

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

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LUCIA MONTERO BERNANDEZ, ELSY SANTOS,
REINA THOMAS and ONELDA THOMAS, on behalf of
themselves and all others similarly situated,

Plaintiffs,

- against -

BNV HOME CARE AGENCY, INC., ACADEMY CARE
GIVERS, INC., BORIS KUCHER, MARGARET RYAN and
RIVA FALIKMAN,

Defendants.
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INDEX NO. _____

**CLASS ACTION
COMPLAINT**

Plaintiffs Lucia Montero Bernandez, Elsy Santos, Reina Thomas and Onelda Thomas, by their attorneys, on behalf of themselves and all others similarly situated, respectfully allege upon knowledge as to themselves and upon information and belief as to all other matters, the following:

PRELIMINARY STATEMENT

1. Plaintiffs are home health care workers formerly employed by Defendants to work in and around the City of New York to provide personal care and assistance to disabled and elderly clients of Defendants.¹

2. Plaintiffs bring this action on behalf of themselves and a class of similarly situated current and former employees, to seek redress for systematic and class-wide underpayment of overtime pay and spread of hours wages, and for unjust enrichment,

¹ Attached hereto as Exhibit A is a certified Spanish translation of the complaint and a Certificate of Accuracy.

against BNV Home Care Agency, Inc. (“BNV”) and Academy Care Givers, Inc. (“Academy”), providers of home health care for the elderly and infirm in and around the City of New York; Boris Kucher (“Kucher”), President of BNV; Margaret Ryan (“Ryan”), former owner, chairperson or chief executive officer of Academy; and Riva Falikman (“Falikman”), current owner, chairperson or chief executive officer of Academy (collectively the “Defendants”).

3. Defendants’ unlawful practices, in violation of the provisions of New York Labor law, applicable regulations and common law principles of unjust enrichment, include, but are not limited to, their failure to compensate Plaintiffs and the Class for all wages due for overtime work at not less than one and one-half (1½) times the basic minimum hourly rate for all hours worked in excess of forty (40) hours in a workweek and failure to pay the “spread of hours” premium required by the New York Labor Law and applicable regulations.

4. Defendants have been unjustly enriched by virtue of their systematic failure to compensate Plaintiffs and the Class in accordance with New York law.

5. On behalf of themselves and the Class, Plaintiffs seek injunctive relief requiring Defendants to comply with the law, compensatory damages in the amounts Defendants and Class members should have received had Defendants calculated their wages properly under the law, pre- and post-judgment interest, and attorneys’ fees and costs.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this action because Defendants operate their business in the State of New York, County of New York.

7. Venue in this Court is proper pursuant to CPLR § 503. Defendants regularly conduct business and provide services in the State of New York and within New York County. Some of the work that is the subject of the Plaintiffs' claims was performed in New York County. Accordingly, Plaintiffs' causes of action arise in this venue.

8. Plaintiffs bring causes of action based solely on and arising under New York law. The claims of Plaintiffs and the Class are claims for violations of New York law that occurred exclusively in New York and all or substantially all Class members are residents of New York. These claims arise from Defendants' systematic wage abuse against their home health care workers in New York.

PARTIES

9. Plaintiff Lucia Montero Bernandez ("Montero"), an individual residing in Bronx County, is a home health care worker employed by Defendants from approximately May 2009 to July 2011 to work in and around the City of New York to provide personal care and assistance to disabled and elderly clients of Defendants.

10. Plaintiff Elsy Santos ("Santos"), an individual residing in Bronx County, is a home health care worker employed by Defendants from approximately August or September 2009 to November 2010 to work in and around the City of New York to provide personal care and assistance to disabled and elderly clients of Defendants.

11. Plaintiff Reina Thomas, an individual residing in Bronx County, is a home health care worker employed by Defendants from approximately November 2008 to October 2011 to work in and around the City of New York to provide personal care and assistance to disabled and elderly clients of Defendants.

12. Plaintiff Onelda Thomas, an individual residing in Bronx County, is a home health care worker employed by Defendants from approximately September 2008 to July 2011 to work in and around the City of New York to provide personal care and assistance to disabled and elderly clients of Defendants.

13. Defendant BNV Home Care Agency, Inc. was and is a home care service agency licensed by the New York State Department of Health. On information and belief, BNV is a domestic business corporation with offices located at 96-60 Queens Boulevard, Rego Park, New York 11374; 605 Brighton Avenue, 2nd Floor, Brooklyn, New York 11230; and 500 Willis Avenue, Floor 2, Bronx, New York 10455.

14. Defendant Academy Care Givers, Inc. was and is a home care service agency licensed by the New York State Department of Health. On information and belief, Academy is a domestic business corporation with its principal place of business at 500 Willis Avenue, Floor 2, Bronx, New York 10455.

