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HEARING OFFICER ADMINISTRATIVE HEARING

OFFICE OF THE CONTROLLER

CITY AND COUNTY OF SAN FRANCISCO

IN THE MATTER OF:

CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF LABOR STANDARDS
ENFORCEMENT (OLSE),

and

PAPA POTRERO'S PIZZA.

CASE NO: MWO-222

**STATEMENT OF FINDINGS
OF HEARING OFFICER**

HEARINGS: NOVEMBER 10, 2008
NOVEMBER 17, 2008
DECEMBER 8, 2008
JANUARY 12, 2009
JANUARY 26, 2009

RECORD CLOSED: MARCH 16, 2009

INTRODUCTION

Between July 12, 2007 and October 10, 2007, the San Francisco Office of Labor Standards Enforcement (OLSE) received complaints from the following 6 employees of Papa Potrero's Pizza (Papa Potrero's) alleging violations under the San Francisco Minimum Wage Ordinance (MWO): Gilberto (Oswaldo) Quiroz Guerra (Claimant #1); Jose de Jesus Montoya (Claimant #2); Lilian Castillo (Claimant #3); Rogerio Pinto (Claimant #4); Krusner Neves (Claimant #5); and Rosalba Menjivar (Claimant #6). Each employee alleged that Papa Potrero's Pizza underpaid them through a payroll scheme that involved bimonthly check and cash payments, or cash payments only. The employees alleged that they were underpaid for regular hours worked and/or overtime hours worked. Based on those complaints and the commencement of an investigation into the payment practices of the employer, the OLSE determined that Marcos Fernandes de Sosa (Claimant #7) might have also been underpaid while he was employed at Papa Potrero's Pizza.

The wage claims for the 7 employees were consolidated into OLSE Case No. MWO-222. As its investigation continued, the OLSE determined that the employees' claims were credible and the restaurant had violated the Minimum Wage Ordinance with regard to all seven claimants.

1 The OLSE contends that total wages and interest in the sum of \$58,984.01 is owed to the 7
2 claimants, and the department calculates that maximum penalties in the sum of \$734,400.00 are
3 owed to the employees and the City (\$371,700.00 in penalties owed to the employees and
4 \$371,700.00 owed to the City).

5 By letter dated July 15, 2008, Donna Levitt, Manager of the Office of Labor Standards
6 Enforcement, requested that the Office of the Controller for the City and County of San Francisco
7 appoint an impartial hearing officer to conduct a hearing under San Francisco Administrative
8 Code Section 12R.7(b) in regard to possible violations of the San Francisco Minimum Wage
9 Ordinance by employer Papa Potrero's Pizza. (Hearing Officer's Exhibit 1)

10 By letter dated July 25, 2008, San Francisco Controller Ben Rosenfield informed Papa
11 Potrero's Pizza and Deputy City Attorney Jill Figg, counsel for the OLSE, that the Controller's
12 Office appointed the undersigned hearing officer to conduct a hearing regarding alleged violations
13 of the MWO. (Hearing Officer's Exhibit 2) The letter states in pertinent part:

14 "I hereby appoint Peter Kearns as the Hearing Officer in this matter. The
15 Hearing Officer's role is to conduct a hearing that affords employer Papa
16 Potrero's Pizza due process regarding the possible violations referenced
17 in OLSE's July 15th letter. (Administrative Code Section 12R.7(b).)

18 The Hearing Officer will promptly set a hearing date and notify the parties.
19 At the conclusion of the hearing, the hearing officer will provide written
20 Findings of Fact to OLSE and to Papa Potrero's Pizza. OLSE will then
21 make a final determination and notify Papa Potrero's Pizza."

22 By letter dated July 25, 2008, the undersigned hearing officer provided written notice to
23 the OLSE and Papa Potrero's Pizza that hearings would be conducted on September 4, 2008
24 and September 5, 2008. Pursuant to the notice of hearing, the OLSE was requested to submit a
25 pre-hearing statement on or before August 7, 2008, and Papa Potrero's Pizza was requested to
26 submit a pre-hearing statement on or before August 15, 2008. (Hearing Officer's Exhibit 3) The
27 OLSE was specifically requested to submit a "detailed statement of issues presented to the
28 Hearing Officer for Findings," and Papa Potrero's Pizza was specifically requested to submit a
"response to OLSE's statement of issues presented to the Hearing Officer for decision."

The hearings scheduled for September 4, 2008 and September 5, 2008 were rescheduled

1 for November 10, 2008 and November 17, 2008 to accommodate the employer's schedule. By
2 letter dated August 29, 2008, the undersigned hearing officer provided written notice to the OLSE
3 and Papa Potrero's Pizza of the rescheduled hearings, and the OLSE was requested to submit its
4 pre-hearing statement on or before September 26, 2008, and Papa Potrero's Pizza was
5 requested to submit its pre-hearing statement on or before October 3, 2008. (Hearing Officer's
6 Exhibit 6)

7 On September 26, 2008, the OLSE submitted its pre-hearing statement, which includes
8 OLSE Exhibits A-Y. (Hearing Officer's Exhibit 7) The pre-hearing statement lists the following
9 issues to be presented to the hearing officer:

- 10 (1) Did Papa Potrero's violate the MWO by failing to pay the minimum
11 wage to Claimant Gilberto Quiroz Guerra? If so, how much does it
owe Claimant Guerra?
- 12 (2) Did Papa Potrero's violate the MWO by failing to pay the minimum
13 wage to Claimant Jose de Jesus Montoya? If so, how much does
it owe Claimant Montoya?
- 14 (3) Did Papa Potrero's violate the MWO by failing to pay the minimum
15 wage to Claimant Lillian Castillo? If so, how much does it owe
Claimant Castillo?
- 16 (4) Did Papa Potrero's violate the MWO by failing to pay the minimum
17 wage to Claimant Rogerio Pinto? If so, how much does it owe
Claimant Pinto?
- 18 (5) Did Papa Potrero's violate the MWO by failing to pay the minimum
19 wage to Claimant Krusner Neves? If so, how much does it owe
Claimant Neves?
- 20 (6) Did Papa Potrero's violate the MWO by failing to pay the minimum
21 wage to Claimant Rosalba Menjivar? If so, how much does it owe
Claimant Menjivar?
- 22 (7) Did Papa Potrero's violate the MWO by failing to pay the minimum
23 wage to Claimant Marcos Fernandes de Sousa? If so, how much
does it owe Claimant de Sousa?
- 24 (8) Did Papa Potrero's violate the MWO? If so, how much does it owe
25 the City in administrative penalties? and
- 26 (9) Should Papa Potrero's be required to comply with the MWO?

27 On September 29, 2008, the undersigned hearing officer granted Papa Potrero's request
28

1 for an extension of time through October 14, 2008 to respond to the OLSE's pre-hearing
2 statement. On October 13, 2008, Papa Potrero's Pizza submitted the following pre-hearing
3 statement:

"This is Papa Potrero's Pizza Pre-Hearing Statement.

- 4 A. Papa Potrero's Pizza agrees that the OLSE has stated
5 appropriate issues for decision.
- 6 B. Papa Potrero's Pizza properly paid its employees. Papa Potrero's
7 Pizza's responsive case may take approximately four hours to
8 present.
- 9 C. By a combination of checks and cash payments, Papa Potrero's
10 Pizza complied with San Francisco's Minimum Wage Order.
11 OLSE's estimate of the hours worked by the employees is
12 flawed. The employees stole the vast majority of the relevant time
13 sheets. Most of the time sheets submitted as exhibits are actually
14 written by employees, not the employer.
- 15 D. Employer owners Makhan Singh and Harjeet Singh and former
16 employee Gurpreet Singh (not related) will testify that the
17 employer properly paid its employees.
- 18 E. Papa Potrero's Pizza intends to use the exhibits submitted by
19 OLSE."

20 Public hearings were conducted on the following dates: November 10, 2008 (City Hall
21 Room 406); November 17, 2008 (City Hall Room 416); December 8, 2008 (City Hall 406);
22 January 12, 2009 (City Hall 479); and January 26, 2008 (City Hall 479). Deputy City Attorney
23 Stephanie Gleason Bickham represented the Office of Labor Standards Enforcement at each of
24 the hearings, and attorney Frank P. Sarro represented Papa Potrero's Pizza and its owners,
25 Makhan Singh and Harjeet Singh.

26 At the hearings, the parties had full opportunity to present relevant evidence and
27 argument. Hearing Officer's Exhibits 1 through 14 were entered into the record, as were OLSE
28 Exhibits A through II. Papa Potrero's Pizza did not submit any documentary evidence into the
record. The OLSE called ten witnesses including the seven claimants. Papa Potrero's Pizza
cross-examined the OLSE witnesses, and also called owner Makhan Singh to testify. Those who
testified did so under oath. Table 1 ("Witness List – OLSE and Papa Potrero's Pizza"), attached
and incorporated, sets forth the name and identity of each of the witnesses who testified under

1 oath, and the date the witness appeared. Court reporter Gina L. Peterson was retained by the
2 OLSE to transcribe the hearings.

3 The following individuals were sworn under oath as interpreters for the claimants: Maria T.
4 Garcia de la Noceda (November 10, 2008), Paz Perry (January 12 & 26, 2009), and Susan M.
5 Howard (January 26, 2009). Ms. de la Noceda was "provisionally qualified" to translate in
6 Alameda County courts, Ms. Paz and Ms. Howard are State Certified Court Interpreters. Shortly
7 after Ms. de la Noceda began translating on behalf of Spanish-speaking claimant Lilian Castillo at
8 the November 10, 2008 hearing, the OLSE excused her from the hearing after immediately
9 recognizing the fact that that Ms. de la Noceda was not providing verbatim translation as
10 required.

11 The record was originally held open through February 20, 2009 for the submission of post-
12 hearing legal briefs, and through March 10, 2009 for optional responses. Based on a mutual
13 request by the parties, the open record was extended through March 6, 2009 for initial
14 submissions, and through March 16, 2009 for optional responses. All post-hearing submissions
15 were timely submitted, and the record closed on March 16, 2009.

16 **SEPARATE CLAIMS BROUGHT BEFORE THE CALIFORNIA DEPARTMENT OF LABOR**
17 **STANDARDS ENFORCEMENT**

18 On July 12, 2007, claimants Guerra, Montoya, and Castillo also filed claims with the
19 California Department of Labor Standards Enforcement (DLSE), wherein they alleged that they
20 were not provided with legally required rest or meal breaks. Hearings on those claims were
21 conducted on February 6, 2008, and Decisions were issued on March 6, 2008. Although the
22 claimants failed to meet their burden of proof with respect to rest breaks, they were awarded the
23 following amounts in wages, interest, and penalties based on the employer's failure to provide
24 meal breaks: (1) claimant Guerra was awarded \$8,557.16 in wages for denied meal breaks for the
25 period July 1, 2004 through July 12, 2007, plus \$557.97 in interest and \$3,222.00 in penalties; (2)
26 claimant Montoya was awarded \$8,173.28 in wages for denied meal breaks for the period July 1,
27 2004 through July 12, 2007, plus \$526.22 in interest and \$3,222.00 in penalties; and (3) claimant
28 Castillo was awarded \$840.00 in wages for denied meal breaks for the period February 20, 2007

1 through June 16, 2007, plus \$61.90 in interest and \$2,640.00 in penalties.

2 **PRELIMINARY RULINGS**

3 **Papa Potrero's Request for Exclusion of Witnesses**

4 At the November 10, 2008 hearing, Papa Potrero's Pizza requested that the claimant
5 witnesses be excluded from the hearing room during the testimony of co-claimants to prevent the
6 witnesses from being influenced by one another's testimony. The OLSE declined to stipulate to
7 the exclusion of its witnesses.

