STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: RALPH T. PESCRILLO, PESCRILLO NIAGARA, LLC, AND PESCRILLO NEW YORK, LLC (T/A RALPH T. PESCRILLO DEVELOPMENT), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, and an Order under Articles 6 and 19 of the Labor Law, all dated October 31, 2016, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 16-155 RESOLUTION OF DECISION

APPEARANCES

Sanders & Sanders, Cheektowaga (*Harvey P. Sanders* of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Roya Sadiqi* of counsel), for respondent.

WITNESSES

Ralph T. Pescrillo for petitioners.

Dallas Mort, Steve Langlois, Harry Rainer, and Senior Labor Standards Investigator James Donohue for respondent.

WHEREAS:

On December 29, 2016, petitioners Ralph T. Pescrillo, Pescrillo Niagara, LLC, and Pescrillo New York, LLC (T/A Ralph T. Pescrillo Development) filed a petition pursuant to Labor Law § 101 seeking review of two orders issued against them by respondent Commissioner of Labor on October 31, 2016. Respondent filed her answer on February 9, 2017. Upon notice to the parties, a hearing was held in Buffalo, New York, on August 22 and 23, 2017, before J. Christopher Meagher, member of the Board and designated Hearing Officer in the proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and file post-hearing briefs.

The order to comply with Article 6 (unlawful deductions order) directed petitioners to return unlawful deductions from wages in the combined total amount of $111,885.65 due and owing to eight individual claimants from February 1, 2013 to May 25, 2016. It also included interest at the rate of 16% calculated to the date of the order in the amount of $7,790.80 and assesses 100% liquidated damages in the amount of $111,885.65 and a 200% civil penalty in the amount of $223,771.30 for a total due of $455,333.40. During the hearing, respondent moved to amend the unlawful deductions order to reduce the total wages due to claimants from $111,885.65 to $60,315.95 for the claim periods detailed below based on documentary evidence admitted into the record and testimony that was given at the hearing. Petitioners did not oppose the amounts set forth in the unlawful deductions order being amended, but reserved all claims, objections and defenses to the order to comply. The hearing officer reserved decision on the motion for the Board to rule on as part of its decision in this matter. We grant respondent's motion and amend the order to comply to seek $60,315.95 in wages owed, detailed as follows:

- $5,577.60 for Lindsay Carrier for the period from March 13, 2014 through November 1, 2015;
- $12,125.48 for Gary Chew for the period from November 1, 2013 through May 24, 2016;
- $4,462.08 for Carl Daniels for the period from March 9, 2015 through May 24, 2016;
- $4,434.15 for Stephen Engleka for the period from October 31, 2015 through May 24, 2016;
- $3,174.25 for Stephen Langlois for the period from February 1, 2016 through May 24, 2016;
- $11,378.16 for Christopher Lee for the period from July 1, 2014 through May 25, 2016;
- $17,067.24 for Dallas Mort for the period from February 1, 2013 through May 25, 2016; and
- $2,100.00 for Harry Rainer for the period from October 9, 2015 through May 25, 2016.

As amended, the unlawful deductions order assesses interest at the rate of 16% in the amount of $4,199.91; 100% liquidated damages in the amount of $60,315.95; and 200% in civil penalties in the amount of $120,631.90, for a total amount due of $245,463.71.

The order under Articles 6 and 19 (penalty order) directs petitioners to pay civil penalties in the amount of: $8,000.00 for failure to keep and/or furnish true and accurate payroll records for the period from February 1, 2013 through May 25, 2016, in violation of Labor Law § 661 and 12 NYCRR 141-2.1; $8,000.00 for failure to provide each employee with a complete wage statement with each payment of wages for the period from February 1, 2013 through May 25, 2016, in violation of Labor Law § 661 and 12 NYCRR 141-2.2; and $8,000.00 for failure to provide employees with written notice at the time of hiring, containing their rate of pay and designated payday, or failing to obtain written acknowledgement from employees of receipt of such notice during the period from March 1, 2013 through May 25, 2016, in violation of Labor Law § 195 (1).

The petition alleges that Pescrillo Niagara, LLC and Pescrillo New York, LLC were not employers, nor did either entity exist during the entire claim period as they were each established in 2015, and therefore, they should not have been named in the orders issued by respondent. The petition further alleges that Ralph T. Pescrillo did not deduct rent from wages and the employees who also rented apartments from him did not receive their housing as part of their compensation. Pescrillo also challenges the penalties assessed in the orders and asks that this action be stayed because he filed a bankruptcy petition.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of Ralph T. Pescrillo

Ralph T. Pescrillo (hereinafter "Pescrillo") formed Pescrillo Niagara, LLC, on January 14, 2015 to hold a "partial amount of [his] inventory," consisting of 10 properties purchased with capital provided by private individual lenders. Pescrillo then formed Pescrillo New York, LLC, in April 2015 to hold "a much more substantial amount of [his] inventory," consisting of approximately 100 properties that were burdened with tax delinquencies. Pescrillo managed these properties through a management company called Ralph T. Pescrillo Development during the claim period.[1] Ralph T. Pescrillo Development is a D/B/A Pescrillo filed using his own social security number. Prior to establishing these two holding companies, Pescrillo properties were primarily owned by Pescrillo as an individual, while a few were owned by RTP Property Management, LLC, a limited liability company that Pescrillo established in 2011.[2] Pescrillo is the sole member of Pescrillo Niagara, LLC. Pescrillo is also the sole member of Pescrillo New York, LLC. The LLCs do not have any employees or bank accounts and exist only to hold title to real property. Both LLCs have the same address of record, 714 West Market Street, Niagara Falls, New York, which is also the address of record for Pescrillo's D/B/A and for RTP Property Management, LLC.