15. On information and belief, Defendant Boris Kucher, an individual residing in Kings County, is the president of BNV. On information and belief, his office or usual place of business is 96-60 Queens Boulevard, Rego Park, New York 11374 and 605 Brighton Avenue, 2nd Floor, Brooklyn, NY 11230. At all times relevant to this action, Defendant Kucher possessed and exercised operational control and policy-making authority over employment policies, compensation policies, budgets, employee wages, hours and schedules and client services.

16. On information and belief, Defendant Margaret Ryan, an individual residing in Westchester County, is the former owner, current owner, chairman or chief executive officer of Academy. On information and belief, her office or usual place of

business was 500 Willis Avenue, Floor 2, Bronx, New York 10455. At all times relevant to this action prior to approximately October 2011, Defendant Ryan possessed and exercised operational control and policy-making authority over employment policies, compensation policies, budgets, employee wages, hours and schedules and client services.

17. On information and belief, Defendant Riva Falikman, an individual residing in Kings County, is the current owner, chairman or chief executive officer of Academy. On information and belief, her office or usual place of business is 500 Willis Avenue, Floor 2, Bronx, New York 10455. Since approximately October 2011, Defendant Falikman possessed and exercised operational control and policy-making authority over employment policies, compensation policies, budgets, employee wages, hours and schedules and client services.

18. At all times relevant to this action, Plaintiffs and the Class were “employees” covered by the New York Labor Law, and Defendants were “employers” of Plaintiffs and the Class of home health care workers they seek to represent, as those terms are defined by New York Labor Law §§ 651(5) and (6), 190(2) and (3) and applicable regulations, 12 NYCRR § 142-2.14.

CLASS ACTION ALLEGATIONS

19. Plaintiffs bring this action individually and as a class action under CPLR Article 9, as representatives of a class (the “Class”) consisting of themselves and of all current and former hourly paid home health care workers employed by Defendants for work performed in the State of New York during the period from November 30, 2005 through the present (the “Class Period”).

20. The Class is so numerous that joinder of all Class members is impracticable. Although the precise number of such persons is unknown, and the facts are presently within the sole knowledge of Defendants, there are hundreds of home health care workers employed by Defendants as of the date this Complaint was filed. The Class also includes former employees since November 30, 2005. The class is sufficiently numerous to warrant certification.

21. The claims of all Class members present common questions of law or fact, which predominate over any questions affecting only individual Class members, including:

a) whether Defendants have and are engaged in a pattern or practice of not paying all wages due for overtime work, that is, one and one half (1½) times the basic minimum hourly rate for all hours worked in excess of 40 in a workweek;

b) whether Defendants violated the New York Labor Law by failing to pay Plaintiffs and the Class overtime wages and an extra hour's pay for the "spread of hours" worked;

c) whether Defendants violated the New York Labor Law by failing to pay Plaintiffs and the Class all wages, including overtime wages, in the proper pay period;

d) whether Defendants were unjustly enriched by their wage policies;

e) whether Defendants should be enjoined from continuing the alleged wrongful practices in violation of New York Labor Law and applicable regulations; and

f) what is the proper measure of damages for the type of injury and losses commonly suffered by Plaintiffs and the Class.

22. Plaintiffs' claims are typical of those of the Class, because they are all current or former hourly paid home health care employees of Defendants who sustained damages, including underpayment of wages, as a result of Defendants' common compensation policies and practices. The defenses that likely will be asserted by Defendants against Plaintiffs are typical of the defenses that Defendants will assert against the Class members.

23. Plaintiffs will fairly and adequately protect the interests of the Class and have retained counsel experienced in pursuing complex and class action litigation who will adequately and vigorously represent the interests of the class.

24. A class action is superior to other available methods for the fair and efficient adjudication of this controversy alleged herein for at least the following reasons:

a) this action will cause an orderly and expeditious administration of the Class' claims; economies of time, effort and expense will be fostered; and uniformity of decision will be ensured;

b) this action presents no difficulties impeding its management by the Court as a class action; and no superior alternative exists for the fair and efficient adjudication of this controversy;

c) Class members currently employed by Defendants would be reluctant to file individual claims for fear of retaliation or blacklisting even after the end of their employment;

d) the Class is readily identifiable from records that Defendants are legally required to maintain.

25. No individual class member has any interest in individually controlling the prosecution of a separate individual action. No other suits or complaints have been filed by any class member. Pursuing these small claims on an individual basis is neither practical nor efficient.

26. Prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendants.

27. Defendants have acted, or failed to act, on grounds generally applicable to the Class.

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

STATEMENT OF FACTS

A. Plaintiffs

29. Plaintiffs are home health care workers formerly employed by Defendants to work in and around the City of New York to provide personal home health care and assistance to disabled and elderly clients of Defendants. Plaintiffs provided personal care and assistance to clients based upon a schedule set and dictated by Defendants.

30. Plaintiffs initially were hired by Defendant Academy, but were later transferred to the employment of Defendant BNV without explanation from Defendants.

31. While employed by Defendants, Plaintiffs regularly worked more than forty (40) hours in a week. Plaintiffs also frequently worked a “spread of hours” or a shift longer than ten (10) hours per day.

32. From approximately May 2009 to July 2011, Plaintiff Montero was paid \$8.00 per hour. During her employment, Plaintiff Montero regularly worked more than eight (8) hours per day and as many as seven (7) days per week. Although she regularly worked weeks in excess of forty (40) hours, Plaintiff Montero was not paid the proper overtime premium by Defendants. Rather, she was paid the regular rate of \$8.00 per hour.

33. From approximately August or September 2009 to November 2010, Plaintiff Santos was paid \$8.00 per hour. During her employment, Plaintiff Santos regularly worked more than eight (8) hours per day and as many as seven (7) days per week. Although she regularly worked more than forty (40) hours per week, Plaintiff Santos was not paid the proper overtime premium by Defendants. Rather, she was paid the regular rate of \$8.00 per hour.

34. From approximately November 2008 to October 2011, Plaintiff Reina Thomas was paid \$8.00 per hour. During her employment, Plaintiff Reina Thomas regularly worked more than eight (8) hours per day and as many as seven (7) days per week. Although she regularly worked more than forty (40) hours per week, Plaintiff Reina Thomas was not paid the proper overtime premium by Defendants. Rather, she was paid the regular rate of \$8.00 per hour.

35. From approximately September 2008 to July 2011, Plaintiff Onelda Thomas was paid \$8.00 per hour. During her employment, Plaintiff Onelda Thomas

regularly worked more than eight (8) hours per day and as many as seven (7) days per week. Although she regularly worked more than forty (40) hours per week, Plaintiff Onelda Thomas was not paid the proper overtime premium by Defendants. Rather, she was paid the regular rate of \$8.00 per hour.

B. Defendants

36. Defendants control the hours, hourly pay, assignments and schedules of the Plaintiffs and the other class members.

37. Defendants, as a matter of policy and practice, willfully and intentionally failed to pay Plaintiffs and Class members one and one half (1½) times the New York State minimum wage rate for direct care work in excess of forty (40) hours in a workweek, as New York law and regulations clearly require.

38. Defendants, as a matter of policy and practice, willfully and intentionally failed to pay Plaintiffs and Class members their additional hour of work at the minimum wage as required by the spread of hours provision in the New York Labor Law and applicable regulations.

39. Defendants, as a matter of policy and practice, willfully and intentionally failed to provide Plaintiffs with a statement concurrent with each payment of wages listing the number of regular hours worked per week as required by New York Labor Law.

40. Defendants, as a matter of policy and practice, willfully and intentionally failed to provide Plaintiffs with a statement concurrent with each payment of wages listing the number of overtime hours worked per week and the overtime rate of pay each week as required by New York Labor Law.

First Cause of Action
New York Labor Law: Unpaid Overtime Wages
(As to All Defendants)

41. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

42. Throughout the Class Period, Plaintiffs and members of the Class were Defendants' "employees" within the meaning of the New York Labor Law §§ 190(2) and (3), and 651(5) and (6).

43. Throughout the Class Period, Defendants failed to pay Plaintiffs and the Class overtime wages of not less than one and one-half (1½) times the New York State minimum wage rate for each hour worked in excess of forty (40) hours in a workweek in violation of New York Labor Law Article 19, § 650, *et seq.*, and 12 NYCRR § 142-2.2.

44. Due to Defendants' violations of the New York Labor Law, Plaintiffs and members of the Class are entitled to recover from Defendants all of the unpaid overtime wages of not less than one and one-half (1½) times the New York State minimum wage rate for each hour worked in excess of forty (40) hours in a workweek, reasonable attorneys' fees, costs, pre-judgment and post-judgment interest, liquidated damages and other compensatory and equitable relief pursuant to New York Labor Law Article 6 § 190, *et seq.*, and Article 19 § 650, *et seq.*

45. In light of Defendants' longstanding and ongoing violations of New York Labor Law and applicable regulations, Defendants' failure to pay current employees their wages due has caused and is causing irreparable injury to those Class members who are

currently employed by Defendants, and unless enjoined, will cause further irreparable injury, leaving those Class members with no adequate remedy at law.

