Zeng Liu v. Jen Chu Fashion Corp.

United States District Court for the Southern District of New York
January 7, 2004, Decided
00 Civ. 4221 (RJH) (AJP)

Reporter: 2004 U.S. Dist. LEXIS 35; 2004 WL 33412
ZENG LIU, et al., Plaintiffs, -against- JEN CHU FASHION CORP., JEN CHU APPAREL INC., W & C FASHION CORP., WONG CHAI SPORTSWEAR INC., Y & C MFG. INC., CALVIN CHEN, WINNIE YOUNG CHEN, JEN JEN OF NEW YORK INC., and H.L.S. FASHION CORP., Defendants.

Prior History: Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 2002 U.S. Dist. LEXIS 10542 (S.D.N.Y., 2002)

Disposition: Magistrate recommended that judgment be entered for plaintiffs.

Counsel: [*1] For Zeng Liu, Miao Chen, Feng Jiang, Hong Huang, Xiao Li, PLAINTIFFS: Adam T Klein, Outten & Golden, New York, NY USA. Kenneth Kimerling, Stanley Mark, Asian American Legal Defense & Education Fund Inc, New York, NY, USA. Scott A Moss, Outten & Golden, New York, NY USA.

For Jen Chu Fashion Corp, Jen Chu Apparel Inc, W & C Fashion Corp, Wong Chai Sportswear Inc, Y & C Mfg Inc, Carvin Chen, Winnie Young Chen, Jen Jen of New York Inc, HLS Fashion Corp, DEFENDANTS: Chi-Yuan Hwang, Chi-Yuan Hwang, Esq, Flushing, NY USA.

Judges: Andrew J. Peck, United States Magistrate Judge. Honorable Richard J. Holwell, United States District Judge.

Opinion by: Andrew J. Peck

Opinion

REPORT AND RECOMMENDATION

ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Richard J. Holwell, United States District Judge:

On October 16, 2003, Judge Rakoff (to whom the case was then assigned) entered a default judgment for plaintiffs against defendants Jen Chu Fashion Corp., Jen Chu Apparel, Inc., W & C Fashion Corp., Wong Chai Sportswear Inc., Y & C Mfg. Inc., Jen Jen of New York Inc., and Calvin Chen (hereafter collectively "the Calvin Chen defendants"). (Dkt. No. 64: 10/16/03 Order.) [1]

[*2] Defendants Winnie Young Chen and her company, H.L.S. Fashion Corp. (hereinafter collectively "the Winnie Chen defendants") were represented by John Courtney, Esq., but Mr. Courtney moved to withdraw as counsel. (*See* Dkt. No. 65.) The Court initially denied the motion because Mr. Courtney "lost" his client, *i.e.*, had no means to reach her. (*See* Dkt. Nos. 65 & 68: 10/17/03 & 11/3/03 Orders; *see also* Dkt. No. 71: 11/26/03 Courtney Letter to Court.) Neither Mr. Courtney nor Ms. Chen have responded to plaintiffs' inquest/summary judgment motion. (*See* Dkt. No. 70: 11/13/03 Order.) By memo endorsed Order dated December 22, 2003, the Court granted Mr. Courtney's renewed withdrawal application. (12/22/03 Memo Endorsed Order.) The Court has heard nothing from Winnie Chen. Therefore, judgment against the Winnie Chen defendants should be entered on default.

For the reasons discussed below, the Court should enter judgment for plaintiffs against the Calvin Chen defendants and the Winnie Chen defendants jointly and severally, for damages (including prejudgment interest) of $ 556,577.07, attorneys' fees of $ 20,355, and costs of $ 90.

FACTS

"Where, as here, 'the court [*3] determines that defendant is in default, the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.'" *Chen* v. *Jenna Lane, Inc.*, 30 F. Supp. 2d 622, 623 (S.D.N.Y. 1998) (Carter, D.J. & Peck, M.J.) (quoting 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil 3d § 2688* at 58-59 (3d ed. 1998)). [2]

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[1] Plaintiffs previously settled with defendant Donna Karan International, Inc. (Dkt. No. 53: 7/30/03 Stip. & Order.)