8 The employer's request for exclusion of witnesses was denied because there is no
9 authority requiring witness exclusion at local administrative hearings, and there is no specific
10 authority under the MWO requiring such exclusion. Notwithstanding the ruling, the claimants were
11 unable to observe each other's testimony because the hearing room on January 12 and 26, 2009
12 was only large enough to accommodate one witness and one interpreter at a time.

13 **Papa Potrero's Request to Admit Evidence Regarding Claimants' Immigration Status**

14 At the January 12, 2009 hearing, Papa Potrero's attorney Frank Sarro stated on the
15 record that he intended to question some of the claimants about their immigration status, which
16 the restaurant believed to be probative of the claimants' credibility. Counsel for the OLSE
17 objected and argued that such a line of questioning was not only irrelevant, but also
18 impermissible.

19 The undersigned hearing officer ruled at the January 12, 2009 hearing that any evidence
20 regarding the claimants' immigration status was inadmissible. The hearing officer's determination
21 is supported by the following: (1) California Labor Code §1171.5(a) explicitly provides that all
22 rights under state law "except any reinstatement remedy prohibited by federal law, are available
23 to all individuals regardless of immigration status," and the claimants in this case are not seeking
24 any reinstatement remedy; and (2) California Labor Code §1171.5(b) provides that in proceedings
25 to enforce labor laws, no inquiry shall be permitted into a person's immigration status "except
26 where the person seeking to make this inquiry has shown by clear and convincing evidence that
27 the inquiry is necessary in order to comply with federal immigration law," and the restaurant failed

1 to show by clear and convincing evidence that the inquiry was necessary in order to comply with
2 federal immigration law.

3 **OLSE's Request to Allow Krusner Neves and Marcos de Sosa to Submit Their Cases by**
4 **Declaration or Via Telephone Testimony**

5 The OLSE is seeking wages and interest in the amount of \$5,265.16 on behalf of claimant
6 Krusner Neves (Claimant #5), as well as combined penalties to the claimant and the City in the
7 amount of \$69,400.00. The OLSE is seeking wages and interest in the amount of \$1,766.20 on
8 behalf of Marcos de Souza (Claimant #7), as well as combined penalties to the claimant and the
9 City in the amount of \$77,800.00. Both claimants currently reside in Brazil.

10 At the November 10, 2008 hearing, the OLSE requested that Krusner Neves and Marcos
11 Fernandes de Sosa be permitted to present their claims by declaration or by telephone testimony
12 since the claimants no longer reside in the United States. The employer objected on due process
13 grounds to allowing the claimants to submit their claims through declarations, and argued that the
14 employer had a right to personally question and confront the claimants through cross-
15 examination.

16 The OLSE argued that if the claimants are not permitted to present their claims through
17 declarations, they should at least be able to testify by telephone. Papa Potrero's argued that due
18 process guaranteed the employer the opportunity to confront and cross-examine the claimants in
19 person. The employer specifically argued that personal confrontation was constitutionally required
20 due to the large financial interest at stake, combined with the fact that the outcome of the case
21 depended largely on the credibility of the claimants. The employer further argued that it would be
22 impossible to judge the demeanor or credibility of the witnesses over the telephone, especially
23 since the claimants required Portuguese interpreters.

24 The undersigned hearing officer ruled that Krusner Neves and Marcos Fernandes de
25 Sosa would be permitted to appear and testify by internet video call on Skype so that the
26 claimants' demeanor could be observed during direct and cross examination. The hearing officer
27 further ruled that the video testimony would be afforded proper evidentiary weight based on due
28 process considerations.

1 **SUMMARY OF LEGAL STANDARDS AND EVIDENCE**

2 1. On February 23, 2004, San Francisco established a minimum hourly wage for
3 employees pursuant to Administrative Code Section 12R (the Minimum Wage Ordinance or
4 MWO). Under MWO Section 12R.4, San Francisco employers shall pay to employees no less
5 than the minimum wage for each hour worked in the geographic boundaries of the City. The local
6 minimum wage exceeds the State minimum wage, and it is adjusted each year based on
7 increases in the regional Consumer Price Index for urban wage earners and clerical workers.

8 2. Pursuant to Section 12R.3(b) of the MWO, an employer is any person, as defined
9 in Section 18 of the California Labor Code, including corporate officers or executives, who directly
10 or indirectly or through an agent or another person, including through the services of a temporary
11 services or staffing agency or similar entity, employs or exercises control over the wages, hours
12 or working conditions of any employee.

13 3. Under Section 12R.3(a) of the MWO, an employee is any person who, in a
14 particular week, performs at least two (2) hours of work for an employer within the geographic
15 boundaries of the City, and qualifies as an employee entitled to payment of a minimum wage from
16 any employer under the California minimum wage law, as provided under Section 1197 of the
17 California Labor Code and wage orders published by the California Industrial Welfare
18 Commission, or is a participant in a Welfare-to-Work Program.

19 4. Papa Potrero's Pizza is a restaurant located at 2700 – 24th Street in San
20 Francisco, California, and is owned by Singh Corporation. Makhan Singh is the principal owner of
21 Singh Corporation and he testified that he has owned Papa Potrero's since November 1989, and
22 he has personally managed the restaurant since that time. Because the restaurant is a San
23 Francisco employer, it is covered by the MWO. The restaurant does not dispute that the
24 claimants are former employees of the restaurant. However, it does dispute the legitimacy of the
25 employees' wage claims.

26 5. The yearly amount of San Francisco's minimum hourly wage under Administrative
27 Code Section 12R.4, is set forth below for each year since the MWO took effect in February
28 2004:

TIME PERIOD	MINIMUM WAGE	APPLICABILITY
2/23/04 TO 12/31/04	\$8.50	Nonprofits and small businesses (10 employees or less) exempt
1/1/05 to 12/31/05	\$8.62	\$7.75 for nonprofits and small businesses
1/1/06 to 12/31/06	\$8.82	All nonprofits and businesses
1/1/07 to 12/31/07	\$9.14	All nonprofits and businesses
1/1/08 to 12/31/08	\$9.36	All nonprofits and businesses
1/1/09 to 12/31/09	\$9.79	All nonprofits and businesses

It is undisputed that Papa Potrero's Pizza had 10 or fewer employees during the relevant time periods, and the MWO therefore governed minimum wage for the restaurant effective January 1, 2005, at which time the minimum wage was \$7.75 for small businesses.

6. In addition to paying the minimum hourly wage under the MWO, San Francisco employers are required to pay overtime pursuant to State law. The Industrial Welfare Commission (IWC) of the Department of Industrial Relations promulgates Industrial Welfare Commission Orders, which govern wages, hours, and working conditions in California. IWC Order No. 5-2001 subjects restaurants to the following state overtime requirements:

Employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

Accordingly, a restaurant in San Francisco must pay at least the minimum hourly rate under the MWO for the first 8 hours of work in a day, and for the first 40 hours of work in a week.

1 Additionally, a San Francisco restaurant must pay time and a half for: (1) all hours worked in
2 excess of 8 hours (up to 12 hours) in any given day (unless it's the seventh consecutive day of
3 work in a workweek, which requires double-time pay); (2) all hours worked in excess of 40 hours
4 per week; and (3) the first 8 hours worked on the seventh consecutive day of work in a workweek.
5 Finally, a San Francisco restaurant must pay double time for: (1) all hours worked in excess of 12
6 hours in any workday; and (2) all hours worked in excess of 8 hours on the seventh consecutive
7 day of work in a workweek.

8 7. Pursuant to Section 12R.7(b) of the Minimum Wage Ordinance, the Office of Labor
9 Standards Enforcement is authorized to take appropriate steps to enforce the MWO, and may
10 investigate any possible violations of the MWO by an employer. Pursuant to San Francisco
11 Administrative Code 2A.23, the Office of Labor Standards Enforcement may also enforce the
12 provisions of the California Labor Code to the extent permitted by State Law. Additionally,
13 California Labor Code §2666 provides that state and county government entities have all of the
14 powers of an authorized representative of the Department of Industrial Relations in the
15 investigation of suspected Labor Code violations.

16 8. OLSE Supervising Compliance Officer Richard Waller testified that the OLSE only
17 investigates the wage payment practices of a business following an employee complaint. Mr.
18 Waller testified that after receiving an employee complaint, the OLSE opens a case file, and
19 OLSE staff members investigate the complaint.

20 9. Josh Pastreich is an OLSE Compliance Officer. Mr. Pastreich testified that on July
21 12, 2007, Rael Silva of Young Workers United visited the OLSE office with the following three
22 employees from Papa Potrero's Pizza, each of whom filed a wage claim report: Gilberto
23 (Oswaldo) Quiroz Guerra (Claimant #1); Jose de Jesus Montoya (Claimant #2); and Lilian Castillo
24 (Claimant #3). The claimants are Spanish-speaking, and the claim forms were completed in
25 Spanish. (OLSE Exhibits A-C) Josh Pastreich testified that the claims were assigned to him
26 because he is bilingual in English and Spanish.

27 10. The initial three claimants alleged unpaid wages, underpayment of minimum wage,
28 and/or unpaid overtime. Josh Pastreich testified that Mr. Guerra and Mr. Montoya each

1 specifically alleged that although they were paid the minimum wage by payroll check for the first
2 80 hours of work per two-week pay period, they were underpaid in cash for all overtime hours
3 worked. Mr. Pastreich further testified that Lilian Castillo specifically alleged that she was paid in
4 cash at a rate less than minimum wage for all hours worked.

5 11. Josh Pastreich testified that on July 13, 2007, the day after the first three claims
6 were filed, Rael Silva of Young Workers United informed the OLSE that claimants Guerra and
7 Montoya had been fired on the evening of July 12, 2007. After receiving the message that two of
8 the claimants had been fired, Mr. Pastreich went to the restaurant to conduct a site visit.

9 12. Mr. Pastreich testified that when he arrived at the restaurant on July 13, 2007, he
10 introduced himself to Harjeet Singh and asked to speak to the owner or manager of the restaurant
11 regarding employee wage claims that had been filed with the OLSE. According to Mr. Pastreich,
12 Ms. Singh informed him that neither the owner nor the manager was available. Mr. Pastreich
13 further testified that when he proceeded to the kitchen to interview the employees, he met Makhan
14 Singh, the owner, who was preparing pizzas. Mr. Pastreich testified that he informed Mr. Singh that
15 he was investigating claims of underpayments under the San Francisco Minimum Wage
16 Ordinance, at which time Mr. Singh showed Mr. Pastreich an employee time sheet that was posted
17 in the kitchen. (OLSE Exhibit J, page 4) The handwritten time sheet shows hours worked for each
18 day during the week of July 2, 2007 through July 8, 2007, as well as the week July 9, 2007 through
19 July 15, 2007. The time sheet lists the following employees: Makhan, Harjeet, Oswaldo/Gilberto,
20 Jesus, Marcos, Krusner, and Irvias.

