SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

KRISTIN NORIEGA and OLIVER GUMMERT, on behalf of themselves and all others similarly situated, Plaintiffs, - against - WOLFGANG PUCK CATERING AND EVENTS, LLC and COMPASS GROUP USA, INC., Defendants.	Index No. 650209/2013 **AMENDED CLASS ACTION COMPLAINT** Place of Trial: New York County The basis of venue is: Plaintiffs' Residence

Plaintiffs Kristin Noriega and Oliver Gummert ("Plaintiffs"), individually and on behalf of all others similarly situated, through their undersigned attorneys, for their Class Action Complaint against Defendants Wolfgang Puck Catering and Events, LLC ("Wolfgang Puck") and Compass Group USA, Inc. ("Compass," together, the "Defendants") allege, upon information and belief, except as to the allegations that pertain to Plaintiffs, which are based upon personal knowledge, as follows:

NATURE OF THE ACTION

1. This action arises out of Defendants' pervasive and repeated disregard of federal and New York State labor laws during the course of Plaintiffs' employment by Defendants as bar service employees at Irving Plaza and The Gramercy Theatre (the "Venues") located in New York City.

2. Defendants knowingly violated New York Labor Law Section 196-d ("Section 196-d"), which provides that no employer shall retain any charge that purports to be a gratuity. Despite receiving a written warning informing them that a charge titled

"service charge" on a banquet bill is *presumptively* a tip under the New York Labor Law ("NYLL") and the New York State Department of Labor's most recent Hospitality Wage Order, and despite their understanding, as shown by internal emails, that Restaurant Associates—Wolfgang Puck's sister company that is also owned by Compass—was "elbows deep" in a class action for applying a "service charge" to its bills, Defendants continued to add a "service charge" to the bills at their special events ("Special Events") at the Venues, and failed to pay that service charge to Plaintiffs and the Class. On information and belief, that practice continues to this day. Plaintiffs bring their Section 196-d claim on behalf of a class consisting of all bar service employees who worked for Defendants at the Venues from June 1, 2008 through the date of a judgment in this action.

3. Plaintiffs also bring several related individual claims for failure to pay overtime in violation of the federal Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"); violation of the NYLL's "spread of hours" law, which requires employers to pay employees an extra hour of pay, at the minimum wage, if the employee works over ten hours in a day; and breach of contract with respect to Plaintiff Oliver Gummert.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to CPLR §§301 and/or 302. Venue is proper in this county because Plaintiffs reside herein.

THE PARTIES

The Plaintiffs

5. Plaintiff Kristin Noriega resides in New York, New York. Plaintiff Noriega was hired by Defendants as a server for Wolfgang Puck in October 2010, was given managerial responsibilities in or about April, 2011, and was officially given the title of Administrative Manager in September, 2011. Plaintiff Noriega left her employment with Defendants in early January, 2012. At all times relevant to this action, Plaintiff Noriega continued her duties as a server and/or bartender.

6. Plaintiff Oliver Gummert resides in New York, New York. Plaintiff Gummert was hired by Defendants to work at Wolfgang Puck in or about 2008. Plaintiff Gummert was promoted to Operations Manager in July, 2012; he resigned from Defendants' employ on December 31, 2012. Although Plaintiff Gummert was called a manager, he was paid hourly rates at all times and was never claimed by Defendants to be exempt from the overtime requirements of the FLSA or the NYLL. In addition to his other responsibilities, Plaintiff Gummert worked as a bartender at all times relevant to this action.

The Defendants

Wolfgang Puck

7. Defendant Wolfgang Puck is a Delaware limited liability company with headquarters in Los Angeles, California. Wolfgang Puck caters the academy awards, as well as events at hundreds or thousands of locations throughout the United States. In 2004, Wolfgang Puck was acquired by Defendant Compass. In 2008, Wolfgang Puck entered into a partnership with Live Nation Worldwide, Inc. ("Live Nation"), a concert promotion company, to provide nationwide club concession services at Live Nation's events. At the Venues, Wolfgang Puck provides only bar and drink service, with minimal food service. In addition to its service at the Venues, Wolfgang Puck also provides catering and/or bar service for events at the NYCB Theatre at Westbury, in Westbury, New York.