[2] *Accord, e.g., Joe Hand Promotions, Inc. v. Soto*, 2003 U.S. Dist. LEXIS 22560, 01 Civ. 0329, 2003 WL 22962810 at *1 (S.D.N.Y. Dec. 17, 2003) (Peck, M.J.); *Pacific Westeel, Inc. v. D&R Installation*, 2003 U.S. Dist. LEXIS 18436, 01 Civ. 0293, 2003 WL 22359512 at *1 (S.D.N.Y. Oct. 17, 2003) (Peck, M.J.); *Med. Econ. Co. v. HealthExchange, Inc.*, 2003 U.S. Dist. LEXIS 18293, 01 Civ. 11262, 2003 WL 22346391 at *1 (S.D.N.Y. Oct. 15, 2003) (Peck, M.J.); *Trs of the Elevator Div. Ret. Benefit*

[*4] There are twenty-three plaintiffs - five original plaintiffs and eighteen "opt in" plaintiffs pursuant to 29 U.S.C. § 216(b). (*See* Dkt. No. 75: Plfs. Inquest Br. at 2 n.1.)

The Amended Complaint (Dkt. No. 5) alleges as follows:

Plaintiffs are Chinese immigrant garment workers who worked long hours for the defendant companies producing expensive garments but were not paid minimum wages or overtime. (Dkt. No. 5: Am. Compl. P 1.) Plaintiffs were paid either by the hour or by the piece. (Am. Compl. P 6.) Plaintiffs worked at a garment factory at 519 Eighth Avenue in New York City that had various corporate owners, all of which were controlled by Calvin Chen and his then-wife Winnie Chen. (Am. Compl. PP 8-14.) Defendants thus were employers and joint employers of plaintiffs under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., and the New York Labor Law. (Am. Compl. P 16.)

According to the Amended Complaint:

> Plaintiffs worked for defendants generally seven days a week. Prior to May 1999, the hourly workers, Liu and Chen, generally worked eleven hours a day during the weekdays and ten and eight hours a day on Saturday [*5] and Sunday. Plaintiff Huang and the piece workers, plaintiffs Jiang and Li, generally worked twelve hours a day during the weekdays and ten and eight hours a day on Saturday and Sunday. They were rarely paid overtime; and when they were, it was for only a few hours and not the 30 to 40 hours of overtime that they generally worked. The piece workers sometimes were unable to earn the minimum wage. None of the plaintiffs ever received spread-of-hours pay - an extra hour's pay for each ten-hour day.(Am. Compl. P 17.)

Following a New York State Department of Labor visit to the factory, defendants began maintaining two sets of books - one reflecting plaintiffs' actual hours worked and "the other a false record reflecting a workweek with no, or almost no, overtime," and "plaintiffs were required to sign both [time] cards." (Am. Compl. P 37; *see also id*. PP 38-43.)

The Amended Complaint asserts three causes of action: (a) a federal wage claim for defendants' "failure to pay plaintiffs the minimum wage and overtime pay for work over 40 hours per week" (Am. Compl. P 53), (b) a state wage claim for "failure to pay plaintiffs their wages, minimum wages, and overtime pay for work [*6] over 40 hours per week" (Am. Compl. P 55), and (c) a New York spread of hours claim for "failure to pay plaintiffs an extra hour's pay for every day that plaintiffs worked over 10 hours" in violation of New York Labor Law (Am. Compl. P 57). The Amended Complaint seeks, *inter alia*, (i) unpaid wages and liquidated damages pursuant to the FLSA, (ii) unpaid wages including minimum wage, overtime pay and spread of hours pay, plus prejudgment interest, under the New York Labor Law, and (iii) attorneys' fees and costs. (Am. Compl. Wherefore Clause PP a, b & d.)