Pescrillo testified that, during the claim period, claimants worked for him as a sole proprietor doing business as Ralph T. Pescrillo Development, and they did not work for any other Pescrillo entity, including the LLCs named on the orders issued by respondent. Workers signed in and out on the days they worked, and the office manager checked off the days they worked in the sign-in sheet.

Pescrillo testified that some workers lived in his properties, but housing was not provided as part of their employment. Workers who lived in Pescrillo properties paid portions of their rent throughout the month, on a weekly basis, while tenants who did not work for Pescrillo paid their rent monthly, usually on the first day of each month. When workers living in Pescrillo properties paid their rent directly to Pescrillo, he would handwrite them a receipt, but when they gave rent to Tina Aronne, the office manager, she would generate a computerized receipt. Several claimants paid rent on a weekly basis, including Gary Chew, Carl Daniels, Stephen Engleka, Christopher

[1] After May 25, 2016, which is the end of the claim period, the name of the management company changed from Ralph T. Pescrillo Development to RTP Property Management, LLC.

[2] Pescrillo is the sole member of RTP Property Management, LLC.

Lee, Dallas Mort, and Harry Rainer. Pescrillo set the weekly amounts that workers living in Pescrillo properties paid him based on the number of weeks left until the end of the month. If a worker did not pay any rent in a given week, then that amount would be rolled into the following week as rent due. If by the end of the month there was still a rent balance owed, then, prior to processing payroll for that week, Pescrillo contacted the worker to come to an agreement about how many days of work they would perform for which they would not be paid to cover their rent balance. When a worker's rent balance surpassed their earned wages for the week, they would sometimes sign their entire paycheck over to Pescrillo, who would provide them a rent receipt reflecting that paycheck's amount having gone towards rent. Claimants often paid rent on the same day that they received their paychecks, or a couple of days later. Pescrillo testified that he had initiated eviction proceedings against workers that owed more than a month's rent.

Pescrillo testified that:

- Lindsay Carrier (hereinafter "Carrier") lived in one of his properties from March 13, 2014 through November 1, 2015 and worked for Pescrillo prior to moving into a Pescrillo property. When Carrier moved in, the property was personally owned by Pescrillo. Carrier had a lease agreement commencing March 13, 2014 and it reflected a monthly rent of $350.00.

- Gary Chew (hereinafter "Chew") lived in a Pescrillo property prior to working for Pescrillo. Chew's lease indicates a January 22, 2016 start date, but he actually began living in the unit without a written lease on or before February 1, 2013. The monthly rent for the lease that commenced January 22, 2016 is $525.00. Chew, who still lives in a Pescrillo property and works for RTP Property Management, LLC, pays his rent in cash and Pescrillo gives him receipts for those rent payments.

- Carl Daniels (hereinafter "Daniels") started renting a Pescrillo property approximately two years after he was hired by Pescrillo. Daniels' lease started on March 9, 2015, but he lived in another Pescrillo property prior to that date. The March 9, 2015 lease shows a $400.00 monthly rent.

- Stephen Engleka (hereinafter "Engleka") lived in a Pescrillo property from November 1, 2015 through May 2016. His lease reflects a monthly rent of $795.00. Engleka worked for Pescrillo between 2013 and 2015 and still works for Pescrillo, but did not begin living in a Pescrillo property until November 1, 2015.

- Steven Langlois (hereinafter "Langlois") lived in a Pescrillo property from May 1, 2015 to July 2017. He had a lease reflecting a $995.00 monthly rent. Pescrillo testified that Langlois started working for him around November 2015, but no longer works for him.

- Christopher Lee (hereinafter "Lee") lived in a property owned by Pescrillo Niagara, LLC or Pescrillo New York, LLC from July 1, 2014 to March 31, 2017. His lease reflects a monthly rent of $595.00. Lee began working for Pescrillo sometime after July 1, 2014 and he still works for Pescrillo.

- Harry Rainer (hereinafter "Rainer") lived in a property owned by Pescrillo Niagara, LLC or Pescrillo New York, LLC from April 1, 2015 to February 2016. The lease reflects a monthly rent of $595.00. Rainer started working for Pescrillo before April 1, 2015 and quit in 2016, sometime after moving out of the Pescrillo property.

Pescrillo's only testimony about Dallas Mort's (hereinafter "Mort") tenancy or employment was that he once prepaid rent by several months, in January 2014 and, thus, no rent was deducted from his paycheck during those months and that he paid a weekly rent. Leases were admitted into evidence showing that Mort lived in two different Pescrillo properties. One lease commenced in January 2012 and had a monthly rent of $650.00 and the other lease commenced on February 1, 2016 and had a monthly rent of $595.00. Rent receipts and payment histories were also admitted into evidence.

Pescrillo testified that he always paid workers by check, not cash, but sometimes he cashed some workers' checks and kept the money for rent. The workers would sign their check over to Pescrillo, and sometimes, workers would give Pescrillo additional cash to satisfy their rent debt if their paycheck was not enough to cover the rent due. Prior to the New York State Department of Labor's visit on January 20, 2016, Pescrillo's practice was to pay workers a portion of their wages and apply the remaining amount towards their rent. Pescrillo testified that between January 20, 2016, the date the Department of Labor visited him, and May 25, 2016, he did not deduct any rent payments from workers' wages.