Compass

8. Defendant Compass is a Delaware corporation with headquarters in North Carolina. Plaintiffs and the Class were paid by and received paychecks from Compass. Compass owns, in whole or in part, numerous companies in the food service industry. Among those companies, two—Restaurant Associates and Levy Restaurants, Inc.—have been defendants in class action lawsuits for failure to pay overtime and violation of Section 196-d. In the first case, the complaint alleges that these companies added a "service charge" to customers' bills at the US Tennis Open held Queens, New York; in the second, the complaint alleges that Restaurant Associates—and Compass, which was also a defendant in that case—added a "service charge" to customers' banquet bills at events throughout the State of New York. As a result of these class actions, the first of

which was instituted in March, 2010, during the Class Period in this case, Defendants knew or should have known that their addition of the Service Charge at the Venues, and failure to pay that Service Charge to the Class, violated Section 196-d.

9. At all relevant times, Compass has been an employer and/or joint employer of Plaintiffs and the Class within the meaning of the FLSA and the NYLL. Compass has exercised substantial control over Plaintiffs and the Class, and Compass's human resources department had a direct relationship with Plaintiffs and the Class. On Page 2 of the Wolfgang Puck Catering Hourly Employee Handbook (the "Handbook"), under a Compass logo, appears a message by Gary R. Green, CEO of Compass, stating that Mr. Green takes "great pleasure to welcome you to Compass Group North America." On that same page, the Handbook contains a detailed discussion of the "Compass Group Vision & Values." Page 4 of the handbook references a "SpeakUp Hotline" at 1-866-232-9273 that is available to employees "for reporting a concern privately and confidentially about situations they feel may be unsafe, unethical, or illegal[.]" This telephone number belongs to Compass. Moreover, Plaintiffs' paychecks come from Compass, and Plaintiffs' pay stubs bear Compass's name and address. Still further, Plaintiff Kristin Noriega's emails, sent from an email address given to her by Defendants, contained a disclaimer supplied by Compass, which referred the reader to Compass's website and stated: "This email is subject to certain disclaimers, which may be reviewed via the following link. http://compass-usa.com/Pages/Disclaimer.aspx."

CLASS ACTION ALLEGATIONS

10. Plaintiffs bring their Section 196-d Claim as a class action pursuant to CPLR, Article 9, Sections 901 and 902, on behalf of a class (the "Class"), consisting of:

> All persons who work or worked as bartenders and food service employees at Special Events at the Venues for Wolfgang Puck and/or Compass at any time from June 1, 2008 through the entry of judgment in this action. Excluded from the Class are the named defendants and any corporations, partnerships, or other entities affiliated with them.

11. The Class is so numerous that joinder of all members is impracticable. The exact number of the Class members is unknown, but is believed to be over 40. The identity of the Class members is known to Defendants and is contained in the employment records that they are required to create and maintain as a matter of state and federal law.

12. Plaintiffs' claims are typical of the claims of the other members of the Class as Plaintiffs and all other members of the Class sustained damages arising out of Defendants' conduct in violation of state laws as complained of herein. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in complex class action litigation. The Class members work, or have worked, for Defendants as bartenders and service employees; enjoy the same statutory rights and protections under the NYLL; and have sustained similar types of damages as a result of Defendants' failure to comply with the NYLL.

13. Plaintiffs have no interests that are contrary to or in conflict with those of the other members of the Class.

14. Plaintiffs know of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

15. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members. Among the questions of law and fact common to the Class are:

a. Whether the NYLL was violated by Defendants' acts as alleged

herein;

b. Whether Defendants improperly accepted and/or retained the Service Charges charged to and paid by patrons at the Venues;

c. Whether Defendants had any good faith basis for failing to pay all wages due including the Service Charge; and

d. Whether the members of the Class have sustained damages and, if so, the proper measure of such damages.

