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

JAIME GUAMAN and VIRGILIO QUINDE, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

RODNEY EDDIE, BLUE PRINT CARPENTRY, INC., BLUE-LINE FRAMING CONTRACTOR, INC., PROLINE CARPENTRY, INC., WOODSTONE CARPENTRY, INC., GATEHOUSE CARPENTRY, and FRAMED STRUCTURES, INC.,

Defendants.

11 Civ. 3838

(VLB) (LMS)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR DEFAULT JUDGMENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

FACTS 1

ARGUMENT 3

I. Default Judgment is Appropriate 3

II. Court May Appropriately Order Default Judgment on the Issue of Liability and Damages without Resolving the Entire Action 4

III. Plaintiffs Are Entitled to Damages 6

A. Back Wages 7

B. Liquidated Damages 8

C. Pre-Judgment Interest 10

D. Statute of Limitations 10

E. Reasonable Attorneys' Fees and Costs 11

IV. An Inquest Is Unnecessary 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Bambu Sales, Inc. v. Ozak Trading Inc., 58 F.3d 849 (2d Cir.1995).. 3

Brock v. Wilamowsky, 833 F.2d 11 (2d Cir. 1987)... 9

Century 21 Real Estate LLC v. Bercosa Corp., 666 F.Supp.2d 274 (E.D.N.Y. 2009)................. 11

Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980)... 5, 6

Epelbaum v. Nefesh Achath B'Yisrael, Inc., 237 A.D.2d 327, 654 N.Y.S.2d 812 (N.Y.A.D. 2 Dept. 1997).. 8

Finkel v. Romanowicz, 577 F.3d 79 (2nd Cir. 2009) 11

Fustok v. ContiCommodity Services, Inc., 873 F.2d 38 (2nd Cir. 1989) 11, 12

Ginett v. Computer Task Group, Inc., 962 F.2d 1085 (2nd Cir. 1992)...................................... 5, 6

Information Resources, Inc. v. Dun and Bradstreet Corp., 294 F.3d 447 (2nd Cir. 2002). 5

Lanzetta v. Florio's Enterprises, Inc., 08 Civ. 6181, 2011 WL 3209521 (S.D.N.Y. July 27, 2011) 9

Maizus v. Weldor Trust Reg., 144 F.R.D. 34 (S.D.N.Y.1992) 3

Platek v. Duquesne Club, 961 F.Supp. 835 (W.D.Pa. 1995).. 8

Reich v. Midwest Body Corp., 843 F.Supp. 1249 (N.D.Ill. 1994)... 8

Reich v. Waldbaum, Inc., 52 F.3d 35 (2nd Cir. 1995).. 10

Rodriguez v. Almighty Cleaning, Inc., 784 F.Supp.2d 114 (E.D.N.Y. 2011)................................ 6

Schmitt v. State of Kan., 864 F.Supp. 1051(D.Kan. 1994). 8

Sony BMG Music Entertainment v. Thurmond, CV 06-1230, 2009 WL 4110292 (E.D.N.Y. Nov. 24, 2009).. 3

United States Freight Co. v. Penn Cent. Transp. Co., 716 F.2d 954 (2d Cir.1983)....................... 3

Yu G. Ke v. Saigon Grill, Inc., 595 F.Supp.2d 240 (S.D.N.Y. 2008) 9, 10

Statutes

28 U.S.C. §1291 5

29 U.S.C. § 207 .... 7, 12

29 U.S.C. § 216 .... 8, 11

29 U.S.C. § 255 10

N.Y. C.P.L.R. § 5001 10

N.Y. C.P.L.R. § 5004 10

N.Y. Wage Theft Prevention Act ("WTPA"), L.2010, c. 564, § 16, eff. April 9, 2011 9