Beginning in 2016, payroll was processed by Pescrillo's accountant, Vincent Di Marco (hereinafter "Di Marco"). On a weekly basis, Pescrillo told Di Marco the hours worked by each worker, and Di Marco used this information to create the payroll records that were introduced. Pescrillo testified that he used to pay workers by the day and they usually worked eight-hour days. Upon learning that he was not supposed to pay workers by the day from the Department of Labor, Pescrillo changed the payment of wages to an hourly rate sometime in 2016.

During the claim period, Pescrillo reminded workers when rent was due each week, but he has since stopped doing that. During the claim period, Pescrillo tried to evict Mort, who was no longer working for him when he sought Mort's eviction. Pescrillo testified that he never terminated or threatened to terminate any workers for failing to pay rent. He also never had to threaten to evict workers because workers always "worked out their rental payment" with him before his office issued paychecks. In addition to deducting rent from wages, Pescrillo deducted money from wages for the workers' home water bills.

Respondent's Evidence

Testimony of claimant Dallas Mort

Mort first met Pescrillo in 2011 when he went to ask Pescrillo about renting an apartment. During this initial meeting, Pescrillo offered Mort a job maintaining and servicing his properties for $65.00 per day. Mort began working for Pescrillo and later he began renting an apartment from him. Mort worked Mondays through Fridays from 8:00 a.m. until 4:00 p.m., with thirty minutes for lunch each day. Mort was paid on Fridays. Initially Mort was paid entirely in cash but at some point, during his employment, Pescrillo would pay him for two days of work by check and the rest

of his wages would be paid in cash, after his rent was deducted. Mort and other workers asked to be paid for 40 hours of work on the books, rather than for only two days, but Pescrillo refused.

Mort initially paid $650.00 per month for rent. Pescrillo deducted $150.00 from Mort's weekly wages for rent and gave Mort the remaining balance of his weekly pay. Pescrillo decided what Mort's wages were, how much rent he paid and how much was deducted from his weekly pay toward rent. Some weeks, Mort paid an amount other than $150.00 toward rent, as shown in rent receipts and Mort testified that he would have to pay a higher amount if he was previously short on rent or if a holiday was coming up, during which Mort would not work. Pescrillo wanted the rent paid prior to the holiday, so he would deduct a higher amount from wages to pay toward rent around holidays.

On the days that Mort was scheduled to work, he reported to Pescrillo's office in the morning to sign in on a yellow notepad where all workers, a total of 9-12 people, signed in prior to Pescrillo assigning the day's work (cleaning, painting, plumbing, electrical, etc.) and dispatching them to the various properties. At the end of the workday, Mort returned to Pescrillo's office to report on what he did that day.

On Fridays, Mort and the workers reported to Pescrillo's office at the end of the workday to be paid their wages for that week. Pescrillo would hand Mort the balance of his pay for the week, after the rent payment deduction. Mort observed Pescrillo deducting rent from wage payments to Chew, Lee, Daniels, Engleka, Langlois, and other employees. If Mort did not work a given day, he was not paid for that day. If Mort fell behind on his rent, he was not allowed to return to work until his rent was paid. Mort also heard Pescrillo tell Chew that he also could not work until he was caught up on rent.

The last time Mort fell behind on rent payments, he went to work that following Monday, but Pescrillo told him he could not work until he paid the rent from the prior week and told Mort to return to his office on Friday with the rent money. Mort understood this was illegal, so he called the New York State Department of Labor. Pescrillo fired him after learning that Mort called the New York State Department of Labor. Mort learned that he had been fired from Lee. Mort then called Pescrillo's office to get clarification and the secretary told him "what do you think was going to happen, you called the labor board." Pescrillo fired Mort in 2016 and then initiated eviction proceedings against him. Mort moved out of the Pescrillo property in 2017.

Testimony of claimant Stephen Langlois

Langlois began living in a Pescrillo property in 2011. He began working for Pescrillo in June 2015, when Pescrillo offered Langlois a job earning $100 per day, to be paid in cash on Fridays. Langlois first maintained Pescrillo's trucks but after about a month of doing that, he started doing property maintenance on Pescrillo's properties. Langlois' responsibilities included painting apartments, showing apartments to potential renters, and driving workers to work-sites. Towards the end of 2015 or beginning of 2016, Pescrillo started deducting rent from Langlois' weekly pay, and simultaneously started to pay him "on the books" by check for one or two days of the week, while the remaining work days were paid in cash. Pescrillo told Langlois that he was going to be paid partially by check because of "labor issues."

Langlois testified that he initially worked six days a week, but at some point, transitioned to a five-day work-week. When he worked a five-day work schedule, he did not work weekends, nor did he work during the holidays on which Pescrillo's office was closed. During the time he worked for Pescrillo, Langlois took approximately five days off. Langlois reported to work at 8:00 a.m. at Pescrillo's warehouse located at 714 West Market Street, where Pescrillo would dispatch him and the other workers to that day's work site. Langlois worked until 4:30 p.m., when he returned to the warehouse for Pescrillo to note the time he finished working. Pescrillo tracked hours Langlois and other workers worked by writing on a piece of paper the time at which they arrived and left his warehouse. None of the workers signed the paper where Pescrillo tracked their hours worked.