EVIDENCE ON THE INQUEST AND ANALYSIS

The Second Circuit has approved the holding of an inquest by affidavit, without an in-person court hearing, "'as long

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Plan v. Premier Elevator Co., 2003 U.S. Dist. LEXIS 16110, 03 Civ. 2703, 2003 WL 22127912 at *1 (S.D.N.Y. Sept. 16, 2003); *Cablevision Sys. N.Y. City Corp. v. Torres*, 2003 U.S. Dist. LEXIS 15524, 02 Civ. 7602, 2003 WL 22078938 at *3 (S.D.N.Y. Sept. 9, 2003) (Peck, M.J.); *Eastern Freight Ways v. Eastern Motor Freight*, 2003 U.S. Dist. LEXIS 11534, 02 Civ. 3138, 2003 WL 21540382 at *1 (S.D.N.Y. July 9, 2003) (Peck, M.J.), *report & rec. adopted as modified on other grounds*, 2003 U.S. Dist. LEXIS 13932, 2003 WL 21921270 (S.D.N.Y. Aug. 11, 2003); *Schruefer v. Winthorpe Grant, Inc.*, 2003 U.S. Dist. LEXIS 11179, 99 Civ. 9365, 2003 WL 21511157 at *1 (S.D.N.Y. July 2, 2003) (Peck, M.J.); *Jov Lud Distribs. Int'l, Inc. v. Contini*, 2003 U.S. Dist. LEXIS 2701, 00 Civ. 5011, 2003 WL 554616 at *1 (S.D.N.Y. Feb. 28, 2003) (Peck, M.J.); *Rolex Watch U.S.A., Inc. v. Brown*, 2002 U.S. Dist. LEXIS 10054, 01 Civ. 9155, 2002 WL 1226863 at *1 (S.D.N.Y. June 5, 2002) (Peck, M.J.); *King Vision Pay-Per-View Corp. v. Drencia Rest. Corp.*, 2002 U.S. Dist. LEXIS 8636, 01 Civ. 9777, 2002 WL 1000284 at *1 (S.D.N.Y. May 15, 2002) (Peck, M.J.); *Ainbinder v. Bernice Mining & Contr. Inc.*, 2002 U.S. Dist. LEXIS 4910, 01 Civ. 2492, 2002 WL 461576 at *2 (S.D.N.Y. Mar. 26, 2002) (Peck, M.J.); *Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 2002 U.S. Dist. LEXIS 4944, 00 Civ. 7352, 2002 WL 461574 at *3 (S.D.N.Y. Mar. 26, 2002) (Peck, M.J.); *King Vision Pay-Per-View Corp. v. Papacito Lidia Luncheonette, Inc.*, 2001 U.S. Dist. LEXIS 19968, 01 Civ. 7575, 2001 WL 1558269 at *1 (S.D.N.Y. Dec. 6, 2001) (Peck, M.J.); *Trs. of the Pension & Welfare Funds of the Moving Picture Mach. Operators Union, Local 306 v. Gordon's Film & Co. (New York) Int'l Inc.*, 2001 U.S. Dist. LEXIS 18455, 00 Civ. 8452, 2001 WL 1415145 at *1 (S.D.N.Y. Nov. 13, 2001) (Peck, M.J.); *Coast To Coast Fabrics, Inc. v. Tracy Evans, Ltd.*, 2001 U.S. Dist. LEXIS 1, 00 Civ. 4417, 2001 WL 5037 at *1 (S.D.N.Y. Jan. 2, 2001) (Peck, M.J.); *Starbucks Corp. v. Morgan*, 2000 U.S. Dist. LEXIS 14677, 99 Civ. 1404, 2000 WL 949665 at *1 (S.D.N.Y. July 11, 2000) (Peck, M.J.); *King Vision Pay-Per-View, Ltd. v. New Paradise Rest.*, 2000 U.S. Dist. LEXIS 8792, 99 Civ. 10020, 2000 WL 378053 at *1 (S.D.N.Y. Apr. 11, 2000) (Peck, M.J.);*Independent Nat'l Distrib., Inc.* v. *Black Rain Communications, Inc.*, 1996 U.S. Dist. LEXIS 22576, 94 Civ. 8464, 1996 WL 238401 at *2 (S.D.N.Y. Apr. 4, 1996) (Keenan, D.J. & Peck, M.J.).

as [the Court has] ensured that there was a basis for the damages specified in the default judgment.'" *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 111 (2d Cir. 1997) (quoting *Fustok v. ContiCommodity Servs., Inc.*, 873 F.2d [[38, 40 (2d Cir. 1989)). [3] Here, using affidavits was particularly appropriate because plaintiffs are Chinese-speakers who do not speak English, and the evidence could best be provided [*7] in cumulative chart form. (*See* Dkt. No. 77: Kimerling 12/12/03 Inquest Aff. Exs. A-B.) The Court has reviewed plaintiffs' affidavits and interrogatory responses (Kimerling 12/12/03 Inquest Aff. Ex. B) and counsel's charts and summaries (*id*., Exs. A, C & E; *see also* Kimerling 12/29/03 Supp. Aff. Exs. AC).