NY Labor Law § 198 .... 8, 9, 10, 12

NY Labor Law § 652 8

NY Labor Law § 663 .... 8, 9, 11, 12

NY Labor Law §191 8

Rules

12 NY ADC 142-2.2 9

29 C.F.R. 778.315 8

Fed. R. Civ. P . 55 13

Fed. R. Civ. P. 37 3

Fed. R. Civ. P. 54 .... 4, 5

Eighteen Plaintiffs originally brought this action against the Defendants Rodney Eddie, Blue Print Carpentry, Inc., Blue-Line Framing Contractor, Inc., Woodstone Carpentry, Inc., Gatehouse Carpentry, and Framed Structures, Inc. ("Defendants") for failure to pay minimum and overtime wages.[1] Because Defendants failed to comply with an order requiring them to appear to defend the claims, the Court granted Plaintiffs permission to move for default judgment. Seventeen of the Plaintiffs now move for a default judgment in the amount of $607,165.26, including back wages, liquidated damages, pre-judgment interest, and attorneys' fees and costs.[2]

FACTS

The Plaintiffs were employed by Defendants as laborers to do carpentry work on construction projects. Although the Plaintiffs worked on a regular schedule of more than 40 hours per week, Defendants did not pay them overtime wages. Instead, Plaintiffs were paid the same hourly rate for all hours with no overtime premium. While Plaintiffs worked for Defendants in the winter of 2010-11, Defendants stopped paying them any wages for the work they had performed. Defendants acted willfully with respect to their minimum wage and overtime violations.[3]

This is an action under the Fair Labor Standards Act and New York State Law to recover

[1] Defendant Proline Carpentry, Inc. ("Proline") was added via the second amended complaint. Plaintiffs do not move for default judgment against Proline at this time.

[2] Plaintiff Luis Morocho does not seek default judgment at this time.

[3] These facts are set out in the Job and Damages sections of the Declarations of Plaintiffs Alvarado, Carchi, Jaime Guaman, Juan Carlos Guaman, Walter Guaman, Huanga, Murillo, Naulaguari, Cain Ortiz, Luis Ortiz, Ivan Yorgi Quinde, Virgilio Quinde, Tacuri, Tenelanda, Tuapante, Uyaguari, and Uyaguari (hereinafter "*Plaintiffs' Decls.*") which are filed in support of this motion.

unpaid wages owed by Defendants to Plaintiffs. Affidavit of Michael J.D. Sweeney in Support of Plaintiffs' Motion for Default Judgment ("*Sweeney Aff.*") at ¶ 5. On June 6, 2011, Plaintiffs filed the Complaint against Defendants. *Id.* at ¶ 6. The Complaint alleges that Defendants employed the 18 Plaintiffs as laborers, but failed to pay them overtime wages throughout their employment and failed to pay them any wages at all for certain periods in the winter of 2010-11. *Id.* at ¶ 7. Although the Plaintiffs served the corporate Defendants through the Secretary of State, the individual Defendant Eddie actively evaded Plaintiffs' several service attempts. *Id.* at ¶ 8.

On August 3, 2011, Plaintiffs requested an Entry of Default against the corporate Defendants for failure to respond to the Complaint. *Id.* at ¶ 9. Nine days later, on August 12, Defendants accepted service via stipulation and Plaintiffs agreed to lift the default against the corporate Defendants. *Id.* at ¶ 10. Defendants finally answered the Complaint on September 12, 2011. *Id.* at ¶ 11. Plaintiffs filed an Amended Complaint against Defendants on December 1, 2011, to substitute a named Plaintiff. *Id.* at ¶ 12. On December 14, 2011, Defendants answered the Amended Complaint. *Id.* at ¶ 13. On January 3, 2012, Defendants' counsel moved to withdraw as counsel due to Defendants' failure to participate in the litigation, refusal to communicate with counsel, and refusal to pay attorneys' fees. *Id.* at ¶ 14.

The Court issued a Scheduling Order on January 5, 2012, requiring Defendants to appear and the individual Defendant to appear in person before the Court at a conference on January 13, 2012 at 10:30 a.m. *Id.* at ¶ 15. Defendants, including the individual Defendant, failed to appear as ordered at the January 13, 2012 conference. *Id.* at ¶ 16. On January 17, 2012, the Court granted Defense counsel's motion to withdraw and ordered the Defendants to appear in Court on February 14 or the Court would grant Plaintiffs permission to move for default judgment. *Id.* at ¶ 17. Defendants did not appear in Court on February 14, 2012 and the Court granted Plaintiffs

permission to move for default judgment. *Id.* at ¶ 18. On March 16, 2012, Plaintiffs filed a Second Amended Complaint to add Proline Carpentry, Inc. ("Proline") as a Defendant. *Id.* at ¶ 19. Plaintiffs do not seek default judgment against Proline at this time.