21 13. Pursuant to Section 12R.5(c) of the MWO, San Francisco employers are required to
22 retain payroll records pertaining to employees for a period of four years, and employers shall allow
23 the OLSE access to such records, with appropriate notice and at a mutually agreeable time, to
24 monitor compliance with the requirements of the MWO. During the July 13, 2007 site visit, Josh
25 Pastreich delivered a letter to Makhan Singh requesting the restaurant to produce payroll records.
26 The July 13, 2007 letter from Mr. Pastreich states, in pertinent part:

27 "The Office of Labor Standards Enforcement (OLSE) received a
28 complaint alleging non-compliance with the San Francisco Administrative

1 Code Chapter 12R, Minimum Wage Ordinance (MWO). Under MWO
2 Section 12R.7(b), OLSE is granted authority to investigate any possible
3 violations and where it has reason to believe that a violation has
4 occurred, order temporary or interim relief to mitigate violations. Pursuant
5 to Section 12R.7(b) of the Code, please provide copies of payroll records
6 for the period February 23, 2004 to the present for Papa Potrero's Pizza
7 and all divisions, subsidiaries and parent companies. The documents
8 should include the following:

- 9 • Copies of original time cards, sign-in sheets, ledgers and any and
10 all payroll records which show the actual hours worked each day
11 for each employee for the period February 23, 2004 to the
12 present.
- 13 • Copies of the payroll check stub details and/or itemized pay stubs.
14 Those records, as per Labor Code Section 226, should include the
15 number of hours worked, the rate of pay, all deductions, net
16 wages earned, the payroll period, the name of the employee and
17 his/her social security number, the name of the employer, for each
18 employee for the period February 23, 2004 to the present.
- 19 • A list of former and current employees with addresses and
20 telephone numbers. Please include on the list all those employees
21 who worked for the period February 23, 2004 to the present.

22 Pursuant to San Francisco Administrative Code, Chapter 12R.7(b), these
23 records are to be provided upon OLSE's request. The above requested
24 documents are due in OLSE's office no later than close business July 30,
25 2007."

26 (OLSE Exhibit H) It is noted that although the July 13, 2007 letter requests payroll records
27 beginning on February 23, 2004, the effective date of the MWO, the Ordinance did not govern the
28 minimum wage of the subject restaurant until January 1, 2005 because it employed 10 or fewer
workers.

14. Mr. Pastreich testified that during the July 13, 2007 site visit, Mr. Singh denied
paying cash to any of his employees.

15. Mr. Pastreich testified that he went to the restaurant a second time on or around
July 16, 2007, during which time he delivered to the restaurant informational posters that San
Francisco employers are required to display for workers. Mr. Pastreich testified that during the
second visit, Mr. Singh agreed to cooperate with the OLSE investigation and he again denied
paying cash to any of his employees.

16. Josh Pastreich testified that on or around July 17, 2007, claimant Montoya

1 delivered to the OLSE a packet of documents, which the department submitted as Exhibit I. Exhibit
2 I includes the following:

3 (1) Copies of handwritten timesheets for various two-week time periods in 1999, 2003,
4 2004, 2005, 2006, and 2007;

5 (2) Copies of handwritten calculations of hours worked by various employees for 14
6 different pay periods in 2005 (9 pay periods) and 2007 (5 pay periods); and

7 (3) A 2007 schedule for Gilberto Quiroz Guerra, Jose de Jesus Montoya, Lilian Castillo
8 Krusner Neves, and Marcos Fernandes de Sosa.

9 17. Jose Montoya testified that most of the documents delivered to the OLSE on July
10 17, 2007 were photocopied by him and other employees during the relevant time periods, and a
11 few of the handwritten calculations of hours worked were found in the trash. Mr. Montoya and
12 claimant Lilian Castillo testified that they and other workers, or their friends, often photocopied the
13 timesheets at a nearby photocopy store to assure that the restaurant paid the employees for all
14 hours worked. Mr. Montoya further testified that the 2007 schedule went into effect sometime in
15 January 2007.

16 18. Josh Pastreich testified that the documents received from Mr. Montoya corroborated
17 the alleged number of hours worked by claimants Guerra, Montoya, and Castillo. He further
18 testified that based on the documents and interviews with the first three claimants, he was able to
19 determine that the following additional workers were also underpaid: Rogerio Pinto (Claimant #4);
20 Krusner Neves (Claimant #5); Rosalba Menjivar (Claimant #6); and Marcos Fernandes de Sosa
21 (Claimant #7). However, Mr. Pastreich did not have direct contact with the additional claimants until
22 at least several months later.

23 19. On July 27, 2007, Papa Potrero's Pizza delivered payroll records to the OLSE for
24 the period January 1, 2005 through July 16, 2007. (OLSE Exhibit J) Josh Pastreich testified that
25 the payroll records corroborated the allegation that Mr. Guerra and Mr. Montoya were paid through
26 payroll only for regular hours (40 hours per week/80 hours per pay period), and they were not paid
27 through payroll for any overtime hours. After reviewing the payroll documents produced by the
28 restaurant, the OLSE determined that Papa Potrero's failed to produce all documents requested

1 under MWO Section 12R.5(c).

2 20. On August 13, 2007, the OLSE sent a Notice of Violation (NOV) to Papa Potrero's
3 Pizza stating that the restaurant had failed to produce all requested records pursuant to MWO
4 Section 12R.5(c). (OLSE Exhibit K) The NOV states that the employer is required to provide the
5 following documents within 10 days to correct the violation: (1) copies of original time cards, sign-in
6 sheets, ledgers and any and all payroll records which show the actual hours worked each day for
7 each employee for the period from February 23, 2004 to the present; (2) copies of the payroll
8 check stub details and/or itemized pay stubs; and (3) a list of former and current employees with
9 addresses and telephone numbers for the period from February 23, 2004 to the present. The NOV
10 further states:

11 "Pursuant to Section 12R16(b) of the San Francisco Administrative Code,
12 the OLSE is empowered to assess administrative penalties in the amount
13 of \$500.00 for the above referenced violation. **You have ten (10) days**
14 **from the date of this Notice to establish that no violation occurred,**
15 **that you are not responsible for the violation, or that you intend to,**
16 **and have, corrected the violation described herein.** If you fail to
17 comply with this Notice within the time period provided, the OLSE will
18 issue an administrative citation assessing a penalty or penalties in the
19 amount described above."

20 21. On September 7, 2007, the OLSE issued a Citation of the Minimum Wage
21 Ordinance based on Papa Potrero's failure to comply with the August 13, 2007 NOV. (OLSE
22 Exhibit K) The citation required the restaurant to pay a penalty of \$500.00 for failure to maintain
23 proper payroll records. The restaurant paid the \$500.00 penalty to the OLSE the following week.

24 22. On September 10, 2007, the OLSE sent a Notice of Determination to Papa Potrero's
25 Pizza, which states that the OLSE determined that the restaurant owed back wages and interest to
26 the following workers: Gilberto Quiroz Guerra; Jose de Jesus Montoya; Lilian Castillo; Rogerio
27 Pinto; and Marcos Fernandes de Sosa. (OLSE Exhibit L) The letter states, in pertinent part:

28 "The total amount of back wages owed, including simple interest, is
\$45,347.89. [Sec. 12.R.7.(d)] This determination is based on the review of
documents, interviews with workers, observation of business operations
and interviews with representatives of the business. The worksheet
detailing the amount owed to each employee is enclosed for your review.

To date, you have only provided one timesheet. However, OLSE was
able to obtain a significant number of timesheets from employees which
include actual hours worked, rates of pay, and the names of the

1 employees. From these records the OLSE was able to extrapolate
2 reasonable estimates of the hours worked by each employee. This
3 determination only covers the above listed workers and in no way waives
4 the rights of any other former or current employees' right to bring a future
5 action to this office.

6 The OLSE believes this determination to be fair and reasonable. If you
7 disagree you may request a due process hearing by submitting a written
8 objection by no later than the close of business Friday, September 21,
9 2007. The request for hearing must contain the grounds for the objection
10 and any supporting documentation and be sent to Donna Levitt, Manager,
11 Office of Labor Standards Enforcement, City Hall, Room 430, 1 Carlton B.
12 Goodlett Place, San Francisco.

13 In lieu of requesting a hearing, Papa Potrero's Pizza may provide
14 restitution for the assessed amounts by delivering or mailing a check
15 made payable to the City and County of San Francisco for the full amount
16 indicated on the worksheet to the Office of Labor Standards Enforcement,
17 Living Wage/Living Health Unit, City Hall, Room 430, 1 Dr. Carlton B.
18 Goodlett Place, San Francisco, CA 94102. The check must be received
19 no later than the close of business Friday September 21, 2007. Payment
20 of the assessed amounts shall not affect the City's right to take
21 appropriate action for any failure to comply with the MWO, including, but
22 not limited to, imposing appropriate penalties and recovering attorneys'
23 fees and costs for violations of the Ordinance."

24 Although the September 10, 2007 Notice of Determination is signed by Supervising Compliance
25 Officer Richard Waller, Josh Pastreich testified that he prepared the letter for Mr. Waller's approval
26 and signature.

27 23. On September 18, 2007, Frank P. Sarro, attorney for Papa Potrero's Pizza,
28 delivered a written objection to the September 10, 2007 Notice of Determination regarding unpaid
wages, and the employer requested a due process hearing. (OLSE Exhibit M)

24 24. Between October 3, 2007 and October 10, 2007, the OLSE interviewed and
25 received written statements from the following claimants: Rogerio Pinto (Claimant #4); Krusner
26 Neves (Claimant #5); and Rosalba Menjivar (Claimant #6). (OLSE Exhibit N, O, & P) Each of the
27 claimants alleged underpayments that were made either in cash, or through a combination of cash
28 and payroll checks. Although the OLSE had not yet made contact with Marcos Fernandos de
Sousa (Claimant #7), Josh Pastreich testified that he was able to determine that Mr. de Sousa had
also been underpaid based on the documents provided by Mr. Guerra, as well as interviews with
the other claimants.

1 25. On December 5, 2007, the OLSE mailed an Amended Notice of Determination to
2 Papa Potrero's counsel. This Determination concluded that for the period January 1, 2005 through
3 September 5, 2007, Papa Potrero's owed the claimants back wages and simple interest in the sum
4 of \$55,367.14. (OLSE Exhibit R) The Amended Notice states, in pertinent part:

5 "By letter dated September 10, 2007, the Office of Labor Standards
6 Enforcement (OLSE) issued a 'Notice of Determination' assessing Papa
7 Potrero's Pizza \$45,347.89 in back wages for six (6) employees.
8 However, since that time, the OLSE obtained additional information and
9 hereby amends its determination to:

- 10 • Include back wages for two additional employees, Krusner Teixeira
11 Neves in the amount of \$4,973.23, and Rosalva Menjivar in the
12 amount of \$3,820.75, for the period February 23, 2004 to July 15,
13 2007; and ,
- 14 • Adjust the back wages owed to Rogerio Rodriguez Pereira Pinto
15 (previously known only as Rogelio) from \$8,703.40 to \$9,265.59.

16 The back wage determinations for the other employees in the original
17 notice of determination remain the same. The full amended amount of
18 back wages owed, including simple interest is \$55,367.14. The
19 worksheets detailing the amount owed to each employee (including
20 worksheets for the two additional employees and the adjusted worksheet
21 for Mr. Pinto) is enclosed for your review.

22 The original determination and the 'Amended' determination only cover
23 the named employees and in no way affects the liability Papa Potrero's
24 Pizza may have to other current or former employees.

25 By letter dated September 18, 2007, you responded to OLSE's original
26 determination by stating your client's disagreement with the OLSE's
27 original determination and requesting a due process hearing. In response,
28 the OLSE offered to schedule a case conference where the factual issues
of the investigation and a possible settlement could be discussed. Papa Potrero's Pizza refused this offer.

Therefore, this matter will be referred for formal hearing at which time OLSE may seek administrative penalties of \$100 for each day or portion thereof that a violation occurred or continued, pursuant to San Francisco Administrative Code, Section 12R.7(b).

A copy of San Francisco Administrative Code, Section 12R is enclosed for your information. The right to a hearing and administrative penalties are contained in section 12R7 (b)."