16. Class action treatment is superior to other available methods for the fair and efficient adjudication of the controversy alleged herein. Treating this as a class action will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. As a practical matter, absent a class action, there will be no individual lawsuits to recover the misappropriated gratuities due to Plaintiffs and the Class because the amounts due and owing to each class member are too small to warrant the filing of individual litigation. Moreover, Class members would be reluctant to file individual claims for fear of retaliation. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy. The Class is readily identifiable from records that Defendants are legally required to maintain.

17. This forum is ideal for the consolidation of this litigation. This forum has a direct connection to the subject matter of this action because Defendants do business in the County of New York, and the Venues are located in this county.

18. Prosecuting separate or individual actions would unnecessarily tax the Court's resources, as well as those of the Defendants and individual Class members. Plaintiffs are not aware of any individual actions filed against Defendants arising from the subject matter herein.

19. Without a class action, Defendants will likely retain the benefit of their wrongdoing and will continue a course of action that will result in further damages to Plaintiffs and the members of the Class.

FACTUAL ALLEGATIONS

Defendants' Violations of Section 196-d as to the Class

20. In or about June, 2008, Defendants contracted with non-party Live Nation to provide bar service at the Venues. The bar service includes beverages and minimal food offerings, such as hot pretzels. Defendants provide bar service for all or substantially all events at the Venues. The Venues frequently have more than one, and as many as three, events in a 24-hour period. The Venues have live music on a near nightly basis. Many of the events at the Venues are concerts; Defendants also host Special Events—for instance, corporate parties—which include an open bar. Defendants host between 20 and 30 Special Events per year. The Service Charge is added to customers' bills at the Special Events only.

21. Section 196-d prohibits employers from demanding, accepting, or retaining, directly or indirectly, any part of an employee's gratuity or any charge purported to be a gratuity. According to section 146-2.18 of the governing Hospitality Wage Order, promulgated by the New York State Department of Labor, there is "a rebuttable presumption that any charge . . . including but not limited to any charge for

"service" or "food service," is a charge purported to be a gratuity" and therefore must be paid over to service employees.

22. Nonetheless, in the contracts for Special Events, Defendants and Live Nation add a Service Charge, in excess of 20%, to their customers' bills. This Service Charge is well-known to Defendants' employees, but its true nature is not disclosed to customers. On information and belief, customers are told that the Service Charge is a tip for the Class. In reality, none of the Service Charge has ever been paid to the Class.

23. Defendants and Live Nation have admitted that they add the Service Charge to customers' bills. In an email dated December 5, 2011, Plaintiff Kristin Noriega contacted Laura Mulholland, a promoter of Live Nation, inquiring as to whether Defendants' employees would receive any portion of the Service Charge. Ms. Mulholland admitted that a Service Charge was added to the bill, stating:

> Any money I collect from client as staffing fee or service charge is allocated to [Wolfgang] Puck as the same. It is up to [Wolfgang] Puck how you distribute that. *For example on tonight's tab, we will be adding a 22% service charge at the end.* (Emphasis added.) How and if you distribute that to staff is up to you.
>
> Maybe as a company you should consider a higher pay rate for private events with hosted bars. That's what other companies do.
>
> Again though, this is not my decision or area of responsibility. I do think that it should be made VERY CLEAR to your bartenders that Puck collect funds from these events that do not go into their pockets. (Emphasis in original.)

24. The day after Ms. Noriega received the above email, she was taken aside by her supervisor, Tyler Brown, and told that if she inquired any further about Defendants' violations of the labor laws she would be fired.