Plaintiffs' affidavits described: the plaintiff's job positions at the factory owned by Calvin Chen and Winnie Chen; the time period during which plaintiff worked for defendants; plaintiff's normal work schedule; and plaintiff's rate of pay or wage calculations, based on defendants' records where available, otherwise based on plaintiff's records. (Dkt. [*8] No. 77: Kimerling 12/12/03 Inquest Aff. Exs. A(1)-A(23).) Where available the affidavits also included sample pages from the plaintiff's piecework or other records, but since they are, for the most part, in Chinese, including the complete records would not have assisted the Court.

It should be noted that "plaintiffs were unable to obtain any time records from the defendants," and only obtained from defendants "some wage records for 1999 and 2000 . . . [which] plaintiffs rely on . . . for the time that they cover." (Kimerling 12/12/03 Inquest Aff. PP 5-6.) "For other periods of employment, plaintiffs rely on their own records and/or estimates of their weekly wages . . . [which] are most often based on average wages drawn from the Defendants' records or the plaintiffs' own records." (Kimerling 12/12/03 Inquest Aff. P 6.)

Defendants were served with a copy of plaintiff's inquest papers but did not respond. In a FLSA case, in the absence of rebuttal by defendants, plaintiffs' recollection and estimates of hours worked are presumed to be correct. *See*, *e.g.*, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 66 S. Ct. 1187, 1192, 90 L. Ed. 1515 (1946) [*9] ("An employee has carried out his burden [of production under the FLSA] if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work by just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate."); *Grochowski*, v. *Phoenix Constr.*, 318 F.3d 80, 87-88 (2d Cir. 2003); *Harold Levinson Assocs., Inc. v. Chao*, No. 01-6105, 37 Fed. Appx. 19, 20, 2002 WL 1032708 at *1 (2d Cir. May 22, 2002); *Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 31 (2d Cir. 2002); *Reich v. Southern New England Telecomms. Corp.*, 121 F.3d 58, 66 (2d Cir. 1997); *Moon v. Kwon*, 248 F. Supp. 2d 201, 219 (S.D.N.Y. 2002); *Chao v. Vidtape, Inc.*, 196 F. Supp. 2d 281, 293 (E.D.N.Y. 2002),*aff'd* [*10] *as modified on other grounds*, Nos. 02-6090, 02-6129, 66 Fed. Appx. 261, 2003 WL 21243085 (2d Cir. May 29, 2003); *Guo Xing Cao v. Chandara Corp.*, 2001 U.S. Dist. LEXIS 8631, 00 Civ. 8057, 2001 WL 34366628 at *4-5 (S.D.N.Y. July 25, 2001); *Chen v. Jenna Lane, Inc.*, 30 F. Supp. 2d 622, 624-25 (S.D.N.Y. 1998) (Carter, D.J. & Peck, M.J.). Here, plaintiffs' hours worked were derived from their contemporaneous piecework and other records. The Court accepts plaintiffs' estimates of hours worked.

Consistent with the approach previously used by Mr. Kimerling and approved by the Court in *Chen v. Jenna Lane, Inc.*, 30 F. Supp. 2d at 625, Mr. Kimerling described the methodology he employed to determine minimum wage payment, overtime and spread of hours pay for plaintiffs, as follows:

> MINIMUM WAGE
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> 12. To determine whether Plaintiffs were paid the minimum wage, the charts calculate the minimum wages based [on] what was the appropriate hourly rates at the time of the work. The minimum wage requirements were different under the federal Fair Labor Standards Act and under the New York State Labor Law during the periods covered by this lawsuit. Because the nonpayment [*11] of minimum wage and overtime were intentional and willful acts, a three year statute of limitations applies under FLSA. 29 U.S.C. § 255(a). For the three years prior to the date the complaint was filed, June 7, 2000, the FLSA rates were used. As of September 1, 1997, the FLSA rate of $ 5.15 applied. 29 U.S.C. § 206(a). Prior to that, a rate of $ 4.75 applied. *Id*. For the Plaintiffs that opted into the case, their opt-in dates became the starting point for

