| 1 | IN THE OFFICE OF THE CONTROLLER | |
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| 2 | CITY AND COUNTY OF SAN FRANCISCO | |
| 3 | In the Matter of: | Case No. MWO-819 |
| 5 6 | CITY AND COUNTY OF SAN FRANCISCO OFFICE OF LABOR STANDARDS ENFORCEMENT | FINDINGS OF FACT FOR THE OFFICE OF LABOR STANDARDS ENFORCEMENT |
| 7 | VS. | |
| 8 | MARILYN ZEIDAN, AYMAN NESHEIWAT, and FRANK ZEIDAN, as individuals d/b/a RIGHTWAY MARKET & | |
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| 28 | Proposed Findings of Fact Rightway Market & Deli: OLSE Case No. MWO-819 | c:\users\barbara413\desktop\bob hirsch\h17-133 - rightway market & deli, case no. mwo-819\h17-133 - ccsf |

INTRODUCTION

On October 5, 2018, a hearing was conducted between the City and County of San Francisco (the "City"), through its Office of Labor Standards Enforcement ("OLSE") and Respondents Marilyn Zeidan, Ayman Nesheiwat, and Frank Zeidan (collectively "Respondents"). The City alleges that Respondents violated the City's Minimum Wage Ordinance ("MWO") and the California Labor Code by failing to pay the required minimum wage and overtime to Ronal Gonzalez Cinto and Federico Mora while Cinto and Mora worked for Respondents at Rightway Market & Deli ("Rightway"). *See* S.F. Admin. Code § 12R; *see also* Cal. Labor Code §§ 218, 510. Respondents dispute that they failed to pay Cinto and Mora the required wages, and Respondent Frank Zeidan additionally disputes that he is an employer at Rightway responsible for payment of wages for any employee.

At the October 5 hearing, the parties presented testimony and documentary evidence in support of their contentions. In addition, all parties were permitted to question any witness called by any other party. After the hearing, the parties were permitted to file closing briefs. Respondent Frank Zeidan filed a closing brief on November 2, 2018. The City filed its closing brief on December 21, 2018. Respondents Marilyn Zeidan and Ayman Nesheiwat did not file closing briefs. Having considered the evidence presented by the parties, including the testimony of all witnesses, as well as the factual and legal contentions in the parties' closing briefs, I make the following findings of fact and rulings:

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FINDINGS AND RULINGS

I. Required Wages

1. The MWO requires employers in San Francisco to pay their employees a designated minimum wage and to meet other requirements, including maintaining accurate records of the hours worked by employees. *See* S.F. Admin. Code §12R. The MWO required employers to pay employees at least \$10.74 per hour in 2014; \$11.05 per hour from January 1, 2015 to April 30, 2015; \$12.25 per hour from May 1, 2015 to June 30, 2016; and \$13.00 per hour from July 1, 2016 through July 1, 2017 for all hours worked. *Id*.

2.

The MWO applies to Respondents' employment of Cinto and Mora at Rightway.

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3. California Labor Code section 510 requires Respondents to pay one and one-half times the regular rate of pay for any work over eight hours in a day and over forty hours in a workweek, and double the regular rate of pay for "any work in excess of eight hours on any seventh day of a workweek." *See* Cal. Labor Code §510.

4. California Labor Code section 510 applies to Respondents' employment of Cinto and Mora at Rightway. California Labor Code section 218 and San Francisco Administrative Code section 2A.23 authorize the City, through the OLSE, to recover any overtime wages owed under California Labor Code section 510. *See* Cal. Labor Code §§ 218 and 510; *see also* S.F. Admin. Code § 2A.23(a).

II. City's Investigation of Respondents

5. The City, through the OLSE, conducted an investigation of Respondents for minimum wage and overtime violations pursuant to its authority under the MWO.