Langlois' rent was $995.00 a month. Initially, Langlois paid his rent in full each month with disability payments that he was receiving but in October 2015, when he was no longer receiving disability, Pescrillo began deducting rent money from his wages each week. Pescrillo determined how much to deduct in rent payments from Langlois' weekly wages, ranging from $100.00 to $200.00. Towards the end of his employment with Pescrillo, Langlois had a higher amount of money deducted every other week to pay rent instead of every week. Towards the end of 2015 or beginning of 2016, Langlois' wages were paid entirely by check. When Langlois started to be paid all of his wages in check, he had to immediately go cash his check when he received it on Fridays and return to the office to pay rent or he had to do it by the following Monday if he got his check late in the day. If a worker did not return with their rent payment later in the day, they would be prohibited from returning to work the following Monday, until the rent was paid. Langlois was once told he could not return to work until he paid his rent balance which was less than $20.00. He was able to obtain the money quickly and pay Pescrillo and Pescrillo allowed him to return to work. Langlois saw this happen to Chew. He heard Pescrillo tell Chew that he could not work until he was current with his rent payments. Langlois testified that he never received a paystub or receipt of any kind indicating wages that he received. He did, however, receive rent receipts each week.

In addition to rent, Langlois paid Pescrillo approximately $125.00 every three months for water service at his home. Langlois stopped working for Pescrillo in April 2017. Langlois moved out of the Pescrillo property in July 2017.

Testimony of claimant Harry Rainer

Harry Rainer worked for Pescrillo from February 1, 2010 through April 2016, initially doing roof work and later maintenance work at the properties. Rainer worked Monday through Friday, 8:00 a.m. to 4:30 p.m., with a half-hour lunch break. Sometimes Rainer signed in by writing his name and time of arrival to work on a sheet of paper with Pescrillo. Rainer testified that, at first, he earned $10.00 per hour, which was $80.00 per day, paid in cash. After about two years, Pescrillo told Rainer he was going to be paid for two days by check, and the remaining three workdays would be paid in cash. Sometime in 2015, Rainer began getting paid for five days of work per week in check.

Rainer lived in a Pescrillo property from March 15, 2015 through March 15, 2016, paying a monthly rent of $595.00. Approximately four months after moving into a Pescrillo property, Rainer fell behind on rent and spoke with Pescrillo about setting up a $75.00 weekly payment plan, which Pescrillo did by taking $75.00 out of Rainer's weekly wages. At some point, Pescrillo began

to deduct more than $75.00 from Rainer's pay, and he began deducting between $130.00 and $150.00 a week from Rainer's pay. Rainer also had to pay $135.00 every three months for water, which he paid in cash. When Rainer received his pay in check for two days and in cash for the remaining three days of work in a week, the rent payments were taken out of the cash payment for wages and he received a rent receipt for that.

Rainer testified that after they started receiving all of their pay in checks sometime in 2015, Pescrillo told all of the workers, including Rainer, Mort, Carrier, Chew and an employee named Chad whose last name Rainer does not know, that they had to pay their rent by the end of the day on Friday or they would not be able to return to work. Rainer testified that Pescrillo gave the employees, including Rainer, Mort, Engleka, and Chew, their checks on Fridays, at the beginning of their lunch break, and would tell them that they had to pay their rent by the end of lunch or else they would not be allowed to return to work. Rainer would quickly cash his check and return to Pescrillo's office to pay the $75.00 in rent. He saw Mort, Lindsay Carrier, Gary Chew and an employee named Chad do the same thing during their lunch breaks.

Rainer lived with two to three roommates who sometimes contributed to the $595.00 rent. Sometimes his roommates paid portions of rent with money lent to them by Rainer, other times Rainer would just pay $300 of the monthly rent while his roommates paid the balance. Rainer testified that rent receipts are not accurate as he sometimes paid a different amount than the amounts indicated, but that his share of the rent was supposed to be $300 per month.

Testimony of Senior Labor Standards Investigator James Donohue

James Donohue testified that the investigation against Pescrillo was referred to the New York State Department of Labor ("DOL") from the New York State Office of the Inspector General. The matter was assigned to Edwin Rodenhaus, an investigator with the DOL who investigated the claims and was supervised by Donohue.

Rodenhaus made his initial field visit to Pescrillo's office on January 20, 2016. He met with workers, including Daniels, Chew and Mort and created narrative reports, which are written documentation of interviews that Rodenhaus performed. Daniels, Chew and Mort each signed the reports that Rodenhaus created. The narrative report signed by Daniels states that he earns $72.00 per day and that his employer deducts his $400.00 monthly rent from his wages. It also states that rent and the water bill are deducted from wages. It also states he signs in and out. The narrative report for Chew states that Pescrillo takes two-three days of wages per week for rent. It states that Chew never received a paycheck until four or five months prior to January 20, 2016. It also states that he does not record his hours or sign in. The narrative report signed by Mort states that he worked 40 hours per week, Monday through Friday, and was paid three days of wages and two days toward rent. He was paid $100.00 per day and signed in and out on a time sheet.

Donohue testified that during the field visit, Rodenhaus gave Pescrillo a notice of revisit, dated January 20, 2016, requesting payroll records and records of daily and weekly hours worked for all employees from January 20, 2013 through January 20, 2016. Rodenhaus also asked for written notices of pay in that notice of revisit. Rodenhaus wrote a report based on his January 20, 2016 field visit that Donohue testified he reviewed. Donohue testified that Pescrillo did not provide records showing hours worked and wages paid when those documents were requested. Donohue also testified that, as documented in the respondent's file, Rodenhaus told Pescrillo that he could

not deduct rent dues from wages. In April 2016, Pescrillo provided respondent with the names of past and current employees who also lived in his properties, their addresses, the rent they paid, the dates they were hired and terminated, and their hourly wage rates. Respondent used this information to calculate unlawful deductions owed to claimants.

