>1</sup> This action informed the Defendants that Plaintiffs demanded to be paid overtime, a fired worker, plaintiff Raymundo Lara Molina, must be reinstated, and that no retaliation be visited upon the participants in the action.<sup>2</sup> On August 27, 2007, this office mailed a certified letter to Mr. Martin, the Chief Executive Officer of Wild Edibles, complaining about violations of the Fair Labor

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<sup>1</sup> Rankin Declaration, Exhibit 3 Randel ¶ 5

<sup>2</sup> Rankin Declaration, Exhibit 3 Randel ¶ 6

Standards Act (“FLSA”) and the New York State labor law (“NYLL”).<sup>3</sup> On September 17, 2007 we anticipate filing this lawsuit.

## II. Retaliation

Immediately after the workers demanded their rights be respected, Jason Borges was asked into the office to meet with Mr. Martin.<sup>4</sup> At that meeting Mr. Borges was asked what he wanted.<sup>5</sup> He replied he wanted to be paid overtime and receive benefits. Mr. Martin refused to agree to pay overtime or provide benefits and promptly fired Mr. Borges.<sup>6</sup> Upon Mr. Borges’ leaving the premises, Mr. Martin yelled at Mr. Borges, “quit or fired, it doesn’t f\_g matter, you’re not going to get anything but unemployment, so get the f\_out.”<sup>7</sup> Two days later on August 22, 2007 Raul Molina, an employee who joined in demanding overtime pay, was fired in retaliation for asserting his rights.<sup>8</sup> Sometime either in the first week of September or the last week of August, plaintiff Julio Cesar Moreno Gonzalez, an employee who joined in demanding overtime pay, was also fired in retaliation for asserting his rights.<sup>9</sup>

While terminating someone’s employment is one of the most egregious ways an employer can retaliate, Wild Edibles is also retaliating in more subtle ways. All of the workers who are still employed state they are being treated differently than the other employees.<sup>10</sup> They are suffering from abuse and pressure to perform at a level never before expected of them nor reasonably obtainable. Mr. Martin is trying to work these Plaintiffs to the point they quit. One employee, Marco Antonio Corona, has already left

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<sup>3</sup> Rankin Declaration, Exhibit 1

<sup>4</sup> Rankin Declaration, Exhibit 3 Randel ¶ 6 - 7

<sup>5</sup> Rankin Declaration, Exhibit 2 Borges ¶ 8

<sup>6</sup> Rankin Declaration, Exhibit 2 Borges ¶ 8

<sup>7</sup> Rankin Declaration, Exhibit 2 Borges ¶ 9

<sup>8</sup> Rankin Declaration, Exhibit 3 Randel ¶ 12; Exhibit 4 Barturen ¶ 16; Exhibit 5 Tabara ¶ 7

<sup>9</sup> Rankin Declaration, Exhibit 4 Barturen ¶ 17; Exhibit 5 Tabara ¶ 7

<sup>10</sup> Rankin Declaration, Exhibit 3 Randel ¶ 14; Exhibit 4 Barturen ¶ 19 - 23; Exhibit 5 Tabara ¶ 8

due to the working conditions being so hostile and abusive.<sup>11</sup> The workers are justifiably incredibly fearful that joining this lawsuit or standing up for their rights will result in their being fired or worked into the ground.<sup>12</sup> This request injunctive relief is the only way these workers will be able to continue their employment and simultaneously assert their legally protected rights.

### **ARGUMENT**

A preliminary injunction “serves as an equitable policing measure to prevent the parties from harming one another during the litigation; to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began.” *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953). Where, as here, a plaintiff seeks a preliminary injunction to maintain the status quo, the plaintiff must show (1) irreparable harm in the absence of injunctive relief, and (2) *either* (a) a likelihood of success on the merits or (b) sufficiently serious question going to the merits and a balance of hardships tipping decidedly in its favor. *M’Baye v. World Boxing Ass’n*, 429 F.Supp. 2d 660, 667 (S.D.N.Y. 2006) (citing *Time Warner Cabel v Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997)).<sup>13</sup> Plaintiffs easily satisfy this test.