25. However, Defendants had warning that their acts were illegal well before Plaintiff Noriega's inquiry. In or about December, 2010, Defendants received an e-mail

Alert from a law firm (the "Alert") which notified them of the Hospitality Wage Order's rule—effective January 1, 2011—that a "service charge" added to a bill is presumptively a tip for employees. That Alert attached the wage order, which states in relevant part:

> There shall be a rebuttable presumption that any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for "service" or "food service," is a charge purported to be a gratuity.

26. Despite receiving this Alert, Defendants continued to add a Service Charge to their customers' bills at Special Events.

27. One year after receiving the Alert—and over eleven months after the Wage Order took effect—on December 16, 2011, Compass Vice President of Human Resources Robin Cerrati forwarded the December, 2010 law firm Alert to Plaintiffs' supervisor at the Venues. Ms. Cerrati's email copied language from the Alert that stated, *inter alia*: "If an employe[r] plans to add a mandatory charge to a customer's bill, and **does not plan to distribute that charge to service employees, specific precautions must be taken, including eliminating the use of the term 'service charge.'**" (Emphasis in original.)

28. Plaintiffs' supervisor at the Venues, Tyler Brown, then forwarded Ms. Cerrati's email to Live Nation, informing Live Nation that the "Service Charge" language should be changed to an "administrative charge." Mr. Brown noted that Wolfgang Puck's sister company, Restaurant Associates—which is also owned by Compass—"is elbows deep in a huge class action suit from not distributing the full amount of service charges to all employees; Puck will be implementing this change in vocabulary immediately." On information and belief, this change was never implemented, and to this day, Defendants' bills to their customers at Special Events add a "service charge."

29. Despite Defendants' clear knowledge that the law presumes that "service charge" is a tip and requires that a "service charge" be paid over to service employees, Defendants retained all monies from the Service Charge and never paid any of it to Plaintiffs and the Class.

Plaintiffs' Individual Claims

30. **Spread of Hours Pay**. Throughout Plaintiffs' employment, Plaintiffs frequently worked more than then hours per day, or the length of time between the beginning and end of their work day was more than ten hours. Defendants failed to pay to Plaintiffs one hour of additional pay at the basic minimum hourly rate on each of these days, as required by the NYLL and its supporting regulations.

31. **Failure to Pay Overtime to Plaintiff Gummert.** Defendants consistently violated the FLSA and the NYLL with respect to Plaintiff Oliver Gummert. In addition to the Special Events described above, Defendants provided bar service for nightly concerts at the Venues. Plaintiff Gummert worked at all or most of these concerts.

32. Plaintiff Gummert frequently worked more than 40 hours per week and was not paid at time-and-one-half rates for hours worked over 40; sometimes Plaintiff Gummert was not paid at all for hours worked over 40 and sometimes he was paid at his regular hourly rate rather than time-and-one-half.

33. Defendants failed to keep accurate records of Plaintiff Gummert's hours worked, in violation of the NYLL and the FLSA's record-keeping requirements, and in some weeks Defendants edited Plaintiff Gummert's time records so the records did not reflect that he worked over 40 hours.

34. **Breach of Contract on Behalf of Plaintiff Gummert.** In or about April, 2012, Plaintiff Oliver Gummert's responsibilities were substantially increased to include tasks that were formerly performed by his supervisor, Tyler Brown, who had left the company. Plaintiff Gummert asked if his pay would be increased accordingly; in response, Plaintiff was promised a year-end "bonus" by Defendants as consideration for his extra work. In reliance on this promise, and solely because of this promise, Plaintiff Gummert performed the additional work that was required of him. Plaintiff Gummert was never paid the year-end bonus he was promised, which should have been $5,000.

FIRST CAUSE OF ACTION
On Behalf of Plaintiffs and the Class
New York Labor Law Article 6, Section 196-d
Unlawful Retention of Gratuities

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

36. During the Class Period, Plaintiffs and the Class were employees of Defendants. Defendants imposed the Service Charge at the Venues. Defendants failed to notify their customers that the Service Charge was not a gratuity and was not paid to Plaintiffs and the Class and/or actively led their customers to believe that the Service Charge was being paid to the Class as a gratuity. At no time did Defendants provide clear written notice to their customers, on the bills presented for payment, that the Service Charge was not a gratuity. A reasonable customer would likely believe the Service Charge was a gratuity intended for Plaintiffs and the members of the Class.