26 26. On January 15, 2008, Papa Potrero's counsel requested copies of all timesheets in
27 OLSE's possession, which the OLSE produced on February 11, 2008. At the hearings, Makhan

1 Singh testified that the timesheets in the OLSE's possession were stolen from a locked filing
2 cabinet in the basement of the restaurant. Mr. Singh further testified that he first noticed the
3 records were missing shortly after the first visit by Josh Pastreich on July 13, 2007. According to
4 OLSE staff members, Papa Potrero's first alleged the records were stolen during a case
5 conference in April 2008, even though the employer had been fined \$500.00 in September 2007
6 for its failure to maintain proper records, and the employer had participated in wage-related
7 hearings before the DLSE in February 2008 where payroll records were also at issue.

8 27. At the hearings, Makhan Singh testified that he believed that the timesheets
9 submitted by the OLSE had been manufactured by the claimants to bolster their claims. However,
10 he also testified that some of the timesheets were in his own handwriting.

11 Wage Claim Calculations

12 28. Josh Pastreich testified that he calculated the amount of the underpaid wages owed
13 to the claimants in the September 10, 2007 Notice of Determination and the December 5, 2007
14 Amended Notice of Determination by using the hours stated in the timesheets that had been
15 provided by claimant Montoya for those periods that time sheets were available, and by averaging
16 those hours for periods where no time sheets were available. Mr. Pastreich further testified that
17 prior to the hearings and during the hearing process, he refined the calculation method by using
18 the actual hours stated in the timesheets for those periods that time sheets were available, and
19 instead of using averages for periods with no timesheets, he relied upon interview information
20 provided to him by the claimants. Mr. Pastreich testified that reliance upon interview information
21 better comports with prevailing law, and the OLSE submitted a copy of Section 41.1.1 of the Policy
22 and Interpretations Manual of the Division of Labor Standards Enforcement, which states:

23 "It is the employer's responsibility to keep accurate records of the time
24 that employees work. If the employer fails to maintain accurate time
25 records, the employee's credible testimony or other credible evidence
26 concerning his hours worked is sufficient to prove a wage claim. The
27 burden of proof is then on the employer to show that the hours claimed by
28 the employee were not worked. Time records must be kept whether it is
customary in the area or industry. (*Anderson v. Mt. Clemens Pottery*
(1946) 328 U.S. 680; 90 L.Ed. 1515; 66 S.Ct. 1187 (rhg. den. 329 U.S.
822)) The leading California case on this issue is *Hernandez v. Mendoza*
(1988) 199 Cal. App. 3d 721; 245 Cal.Rptr. 36, which follows the rationale

set out in the *Anderson v. Mt. Clemens Pottery* case.”

1 Mr. Pastreich further testified that during the hearing process, he identified some errors and
2 mistakes in previous calculations of wages owed to the claimants, and those errors were all
3 corrected during the period of time in which the hearings were conducted. Mr. Pastreich further
4 testified that OLSE Exhibit FF includes all corrections that were found to be necessary during the
5 hearing process.

6 29. In this case, the audit period begins on January 1, 2005, the effective date of the
7 MWO for small employers, through September 5, 2007, the last day worked by any of the
8 claimants. The OLSE calculates that the claimants are owed back wages and interest in the sum of
9 \$58,984.01 as follows: (1) Gilberto Quiroz Guerra (\$14,466.54); (2) Jose de Jesus Montoya
10 (\$18,286.40); (3) Lilian Castillo (\$4,032.72); (4) Rogerio Pinto (\$9,230.49); (5) Krusner Neves
11 (\$5,265.16); (6) Rosalba Menjivar (\$5,936.52); and (7) Marcos Fernandes de Sosa (\$1,766.20).
12 The OLSE further calculates that penalties in the sum of \$371,700.00 are owed to the claimants,
13 and additional penalties in the amount of \$371,700.00 are owed to the OLSE.

14 Interest Sought by the OLSE

15 30. Section 12R.7(d) of the MWO provides that in any administrative action brought for
16 the nonpayment of wages under the MWO, interest shall be awarded on all due and unpaid wages,
17 at the rate of interest specified in California Civil Code §3289(b). The section further provides that
18 interest shall accrue from the date the wages were due and payable to the date the wages are paid
19 in full. California Civil Code §3289(b) provides for simple interest at the rate of 10% per annum. In
20 this case, the OLSE seeks a determination as to the amount of interest owed to each employee
21 beginning on the first day the employee was underpaid through November 9, 2008, the day before
22 the first hearing.

23 Penalties Sought by the OLSE on Behalf of the Claimants and the Department

24 31. Section 12R.7(b) of the MWO provides that penalties may be assessed on behalf
25 of an employee when an employer fails to pay the minimum wage. Where the OLSE, after a
26 hearing that affords a suspected violator due process pursuant to Administrative Code Section
27 12.R.7(b), determines that a violation has occurred, it may order any appropriate relief including,
28

1 but not limited to, reinstatement, the payment of any back wages unlawfully withheld, and the
2 payment of an additional sum as an administrative penalty in the amount of \$50.00 to each
3 employee or person whose rights under the MWO were violated for each day or portion thereof
4 that the violation occurred or continued. Pursuant to Section 12R.7(b), a violation for unlawfully
5 withholding wages shall be deemed to continue from the date immediately following the date that
6 the wages were due and payable to the date preceding the date the wages are paid in full.
7 Section 12.R.7(b) further provides that the OLSE may also order a violating employer or person
8 to pay to the OLSE a sum of not more than \$50.00 for each day or portion thereof and for each
9 employee or person as to whom the violation occurred or continued (\$50.00 per day multiplied by
10 the number of underpaid employees). Payments to the OLSE are "to compensate the City for the
11 costs of investigating and remedying the violation."

12 32. In this case, the OLSE requests a determination of maximum penalties that may
13 be assessed on behalf of the employees, as well as the maximum payment that may be
14 assessed on behalf of the department, for the period the violations continued through November
15 9, 2008, the day before the first hearing.

16 **OLSE's Calculation of Wages Owed to Each Claimant and OLSE'S Calculation of Penalties**

17 Gilberto (Oswaldo) Quiroz Guerra (Claimant #1)

18 33. Claimant Gilberto Guerra and owner Makhan Singh each testified that Mr. Guerra
19 began working at the restaurant as a cook and kitchen worker in approximately 1999. Mr. Singh
20 testified that he fired Mr. Guerra on July 12, 2007 because Mr. Guerra refused to keep busy by
21 cleaning the kitchen when business was slow.

22 34. Mr. Guerra credibly testified that between January 2005 and January 2007, he
23 worked approximately 136 hours per two-week pay period. Mr. Guerra specifically testified that
24 he typically worked the following approximate hours: Monday through Thursday – 10:00 AM to
25 9:00 PM; Friday – 10:00 AM to 11:00 PM; Saturday – 12:00 PM to 9:00 PM; and Sunday – 3:00
26 PM to 11:00 PM. He further testified that he took one day off every two weeks – usually on
27 Wednesday – but he sometimes traded his day off with Jesus Montoya. Mr. Guerra further
28

1 credibly testified that in early 2007, his hours were reduced to approximately 84 hours per two-
2 week period. Timesheets submitted by the OLSE corroborate the claimant's testimony regarding
3 his schedule, as set forth in the table below. (OLSE Exhibit FF)

PAY PERIOD ENDING	TOTAL HOURS WORKED
1/30/05	139
10/23/05	139
11/6/05	139
12/4/05	115
3/12/06	136
1/14/07	119
1/28/07	99
3/11/07	92
3/25/07	84
4/8/07	85
4/22/07	90
5/6/07	71
5/20/07	90
7/15/07*	56.25

* Mr. Guerra's last day at the restaurant was July 12, 2007.

13 35. The OLSE submitted copies of handwritten calculations of hours worked by
14 various employees during 9 pay periods in 2005 and 5 pay periods in 2007. (OLSE Exhibit I) The
15 handwritten calculations show that Mr. Guerra worked between 115 and 148 hours per pay period
16 in 2005, which is consistent with Mr. Guerra's testimony and the timesheets submitted into
17 evidence. The 2007 calculations show that Mr. Guerra worked between 71 and 92 hours per pay
18 period, which is also consistent with his testimony and the timesheets. The 2007 employee
19 schedule submitted by the OLSE shows that Mr. Guerra was scheduled to work 47 hours per
20 week, which is also consistent with his testimony.

21 36. Mr. Guerra credibly testified that he was paid the minimum wage for 40 hours of
22 work per week through the employer's payroll system, and he was paid a flat rate of \$9.00 an
23 hour for all overtime hours worked. Accordingly, the claimant alleges that he was underpaid for all
24 overtime hours worked. The employer's payroll records confirm that Mr. Guerra was paid the
25 minimum wage (\$7.75/hr. in 2005; \$8.82/hr. in 2006; and \$9.14/hr. in 2007) for 80 hours of work
26 per two-week pay period from January 1, 2005 through July 12, 2007. (OLSE Exhibit J)

27 37. Papa Potrero's owner, Makhan Singh, does not deny that claimant Guerra worked
28

1 overtime between January 1, 2005 and July 12, 2007, nor does he deny that the claimant was
2 paid \$9.00 per hour in cash for overtime hours. Instead, Mr. Singh claims that Mr. Guerra is
3 exaggerating the number of hours that he worked. However, aside from the payroll records
4 showing that Mr. Guerra was paid the required minimum wage for 80 hours per two-week pay
5 period, the restaurant never provided the OLSE with any additional payroll records and no
6 additional documentation was offered during the hearings. As previously discussed, Mr. Singh
7 claims that the employees stole almost all of the payroll-related records. Mr. Singh further testified
8 that he believes that the timesheets submitted into evidence were manufactured by the claimants,
9 even though he acknowledged that some of the timesheets were in his own handwriting.

10 38. Based on interviews with the claimant, payroll documentation, timesheets, and
11 handwritten calculations of hours worked during various pay periods, the OLSE calculates that
12 Mr. Guerra was underpaid \$11,421.23 during the period January 1, 2005 through July 12, 2007.
13 The OLSE submitted a detailed breakdown of its calculations, which credits the employer for
14 having paid minimum wage for all regular hours worked (40 hours per week), as well as \$9.00 per
15 hour for all overtime hours worked. (OLSE Exhibit FF) In addition, the OLSE calculates that the
16 claimant is owed 10% simple interest, up to the first day of hearing, in the amount of \$3,045.31.
17 Accordingly, the OLSE calculates that the claimant is owed total wages and interest in the
18 amount of \$14,466.54 (\$11,421.23 wages + \$3,045.31 interest = \$14,466.54).

19 39. The OLSE calculates maximum penalties owing to Mr. Guerra in the amount of
20 \$69,700.00, which amount is calculated by multiplying \$50.00 per day for each day that the
21 violation continued, beginning on January 16, 2005 (the first payday the claimant was underpaid
22 in 2005) and continuing through November 9, 2008 (the day before the first hearing) (\$50.00 X
23 1,394 days for the period 1/16/05 through 11/9/08 = \$69,700.00). The OLSE also seeks
24 maximum penalties in the same amount on behalf of the department pursuant to Section
25 12R.7(b) of the MWO.

26 Jose de Jesus Montoya (Claimant #2)

27 40. Claimant Jose de Jesus Montoya began working at the restaurant as a cook and
28 kitchen worker in approximately 1998. Mr. Montoya testified that he also uses the name Jesus

1 Gutierrez because his last name is actually Montoya-Gutierrez. Mr. Montoya testified that he was
2 fired on July 12, 2007, and Makhan Singh testified that the claimant quit on that date.