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[3] *Accord*, *e.g.*, cases cited in fn.1 above; *see also*, *e.g.*, *Chen v. Jenna Lane, Inc.*, 30 F. Supp. 2d 622, 624 (S.D.N.Y. 1998) (Carter, D.J. & Peck, M.J.); *Semi Conductor Materials, Inc. v. Agriculture Inputs Corp.*, 1998 U.S. Dist. LEXIS 22939, 96 Civ. 7902, 1998 WL 388503 at *8 (S.D.N.Y. June 23, 1998) (Kaplan, D.J. & Peck, M.J.).

statute of limitation purposes. As stated above, the opt-in dates of the opt-in plaintiffs, as well as the date of the filing of the Complaint for the original plaintiffs, are attached in Exhibit E.

13. Under the New York State Labor Law, the minimum wage for the period prior to June 7, 1997 (three years before the filing of the Complaint) was $ 4.25 and [sic; an] hour. N.Y. Lab. § 652. New York's minimum wage did not change until March 31, 2000 when it went up to $ 5.15. Thus, for all the plaintiffs the New York State minimum wage claims are based on a rate of $ 5.15 and [sic; an] hour. [4]

14. Plaintiffs' actual weeklyearnings were compared to the appropriate minimum wage weekly [*12] earnings. If a plaintiffs' earnings were below the minimum wage, the amount owed was inserted in the column called Minimum Wage (MW) Owed.

15. For those plaintiffs who were paid by the hour at a rate above the minimum wage, this analysis was not done.

OVERTIME

16. Plaintiffs almost always worked overtime - more than 40 hours a week. However, they were not paid for their overtime. The damage charts calculate what they should have earned in overtime pay using their average hourly rate earned in a week (the "regular rate") or the minimum wage, which ever is larger. The amounts overtime pay owed was placed in the Overtime (OT) Owed column.

SPREAD OF HOUR'S PAY

17. Plaintiffs are entitled to an extra hour's pay, at the minimum wage under New York Labor Law, for every day they are on the job more than 10 hours. To calculate the amount owed, the damage charts did two things. For some plaintiffs, their total weekly work hours were known because they kept their own hours, or because they were paid by the hour, and thus their hours could be calculated based on their reported wages. For these plaintiffs, all of whom generally worked at least 6 days a week, where their hours were 60 or more [*13] including lunch time, they were considered to be entitled to 6 days of spread hours pay. If their total hours were between 53 and 60 hours, they were determined to be entitled to 5 days of spread hours pay. If their total hours were below 53 hours, it was impossible to estimate how many days, if any, were more than 10 hours. For these weeks, no days were determined to [be] entitled to spread of hours pay. This conservative consideration of these 53 hours weeks was done to offset any overestimation that may have occurred in other weeks.

18. Other plaintiffs did not have their own records but provided counsel with their recollections of their regular work hours, i.e., start and leaving times, and their work weeks, i.e., how many seven-day weeks. Using this information, spread-of-hour calculations were done.

19. The New York State minimum wage rate of $ 4.25 was used in these spread-of-hours calculations for all days prior to March 31, 2000, after which the rate of $ 5.15 was used. NY Lab. § 652.

LIQUIDATED DAMAGES

20. Plaintiffs are entitled to liquidated damages for the willful and intentional acts of defendants. There is no excuse for not paying the minimum wages and overtime [*14] wages to manual laborers like plaintiffs. The Defendants must have acted willfully and intentionally.

21. At the bottom of Plaintiffs' damage charts, the federal and New York State liquidated damages are calculated. The federal FLSA's liquidated damages, 100%, are calculated for the first three years of the overtime and minimum wage violations, i.e., for the first three years before the filing date or opt-in date. The New York State liquidated damages, 25%, are calculated for the overtime and minimum wage violations that occurred in the period of time between six years and three years before the filing date or opt-in date. The

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[4] Mr. Kimerling's statement is incorrect: The minimum wage claim is based on $ 5.15 where the federal and state limitations periods overlap, *i.e.*, for September 1997 forward; for the period prior to June 1997, the state rate of $ 4.25 was used; and for the period between June 7, 19967 and August 31, 1997, the federal rate of $ 4.75 was used. The Court verified this through the calculations on plaintiffs' charts, Kimerling 12/12/03 Inquest Aff. Ex. A. Thus, the affidavit description is incorrect but the charts were correctly done.

spread-of-hours damages are subject to New York State's liquidated damages for the total period covered in the damage charts.(Dkt. No. 77: Kimerling 12/12/03 Inquest Aff. PP 12-21.)