Second Cause of Action
New York Labor Law: Spread of Hours Pay
(As to All Defendants)

46. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

47. During the Class Period, Defendants failed to pay Plaintiffs and the members of the Class an additional hour's pay at the basic minimum hourly wage rate for every day that they worked a spread of hours that exceeded ten (10) hours or a shift in excess of ten (10) hours, in violation of New York Labor Law §§ 190, *et seq.*, and 650, *et seq.*, and 12 NYCRR § 142.

48. Due to Defendants' violations of the New York Labor Law, Plaintiffs and the members of the Class are entitled to recover from Defendants their unpaid wages, reasonable attorneys' fees, costs, pre-judgment and post-judgment interest, liquidated damages and other compensatory and equitable relief pursuant to New York Labor Law Article 6 § 190, *et seq.*, and Article 19 § 650, *et seq.*

49. In light of Defendants' longstanding and ongoing violations of New York Labor Law and applicable regulations, Defendants' failure to pay current employees their wages due has caused and is causing irreparable injury to those Class members who are currently employed by Defendants, and unless enjoined, will cause further irreparable injury, leaving those Class members with no adequate remedy at law.

Third Cause of Action
New York Labor Law Section 195
Defendants' Failure to Pay Wages When Due
(As to All Defendants)

50. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

51. Defendants have failed to pay Plaintiffs and the Class members all wages, including overtime wages, for the hours they each worked for Defendants. New York Labor Law requires that wages be paid on an employer's regular payday for all hours worked.

52. Due to Defendants' violations of the New York Labor Law, Plaintiffs and the members of the Class are entitled to recover from Defendants their unpaid wages, reasonable attorneys' fees, costs and pre-judgment and post-judgment interest.

53. In light of Defendants' longstanding and ongoing violations of New York Labor Law and applicable regulations, Plaintiffs and the Class also seek injunctive relief precluding Defendants from continued violations of these laws and affirmatively mandating their compliance with the provisions of the New York Labor Law.

Fourth Cause of Action
Unjust Enrichment: Defendants' Failure to Pay All Wages Due
Including Wages for Overtime And Spread of Hours
(As to All Defendants)

54. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

55. At all times material to this Complaint, Defendants, by their policies and actions, benefited from, and increased their profits and personal compensation by failing to pay Plaintiffs and the Class: (i) all wages due for work performed, including but not

limited to overtime for hours worked in excess of forty (40) hours in a workweek at one and one-half (1½) times the New York State minimum wage rate; and (ii) an extra hour at the minimum wage for working a “spread of hours” in excess of ten (10) hours or a shift longer than ten (10) hours.

56. Defendants have accepted and received the benefits of the work performed by Plaintiffs and the Class at the expense of Plaintiffs and the Class.

57. It is inequitable and unjust for Defendants to reap the benefits of Plaintiffs’ and the Class’s labor, which includes underpaid overtime hours caring for the clients of Defendants and the pay due for spread of hours.

58. Plaintiffs and the Class are entitled to relief for this unjust enrichment in an amount equal to the benefits unjustly retained by Defendants, plus interest on these amounts.

Fifth Cause of Action
New York Labor Law Section 195: Defendants’ Failure to Provide Complete
Written Statements Concurrent with the Payment of Wages
(As to All Defendants)

59. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

60. Pursuant to New York Labor Law New York Labor Law Article 6 § 195(3), as of April 9, 2011, all employers are required to provide employees with a written statement concurrent with the payment of wages which lists, *inter alia*, the number of regular and overtime hours worked and the overtime rate of pay.

61. Defendants willfully and systematically failed to provide Plaintiffs with written statements which listed the number of regular and overtime hours worked each week or the overtime rate of pay.

62. Accordingly, Plaintiffs are entitled to recover from Defendants damages pursuant to New York Labor Law Article 6 § 198.

63. Plaintiffs also seek injunctive relief precluding Defendants from continued violations of these laws and affirmatively mandating their compliance with the provisions of the New York Labor Law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Montero, Santos, Reina Thomas and Onelda Thomas, on behalf of themselves and all members of the Class, respectfully pray that this Court enter judgment:

1. Certifying the Class described herein pursuant to CPLR Article 9;
2. Entering judgment against Defendants, jointly and severally, in the amount of the Plaintiffs' and class members' individual unpaid wages, statutory damages and actual and compensatory damages and pre- and post-judgment interest as allowed by law;
4. Awarding Plaintiffs the attorneys' fees and costs incurred in this litigation; and
5. Issuing a declaratory judgment that the practices complained of herein are unlawful under New York Labor Law;

6. Enjoining Defendants to cease the practices found illegal or in violation of the rights of Class; and

7. Granting Plaintiffs and the Class such further relief as this Court deems just and proper.

Dated: New York, New York
November 30, 2011

Respectfully submitted,

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