3 41. Mr. Montoya credibly testified that he worked approximately 133 hours every two
4 weeks between January 2005 and January 2007. Mr. Montoya specifically testified that during
5 that two-year period, he typically worked the following approximate hours: Monday – 3:00 PM to
6 11:00 PM; Tuesday – 10:00 AM to 11:00 PM; Wednesday and Thursday – 3:00 PM to 11:00 PM;
7 Friday – 11:00 AM to 12:00 PM; Saturday – 12:00 PM to 12:00 AM; and Sunday – 12:00 PM to
8 11:00 PM. He further testified that he took one day off every two weeks – usually on Tuesday –
9 but he sometimes traded his day off with Gilberto Guerra. Mr. Montoya further credibly testified
10 that in early 2007, his hours were reduced to 118 hours every two weeks. Timesheets submitted
11 by the OLSE corroborate the claimant’s testimony regarding his schedule, as set forth in the table
12 below. (OLSE Exhibit FF)

PAY PERIOD ENDING	TOTAL HOURS WORKED
1/30/05	133
10/23/05	133
11/6/05	133
12/4/05	119
3/12/06	133
1/14/07	115
1/28/07	125
3/11/07	110
3/25/07	118
4/8/07	118
4/22/07	109
5/6/07	120
5/20/07	109
7/15/07*	42.75

* Mr. Montoya’s last day at the restaurant was July 12, 2007.

22 42. The OLSE submitted copies of handwritten calculations of hours worked by
23 various employees during 9 pay periods in 2005 and 5 pay periods in 2007. (OLSE Exhibit I) The
24 handwritten calculations show that Mr. Montoya worked between 119 and 133 hours per pay
25 period in 2005, which is consistent with Mr. Montoya’s testimony and the timesheets submitted
26 into evidence. The 2007 calculations show that Mr. Montoya worked between 115 and 120 hours
27 per pay period, which is also consistent with his testimony and the timesheets. The 2007
28

1 employee schedule submitted by the OLSE shows that Mr. Montoya was scheduled to work 54
2 hours per week, which is also consistent with his testimony.

3 43. Mr. Montoya credibly testified that he was paid the minimum wage for 40 hours of
4 work per week through the employer's payroll system, and he was paid a flat rate of \$8.50 an
5 hour for all overtime hours worked. Accordingly, the claimant alleges that he was underpaid for all
6 overtime hours worked. The employer's payroll records confirm that Mr. Montoya was paid the
7 minimum wage (\$7.75/hr. in 2005; \$8.82/hr. in 2006; and \$9.14/hr. in 2007) for 80 hours of work
8 per two-week pay period from January 1, 2005 through July 12, 2007. (OLSE Exhibit J)

9 44. Papa Potrero's owner, Makhan Singh, does not deny that claimant Montoya
10 worked overtime between January 1, 2005 and July 12, 2007, nor does he deny that the claimant
11 was paid \$8.50 per hour in cash for overtime hours. Instead, Mr. Singh claims that Mr. Montoya is
12 exaggerating the number of hours that he worked. However, aside from the payroll records
13 showing that Mr. Montoya was paid the required minimum wage for 80 hours per two-week pay
14 period, the restaurant never provided the OLSE with any additional payroll records and no
15 additional documentation was offered during the hearings. As previously discussed, Mr. Singh
16 claims that the employees stole almost all of the payroll-related records. Mr. Singh further testified
17 that he believes that the timesheets submitted into evidence were manufactured by the claimants,
18 even though he acknowledged that some of the timesheets were in his own handwriting.

19 45. Based on interviews with the claimant, payroll documentation, timesheets, and
20 handwritten calculations of hours worked during various pay periods, the OLSE calculates that
21 Mr. Montoya was underpaid \$14,583.15 during the period January 1, 2005 through July 12, 2007.
22 The OLSE submitted a detailed breakdown of its calculations, which credits the employer for
23 having paid minimum wage for all regular hours worked (40 hours per week), as well as \$8.50 per
24 hour for all overtime hours worked. (OLSE Exhibit FF) In addition, the OLSE calculates that the
25 claimant is owed 10% simple interest, up to the first day of hearing, in the amount of \$3,703.25.
26 Accordingly, the OLSE calculates that the claimant is owed total wages and interest in the
27 amount of \$18,286.40 (\$14,583.15 wages + \$3,703.25 interest = \$18,286.40).

28 46. The OLSE calculates maximum penalties owing to Mr. Montoya in the amount of

1 \$69,700.00, which amount is calculated by multiplying \$50.00 per day for each day that the
2 violation continued, beginning on January 16, 2005 (the first payday the claimant was underpaid
3 in 2005) and continuing through November 9, 2008 (the day before the first hearing) (\$50.00 X
4 1,394 days for the period 1/16/05 through 11/9/08 = \$69,700.00). The OLSE also seeks
5 maximum penalties in the same amount on behalf of the department pursuant to Section
6 12R.7(b) of the MWO.

7 Lilian Castillo (Claimant #3)

8 47. Claimant Lilian Castillo began working at the restaurant as a waitress on or around
9 February 15, 2007, and she was fired on June 16, 2007. Ms. Castillo testified that she was fired
10 because business was slowing down, and Makhan Singh testified that the claimant was fired for
11 giving away free beer.

12 48. Ms. Castillo credibly testified that during approximately the first month of her
13 employment, she worked between 40 and 50 hours per week. She further credibly testified that
14 beginning in or around mid-March 2007, she began working approximately 70 hours per week
15 because she was the only waitress on staff. Ms. Castillo specifically testified that she worked
16 between 9 and 11 hours per day, with no days off. Timesheets submitted by the OLSE
17 corroborate the claimant's testimony regarding her schedule, as set forth in the table below.

18 (OLSE Exhibit FF)

19

PAY PERIOD ENDING	TOTAL HOURS WORKED
3/11/07	88
3/25/07	131
4/8/07	157
4/22/07	145
5/6/07	144
5/20/07	140

20
21
22
23

24 49. The handwritten calculations of hours worked during various time period in 2007
25 show that Ms. Castillo worked between 88 and 157 hours per pay period, which is consistent with
26 her testimony and the timesheets. The 2007 employee schedule submitted by the OLSE shows
27 that Ms. Castillo was scheduled to work 43 hours per week. Ms. Castillo testified that the 2007
28

1 schedule submitted into evidence was the schedule that she worked for the first month she
2 worked at the restaurant, before she started working an average of 10 hours per day.

3 50. Ms. Castillo was paid \$8.00 per hour in cash for all hours worked, and she
4 therefore alleges that she was underpaid for all hours worked since the minimum wage was \$9.14
5 per hour in 2007. Although the employer does not dispute the hourly wage paid to Ms. Castillo, it
6 does dispute the number of hours she claims to have worked during the period of her
7 employment.

8 51. Makhan Singh testified that the claimant agreed to work for \$8.00 per hour
9 because she did not have a social security number. Although Mr. Singh does not deny that Ms.
10 Castillo was not paid minimum wage, he claims that Ms. Castillo is exaggerating the number of
11 hours that she worked. Although Mr. Singh testified that Ms. Castillo worked about 42 or 43
12 hours per week, the restaurant failed to submit any documentation in support of that assertion. As
13 previously discussed, Mr. Singh claims that the employees stole almost all of the payroll-related
14 records. Mr. Singh further testified that he believes that the timesheets submitted into evidence
15 were manufactured by the claimants, even though he acknowledged that some of the timesheets
16 were in his own handwriting. Ms. Castillo credibly testified that while she worked at the restaurant,
17 she was in charge of recording hours worked on employee timesheets, and she further testified
18 that the timesheets submitted into the record for the period of time she worked at the restaurant
19 were filled out either by her and/or by Makhan Singh or Harjeet Singh.

20 52. Based on interviews with the claimant, as well as the employee timesheets and
21 handwritten calculations of hours worked during various pay periods, the OLSE calculates that
22 Ms. Castillo was underpaid \$3,494.37 during the period February 15, 2007 through June 16,
23 2007. The OLSE submitted a detailed breakdown of its calculations, which credits the employer
24 for having paid \$8.00 an hour to Ms. Castillo for all hours worked. (OLSE Exhibit FF) In addition,
25 the OLSE calculates that the claimant is owed 10% simple interest, up to the first day of hearing,
26 in the amount of \$538.35. Accordingly, the OLSE calculates that the claimant is owed total wages
27 and interest in the amount of \$4,032.72 (\$3,494.37 wages + \$538.35 interest = \$4,032.72).

28 53. The OLSE calculates maximum penalties owing to Ms. Castillo in the amount of

1 \$31,200.00, which amount is calculated by multiplying \$50.00 per day for each day that the
2 violation continued, beginning on February 25, 2007 (the first payday the claimant was underpaid)
3 and continuing through November 9, 2008 (the day before the first hearing) (\$50.00 X 624 days
4 for the period 2/25/07 through 11/9/08 = \$31,200.00). The OLSE also seeks maximum penalties
5 in the same amount on behalf of the department pursuant to Section 12R.7(b) of the MWO.

6 Rogério Pinto (Claimant #4)

7 54. According to his testimony and a declaration submitted in support of his wage
8 claim, Rogério Pinto began working at the restaurant as a delivery driver on September 9, 2005,
9 and he continued to work in that capacity until December 19, 2006.

10 55. Mr. Pinto credibly testified that in 2005 and 2006, he generally worked about 54
11 hours per week as follows: Monday through Thursday – 11:00 AM to 5:00 PM; and Friday through
12 Sunday – 11:00 AM to 9:00 PM. He further testified that his weekly hours occasionally varied if he
13 took a day off. Timesheets submitted by the OLSE corroborate the claimant's testimony regarding
14 his schedule, as set forth in the table below. (OLSE Exhibit FF)

PAY PERIOD ENDING	TOTAL HOURS WORKED
10/23/05	110
11/6/05	110
12/4/05	100
3/12/06	102

15
16
17
18
19 56. Handwritten calculations of hours worked during two different time periods in 2005
20 show that Mr. Pinto worked 100 hours during one of the pay periods and 110 hours in the other,
21 which is consistent with his testimony and the timesheets.

22 57. Mr. Pinto credibly testified that between September 9, 2005 and December 19,
23 2006, he was paid \$7.75 per hour in cash for all hours worked. The claimant therefore alleges
24 that he was underpaid for all overtime hours worked in 2005 (when the minimum wage for small
25 employers was \$7.75/hr), and he further alleges that he was underpaid for all hours worked in
26 2006 (when the minimum wage for all employers was \$8.82/hr). Although the employer does not
27 dispute the hourly wage paid to the claimant, the employer does dispute the number of hours
28

1 worked by Mr. Pinto between September 9, 2005 and December 19, 2006.

2 58. Claimant Pinto returned to the restaurant and resumed employment as a delivery
3 driver on August 13, 2007, and he quit on or around September 5, 2007 because he was only
4 able to get three shifts per week upon his return. Mr. Pinto credibly testified that between August
5 13, 2007 and September 5, 2007, he generally worked around 50 hours per pay period. He
6 specifically testified that he worked the following weekly schedule: Thursday – 11:00 AM to 10:00
7 PM; Friday – 5:00 PM to 10:00 PM; and Saturday – 11:00 AM to 8:00 PM.

8 59. Mr. Pinto credibly testified that during the second period of his employment at the
9 restaurant, he was paid the required minimum wage in the amount of \$9.14 per hour for up to 8
10 hours per day through the restaurant's payroll system, and he was paid \$8.00 an hour in cash for
11 all hours exceeding 8 hours per day. Accordingly, the claimant alleges that he was underpaid for
12 all overtime hours worked during this period.