ARGUMENT

I. Default Judgment is Appropriate

Fed. R. Civ. P. 37(b)(2) provides:

> If a party ... fails to obey an order to provide or permit discovery ... or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others ... [a]n order ... rendering a judgment by default against the disobedient party....

Entry of default judgment is an appropriate sanction for significant and repeated discovery violations. *See Bambu Sales, Inc. v. Ozak Trading Inc.,* 58 F.3d 849, 853 (2d Cir.1995) (upholding entry of default judgment against defendants who ignored magistrate judge's discovery order for five months); *United States Freight Co. v. Penn Cent. Transp. Co.,* 716 F.2d 954, 954-55 (2d Cir.1983) (upholding sanction of default judgment where defendant failed to comply with magistrate judge's discovery order despite proper notice); *Maizus v. Weldor Trust Reg.,* 144 F.R.D. 34, 37 (S.D.N.Y.1992) (entering default judgment against defendant for noncompliance with discovery orders).

Courts consider the following factors in determining whether a default judgment is appropriate: (1) the party's history of noncompliance; (2) whether the party had sufficient time to comply; and (3) whether the party had received notice that further delays would result in dismissal. *Sony BMG Music Entertainment v. Thurmond*, CV 06-1230, 2009 WL 4110292, 3 (E.D.N.Y. Nov. 24, 2009). As described above, Defendants have a long history of non-compliance, from refusing to participate in discovery to ignoring Court orders to appear and

defend. Defendants have had more than enough time to comply with the Court's orders. When they did not appear as ordered at the first court conference on January 13, the Court ordered them to appear a month later on February 14. The Court's Order gave Defendants notice that their failure to appear on February 14 "will ... result in the Court granting permission to Plaintiffs to seek default judgment". Doc. No. 39 at 2. Defendants did not comply with that order either. Accordingly, Plaintiffs are due default judgment.

II. Court May Appropriately Order Default Judgment on the Issue of Liability and Damages without Resolving the Entire Action

Plaintiffs move for default against Defendants Rodney Eddie, Blue Print Carpentry, Inc., Blue-Line Framing Contractor, Inc., Woodstone Carpentry, Inc., Gatehouse Carpentry, and Framed Structures, Inc. ("Defendants"). Defendant Proline Carpentry, Inc. ("Proline") was added via the second Amended Complaint, and Plaintiffs do not move for default judgment against Proline at this time. Seventeen of the 18 Plaintiffs seek default judgment. Plaintiff Luis Morocho does not seek default judgment at this time.

Fed. R. Civ. P. 54(b) provides

> When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

For a proper entry of partial final judgment under Rule 54(b), three requirements must be satisfied:

> (1) Multiple claims or multiple parties must be present, (2) at least one claim, or the rights and liabilities of at least one party, must be finally decided within the meaning of 28 U.S.C. § 1291, and (3) the district court must make "an express determination that

> there is no just reason for delay" and expressly direct the clerk to enter judgment.

Information Resources, Inc. v. Dun and Bradstreet Corp., 294 F.3d 447, 451 (2nd Cir. 2002).

Plaintiffs meet these requirements. There are both multiple claims and multiple parties in this case. The Court can finally decide the wage-and-hour claims for the 17 Plaintiffs against the Defendants within the meaning of 28 U.S.C. §1291. A decision ends the litigation of those claims for those parties. There is nothing left for the court to do but execute judgment on those claims against those Defendants. *Information Resources, Inc.*, 294 F.3d at 451. Finally, there is no just reason for delaying a partial judgment. The risk that a delayed judgment would result in Plaintiffs' inability to collect the judgment supports granting a final judgment under Fed. R. Civ. P. 54(b) without resolving the entire action. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 12 (1980); *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1097 (2nd Cir. 1992). Plaintiffs' recovery is threatened by delay because the Plaintiffs have reason to believe that Defendants are and plan to continue dissipating their assets rather than satisfy any judgment that Plaintiffs may secure in this Court. Defendant Eddie controls all the assets of the corporate Defendants. *Sweeney Aff.* at ¶ 21. Public records show that the individual Defendant, Rodney Eddie, sold his residence in Fallsburg, New York on September 7, 2011, to a non-defendant holding company for an amount below the assessed market value. *Id.* at ¶ 22. The Court warned Eddie that dissipating assets for the purpose of avoiding a judgment was illegal. Doc. No. 39, July 17, 2012 Order at 2. Despite the warning, Plaintiffs have reason to believe that Eddie continues to dissipate the assets. *Sweeney Aff.* at ¶ 23. Moreover, Defendants have indicated that they intend to shirk their financial responsibilities in this action. As an initial matter, they have chosen to repeatedly ignore Court orders requiring their appearance. They have also refused to