37. The Service Charges were "gratuities" under NYLL, Article 6, Section 196-d.

38. Defendants' violations of Section 196-d were willful and/or not in good faith.

39. Plaintiffs and the Class are entitled to recover from Defendants the Service Charge, reasonable attorneys' fees, costs, liquidated damages, and pre-judgment and post-judgment interest.

SECOND CAUSE OF ACTION
(On Behalf of Plaintiff Gummert Individually)
New York Labor Law, Article 19: Failure to Pay Overtime

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

41. Plaintiff Gummert was an employee of Defendants within the meaning of NYLL, Article 6, §190(2), and supporting New York regulations.

42. Defendants were "employers" and/or joint employers within the meaning of NYLL Article 6, §190(3), and any supporting regulations.

43. Defendants failed to pay Plaintiff Gummert his overtime wages of not less than one and one-half times the regular rate of pay for each hour worked in excess of 40 hours in a workweek.

44. Defendants' failure to pay Plaintiff Gummert overtime wages was willful and/or not in good faith within the meaning of NYLL, Article 19, §663. Defendants were aware of the requirements of the NYLL and continued to deprive Plaintiff Gummert of all wages owed.

45. Due to Defendants' violations of the NYLL, Plaintiff Gummert is entitled to recover from Defendant his unpaid wages, liquidated damages, reasonable attorneys' fees, costs, and pre-judgment and post-judgment interest.

THIRD CAUSE OF ACTION
(On Behalf of Plaintiff Gummert Individually)
Fair Labor Standards Act, 29 U.S.C. §201, et seq: Failure to Pay Overtime

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

47. Plaintiff Gummert was an "employee" of Defendants within the meaning of the FLSA, 29 U.S.C. §203(e) and (g).

48. At all relevant times, Defendants have been "employers" and/or joint employers engaged in interstate "commerce" and/or the production or sale of "goods" for "commerce" within the meaning of the FLSA, 29 U.S.C. §203.

49. At all relevant times, Defendants' businesses have had annual gross revenues in excess of $500,000.

50. Defendants were required to properly pay Plaintiff Gummert all wages due including wages for all hours worked, including applicable overtime wages for all hours worked in excess of 40 hours in a workweek.

51. Defendants failed to pay Plaintiff Gummert all wages due including overtime wages of not less than one and one-half times the regular rate of pay for each hour worked in excess of 40 hours in a workweek to which he was entitled under the FSLA, 29 U.S.C. §207.

52. Defendants' violation of the overtime requirements of the FLSA was part of their regular business practice and constituted a pattern, practice, and/or policy.

53. As a result of Defendants' violations of the FLSA, Plaintiff Gummert suffered damages by being denied pay for all of his hours worked, by being denied

overtime wages in accordance with the FLSA in an amount to be determined at trial, and is entitled to recovery of such amounts, liquidated damages in an amount equal to his unpaid wages, prejudgment and post judgment interest, reasonable attorneys' fees, costs, and punitive damages pursuant to 29 U.S.C. §216(b).

54. Defendants' unlawful conduct, as described above, was willful and intentional and/or was not in good faith. Defendants knew or should have known that the practices complained of herein were unlawful. Defendants knew that Plaintiff Gummert routinely worked in excess of forty hours per week.

55. Defendants have not made a good faith effort to comply with the FSLA with respect to the compensation of Plaintiff Gummert.

56. Because Defendants' violations of the FSLA have been willful, a three-year statute of limitations applies, pursuant to 29 U.S.C. §255(a).