13 60. Papa Potrero's owner, Makhan Singh, does not deny that the restaurant paid Mr.
14 Pinto \$7.75 an hour in cash in 2005 and 2006. Instead, Mr. Singh claims that Mr. Pinto is
15 exaggerating the number of hours that he worked. Although Mr. Singh testified that Mr. Pinto
16 worked 40 hours per week (Monday through Friday – 11:00 AM to 5:00 PM and Saturday and
17 Sunday – 12:00 PM to 5:00 PM), the restaurant failed to submit any documentation in support of
18 such. As previously discussed, Mr. Singh claims that the employees stole almost all of the
19 payroll-related records. Mr. Singh further testified that he believes that the timesheets submitted
20 into evidence were manufactured by the claimants, even though he acknowledged that some of
21 the timesheets were in his own handwriting.

22 61. Based on interviews with the claimant, as well as the employee timesheets and
23 handwritten calculations of hours worked during various pay periods, the OLSE calculates that
24 Mr. Pinto was underpaid \$7,355.15 during the period September 9, 2005 through December 19,
25 2006. The OLSE submitted a detailed breakdown of its calculations, which credits the employer
26 for having paid \$7.75 an hour to Mr. Pinto for all hours worked in 2005 and 2006. (OLSE Exhibit
27 FF) The OLSE also calculates that Mr. Pinto was underpaid \$68.52 for hours worked between
28 August 13, 2007 and September 5, 2007, which credits the employer for having paid the claimant

1 \$9.14 per hour for all regular hours worked, and \$8.00 for all overtime hours worked. In addition,
2 the OLSE calculates that the claimant is owed 10% simple interest, up to the first day of hearing,
3 in the amount of \$1,806.82. Accordingly, the OLSE calculates that the claimant is owed total
4 wages and interest in the amount of \$9,230.49 (\$7,423.67 wages + \$1,806.82 interest =
5 \$9,230.49).

6 62. The OLSE calculates maximum penalties owing to Mr. Pinto in the amount of
7 \$57,800.00, which amount is calculated by multiplying \$50.00 per day for each day that the
8 violation continued, beginning on September 11, 2005 (the first payday the claimant was
9 underpaid) and continuing through November 9, 2008 (the day before the first hearing) (\$50.00 X
10 1,156 days for the period 9/11/05 through 11/9/08 = \$57,800.00). The OLSE also seeks
11 maximum penalties in the same amount on behalf of the department pursuant to Section
12 12R.7(b) of the MWO.

13 Krusner Teixeira Neves (Claimant #5)

14 63. In response to the OLSE's request to allow Krusner Neves to testify by telephone
15 from Brazil, the undersigned hearing officer ruled that Mr. Neves would be permitted to appear
16 and testify by internet video call on Skype so that the claimant's demeanor could be observed
17 during direct and cross examination. Prior to the testimony, counsel for the employer argued that
18 video testimony would not provide the employer with adequate due process because the
19 employer would be denied the right to face-to-face cross-examination, which was essential since
20 any decision in the claimant's favor would be substantially based on the content of his testimony.

21 64. In an attempt to provide a means for everyone present at the hearing to observe
22 the claimant's testimony, the OLSE projected the video image of Mr. Neves on a wall in the
23 hearing room. Although the image of Mr. Neves was visible, the quality of the webcam feed
24 and/or projection resulted in an image that was sometimes blurry and/or shadowy. The claimant's
25 demeanor was therefore difficult to observe during certain portions of his testimony.

26 Notwithstanding the quality of the image, the hearing officer allowed the testimony to proceed and
27 the parties were informed that the evidence would be afforded proper weight.

28 65. According to his testimony and a declaration submitted in support of his wage

1 claim, Krusner Neves began working at the restaurant as a delivery driver in December 2006, and
2 he continued to work in that capacity until the end of August 2007. Although the video image was
3 not perfectly clear throughout the claimant's testimony, the claimant provided clear and succinct
4 testimony that was not refuted with any substantial evidence by the employer. The claimant
5 alleges that during approximately the first three months of his employment, he worked about 24
6 hours per week. After the first three months, he claims to have worked approximately 60 to 64
7 hours per week. Timesheets for 9 pay periods indicate that the claimant worked between 53.5
8 and 125 hours per two-week pay period. The 2007 employee schedule submitted by the OLSE
9 shows that Mr. Neves was scheduled to work 64 hours per week. Mr. Neves testified that he was
10 paid \$7.75 per hour in cash for all hours worked until approximately July 1, 2007. After that, Mr.
11 Neves testified that he was paid \$9.14 an hour by check for the first 80 hours per pay period, and
12 \$8.00 an hour in cash for all hours exceeding 80 hours per pay period.

13 66. The restaurant asserted that the claimant exaggerated the number of hours he
14 worked each pay period. No evidence was submitted regarding the claimant's hourly rate of pay.

15 67. Based on interviews with the claimant, as well as the employee timesheets, the
16 OLSE calculates that Mr. Neves was underpaid \$4,578.96 during the period December 17, 2006
17 through August 26, 2007. In addition, the OLSE calculates that the claimant is owed 10% simple
18 interest, up to the first day of hearing, in the amount of \$686.20. Accordingly, the OLSE calculates
19 that the claimant is owed total wages and interest in the amount of \$5,265.16 (\$4,578.96 wages +
20 \$686.20 interest = \$5,265.16).

21 68. The OLSE calculates maximum penalties owing to Mr. Neves in the amount of
22 \$34,700.00, which amount is calculated by multiplying \$50.00 per day for each day that the
23 violation continued, beginning on December 17, 2006 (the first payday the claimant was
24 underpaid) and continuing through November 9, 2008 (the day before the first hearing) (\$50.00 X
25 694 days for the period 12/17/06 through 11/9/08 = \$34,700.00). The OLSE also seeks maximum
26 penalties in the same amount on behalf of the department pursuant to Section 12R.7(b) of the
27 MWO. Although the OLSE seeks maximum penalties on behalf of the claimant and the
28 department, Josh Pastreich testified that he had minimal contact with the claimant during the

1 investigation, especially after the claimant moved back to Brazil. Mr. Neves therefore had little
2 affect on the overall outcome of the investigation.

3 Rosalba Menjivar (Claimant #6)

4 69. Claimant Rosalba Menjivar credibly testified that she worked at the restaurant as a
5 waitress from approximately November 2004 to October 28, 2005, and she worked the following
6 hours in 2005 (the first year the MWO regulated the restaurant's wages):

- 7 • For about the first three months, she worked approximately 5 hours per day, 7
8 days a week, for a total of 35 hours per week;
- 9 • Sometime around the end of January 2005, the other waitress (Graciella) was
10 fired, at which time Ms. Menjivar began working seven days a week, from 11:00
11 AM to 11:00 PM, for a total of 84 hours per week; and
- 12 • On or around July 14, 2005, a second waitress (Olga) was hired and Ms.
13 Menjivar began working six days a week from approximately 4:00 PM to 11:00 PM,
14 for a total of 42 hours per week. Ms. Menjivar testified that she recalls the date
15 Olga was hired because it was on or around Ms. Menjivar's birthday, which is July
16 14th.

17 70. The claimant further credibly testified that she was paid \$7.00 per hour in cash for
18 the first several months she worked at the restaurant, and her hourly wage was increased to
19 \$7.75 per hour in January 2005. Based on her testimony, Ms. Menjivar alleges that she was paid
20 minimum wage (\$7.75/hr) for all hours worked in 2005. Ms. Menjivar's claim is therefore based on
21 the allegation that she was underpaid for all overtime hours worked. Ms. Menjivar testified that
22 sometime in 2005, the restaurant began paying her with a combination of payroll checks and
23 cash, and the payroll check payments were typically for only 40 hours per pay period (or 20 hours
24 per week) – with the remainder of her wage paid in cash. She further testified that the employer
25 withheld a portion of the cash payment each pay period to repay a loan that she received from
26 Makhan Singh for dental work.

27 71. Although the employer's payroll record shows that Ms. Menjivar was first paid with
28 a payroll check on April 25, 2005, for 80 hours of work at \$7.75 per hour, the record also show

1 that between May 9, 2005 and October 24, 2005, the claimant was paid through payroll for only
2 40 hours per pay period at \$7.75 per hour. Her final paycheck was issued on November 7, 2005,
3 for 18.5 hours of work at \$7.75 per hour. (OLSE Exhibit J) The payroll records therefore
4 corroborate the claimant's testimony.

5 72. Only three timesheets from 2005 were submitted into the record, and they show
6 that the claimant worked the following hours. (OLSE Exhibit FF)

PAY PERIOD ENDING	TOTAL HOURS WORKED
1/30/05	75
10/23/05	106
11/6/05	18.5

* Ms. Menjivar's last day at the restaurant was October 28, 2005.

7
8
9
10 73. The handwritten calculations of hours worked show that Ms. Menjivar worked
11 between 75 and 110 hours per pay period in 2005. (OLSE Exhibit I)

12 74. Makhān Singh claims that Ms. Menjivar is exaggerating the number of hours that
13 she worked. Mr. Singh claims that the employees stole almost all of the payroll records, including
14 all tax-related documents pertaining to Ms. Menjivar's employment. Mr. Singh further testified that
15 he believes that the timesheets submitted into evidence were manufactured by the claimants,
16 even though he acknowledged that some of the timesheets were in his own handwriting.

17 75. Based on interviews with the claimant, payroll documentation, timesheets, and
18 handwritten calculations of hours worked during various pay periods, the OLSE calculates that
19 Ms. Menjivar was underpaid \$4,386.50 during the period January 1, 2005 through October 28,
20 2005. The OLSE submitted a detailed breakdown of its calculations, which credits the employer
21 for having paid minimum wage (\$7.75) for all hours worked in 2005. (OLSE Exhibit FF) In
22 addition, the OLSE calculates that the claimant is owed 10% simple interest, up to the first day of
23 hearing, in the amount of \$1,550.02. Accordingly, the OLSE calculates that the claimant is owed
24 total wages and interest in the amount of \$5,936.52 (\$4,386.50 wages + \$1,550.02 interest =
25 \$5,936.52).

26 76. The OLSE calculates maximum penalties owing to Ms. Menjivar in the amount of
27 \$69,700.00, which amount is calculated by multiplying \$50.00 per day for each day that the
28

1 violation continued, beginning on January 16, 2005 (the first payday the claimant was underpaid
2 in 2005) and continuing through November 9, 2008 (the day before the first hearing) (\$50.00 X
3 1,394 days for the period 1/16/05 through 11/9/08 = \$69,700.00). The OLSE also seeks
4 maximum penalties in the same amount on behalf of the department pursuant to Section
5 12R.7(b) of the MWO.

6 Marcos Fernandes de Sousa (Claimant #7)

7 77. In response to the OLSE's request to allow Marcos de Sousa to testify by
8 telephone from Brazil, the undersigned hearing officer ruled that Mr. de Sousa would be permitted
9 to appear and testify by internet video call on Skype so that the claimant's demeanor could be
10 observed during direct and cross examination. Prior to the testimony, counsel for the employer
11 argued that video testimony would not provide the employer with adequate due process because
12 the employer would be denied the right to face-to-face cross-examination, which was essential
13 since any decision in the claimant's favor would be substantially based on the content of his
14 testimony.

15 78. In an attempt to provide a means for everyone present at the hearing to observe
16 the claimant's testimony, the OLSE projected the video image of Mr. de Sousa on a wall in the
17 hearing room. Although the image of Mr. de Sousa was visible, the quality of the webcam feed
18 and/or projection resulted in an image that was sometimes blurry and/or shadowy. The claimant's
19 demeanor was therefore difficult to observe during certain portions of his testimony.
20 Notwithstanding the quality of the image, the hearing officer allowed the testimony to proceed and
21 the parties were informed that the evidence would be afforded proper weight.