Since rent was deducted from wages, Donohue testified that wages owed were initially determined by multiplying the number of months' workers lived in Pescrillo properties by the amount of rent they paid, minus the rent credit due to employers, since DOL was calculating the matter under the Building Services Industry Wage Order, which allows for such credit. Donohue testified that because petitioners impermissibly deducted wages for rent under Section 193 of Article 6 of the New York State Labor Law, respondent was not required to include a rent credit in the wage calculation. Donohue testified that respondent decided to continue to give Pescrillo the rent credit that was initially included in the wage calculation.

Donohue testified that Rodenhaus reviewed what Pescrillo purported to be payroll records for the audit period, February 1, 2013 through June 1, 2016, but he determined they were not sufficient as they did not show actual hours worked. As such, Rodenhaus's calculation of wages owed were based on the limited records provided by Pescrillo and statements by the claimants.

Donohue testified that after respondent issued the order to comply, petitioners provided additional payroll records for the period January 2015 to June 2016. Donohue believed that those payroll records, in combination with rent receipts provided by petitioners, supported the statements made by claimants that a portion of their pay was withheld for rent. Those records only showed wages paid, not wages earned, and some documented a day of work as an hour of work, indicating that the hourly wage was $70.00 per hour when in fact that was the daily wage. Donohue testified that Mort's name did not appear in the new set of payroll records for many of the weeks, but Mort told investigators that he worked during those weeks in which he did not appear in the payroll records. Petitioner also provided rent receipts showing Mort paid rent for the weeks that he did not appear in payroll records, so Donohue credited Mort's statements that he worked during those weeks.

Donohue testified that liquidated damages were assessed at 100% because Pescrillo withheld wages, did not provide sufficient records before the issuance of the order to comply, did not act in good faith, and continued to withhold wages even after DOL's initial site visit. He testified that civil penalties were assessed at 200% because there was no good faith on the part of petitioners as they did not have any time or payroll records for 2013 and 2014 and they continued to deduct rent from wages. Donohue testified that respondent assessed $8,000 per each of the three counts in the penalty order. He testified that a $1,000 penalty was assessed per employee and there were eight employees included in the order.

Despite receiving a new set of payroll records from Pescrillo several weeks prior to the hearing, Donohue testified that they continued to be insufficient because there were no records for a portion of the claim period, the records did not account for all wages earned, just those paid, and the records do not reflect actual hours worked, just days worked and those days of work are incorrectly reflected as hours worked.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provision of Board Rules of Procedure and Practice (Board Rules) (12 NYCRR) § 65.39.

Petitioners' burden of proof in this matter is to establish, by a preponderance of the evidence, that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rule [12 NYCRR] § 65.30; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of Ram Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [Oct. 11, 2011]). For the reasons stated below, we find that petitioners failed to meet their burden of proof to show that the order to comply is unreasonable and we affirm the amended unlawful deductions order but limit the time period in which the petitioner LLCs are liable. We also revoke the penalty order.

Pescrillo's Bankruptcy Proceedings

Petitioners requested, in the petition, that the proceedings be stayed pending Pescrillo's personal bankruptcy proceedings. Petitioners presented no evidence regarding the purported bankruptcy proceeding at the hearing Even had petitioners presented evidence regarding the bankruptcy, the automatic stay provision of the Bankruptcy Code does not preclude the Board from deciding petitioners' appeal (*Matter of Kerber and Wurld Media, Inc.*, Docket No. PR 08-170, at pp. 2-4 [October 21, 2009]; *see also Matter of Maddi, MD and Joseph L. Maddi, Physician, P.C.*, Docket No. PR 10-301, at p. 2 [February 27, 2014]).

Pescrillo Niagara, LLC and Pescrillo New York, LLC are Liable as Employers

As used in Article 6 of the Labor Law, "employer" is defined as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* Labor Law § 651 [6]). "'Employed' includes permitted or suffered to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act (hereinafter "FLSA"), like the New York Labor Law, defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and the test for determining whether an entity or person is an "employer" under the New York Labor Law is the same test used for analyzing employer status under the FLSA (*Ansoumana v Gristede's Operating Corp.*, 255 FSupp2d 184, 189 [SD NY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, (172 F3d 132, 139 [2d Cir 1999] *citing Carter v Dutchess Comm. College*, 735 F2d 8, 12 [2d Cir 1984] and *Goldberg v Whitaker House Coop.*, 366 US 28, 33 [1961]), the Second Circuit Court of Appeals explained the "economic reality test" used for determining employer status:

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of

> payment, and (4) maintained employment records" (internal quotations and citations omitted).

No one of these factors is dispositive, as the purpose of examining them is to determine the economic reality based on a "totality of circumstances" (*id.*). There is no dispute that, as a matter of economic reality, Pescrillo was an employer for the claimants as he hired and fired, supervised and controlled employee work schedules or condition of employment, determined the rate and method of pay, and maintained some employment records. The dispute is whether the LLCs can also be held liable for the unlawfully deducted wages. An employee may have more than one employer and the definition of who qualifies as an employer is to be interpreted broadly. (*See Barfield v N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 140 [2d Cir 2008]; *Zheng v Liberty Apparel Co.*, 355 F.3d 61, 69 [2d Cir 2003]; *Matter of Ernest A. Zurita II A/K/A Ernesto Zurito*, Docket No. PR 17-029, at pp. 5-6 [June 6, 2018).