pay their prior counsel for its work on the case, suggesting that they intend not to honor any aspect of their obligations with respect to this litigation.

Plaintiffs are laborers working at the lower end of the socio-economic ladder. Every part of their wages makes a difference in their lives. Although they performed the work for their wages, they have been waiting over a year for their pay. That their pay has already been delayed a year combined with the risk of non-payment in the future is sufficient basis for directing entry of final judgment against Defendants for the 17 Plaintiffs. *Curtiss-Wright Corp.,* 446 U.S. at 12; *Ginett*, 962 F.2d at 1097.

III. Plaintiffs Are Entitled to Damages

"A default judgment entered on the well-pleaded allegations in the complaint establishes a defendant's liability. The only question remaining, then, is whether Plaintiffs have provided adequate support for the relief they seek. The moving party need only prove 'that the compensation sought relates to the damages that naturally flow from the injuries pleaded.'" *Rodriguez v. Almighty Cleaning, Inc.*, 784 F.Supp.2d 114, 125 (E.D.N.Y. 2011) (citations omitted). In their Complaint, Plaintiffs sought unpaid back wages, liquidated damages, interest, and their costs and reasonable attorneys' fees under the FLSA and New York Labor law; pre-judgment and post-judgment interest, as provided by law; and a finding that Defendants acted willfully in their wage-and-hour violations. Amended Complaint, Doc. No. 27 at pp. 10-11. Federal and state law both provide for recovery of back wages owed, recovery of liquidated damages, and recovery of reasonable attorneys' fees and costs. New York State law also provides for the recovery of agreed-upon wages and pre-judgment interest. Appended to the Sweeney Affidavit as Exhibit 1 is a proposed Statement of Damages based on each Plaintiff's testimony. Also attached to the Affidavit is Exhibit 2, showing a summary and week-by-week

calculation of damages for each Plaintiff. An explanation of the damages calculations follows.

A. *Back Wages*

Defendants are liable for back wages under the FLSA and New York Labor law. Through their testimony, each of the Plaintiffs has shown that (1) he had an agreement with Defendants to be paid a specific hourly rate for his work and that the Defendants paid the hourly rate for a period of time; (2) Defendants paid him the same hourly rate for all hours worked each week, including hours more than 40; and (3) for a period of time, Defendants simply stopped paying him any wages at all.[4] There are two types of back wages owed in this case: (1) an overtime premium for overtime hours because Defendants paid the same hourly wage for hours worked over 40 as they did for hours under 40 in a week; and (2) payment of wages in those weeks in which Defendants paid Plaintiffs no wages at all.

The FLSA requires employers to pay employees time and one-half their regular hourly rate of pay for any hours worked more than 40 in a week. 29 U.S.C. § 207. Because Defendants paid Plaintiffs the same hourly rate of pay for all hours worked including those more than 40 in a week, they are liable to each Plaintiff under §207 for the overtime premium, 50% of the regular hourly rate, for each hour over 40 that the Plaintiff worked in any week. As the Department of Labor regulations make clear, implicit in the FLSA's overtime requirement is that FLSA overtime "cannot be said to have been paid to an employee unless all the straight time compensation due him for the non-overtime hours under his contract (express or implied) or under any applicable statute has been paid." 29 C.F.R. 778.315. Accordingly, the FLSA requires that in weeks in which an employee works overtime hours, he must be paid for both non-

[4] See *Plaintiffs' Decls.* Damages Section.

overtime and overtime hours at the contractual rate. *Platek v. Duquesne Club*, 961 F.Supp. 835, 840 (W.D.Pa. 1995); *Reich v. Midwest Body Corp.*, 843 F.Supp. 1249, 1251 -1252 (N.D.Ill. 1994); *Schmitt v. State of Kan.*, 864 F.Supp. 1051, 1061 (D.Kan. 1994). As Plaintiffs worked a regular schedule that required overtime work, Defendants are required to pay each Plaintiff all the straight time compensation due him for the non-overtime hours under his agreed upon rate of pay. *Id*.