### **I. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT IMMEDIATE INJUNCTIVE RELIEF**

Plaintiffs will suffer irreparable harm unless this Court grants immediate injunctive relief. Each and every day, Defendants take additional steps to try to harass and intimidate Plaintiffs and deter them from continuing with this lawsuit. This last week

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<sup>11</sup> Rankin Declaration ¶ 8

<sup>12</sup> Rankin Declaration, Exhibit 3 Randel ¶ 14; Exhibit 4 Barturen ¶ 25; Exhibit 5 Tabara ¶ 9

<sup>13</sup> “The standard for granting a temporary restraining order and a preliminary injunction...are identical” *Spencer Trask Software & Info. Servs., LLC v. Prost Int’l Ltd.*, 190 F. Supp 2d 577, 580 (S.D.N.Y. 2002).

alone Plaintiff Marco Antonio Corona was forced to quit his job with the Defendants as a result of the continual retaliatory conduct which has occurred since Defendants first demanded that they be paid for their overtime work. Mr. Barturen is forced to load and unload his truck without the assistance previously given to him, and afforded to the other drivers.<sup>14</sup> Unless Defendants are enjoined from continuing to retaliate against Plaintiffs, they will soon have terminated or forced out all the Plaintiffs who still work for the Defendants and will have created the type of atmosphere that dissuades anyone else from coming forward. In this situation, Plaintiffs will not be able to find witnesses to testify in their favor, and they may decide to give up prosecuting their claims. This is irreparable harm, and it warrants immediate injunctive relief.

Section 15(a)(3) of the Fair Labor Standards Act (“FLSA”) makes it unlawful for any person “to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding.” 29 U.S.C §215(a)(3).<sup>15</sup> Indeed, the protections afforded by the FLSA, including its overtime compensation guarantees, can only be effective if the anti-retaliation provision is strongly enforced. As the Supreme Court has explained, “effective enforcement [of the FLSA]... could only be expected if employees felt free to approach officials with their grievances...[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.” *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 335 (1960); *see also Centeno-Bernuy v. Perry*, 302 F.Supp. 2d 128, 135

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<sup>14</sup> Rankin Declaration, Exhibit 4 Barturen ¶ 20 - 21

(W.D.N.Y.2003)(“Unchecked retaliation, no matter its form, subverts the purpose of the FLSA...and other federal employment laws.”). New York labor law includes similar provisions. *See* N.Y.Lab.Law § 215(1)(“No employer or his agent, or the officer or agent of any corporation, shall discharge, penalize, or in any other manner discriminate against any employee because such employee has made a complaint to his employer, or . . . has caused to be instituted a proceeding under or related to this chapter....”).

It is well established that an employer’s retaliatory acts can irreparably harm employees, particularly where these acts deter potential plaintiffs or potential witnesses from coming forward to challenge the employer’s illegal conduct. *See, Holt v. The Cont’l Group, Inc.*, 708 F.2d 87, 91 (2d Cir. 1983)(“A retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights ...or from providing testimony for the plaintiff in her effort to protect her own rights. These risks may be found to constitute irreparable injury.”); *see also, Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986)(“The claimed violation of the law in this case is retaliatory action for the exercise of Title VII rights, action which, if plaintiff is correct, will have a deleterious effect on the exercise of these rights by others.”); *Bonds v. Heyman*, 950 F.Supp. 1202, 1214-15 (D.D.C. 1997), *abrogated on other grounds by Nat’l R.R. Passenger Corp. V. Morgan*, 536 U.S. 101, 105 (2002)(“[A] plaintiff who demonstrates that an adverse personnel action is likely to have a chilling effect on other employees who, after witnessing their fellow co-worker’s discharge or dismissal, would now refuse to file claims in fear of reprisal, would also meet [the preliminary injunction standard].”).

Courts have been particularly willing to find irreparable harm where victims of retaliation are highly visible, such that other plaintiffs or potential witnesses are

presumptively aware of the alleged retaliatory acts. *See, e.g., Segar v. Civiletti*, 516 F.Supp. 314, 320 (D.D.C. 1981)(holding that retaliatory demotion and transfer of “highly visible” plaintiff sends message to others to “know your place, don’t challenge management, don’t assert your right[s]”). Wild Edibles has a number of closely connected locations. Mr. Barturen faces retaliatory conduct not just in the warehouse where the majority of Plaintiffs work but also at each of Wild Edibles retail locations where fellow workers are no longer assigned to help him unload the heavy deliveries of fish. This conduct is visible to all of Wild Edibles’ workers, and makes clear the consequences of demanding overtime pay.

In sum, Plaintiffs will be irreparably harmed in their ability to vindicate their rights absent preliminary injunctive relief. For this reason, the Court should require the Defendants to maintain the status quo until this litigation is completed.

## **II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR RETALIATION CLAIMS**

Claims under FLSA anti-retaliation provision are analyzed under the familiar *McDonnell Douglas* framework. *See, Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 876 (2d Cir. 1988). A plaintiff must first establish a *prima facie* indication of retaliation, by showing “(1) participation in protected activity know to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action.” *Lai v. Eastpoint Int’l, Inc.*, No. 99 Civ.2095, 2000 WL 1234595, at \*3 (S.D.N.Y. Aug. 31, 2000). “The term ‘protected activity’ refers to action taken to protest or oppose statutorily prohibited discrimination.” *Id.* (quoting *Cruz v. Coach*, 202 F.3d 560, 566 (2d Cir.2000)). A plaintiff may establish a

causal connection “either indirectly by showing that the protected activity was closely followed in time by the adverse action, *Manoharan v. Columbia Univ. Coll. of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988), or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or directly through evidence of retaliatory animus directed against a plaintiff by the defendant.” *Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir. 1991) (internal quotations omitted)(emphasis removed).