We find that under a theory of single integrated enterprise liability, the LLCs are liable as employers. Federal district courts in New York have repeatedly applied the single integrated enterprise liability theory to federal and New York State labor law wage claim cases.[3] (*Garcia v Chirping Chicken NYC, Inc.*, 2016 US Dist. LEXIS 32750, *20-21 [ED NY, March 11, 2016, No. 15-CV-2335 (JBW/CLP)]; *Coley v Vanguard Urban Improvement Ass'n*, 2016 U.S. Dist. LEXIS 103355, *15-16 [ED NY, August 5, 2016, No. 12-CV-5565 (PKC/RER)]; *Juarez v 449 Restaurant Corp.*, 29 F. Supp. 3d 363, 367-368 [SD NY 2014]; *Perez v Westchester Foreign Autos, Inc.*, 2013 U.S. Dist. LEXIS 35808, *19-23 [SD NY, February 28, 2013, No. 11-Civ-6091 (ER)]). While the Second Circuit has not applied this single employer theory to a wage claim case, it has applied the theory in other employment or labor relations cases and explained the rationale: "[t]he policy underlying the single employer doctrine is the fairness of imposing liability for labor infractions where two nominally independent entities do not act under an arm's length relationship" (*Murray v. Miner*, 74 F3d 402, 405 (2d Cir 1996); *see also Arculeo v On-Site Sales & Mktg., L.L.C.*, 425 F3d 193, 198 [2d Cir 2005] [Title VII employment discrimination case]). Thus, as district courts have done, we now rely on the single integrated enterprise theory of liability to find the petitioner LLCs liable here.

"To establish single employer liability, courts employ a four-factor test, analyzing the extent of: (1) the interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control" (*Coley v Vanguard*, 2016 U.S. Dist. LEXIS 103355, at *16 *citing Garcia v Chirping Chicken,* 2016 US Dist. LEXIS 32750, at *20; *see also Ayala v Your Favorite Auto Repair & Diagnostic Ctr., Inc.*, 2016 U.S. Dist. LEXIS 127425, *58-62 [ED NY, September 16, 2016, No. 14-CV-5269 (ARR/JO)]).

In applying the above test, we find the LLCs are liable as a single integrated enterprise. The first factor clearly exists. Based on the evidence in the record, it is clear that the operations of Pescrillo and the LLCs were intimately interrelated. The second, third and fourth factors are also met here because Pescrillo is the sole individual with any control for either LLC, he manages everything for the LLCs, and he has sole financial control of the LLCs. Based on the evidence entered in the record, Pescrillo was the sole and exclusive source for management and maintenance

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[3] The definitions of employer under the FLSA and the New York State Labor Law are "coextensive." (*Lopez v Pio NYC, Inc.*, 2014 Dist. LEXIS 67121, *6 [SD NY May 15, 2014, NO. 13-CV-4490 (HB)] *citing Hart v Rick's Cabaret Int'l, Inc.*, 967 F.Supp.2d 901, 940 [SDNY 2013]; *see also Matter of Yick Wing Chan v New York Indus. Bd. of Appeals*, 120 AD 3d 1120, 1121 (1st Dept 2014).

of the LLCs' properties. These services were necessary and integral to the success of the LLCs. Without such services, leases could not be signed, rent could not be collected, and the units could not be kept in habitable conditions. The LLCs share the same address of record, 714 West Market Street, Niagara Falls, New York, as Pescrillo's D/B/A.[4] Moreover, each claimant reported to this location at the start of the workday to receive their daily assignments from Pescrillo and at the end of each workday to report to Pescrillo what work had been completed. It is the same office where the claimants were paid their weekly wages and is the same office where they paid their rent.

Pescrillo formed Pescrillo Niagara, LLC, to hold a "partial amount of [his] inventory," consisting of 10 properties purchased with capital provided by private lenders. Pescrillo then formed Pescrillo New York, LLC, to hold "a much more substantial amount of [his] inventory," consisting of approximately 100 properties that were burdened with tax delinquencies. According to Pescrillo, these LLCs do not have any employees and do not have any bank accounts. They exist only to hold title to the real property. Pescrillo is the sole member of both LLCs, and as such, is necessarily the sole source of all decision making, financial or otherwise, on their behalf. With this authority, Pescrillo, engaged himself, on behalf of the LLCs, to manage and maintain over 100 properties; properties which, prior to the LLCs' formation, were primarily owned by Pescrillo himself. There is no evidence of any agreement between the LLCs and Pescrillo as to their respective rights and responsibilities. Such circumstances call into question the alleged separate nature of these business entities. As discussed more fully below, Pescrillo compelled claimants to pay rent weekly, initially by deducting rent directly from their wages and later via separate transaction and conditioned further employment on such payments. Pescrillo was the sole individual with control over the employment relationship and the landlord-tenant relationship. Accordingly, we find that, despite establishing separate business organizations, Pescrillo and the LLCs constitute a single integrated enterprise, based on their interrelated operations, centralized control of labor relations, common management, and common ownership and financial control.

Petitioners failed to meet their burden to prove that respondent's determination that the LLCs are employers was unreasonable or invalid. As such, we find that Pescrillo Niagara, LLC and Pescrillo New York, LLC are employers under the Labor Law but limit the liability of Pescrillo Niagara, LLC and Pescrillo New York, LLC to the time period during which they existed.