FOURTH CAUSE OF ACTION
(Brought on behalf of Plaintiffs Individually)
New York Labor Law, Articles 6 and 19 – Spread of Hours Pay

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

58. Defendants failed to pay Plaintiffs an additional hour's pay at minimum wage for every day that they worked a spread of hours of, or in excess of, 10 hours, in violation of N.Y. Labor Law, §190, *et seq.*, and 650, *et seq.*, and the supporting New York State Department of Labor Regulations including but not limited to NYCRR §146-1.6.

59. Defendants' failure to pay an additional hour's pay at minimum wage for every day that Plaintiffs worked a spread of hours in excess of 10 hours was willful and/or not in good faith.

60. Due to Defendants' violations of the NYLL, Plaintiffs are entitled to recover from Defendants their unpaid wages, reasonable attorneys' fees, costs, and pre-judgment and post-judgment interest, and liquidated damages.

FIFTH CAUSE OF ACTION
(On Behalf of Plaintiff Oliver Gummert)
Breach of Contract

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

62. Plaintiff Oliver Gummert was promised approximately $5,000 in lieu of an immediate pay raise for an increase in his responsibilities while working for Defendants. In reliance on this promise, Plaintiff Gummert took on additional responsibilities during his employment with Defendants. The "bonus" Plaintiff Gummer was promised was an integral part of his pay package and he would not have agreed to perform the additional work required of him by Defendants but for the promise of additional pay at the end of the year.

63. Defendants never paid Plaintiff Gummert the amount he was promised, thereby breaching their contract with Plaintiff.

64. Plaintiff is entitled to $5,000 plus pre-judgment and post-judgment interest, attorneys' fees, and punitive damages.

SIXTH CAUSE OF ACTION
Violations of New York Labor Law, Article 6, §191(1) and (3)
Failure to Timely Pay Wages
(Brought on behalf of Plaintiffs and the Class)

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

66. NYLL, Article 6, §191 requires employers to pay manual workers on a weekly basis and not later than seven calendar days after the end of the week in which the wages are earned. For a terminated employee, the employer is required to pay wages not later than the regular pay day for the pay period during which the termination occurred.

67. As a result of Defendants' violations of the N.Y. Labor Law and their failure to pay or timely pay all wages (including overtime when due), Plaintiffs and the Class have been, and continue to be damaged.

68. Plaintiffs and the Class seek monetary damages, reasonable attorneys' fees and costs and prejudgment and post-judgment interest.

SEVENTH CAUSE OF ACTION
Unjust Enrichment
(Brought on behalf of Plaintiffs and the Class)

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

70. Defendants have unjustly enriched themselves at the expense of Plaintiffs and the Class by failing to pay all wages due including overtime, by failing to pay them in a timely manner, and by improperly retaining gratuities.

71. Plaintiffs and the Class are entitled to compensatory damages from Defendants, in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves individually and on behalf of the Class, respectfully request that this Court grant the following relief:

A. An order certifying Plaintiffs' Section 196-d claim as a class action pursuant to CPLR §§901 and 902 for the class of employees described herein, certifying Plaintiffs as the class representatives and designating Plaintiffs' counsel as Class counsel;

B. Judgment for Plaintiffs and the Class members for all statutory, compensatory, consequential and/or liquidated damages, or any other damages authorized by law or equity, sustained as a result of Defendants' unlawful conduct for which Defendants are jointly and severally liable, as well as prejudgment and post-judgment interest;

C. An award to Plaintiffs and each member of the Class for their reasonable attorneys' fees, costs and expenses incurred in this litigation;

D. An order enjoining Defendants from continuing the conduct alleged herein; and

D. Any and all other relief which the Court deems appropriate.

Dated: New York, New York
June 20, 2013

GARDY & NOTIS, LLP

By: s/Orin Kurtz

Mark C. Gardy
Orin Kurtz
501 Fifth Avenue, Suite 1408
New York, NY 10017
Ph (212) 905-0509
Fax (212) 905-0508