Once a plaintiff satisfies his or her *prima facie* obligation, the defendant must articulate legitimate, non-discriminatory reason for the adverse employment actions. *Lai*, 2000 WL 1234595, at \*4. If the defendant does so, the plaintiff must produce evidence that the defendant’s explanation is false, and that retaliation was more likely than not the real reason for the employment action. *See id.*

Plaintiffs easily satisfy their *prima facie* burden of showing retaliation. First there can be no serious dispute that by demanding overtime pay Plaintiffs engaged in “protected activities” under the meaning of FLSA and New York State Labor Law. Defendants obviously cannot dispute they were aware of these activities and of the identity of the individual Plaintiffs taking part in them.

Second, it is equally clear the Plaintiffs alleging retaliation have suffered adverse employment actions. “Adverse employment actions include discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand.” *Phillips v. Bowen*, 278 F.3d 103, 109 (2d Cir. 2002)(internal quotation marks and citation omitted.)

In sum, Plaintiffs have offered sufficient evidence *both* that there is a causal connection between their participation in protected activities and Defendants' actions against them, *and* that Defendants' anticipated excuses for their actions are nothing more than pretextual excuses to punish Plaintiffs for asserting their rights.

### **III. THE BALANCE OF HARDSHIPS TIPS DECIDEDLY IN PLAINTIFFS' FAVOR**

Even if Plaintiffs could not show a likelihood of success on the merits (which here they have), Plaintiffs can at the very least show “sufficiently serious questions going to the merits to make them a fair ground for litigation,” plus “a balance of the hardships tipping decidedly toward the party requesting preliminary relief.” *Fed. Express Corp. v. Fed. Expresso, Inc.* 201 F.3d 168, 173 (2d Cir. 2000). As explained above, Plaintiffs have offered strong indications that, and thus “substantial questions” about whether, Defendants are engaged in an ongoing campaign of retaliation.

It is also clear the balance of hardships tips decidedly toward Plaintiffs in this lawsuit: Plaintiffs who remain employed with Wild Edibles are desperately in need of injunctive relief. They work with constant harassment and the threat of termination – and thus, of losing their livelihoods and means of support. On the other side of the equation, Defendants will suffer only minimal hardship in being forced to comply with the law. Should a situation arise where Defendants feel they must take action against one of the Plaintiffs, they can easily seek Court approval. Defendants should not be engaging in retaliatory conduct at all, and they should certainly not be firing their workers for requesting overtime pay. In this situation, Defendants cannot complain that an injunction would impose a substantial hardship; Defendants are simply being asked to comply with the law.

Plaintiffs in this lawsuit are in a vulnerable position. Many do not speak English, and all depend on their jobs to support themselves and their families. Their jobs are normally physically demanding and the Defendant's retaliatory conduct places very real additional physical burdens on the Plaintiffs, directly threatening their health. While Defendants conduct pushes many of the Plaintiffs towards quitting they are all in serious need of the income their jobs provide. Faced with similar facts, courts have decided that the balance of hardships tips in favor of awarding preliminary relief to employees. In *Aguilar v. Baine Service Systems, Inc.*, 538 F.Supp.581, 585 (S.D.N.Y. 1982), for example, the court ordered an employer to reinstate Hispanic employees claiming discharge in retaliation for complaints of discriminatory treatment, and noted that "[o]n the one hand, if an injunction is not forthcoming, plaintiffs lose their livelihood and sole financial means. On the other hand, if an injunction does issue, defendants will merely be required to retain the plaintiffs in their current employ." Similarly, in *Callicotte v. Carlucci*, 698 F.Supp. 944, 951 (D.D.C.1988), the court held that a worker alleging wrongful termination had demonstrated that she would face irreparable injury if her termination was upheld, while the employer had only demonstrated a "short-term" burden in keeping her off the payroll. So too here. The facts of this case warrant injunctive relief.

### **CONCLUSION**

For all of the above reasons, Plaintiffs respectfully submit they are entitled to emergency relief. Plaintiffs request that this Court issue a temporary restraining order and preliminary injunction prohibiting Defendants from taking any further adverse employment actions against the Plaintiffs without first

providing advance notice to Plaintiffs and the Court demonstrating that there is legitimate business reason for the adverse employment action.

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Respectfully Submitted

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