[*15] As noted, the above methodology was approved by this Court previously in *Chen v. Jenna Lane, Inc.*, 30 F. Supp. 2d at 625, and the Court again approves it here. The Court has reviewed the affidavits and the charts derived therefrom (Kimerling 12/12/03 Inquest Aff. Exs. B & A, respectively) and has "spot checked" the arithmetic calculations in the charts.

Plaintiffs' original inquest submissions, however, did not reflect the fact that plaintiffs had settled with former defendant Donna Karan. By Order dated December 18, 2003, the Court directed plaintiffs' counsel to address this issue. (12/18/03 Order.) The matter was further discussed at a December 22, 2003 conference before the Court, attended by plaintiffs' counsel and counsel for Donna Karan. (*See* 12/22/03 Conf. Tr.) As a result, plaintiffs' counsel Mr. Kimerling submitted a supplemental affidavit showing how much each plaintiff had received in the Donna Karan settlement, and deducting that from the amount of damages (including federal and state liquidated damages) sought by each plaintiff. (Kimerling 12/29/03 Supp. Aff. PP 2-3, 5 & Exs. A-C.)

Plaintiffs also seek prejudgment interest on their state law claims [*16] pursuant to C.P.L.R. § 5001. (Dkt. No. 75: Plfs. Inquest Br. at 10.) The Second Circuit has held that even where a plaintiff is awarded liquidated damages under the New York Labor Law, prejudgment interest still is appropriate. *Reilly v. Natwest Mkts. Group Inc.*, 181 F.3d 253, 265 (2d Cir. 1999), *cert denied*, *528 U.S. 1119, 120 S. Ct. 940, 145 L. Ed. 2d 818 (2000)*; *Keun-Jae Moon v. Joon Gab Kwon*, 99 Civ. 11810, 2002 U.S. Dist. LEXIS 22959 at *2 (S.D.N.Y. Oct. 30, 2002) (awarding liquidated damages and prejudgment interest for violations of FLSA and New York Labor Law). The statutory interest rate in New York is 9%. C.P.L.R. § 5004. Because the unpaid wages to each plaintiff occurred at different times, interest is to be calculated pursuant to C.P.L.R. § 5001(b) ("Where . . . damages were incurred at various times, interest shall be computed upon each time from the date it was incurred or upon all of the damages from a single reasonable intermediate date."); *see also*, *e.g.*, *Reilly v. Natwest Mkts. Group Inc.*, 181 F.3d at 265. Plaintiffs' counsel used the "midpoint of the accrual of damages" for each plaintiff to calculate [*17] interest. (Kimerling 12/29/03 Supp. Aff. PP 7-8 & Ex. B.) The Court finds acceptable the methodology used by plaintiffs' counsel to compute interest. (Kimerling 12/29/03 Supp. Aff. PP 7-8 & Ex. B.) [5]

Accordingly, plaintiffs are entitled to judgment for the following damage amounts, including federal and state liquidated damages and interest on the state wage claims: [*18]

Plaintiff	Amount
Cai, Rui Yu	$ 2,643.53
Cao, Ke Xiu	39,233.72
Cao, Yao Chai	29,932.63
Chan, Lai Yee	23,952.28
Chen, Bi Fang	33,950.82
Chen, Jin Sen	52,152.58
Chen, Miao Qiong	1,714.76
Chen, Sheng Jian	27,718.42
Chen, Shu Hui	26,804.74
Chen, Yi Qing	20,708.62
Huang, Hong Biao	11,629.74
Jian, Feng Ying	29,272.14
Li, Xiao Dian	23,969.30
Lin, Jin Shun	62,436.75
Lin, Xiu Feng	26,741.95
Liu, Hui Qin	22,568.80

[5] The Court notes that Mr. Kimerling's calculations used an assumption favorable to plaintiff - he attributed the Donna Karan settlement payments first to federal damages and then to the liquidated damage amounts under New York Labor Law. (Kimerling 12/29/03 Supp. Aff. P 5.) Those categories are not entitled to prejudgment interest, which applies only to plaintiffs' state wage claims. While this methodology is favorable to plaintiffs, defendants have defaulted and not submitted any alternative methodology and the Court therefore accepts plaintiffs' methodology for allocating the Donna Karan settlement amounts and calculating interest.