Like the FLSA, the New York Minimum Wage Act requires employers to pay employees time and one-half their regular hourly rate of pay for any hours worked more than 40 in a week. 12 NY ADC 142-2.2 (promulgated pursuant to NY Labor Law § 652); *see, e.g, Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 392 (W.D.N.Y. 2005) (NY Labor Law and FLSA overtime provisions are nearly identical). Therefore, Defendants are liable under NY Labor Law to each Plaintiff for the overtime premium, 50% of the regular hourly rate, for each hour over 40 that Plaintiffs worked in any week. New York's Payment of Wages Act allows an employee to recover wages under the agreed terms of employment. NY Labor Law §191. An employee is due back wages under the Act where he can show that he was not paid his earned wages "in accordance with the agreed terms of employment". *Epelbaum v. Nefesh Achath B'Yisrael, Inc.*, 237 A.D.2d 327, 330, 654 N.Y.S.2d 812, 814 (N.Y.A.D. 2 Dept. 1997). Therefore, Defendants are liable under § 191 for their failure to pay each Plaintiff's wages at the agreed upon rate for all hours worked during the period Defendants paid the Plaintiff no wages at all.

B. Liquidated Damages

Both the FLSA and NY Labor Law provide for liquidated damages. 29 U.S.C. §216(b); NY Labor Law §§ 198, 663. The FLSA provides that

> "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C.A. § 216(b). Liquidated damages are mandatory. Employers have the burden of proving the one narrow exception.

Brock v. Wilamowsky, 833 F.2d 11, 19 (2d Cir. 1987). Defendants have elected to stop defending the case and have not met their burden. Both the New York Payment of Wages Act and the Minimum Wage Act provide that where Plaintiffs have shown they are due back wages, they are also due "an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due." NY Labor Law §§ 198, 663.[5]

Courts allow liquidated damages under both the FLSA and NY Labor Law because they serve different purposes. The FLSA liquidated damages are compensatory while liquidated damages under NY Labor Law are punitive. *Yu G. Ke v. Saigon Grill, Inc.*, 595 F.Supp.2d 240, 262 (S.D.N.Y. 2008); *see also, Lanzetta v. Florio's Enterprises, Inc.*, 08 Civ. 6181, 2011 WL 3209521, 5 (S.D.N.Y. July 27, 2011) (finding that employees should be allowed to recover liquidated damages under both the FLSA and NY Labor Law). Accordingly, during the FLSA three-year statute of limitations, Defendants are liable for liquidated damages in the amount of 125% of the back wages owed, *i.e.*, 100% under the FLSA and 25% under NY Labor Law. Defendants are liable for liquidated damages in the amount of 25% of the back wages owed for claims under NY Labor Law only.[6]

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[5] The NYLL liquidated damages rate was increased to 100% from 25% by the N.Y. Wage Theft Prevention Act ("WTPA"), L.2010, c. 564, § 16, eff. April 9, 2011. During the claim period the rate was 25%.

[6] Some Plaintiffs did not work overtime in some of the weeks for which Defendants paid them no wages. Claims for the agreed upon rate in those weeks are under NY Labor Law.

C. Pre-Judgment Interest

New York Labor law allows recovery of pre-judgment interest and liquidated damages, but where a plaintiff recovers FLSA liquidated damages pre-judgment interest is not available. *Yu G. Ke v. Saigon Grill, Inc.*, 595 F.Supp.2d 240, 262 (S.D.N.Y. 2008). Accordingly, Plaintiffs damage calculations include pre-judgment interest only for those periods beyond the FLSA statute of limitations. Plaintiffs' damage calculations apply the New York statutory interest rate of nine percent per annum calculated from the time of each violation. N.Y. C.P.L.R. §§ 5001(b); 5004.