Petitioners Engaged in Unlawful Wage Deductions

Article 6 prohibits employers from making deductions from an employee's wages unless allowed by statute or regulation, or the deduction has been expressly authorized in writing by the employee and the authorization is kept on file one the employer's premises (Labor Law § 193 [1]). Authorized deductions are limited to payments for the benefit of the employee and are specifically defined in Section 193 (Labor Law § 193 [1] [b]). Rent is not a permitted deduction (*id.*; *Matter of Malatesta and LTC Electrical Contracting, LLC and G.M. Development, Inc.*, Docket No. 09-053, at p. 7 [February 7, 2011]; *Matter of Mendlowitz and Briarcliff Estates, LLC*, Docket No. PR 10-240, at pp. 2-4 [December 15, 2010][interim decision]). There is no dispute that petitioners unlawfully deducted rent from the claimants' wages until January 28, 2016, which is the first day of the first pay period after the respondent informed petitioners that deducting rent from wages is

[4] It is also the same address as RTP Property Management, LLC, the current entity providing management services for the LLCs' properties.

unlawful. Thus, January 28, 2016 to May 25, 2016 is the only part of the claim period that remains in dispute.

Labor Law § 193 (3) (a) states that "[n]o employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under [Labor Law § 193 (1)]". The prohibition against requiring employees to make a payment as a separate transaction unless it is a permitted deduction is intended to prevent employers from indirectly making deductions that they would be prohibited from making directly. *(See Hudacs v Frito-Lay, Inc.*, 90 NY 2d 342, 347-348 [1997]). "The history of Labor Law § 193 manifests the legislative intent to assure that the unequal bargaining power between an employer and an employee does not result in coercive economic arrangements by which the employer can divert a worker's wages for the employer's benefit"] (*Matter of Angello v Labor Ready, Inc.*, 7 NY3d 579, 586 (2006). Conditioning continued employment on the payment of rent, unless expressly authorized by the employee and being done for the benefit of the employee is impermissible under Labor Law § 193 (3) (a) (*See Koljenovic v Marx*, 999 F.Supp.2d 396, 403-404 [ED NY 2014]).

After the January 20, 2016 site visit by respondent, Pescrillo started paying the claimants all of their wages earned in paychecks. Petitioners contend that they did not deduct rent from the claimants' wages during this time as they paid claimants their wages in a paycheck and the claimants would pay their rent in cash on their own, thus they should not be liable for unlawful deductions from January 28, 2016 through May 25, 2016. Petitioners assert that these were voluntary rent payments made by the claimants that were "totally unrelated" to their wage payments. We are unpersuaded by petitioners, as explained below. We find that petitioners' conduct did constitute unlawful deductions in violation of Labor Law § 193 (3) (a).

Mort, Langlois, and Rainier credibly testified that Pescrillo told him and Chew that they could not work until they paid their rent. Langlois and Rainer both credibly testified that they were told to immediately cash their paychecks and pay rent each week. Langlois testified that there was one week when Pescrillo did not allow him to return to work because he owed less than $20.00 in rent but he was able to obtain the balance quickly and pay it to Pescrillo so he could return to work. Langlois and Mort gave consistent testimony that they saw Chew prohibited from returning to work until his rent was paid as well. The investigator's reports that he created based on interviews with the claimants also stated that Pescrillo told the claimants that they could not work until they paid their rent. Petitioners' rent payment records that were admitted into evidence show that Mort, Chew and Daniels made weekly rent payments almost every week between January 28, 2016 and May 25, 2016. This supports the testimony and investigator's reports that claimants were required to pay rent immediately after receiving their weekly paycheck. Some receipts even show some claimants, such as Chew and Daniels, making more than one rent payment on the same date. This lends support to the claimants' testimony that they were told that they could not return to work unless sufficient rent was paid. As evidenced by leases that were admitted as evidence for petitioners, the claimants were tenants in Pescrillo properties pursuant to lease agreements with monthly rent amounts. Yet, Pescrillo compelled the claimants to pay rent weekly, initially by deducting rent directly from their wages and later by making the claimants immediately cash their paychecks so that they could pay rent weekly. We do not find Pescrillo's assertion that he was helping the claimants manage their finances by paying rent weekly to be credible, particularly given his admitted past practice of unlawfully deducting rent directly from wages. Pescrillo conditioned further employment on rent payments as he required the employees who were also his

tenants to pay their rent by separate transaction or not be permitted to work. Pescrillo was the sole individual with control over the employment relationship and the landlord-tenant relationship and his conduct demonstrates that he did not treat the payment of wages and the payment of rent as unrelated transactions. This conduct is a violation of Labor Law § 193 (3) (a).