22 79. On July 3, 2008, Mr. de Sousa provided the OLSE with a written statement
23 concerning his employment at Papa Potrero's, which states that Mr. de Sousa worked as a
24 delivery driver from September 5, 2005 to July 20, 2007. The July 3, 2008 statement further
25 states that the claimant worked 60 hours per week and was paid \$7.00 per hour. However, based
26 on Mr. de Sousa's testimony, the content of the July 3, 2008 statement was inaccurate because
27 he actually began work in September 2006 and he worked about 27 hours per week for \$7.75 per
28 hour.

1 80. In addition to the inconsistencies between the claimant's written statement and
2 testimony, the content of his testimony was confusing and inconsistent and therefore not credible.
3 For instance, after first testifying that he worked 27 hours per week, the claimant testified that he
4 often worked more than 40 hours per week, which testimony is not supported by the documentary
5 evidence submitted by the OLSE. Specifically, the timesheets submitted by the OLSE show that
6 Mr. de Sousa worked between 44 and 63.5 hours per two-week pay period, and the 2007
7 employee schedule submitted by the OLSE shows that Mr. de Sousa was scheduled to work 27
8 hours per week.

9 81. The restaurant asserted that the claimant exaggerated the number of hours he
10 worked. No evidence was submitted regarding the claimant's hourly rate of pay.

11 82. Based on information received from the claimant, as well as the employee
12 timesheets, the OLSE calculates that Mr. Neves was underpaid \$1,508.22 between September
13 24, 2006 and July 15, 2007. In addition, the OLSE calculates that the claimant is owed 10%
14 simple interest, up to the first day of hearing, in the amount of \$257.98. Accordingly, the OLSE
15 calculates that the claimant is owed total wages and interest in the amount of \$1,766.20
16 (\$1,508.22 wages + \$257.98 interest = \$1,766.20).

17 83. The OLSE calculates maximum penalties owing to Mr. de Sousa in the amount of
18 \$38,900.00, which amount is calculated by multiplying \$50.00 per day for each day that the
19 violation continued, beginning on September 24, 2006 (the first payday the claimant was
20 underpaid) and continuing through November 9, 2008 (the day before the first hearing) ($\$50.00 \times$
21 778 days for the period 9/24/06 through 11/9/08 = \$38,900.00). The OLSE also seeks maximum
22 penalties in the same amount on behalf of the department pursuant to Section 12R.7(b) of the
23 MWO. Although the OLSE seeks maximum penalties on behalf of the claimant and the
24 department, Josh Pastreich testified that he never met with the claimant in person, and he had
25 only minimal contact by telephone and/or email with the claimant during the investigation. The
26 claimant therefore had little effect on the overall outcome of the investigation.

27 **Papa Potrero's Constitutional Challenge To The MWO**

28 84. The employer argues that the hearing process under the Minimum Wage Ordinance

1 is unconstitutional because the MWO allows the OLSE to make a final determination in the case,
2 notwithstanding any findings that may be made by the hearing officer. MWO Section 12R.7(b)
3 specifically provides:

4 "Where the agency, after a hearing that affords a suspected violator due
5 process, determines that a violation has occurred, it may order any
6 appropriate relief including, but not limited to, reinstatement, the payment
7 of any back wages unlawfully withheld, and a payment of an additional
8 sum as an administrative penalty in the amount of \$50 to each Employee
9 or person whose rights under this Chapter were violated for each day or
10 portion thereof that the violation occurred or continued.

11 ***

12 In order to compensate the City for the costs of investigating and
13 remedying the violation, the Agency may also order the violating
14 employer or person to pay to the City a sum of not more than \$50 for
15 each day or portion thereof and for each employee or person as to whom
16 the violation occurred or continued. Such funds shall be allocated to the
17 Agency and shall be used to offset the costs of implementing and
18 enforcing this chapter."

19 Based on the fact that the OLSE has authority to make the final decision and to order penalties that
20 will be allocated to the agency, the employer argues that the OLSE has a "direct, substantial,
21 pecuniary interest in reaching a conclusion against Papa Potrero's Pizza." The employer further
22 argues that:

23 "To pass constitutional muster, the MWO must be amended so that OLSE
24 has no decision-making authority over the final outcome of any such
25 proceedings."

26 (Papa Potrero's Pizza March 6, 2009 Post-hearing Brief)

27 HEARING OFFICER'S FINDINGS

28 1. The undersigned hearing officer shall make written findings on the following
issues:

- 29 (1) Did Papa Potrero's violate the MWO by failing to pay the minimum wage to Claimant
30 Gilberto Quiroz Guerra? If so, how much does it owe Claimant Guerra?
- 31 (2) Did Papa Potrero's violate the MWO by failing to pay the minimum wage to
32 Claimant Jose de Jesus Montoya? If so, how much does it owe Claimant
33 Montoya?
- 34 (3) Did Papa Potrero's violate the MWO by failing to pay the minimum wage to
35 Claimant Lillian Castillo? If so, how much does it owe Claimant Castillo?

- 1 (4) Did Papa Potrero's violate the MWO by failing to pay the minimum wage to
- 2 Claimant Rogerio Pinto? If so, how much does it owe Claimant Pinto?
- 3 (5) Did Papa Potrero's violate the MWO by failing to pay the minimum wage to
- 4 Claimant Krusner Neves? If so, how much does it owe Claimant Neves?
- 5 (6) Did Papa Potrero's violate the MWO by failing to pay the minimum wage to
- 6 Claimant Rosalba Menjivar? If so, how much does it owe Claimant Menjivar?
- 7 (7) Did Papa Potrero's violate the MWO by failing to pay the minimum wage to
- 8 Claimant Marcos Fernandes de Sousa? If so, how much does it owe
- 9 Claimant de Sousa?
- 10 (8) Did Papa Potrero's violate the MWO? If so, how much does it owe the City in
- 11 administrative penalties?
- 12 (9) Should Papa Potrero's be required to comply with the MWO?

13 2. As a threshold issue, the question as to whether Papa Potrero's should be
14 required to comply with the MWO (Issue #9, above) is answered in the affirmative. It is
15 undisputed that Papa Potrero's Pizza is a San Francisco restaurant covered by the San
16 Francisco Minimum Wage Ordinance (MWO) as of January 1, 2005 because the restaurant
17 employs 10 or fewer employees. [Administrative Code Section 12R.4]

18 3. After a hearing that affords a suspected violator of the MWO due process, and
19 upon determination that a violation has occurred, the OLSE may order the payment of any back
20 wages unlawfully withheld, as well as an administrative penalty in the amount of \$50.00 to each
21 employee whose rights were violated for each day or portion thereof that the violation occurred or
22 continued. [Administrative Code Section 12R.7(b)] Pursuant to Section 12R.7(b), a violation for
23 unlawfully withholding wages shall be deemed to continue from the date immediately following
24 the date that the wages were due and payable to the date preceding the date the wages are paid
25 in full. In this case, the OLSE seeks a determination as to the amount of penalties owed to each
26 employee beginning on the first day the employee was underpaid through November 9, 2008, the
27 day before the first hearing.

28 4. Section 12R.7(d) of the MWO provides that in any administrative action brought for

1 the nonpayment of wages under the MWO, interest shall be awarded on all due and unpaid
2 wages, at the rate of interest specified in California Civil Code §3289(b). The section further
3 provides that interest shall accrue from the date the wages were due and payable to the date the
4 wages are paid in full. California Civil Code §3289(b) provides for interest at the rate of 10% per
5 annum. In this case, the OLSE seeks a determination as to the amount of interest owed to each
6 employee beginning on the first day the employee was underpaid through November 9, 2008, the
7 day before the first hearing.

8 **Issue #1: Did Papa Potrero's violate the MWO by failing to pay the minimum wage to**
9 **Claimant Gilberto Quiroz Guerra? If so, how much does it owe Claimant Guerra?**

10 5. The undersigned hearing officer finds that the OLSE submitted sufficient evidence
11 to establish that claimant Gilberto Guerra is owed wages in the amount of \$11,421.23 under the
12 MWO for work performed during the period January 1, 2005 through July 12, 2007. This
13 determination is supported by the following: (1) the credible testimony of the claimant; (2) the
14 employer's payroll records; (3) the timesheets submitted by the OLSE; and (4) the handwritten
15 calculations of hours worked during various time periods. Moreover, the employer failed to
16 present any evidence of sufficient substantiality in its own defense. Pursuant to MWO Section
17 12R.7(d), simple interest at the rate of 10% per annum may also be awarded to claimant Guerra
18 in the amount of \$3,045.31. Accordingly, the claimant is owed total wages and interest in the
19 amount of \$14,466.54 (\$11,421.23 wages + \$3,045.31 interest = \$14,466.54).

20 6. Based on the facts of this case, the undersigned hearing officer further finds that it
21 is appropriate for the OLSE to order the restaurant to pay the maximum amount of penalties in
22 the amount of \$69,700.00 to claimant Guerra, which amount is calculated by multiplying \$50.00
23 per day for each day that the violation continued, beginning on January 16, 2005 (the first payday
24 the claimant was underpaid in 2005) and continuing through November 9, 2008 (the day before
25 the first hearing) (\$50.00 X 1,394 days for the period 1/16/05 through 11/9/08 = \$69,700.00). This
26 determination is supported by the following factors: (1) the employer was not cooperative with the
27 OLSE in its investigation; (2) the employer was aware of the fact that its was underpaying the
28 claimant for all overtime hours worked; and (3) the ongoing nature of the violation.

1 **Issue #2: Did Papa Potrero's violate the MWO by failing to pay the minimum wage to**
2 **Claimant Jose de Jesus Montoya? If so, how much does it owe Claimant Montoya?**

3 7. The undersigned hearing officer finds that the OLSE submitted sufficient evidence
4 to establish that claimant Jose de Jesus Montoya is owed wages in the amount of \$14,583.15
5 under the MWO for work performed during the period January 1, 2005 through July 12, 2007.
6 This determination is supported by the following: (1) the credible testimony of the claimant; (2) the
7 employer's payroll records; (3) the timesheets submitted by the OLSE; and (4) the handwritten
8 calculations of hours worked during various time periods. Moreover, the employer failed to
9 present any evidence of sufficient substantiality in its own defense. Pursuant to MWO Section
10 12R.7(d), simple interest at the rate of 10% per annum may also be awarded to claimant Montoya
11 in the amount of \$3,703.25. Accordingly, the claimant is owed total wages and interest in the
12 amount of \$18,286.40 (\$14,583.15 wages + \$3,703.25 interest = \$18,286.40).

13 8. Based on the facts of this case, the undersigned hearing officer further finds that it
14 is appropriate for the OLSE to order the restaurant to pay the maximum amount of penalties in
15 the amount of \$69,700.00 to claimant Montoya, which amount is calculated by multiplying \$50.00
16 per day for each day that the violation continued, beginning on January 16, 2005 (the first payday
17 the claimant was underpaid in 2005) and continuing through November 9, 2008 (the day before
18 the first hearing) (\$50.00 X 1,394 days for the period 1/16/05 through 11/9/08 = \$69,700.00). This
19 determination is supported by the following factors: (1) the employer was not cooperative with the
20 OLSE in its investigation; (2) the employer was aware of the fact that its was underpaying the
21 claimant for all overtime hours worked; and (3) the ongoing nature of the violation.