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Respondents took numerous steps to stymie the City's investigation, including:

a. Respondents initially claimed, in e-mails as well as declarations filed with the
City under the penalty of perjury, that Rightway had no employees since Respondents took control in
February 2014.

b. Respondents then provided documents they called time and pay records for
Cinto and Mora. I question whether these documents are accurate records of pay and hours worked
for several reasons. First, the process to create these records was not reliable, as Respondent
Nesheiwat would allegedly call Respondent Frank Zeidan and report information about which
Respondent Nesheiwat did not have personal knowledge. In addition, many of the alleged records are
monthly entries or contain statements like "Work the same with breaks no overtime," instead of daily
entries showing stop and start times. Also, credible evidence in the form of text messages between
Mora and Respondent Nesheiwat demonstrate that Mora was working on numerous days that these
alleged time and pay records indicate Mora was not working.

c. The City offered evidence that Respondent Frank Zeidan offered Cinto money for Cinto to withdraw his wage claim and stop cooperating with the City's investigation.

d. A friend of Respondent Nesheiwat approached Cinto at work and told Cinto that he would receive five thousand dollars if he withdrew his wage claim, but threatened that Cinto would 2 spend the rest of his life in a wheelchair if he testified against Respondents. 3

7. At the October 5 hearing in this matter, Respondents did not offer credible explanations for their efforts to hinder the City's investigation. Based on the Respondents' incredible testimony and their efforts to obstruct the City's investigation, I do not credit the testimony of Respondents on any issue.

III. **Respondents Status as Employers** 8

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8. Respondents assumed control of Rightway in February 2014. Respondents retained control through December 3, 2016 - the end of OLSE's investigative period.

9. Respondents Marilyn Zeidan and Ayman Nesheiwat do not dispute that they are "employers" as that term is defined in the MWO and California Labor Code. Therefore, I find that they were each employers of Cinto and Mora at Rightway from February 2014 through December 2016. 14

10. Respondent Frank Zeidan also exercised sufficient control over wages, hours, and working conditions that I find he was an employer of Cinto and Mora at Rightway from February 2014 through December 2016, as the term "employer" is defined in the MWO and California Labor Code.

11. Respondent Frank Zeidan was an employer based on the following factual findings:

Respondent Frank Zeidan contacted Mora in February 2015 to talk to Mora 19 a. 20 about coming to work at Rightway.

b. Respondent Frank Zeidan, along with Respondent Nesheiwat, informed Cinto when his schedule changed in 2015 from having every other Saturday off to having every Saturday off.

Respondent Frank Zeidan offered Cinto money in exchange for Cinto not c. testifying against Respondents.

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1d.Respondent Frank Zeidan was involved in managing Rightway, including2coming to the store several times each week to collect cash and drop off goods.

e. Respondent Frank Zeidan took out a loan on his home to purchase Rightway, and subsequently paid down \$60,000.00 of the balance on the loan from store revenue.

f. Respondent Frank Zeidan negotiated the sale of Rightway to two buyers. As
part of the sale, he took control of a store on Geneva Avenue.

g. Respondent Frank Zeidan held himself out as managing Rightway. He told
Cinto and Mora that Rightway was "his store," and when OLSE Compliance Officers visited
Rightway and asked to speak to the owner, the store manager called Respondent Frank Zeidan who
spoke to OLSE on behalf of Rightway.

h. Respondent Frank Zeidan represented Rightway with the City and other
government agencies. He met with OLSE's Compliance Officers to discuss the pay and recordkeeping
practices at the store, and paid \$1000.00 out of his own personal funds for penalties assessed against
Rightway. When Rightway had to go before the State's workers' compensation agency, Respondent
Frank Zeidan appeared on behalf of the store while Respondents Marilyn Zeidan and Ayman
Nesheiwat did not.

IV. Employment of Cinto and Mora

12. Because Respondents failed to maintain accurate records and because I find Cinto and Mora's testimony to be consistent and credible, I credit the testimony of Cinto and Mora regarding their hours and wages. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946); *Brock v. Seto*, 790 F.2d 1446, 1447–48 (9th Cir. 1986); *Hernandez v. Mendoza*, 199 Cal.App.3d 721, 727 (1988).

13.Cinto worked for Respondents at Rightway from February 2014 through December42016.

14. From February 2014 until approximately mid 2015, Cinto started work at about 1:00 p.m., and finished at approximately midnight every day, except when he was off every other Saturday.