D. Statute of Limitations

The FLSA provides for a three-year statute of limitations where the employees show that the employer acted willfully, otherwise the statute of limitations is two years. 29 U.S.C. § 255. Willfulness can be established where the law is clear and the employer's actions are objectively reckless. *Reich v. Waldbaum, Inc.*, 52 F.3d 35, 39-41 (2nd Cir. 1995). In this case, Plaintiffs all testified that Defendants acted willfully. State and federal overtime laws are widely known and Defendants were at least reckless to have ignored them. Finally, Defendants have notice of this action and have willfully chosen not to defend. Accordingly, Plaintiffs are entitled to use a three-year statute of limitations in calculating FLSA damages for their claims.

Both the New York payment of Wages Act and the Minimum Wage Act provide for a six-year statute of limitations and require no showing of scienter. NY Labor Law §§ 198(3), 663. Plaintiffs do not seek to recover back wages twice, once under the FLSA and once under

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Accordingly, the damage calculations apply the NY Labor Law 25% liquidated damages to those claims. See, e.g., *Sweeney Aff.*, Ex. 2, damages for Luis Carchi for the week ending Jan. 23, 2011.

New York Labor Law. The NY Labor Law claims are applicable for those periods outside the FLSA statute of limitations and for purposes of NY Labor Law liquidated damages, which as explained above are additional to the FLSA liquidated damages.

E. Reasonable Attorneys' Fees and Costs

Both the FLSA and New York Labor Law provide that a court shall award reasonable attorneys' fees and costs of the action to employees who successfully establish their claims. 29 U.S.C. § 216. As Plaintiffs have been awarded a judgment, they are due reasonable attorneys' fees and costs of the action. Plaintiffs will move for attorneys' fees by separate motion.

IV. An Inquest Is Unnecessary

Rule 55(b) of the Federal Rules of Civil Procedure provides that where a party has applied for a default judgment, the "[district] court may conduct hearings or make referrals" in order to, among other things, "determine the amount of damages[,] establish the truth of any allegation by evidence[,] or investigate any other matter." Fed. R. Civ. P . 55 (b)(2)(B)-(D) (emphasis added). "In permitting, but not requiring, a district court to conduct a hearing before ruling on a default judgment, Rule 55(b) commits this decision to the sound discretion of the district court. We therefore review the District Court's decision for "abuse of discretion." *Finkel v. Romanowicz*, 577 F.3d 79, 87 (2nd Cir. 2009). It is "not necessary for the District Court to hold a hearing, as long as it ensured that there was a basis for the damages specified in a default judgment." *Fustok v. ContiCommodity Services, Inc.*, 873 F.2d 38, 40 (2nd Cir. 1989). *See, e.g., Century 21 Real Estate LLC v. Bercosa Corp.*, 666 F.Supp.2d 274, 285 (E.D.N.Y. 2009) (relying on documentary evidence, including detailed affidavits, for damages).

Plaintiffs' testimony provides all the evidence necessary to establish the FLSA and New York Labor law violations pled in the Complaint. They testify that they were employed by

Defendants for a specific period of time, that they agreed with Defendants on an hourly rate of pay, that they were paid the same hourly rate for all hours of work even hours more than 40 each week, that Defendants stopped paying them any wages for their work, and that Defendants acted willfully with respect to the wage-and-hour violations. Plaintiffs' testimony also provides all the evidence necessary to calculate damages. As explained above, damages under the FLSA and the New York Labor law for back wages are calculated by equations provided by statute. 29 U.S.C. § 207, NY Labor law §§ 198, 663. Plaintiffs' testimony provides the information necessary to calculate the damages, e.g., hours of work and rate of pay. There is no other information needed to establish the damages. Because the evidence provided establishes Defendants' liability and the amount of damages, further inquest is unnecessary. *Fustok*, 873 F.2d at 40.

CONCLUSION

Accordingly, Plaintiffs seek default judgment against Defendants Rodney Eddie, Blue Print Carpentry, Inc., Blue-Line Framing Contractor, Inc., Woodstone Carpentry, Inc., Gatehouse Carpentry, and Framed Structures, Inc. in the amount of $607,165.26, including back wages, liquidated damages, pre-judgment interest, and attorneys' fees and costs.

Dated: March 27, 2012

/s/ Michael J.D. Sweeney

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