22 **Issue #3: Did Papa Potrero's violate the MWO by failing to pay the minimum wage to**
23 **Claimant Lillian Castillo? If so, how much does it owe Claimant Castillo?**

24 9. The undersigned hearing officer finds that the OLSE submitted sufficient evidence
25 to establish that claimant Lillian Castillo is owed wages in the amount of \$3,494.37 under the
26 MWO for work performed during the period February 15, 2007 through June 16, 2007. This
27 determination is supported by the following: (1) the credible testimony of the claimant; (2)
28 timesheets submitted by the OLSE; and (3) handwritten calculations of hours worked during

1 various time periods. Moreover, the employer failed to present any evidence of sufficient
2 substantiality in its own defense. Pursuant to MWO Section 12R.7(d), simple interest at the rate
3 of 10% per annum may also be awarded to claimant Castillo in the amount of \$538.35.
4 Accordingly, the claimant is owed total wages and interest in the amount of \$4,032.72 (\$3,494.37
5 wages + \$538.35 interest = \$4,032.72).

6 10. Based on the facts of this case, the undersigned hearing officer further finds that it
7 is appropriate for the OLSE to order the restaurant to pay the maximum amount of penalties in
8 the amount of \$31,200.00 to claimant Castillo, which amount is calculated by multiplying \$50.00
9 per day for each day that the violation continued, beginning on February 25, 2007 (the first
10 payday the claimant was underpaid in 2005) and continuing through November 9, 2008 (the day
11 before the first hearing) (\$50.00 X 624 days for the period 2/25/07 through 11/9/08 = \$31,200.00).
12 This determination is supported by the following factors: (1) the employer was not cooperative
13 with the OLSE in its investigation; (2) the employer was aware of the fact that its was underpaying
14 the claimant for all hours worked; and (3) the ongoing nature of the violation.

15 **Issue #4: Did Papa Potrero's violate the MWO by failing to pay the minimum wage
16 to Claimant Rogerio Pinto? If so, how much does it owe Claimant Pinto?**

17 11. The undersigned hearing officer finds that the OLSE submitted sufficient evidence
18 to establish that claimant Rogerio Pinto is owed wages in the amount of \$7,423.67 under the
19 MWO for work performed during the periods September 9, 2005 through December 19, 2006
20 (\$7,355.15) and August 13, 2007 and September 5, 2007 (\$68.52). This determination is
21 supported by the following: (1) the credible testimony of the claimant; (2) the timesheets
22 submitted by the OLSE; (3) the handwritten calculations of hours worked during various time
23 periods; and (4) the employer's payroll records. Moreover, the employer failed to present any
24 evidence of sufficient substantiality in its own defense. Pursuant to MWO Section 12R.7(d),
25 simple interest at the rate of 10% per annum may also be awarded to claimant Pinto in the
26 amount of \$1,806.82. Accordingly, the claimant is owed total wages and interest in the amount of
27 \$9,230.49 (\$7,423.67 wages + \$1,806.82 interest = \$9,230.49).

28 12. Based on the facts of this case, the undersigned hearing officer further finds that it

1 is appropriate for the OLSE to order the restaurant to pay the maximum amount of penalties in
2 the amount of \$57,800.00 to claimant Pinto, which amount is calculated by multiplying \$50.00 per
3 day for each day that the violation continued, beginning on September 11, 2005 (the first payday
4 the claimant was underpaid in 2005) and continuing through November 9, 2008 (the day before
5 the first hearing) ($\$50.00 \times 1,156$ days for the period 9/11/05 through 11/9/08 = \$57,800.00). This
6 determination is supported by the following factors: (1) the employer was not cooperative with the
7 OLSE in its investigation; (2) the employer was aware of the fact that its was underpaying the
8 claimant for all overtime hours worked in 2005 and all hours worked in 2006; and (3) the ongoing
9 nature of the violation.

10 **Issue #5: Did Papa Potrero's violate the MWO by failing to pay the minimum wage to**
11 **Claimant Krusner Neves? If so, how much does it owe Claimant Neves?**

12 13. The undersigned hearing officer finds that the employer was afforded proper due
13 process with respect to the video testimony of claimant Neves. The employer was able to hear all
14 of the testimony of the claimant, the claimant's demeanor could be observed throughout most of
15 his testimony, and the employer conducted cross-examination of the claimant. Although video
16 testimony is only permissible under the California Administrative Procedures Act (APA) when
17 there is no objection to such testimony, the APA is not applicable to local administrative hearings.
18 [See Gov. Code §§ 11340 et seq., see also Gov. Code § 11440.30(a)&(b)]

19 14. The undersigned hearing officer further finds that the OLSE submitted sufficient
20 evidence to establish that claimant Krusner Neves is owed wages in the amount of \$4,578.96
21 under the MWO for work performed during the period December 17, 2006 through August 26,
22 2007. This determination is supported by the following: (1) the credible testimony of the claimant;
23 (2) the timesheets submitted by the OLSE; and (3) the 2007 employee schedule. Moreover, the
24 employer failed to present any evidence of sufficient substantiality in its own defense. Pursuant to
25 MWO Section 12R.7(d), simple interest at the rate of 10% per annum may also be awarded to
26 claimant Neves in the amount of \$686.20. Accordingly, the claimant is owed total wages and
27 interest in the amount of \$5,265.16 ($\$4,578.96$ wages + $\$686.20$ interest = $\$5,265.16$).

28 15. Based on the specific facts pertaining to claimant Neves, the undersigned hearing

1 officer further finds that it is not appropriate for the OLSE to order the restaurant to pay any
2 administrative penalties to the claimant based on the following factors: (1) the claimant did not
3 substantially participate in or advance the department's investigation; and (2) the claimant did not
4 personally appear at the hearing to present his claim even though penalties of \$34,700.00 were
5 sought on his behalf, which amount would have resulted in a substantial deprivation if awarded.

6 **Issue #6: Did Papa Potrero's violate the MWO by failing to pay the minimum wage to**
7 **Claimant Rosalba Menjivar? If so, how much does it owe Claimant Menjivar?**

8 16. The undersigned hearing officer finds that the OLSE submitted sufficient evidence
9 to establish that claimant Rosalba Menjivar is owed wages in the amount of \$4,386.50 under the
10 MWO for work performed during the period January 1, 2005 through October 28, 2005. This
11 determination is supported by the following: (1) the credible testimony of the claimant; (2) the
12 employer's payroll records; (3) the timesheets submitted by the OLSE; and (4) the handwritten
13 calculations of hours worked during various time periods. Moreover, the employer failed to
14 present any evidence of sufficient substantiality in its own defense. Pursuant to MWO Section
15 12R.7(d), simple interest at the rate of 10% per annum may also be awarded to claimant Menjivar
16 in the amount of \$1,550.02. Accordingly, the claimant is owed total wages and interest in the
17 amount of \$5,936.52 (\$4,386.50 wages + \$1,550.02 interest = \$5,936.52).

18 17. Based on the facts of this case, the undersigned hearing officer further finds that it
19 is appropriate for the OLSE to order the restaurant to pay the maximum amount of penalties in
20 the amount of \$69,700.00 to claimant Menjivar, which amount is calculated by multiplying \$50.00
21 per day for each day that the violation continued, beginning on January 16, 2005 (the first payday
22 the claimant was underpaid in 2005) and continuing through November 9, 2008 (the day before
23 the first hearing) (\$50.00 X 1,394 days for the period 1/16/05 through 11/9/08 = \$69,700.00). This
24 determination is supported by the following factors: (1) the employer was not cooperative with the
25 OLSE in its investigation; (2) the employer was aware of the fact that its was underpaying the
26 claimant for all overtime hours worked; and (3) the ongoing nature of the violation.

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1 **Issue #7: Did Papa Potrero's violate the MWO by failing to pay the minimum wage to**
2 **Claimant Marcos Fernandes de Sousa? If so, how much does it owe Claimant de Sousa?**

3 18. The undersigned hearing officer finds that the OLSE failed to meet its burden of
4 proof with regard to the claim of Marcos de Sousa. This determination is supported by the fact
5 that the claim was substantially based on the claimant's testimony, which was not credible. His
6 testimony was inconsistent with his previous wage-claim statement and the content of his
7 testimony was confusing and inconsistent. Without credible testimony in support of the claim, the
8 OLSE is unable to meet its burden of proof. Accordingly, no award for wages, interest, or
9 penalties is warranted for Mr. de Sousa's claim.

10 **Issue #8: Did Papa Potrero's violate the MWO? If so, how much does it owe the City in**
11 **administrative penalties?**

12 19. Under the MWO, the OLSE may order a violating employer or person to pay to the
13 OLSE a sum of not more than \$50.00 per day for each employee as to whom the violation
14 occurred or continued. [Administrative Code Section 12R.7(b)] In this case, the undersigned
15 hearing officer has found that a combined sum of penalties in the amount of \$298,100.00 may be
16 appropriately assessed for payment to the following claimants based on a penalty of \$50.00 per
17 day per claimant (beginning the first day the claimant was underpaid and continuing up to the first
18 day of hearing): Gilberto Guerra (\$69,700.00); Jose de Jesus Montoya (\$69,700.00); Lilian
19 Castillo (\$31,200.00); Rogerio Pinto (\$57,800.00); Rosalba Menjivar (\$69,700.00). Since the
20 guidelines for maximum penalties under the MWO are the same for the claimants and the OLSE,
21 the maximum penalties that may be assessed on behalf of the OLSE is also \$298,100.00.


22 20. Under Section 12R.7(b) of the MWO, any penalty assessed on behalf of the OLSE
23 is intended "to compensate the City for the costs of investigating and remedying the violation."
24 Accordingly, the undersigned hearing officer finds that the OLSE may appropriately order the
25 employer in this case to pay an administrative penalty in the amount equal to the OLSE's costs of
26 investigating and remedying the violations of those claimants who prevailed on their wage claims
27 (all claimants except Marcos de Sousa), which amount may not exceed \$298,100.00. Because no
28 evidence was submitted regarding the actual costs incurred to investigate and remedy the

1 violations, no determination is made herein regarding the actual costs incurred or the amount of
2 the penalty to be assessed.

3 **Papa Potrero's Constitutional Challenge to the MWO**

4 21. The Minimum Wage Ordinance specifically provides that after a due process
5 hearing and a determination that a violation has occurred, the OLSE may order appropriate relief
6 including the payment of any back wages unlawfully withheld, as well as penalties on behalf of
7 the claimant and the department. [Administrative Code Section 12R.7(b)] Since the OLSE is an
8 administrative body of limited jurisdiction, the department's authority is limited to the powers that
9 have been expressly or implicitly conferred upon it. (See *City and County of San Francisco v.*
10 *Board of Permit Appeals* (1989) 207 Cal.App.3d 1099) Neither the OLSE nor any of its designees
11 has the authority to invalidate sections of the MWO. Accordingly, no determination is made
12 concerning the constitutional challenges raised by Papa Potrero's Pizza concerning OLSE's
13 decision-making authority under the MWO.

14
15 Dated: May 1, 2009


Peter Kearns
Hearing Officer

3 **TABLE 1**
4 **WITNESS LIST – OLSE and PAPA POTRERO'S PIZZA**

5

HEARING DATE	NAME OF WITNESS	IDENTITY OF WITNESS
6 November 10, 2008	Donna Levitt	OLSE Manager
7 November 10, 2008	Richard Waller	OLSE Supervising Compliance Officer
8 November 10, 2008; 9 December 8, 2008; 10 January 12, 2009	Josh Pastreich	OLSE Compliance Officer
11 January 12, 2009	Lilian Castillo	Claimant #3
12 January 26, 2009	Gilberto (Oswaldo) Quiroz Guerra	Claimant #1
13 January 26, 2009	Rosalba Menjivar	Claimant #6
14 January 26, 2009	Krusner Neves (Skype Video Conference)	Claimant #5
15 January 26, 2009	Marcos de Sosa (Skype Video Conference)	Claimant #7
16 January 26, 2009	Jose de Jesus Montoya	Claimant #2
17 January 26, 2009	Rogelio Pinto	Claimant #4
18 January 12 & 26, 2009	Makhan Singh	Restaurant Owner

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