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15. From the middle of 2015 until May 2016, Cinto continued to start work between noon 1 and 1 p.m. and finish between 11 p.m. and midnight, except he was off every Saturday instead of 2 every other Saturday. 3 4 From the middle of 2015 until May 2016, Cinto continued to start work between noon 5 15. and 1 p.m. and finish between 11 p.m. and midnight, except he was off every Saturday instead of 6 every other Saturday. 7 16. From May 2016 until he stopped working at Rightway Market & Deli in December 8 2016, Cinto worked five days per week from approximately 3 p.m. to 11 p.m. 9 17. 10 Respondents paid Cinto nine dollars per hour from February 2014 until some point in 2015. 11 12 18. Respondents paid Cinto eleven dollars per hour from 2015 until May 2016. 19. Respondents paid Cinto twelve dollars per hour from May 2016 until he stopped 13 working at Rightway in December 2016. 14 20. Mora worked for Respondents at Rightway from March 2015 through March 2016. 15 16 21. Respondents paid Mora eleven dollars per hour the entire time he worked at Rightway. 17 V. **Back Wages and Other Relief** 18 22. Since Respondents did not provide accurate records of Mora's hours and work, I rely 19 on the City's reasonable reconstruction of back wages which is based on the credible testimony of 20 Cinto and Mora regarding hours and pay. See Mt. Clemens Pottery Co., 328 U.S. at 687-88; Brock, 21 790 F.2d at 1447-48; *Hernandez*, 199 Cal.App.3d at 721. 22 23. Respondents owe Cinto \$40,705.78 in back wages. In addition, Respondents owe 23 Cinto \$13,953.51 in interest through the date of hearing pursuant to Section 3289 of the California 24 Civil Code and the MWO, as well as \$83,950.00 in penalties pursuant to the MWO. See Cal. Civ. 25 §3289; see also S.F. Admin. Code § 12R.7. 26 5 27 Proposed Findings of Fact c:\users\barbara413\desktop\bob Rightway Market & Deli: OLSE Case No. MWO-819 hirsch\h17-133 - rightway market & 28 deli, case no. mwo-819\h17-133 - ccsf v. rightway market and deli -

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24. Respondents owe Mora \$3,202.20 in back wages. In addition, Respondents owe Mora \$983.95 in interest through the date of hearing pursuant to Section 3289 of the California Civil Code and the MWO, as well as \$65,350.00 in penalties pursuant to the MWO. *See* Cal. Civ. \$3289; *see also* S.F. Admin. Code \$ 12R.7.

25. Petitioner asserts that Respondents owe the City \$149,300 in penalties pursuant to the MWO. *See* S.F. Admin. Code § 12R.7.

26. The penalties sought by the City are permitted by the MWO "to offset the costs of implementing and enforcing" the MWO. *See* S.F. Admin. Code § 12R.7(c)(2). The City however, has failed to present any evidence as to the "costs of implementing and enforcing" the MWO against these Respondents. I am awarding the sum of \$10,000 as penalties to be paid to the City based upon my assessment of the case in its entirety, including the hearing conducted in this matter.

27. The penalties to be paid to the City, as well as the penalties to be paid to Cinto and
Mora, do not violate the constitutional prohibition against excessive fines. *See* U.S. Const., 8th
Amend.; Cal. Const., art. I, §17. They are not disproportional to the gravity of the violations
committed by the Respondents. See, *CCSF v. Sainez*, 77 Cal App 4th 1302, 1322-23 (2000). Nor have
the Respondents provided any evidence showing an inability to pay.

28. These proceedings have respected Respondents' rights to procedural due process.
Respondents were provided ample notice of the City's contentions and evidence prior to the October 5 hearing. In addition, Respondents were permitted to present evidence, challenge the City's evidence, and question the City's witnesses at the October 5, 2018 hearing.

VI. Order

Based on the foregoing and pursuant to my authority under the San Francisco Administrative Code and state and federal law, I order the following:

a. Within 30 days of entry of this order, Respondents are ordered to pay Ronal Gonzalez Cinto \$40,705.78 in back wages, \$13,953.51 in interest, and \$83,950.00 in penalties.

| 1 | b. Within 30 days of entry of this order, Respondents are ordered to pay Federico | |
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| 2 | Mora \$3,202.20 in back wages, \$983.95 in interest, and \$65,350.00 in penalties. | |
| 3 | c. Within 30 days of entry of this order, Respondents are ordered to pay the City | |
| 4 | and County of San Francisco \$10,000 in penalties. | |
| 5 | d. Respondents are jointly and severally liable for all of the back wages, interest, | |
| 6 | and penalties. | |
| 7 | e. Respondents are ordered to deliver these payments to the San Francisco Office | |
| 8 | of Labor Standards Enforcement, City Hall, Room 430, 1 Dr. Carlton B. Goodlett Place, San | |
| 9 | Francisco, California 94102. | |
| 10 | IT IS SO ORDERED | |
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| 13 | Dated: December 31, 2018 | |
| 14 | ROBERT HIRSCH | |
| 15 | Hearing Officer | |
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