Petitioners further argue that the wage amounts in the amended order to comply are incorrect because not all of the claimants paid the entire monthly rent themselves, rather some of the rent was paid by other tenants, individuals or a social services agency. While petitioners had rent receipts and rent ledgers, they failed to offer any specific testimony or explanation beyond general conclusions in their post-hearing brief for why the amounts in the amended order to comply were incorrect. The Board has repeatedly held that general, conclusory and incomplete testimony concerning the work schedules of employees is insufficient to satisfy the high burden of precision required to meet an employer's burden of proof in the absence of required records (*Matter of Frank Lobosco and 1378 Coffee, Inc.*, Docket No. PR 15-287, at p. 6 [May 3, 2017] *citing Matter of Young Hee Oh*, Docket No. PR 11-017 at p. 12 [May 22, 2014] [employer cannot shift its burden to DOL with arguments, conjecture, or incomplete, general, and conclusory testimony]). It is petitioners' burden to prove that the order to comply was invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rule [12 NYCRR] § 65.30; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [Oct. 11, 2011]). Petitioners fail to offer any specific testimony to show why the respondent's calculations are incorrect and petitioners' records alone do not specifically refute respondent's calculations. Petitioners failed to meet their burden and, thus, we affirm the amended unlawful deductions order, except we limit the liability of Pescrillo Niagara, LLC and Pescrillo New York, LLC to the time period during which they existed. Respondent is directed to modify the amended unlawful deductions order so as to limit the liability of Pescrillo Niagara, LLC and Pescrillo New York, LLC as determined in this decision.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-a sets the "maximum rate of interest" at "sixteen per centum per annum." Here, respondent correctly determined that unlawful deductions were taken from the claimants and petitioners did not offer any evidence to challenge the imposition of interest. We affirm the interest imposed in the order.

Liquidated Damages

Labor Law § 218 (1) also requires respondent to include liquidated damages in the amount of 100% of the wages found due with the order. Liquidated damages must be paid by the employer unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law." Liquidated damages in the amount of 100% were assessed against petitioners in this matter. Here, respondent correctly determined that unlawful deductions were taken from the claimants and determined that petitioners' conduct was intentional. Petitioners contend that upon learning that they were not permitted to deduct rent from wages from respondent, they immediately stopped doing so. However, as discussed above, we find petitioners did continue to unlawfully

deduct wages by making continued employment contingent on weekly rent payments. Thus, we affirm the liquidated damages imposed in the orders.

The Civil Penalty

Labor Law § 218 (1) provides that if respondent determines an employer has violated certain provisions of the Labor Law, she must assess an "appropriate civil penalty." A civil penalty of up to 200% shall be assessed if respondent finds the violation was willful or egregious, or if the employer has previously violated the Labor Law. (Labor Law § 218 [1]). Respondent assessed a 200% civil penalty against petitioners, which did not exceed the amount allowed by the statute and did so because petitioners continued to violate Labor Law § 193 after the respondent informed petitioners that they had violated Labor Law § 193. As discussed above, we find petitioners continued to unlawfully deduct wages and thus, we affirm the civil penalty because petitioners did not present persuasive evidence that the civil penalty was unreasonable.

The Penalty Order is Revoked

The penalty order assesses an $8,000.00 civil penalty against petitioners for failing to keep and/or furnish true and accurate payroll records for the period from February 1, 2013 through May 25, 2016, in violation of Labor Law § 661 and 12 NYCRR 141-2.1; an $8,000.00 civil penalty for failing to provide each employee with a complete wage statement with each payment of wages for the period from February 1, 2013 through May 25, 2016, in violation of Labor Law § 661 and 12 NYCRR 141-2.2; and an $8,000.00 civil penalty for failing to provide employees with written notice at the time of hiring, containing their rate of pay and designated payday, or failing to obtain written acknowledgement from employees of receipt of such notice during the period from March 1, 2013 through May 25, 2016, in violation of Labor Law § 195 (1).

Labor Law § 218 (1) provides that where a violation involves "a reason other than the employer's failure to pay wages," the amount shall not exceed $1,000.00 for a first violation, $2,000.00 for a second violation, and $3,000.00 for a third or subsequent violation. In applying her discretion to non-wage violations, the statute directs the Commissioner to give "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations...." (Labor Law § 218 [1]).

Although there can be no dispute that petitioners failed to keep the required records or provide required wage statements and the required notices at the time of hiring, Donohue testified that for each count a $1,000.00 civil penalty was assessed for each employee contained in the minimum wage order. The number of employees affected by a violation is not one of the factors enumerated in Labor Law § 218 (1). There is no evidence in the record that respondent gave due consideration to the factors enumerated in the statute with respect to the civil penalties contained in the penalty order. (*Matter of Melissa L. Dewy a/k/a Melissa L. Fuller, Timothy M. Dewy, and TMD Contracting LLC*, Docket No. PR 14-099, at p. 10 [March 2, 2016] *citing Matter of David Popermhem and G.T.S. Thai. Inc.*, Docket No. PR 13-153, at pp. 10-11 [January 20, 2016]). Because respondent provided no reasonable explanation of how the factors were considered in this matter, we revoke the penalty order.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The motion to amend the unlawful deductions order is granted;

2. The unlawful deductions order is further modified to limit the liability of Pescrillo Niagara, LLC and Pescrillo New York, LLC to the time period during which they existed; and

3. The penalty order is revoked in its entirety; and

4. The petition for review be, and the same hereby is, denied in part, modified in part, and granted in part.

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
January 30, 2019.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The motion to amend the unlawful deductions order is granted;

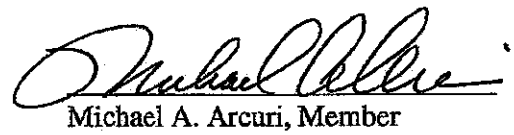
2. The unlawful deductions order is further modified to limit the liability of Pescrillo Niagara, LLC and Pescrillo New York, LLC to the time period during which they existed; and

3. The penalty order is revoked in its entirety; and

4. The petition for review be, and the same hereby is, denied in part, modified in part, and granted in part.

Molly Doherty, Chairperson

J. Christopher Meagher, Member



Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
January 30, 2019.