Liu, Zeng Guan	636.06
Peng, Yue Ming	8,254.46
Shi, Ke Yue	37,139.99
Wang, Qi Kai	13,834.76
Wang, Tang Qing	11,087.30
Xue, Bao Yu	20,020.50
Zou, Jian Qin	30,173.22
	$556,577.07

(Dkt. No. 77: Kimerling 12/12/03 Inquest Aff. Exs. A1-A23; Kimerling 12/29/03 Supp. Aff. Exs. B-C.)

Under both the FLSA and New York Labor Law, both Calvin Chen and Winnie Chen are considered employers and thus are individually liable for these damages. (*See* Dkt. No. 75: Plfs. Inquest Br. at 8-10.) 29 U.S.C. § 203(d); N.Y. Labor Law §§ 2(5)-(6); *see*, *e.g.*, *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139-40 (2d Cir. 1999); *Chung v. New Silver Palace Rest., Inc.*, 272 F. Supp. 2d 314, 318 & n.6 (S.D.N.Y. 2003) [*19] (test for employee under New York Labor Law is same as *Herman* test under FLSA).

Attorneys' Fees

The FLSA provides for attorneys' fees and costs to a successful plaintiff. 29 U.S.C. § 216(b); *see also*, *e.g.*, *Chen v. Jenna Lane, Inc.*, 30 F. Supp. 2d 622, 625 (S.D.N.Y. 1998) (Carter, D.J. & Peck, M.J.).

Plaintiffs request $ 20,355 in attorneys' fees and $ 90 in costs. (*See* Dkt. No. 76: Kimerling 12/12/03 Fee Aff. P 15.) The Court finds Mr. Kimerling's hourly rate of $ 350 (*id*. PP 5-11) to be reasonable. [6] Mr. Kimerling has taken a conservative approach to the hours requested, claiming reimbursement only for the hours billed *after* the plaintiffs' settlement with Donna Karan. (*See id*. P 3.) The Court has reviewed Mr. Kimerling's hourly time entries and finds them reasonable. (*See id*. PP 2-4 & Ex. A.) The $ 90 cost for a court transcript is reasonable.

[*20] Accordingly, plaintiffs are entitled to attorneys' fees of $ 20,355 ($ 350 times 58.1 hours) and costs of $ 90.

CONCLUSION

For the reasons set forth above, the Court should enter judgment for plaintiffs against the Calvin Chen defendants and the Winnie Chen defendants, jointly and severally, for damages (including prejudgment interest) of $ 556,577.07, plus $ 20,355 in attorneys' fees and $ 90 in costs.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to *28 U.S.C. § 636(b)(1)* and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also*Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Richard J. Holwell, 500 Pearl Street, Room 1950, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Holwell. Failure to file objections will result in a [*21] waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993), *cert. denied*, *513 U.S. 822, 115 S. Ct. 86, 130 L. Ed. 2d 38 (1994)*; *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir.), *cert. denied*, *506 U.S. 1038, 113 S. Ct. 825, 121 L. Ed. 2d 696 (1992)*; *Small v. Secretary of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 57-59 (2d Cir. 1988);*McCarthy v. Manson*, 714 F.2d 234, 237-38 (2d Cir. 1983); *28 U.S.C. § 636(b)(1)*; Fed. R. Civ. P. 72, 6(a), 6(e).

DATED: New York, New York

January 7, 2004

Respectfully submitted,

Andrew J. Peck

United States Magistrate Judge

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[6] The Court approved his then-hourly rate of $ 300 in 1998 in *Chen v. Jenna Lane, Inc.*, 30 F. Supp. 2d at 625.