

In the Matter of
SEHAT ENTERTAINMENT, INC.
fdba Sin Club Bar & Grill and
Babak Sehat, successor to Sehat Entertainment, Inc.
Case No. 30-08

Final Order of Commissioner Brad Avakian

Issued July 31, 2009

SYNOPSIS

The Agency paid out \$5,245 in unpaid wages to two wage claimants from the Wage Security Fund and sought to recover the full amount from Respondents, plus a \$1,311.25 penalty, pursuant to ORS 652.414. The forum concluded Respondents were jointly and severally liable for the amounts sought and ordered Respondents to pay \$6,556.25 as reimbursement to the Fund, plus the statutory penalty. Also, the forum concluded Respondents were jointly and severally liable for the remaining unpaid wages totaling \$17,280 and ordered Respondents to pay the wage claimants the full amounts owed. The forum further concluded that Respondents were jointly and severally liable for their willful failure to pay the wages when due and ordered Respondents to pay the wage claimants penalty wages totaling \$4,200, pursuant to ORS 652.150. The forum also concluded that Respondents were jointly and severally liable to one wage claimant for failing to pay him at the applicable overtime rate for the hours he worked in excess of 40 hours per week and ordered Respondents to pay \$2,400 in civil penalties, pursuant to ORS 653.055. ORS 652.140; ORS 652.150; ORS 652.332; ORS 652.414; ORS 653.055.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 3, 2009, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Case presenter Chet Nakada, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Jodi Noelle Durfee and Michael ("Fin") Gette ("Claimants") were present throughout the hearing and were not represented by counsel. Sehat Entertainment, Inc. ("Respondent Corporation") and Babak Sehat ("Respondent Sehat") failed to appear for hearing in person or through counsel.

The Agency called as witnesses: Margaret Pargeter, BOLI Wage and Hour Division Compliance Specialist; Steven Merrill, Respondents' former landlord; Richard Allegretto, Respondents' former customer; Jennifer Bogus, Respondents' former customer, and Claimants Durfee and Gette.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-8;
- b) Agency exhibits A-1 through A-22 (filed with the Agency's case summary), A-23, A-24, A-25, and A-26 (offered during hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On February 22, 2007, Claimant Durfee filed a wage claim with the Agency alleging Babak Sehat dba Sin Club Bar & Grill had employed her and failed to pay her wages for the hours she worked between October 18 and December 31, 2006. Claimant Durfee alleged she earned \$1,691.25, and that Respondent Sehat did not pay any part of those wages and owed her \$1,691.25 in unpaid wages.

2) When she filed her wage claim, Claimant Durfee assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant Durfee, all wages due from Respondent Sehat.

3) On May 24, 2007, Claimant Gette filed a wage claim with the Agency alleging Babak Sehat dba Sin Bar and Grill employed him from September 13, 2006, and April 24, 2007, and failed to pay his wages for the hours he worked during that period. Claimant Gette alleged that he earned \$25,423.50, he was paid only \$1,300, and Respondent Sehat owed him \$24,723.50 in unpaid wages.

4) When he filed his wage claim, Claimant Gette assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant Gette, all wages due from Respondent Sehat.

5) On May 1, 2007, the Agency issued Order of Determination No. 07-1895. In the Order, the Agency alleged Respondent Corporation and Respondent Sehat had employed Claimants during the periods Claimants claimed on their wage claims, failed to pay them for hours worked during those periods, and were liable to them for \$25,278.75 in unpaid wages, plus interest. The Agency also alleged Respondents' failure to pay all of the wages when due was willful and they were liable to Claimants for \$4,200 as penalty wages, plus interest. Additionally, the Agency alleged Respondents failed to compensate Claimant Gette at one and one half times his regular pay rate as required by law and were liable for an additional \$2,400 as civil penalties, plus interest. The Agency further alleged Claimants were paid \$5,245 out of the Wage Security Fund and the BOLI Commissioner is entitled to recover from Respondents the wages paid from the Fund, pursuant to ORS 652.414. The Order gave Respondents 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

6) Respondents were served with the Order of Determination and thereafter filed an answer and requested a hearing. On September 24, 2007, Respondent Sehat responded by facsimile transmission to the Order stating, "I, Babak Sehat, as an authorized representative of Sehat Entertainment, an inactive corporation in the state of Oregon, deny exhibits A, B and C and request a hearing." On September 26, 2007, the Agency sent Respondents a Notice of Insufficient Answer to Order of Determination # 07-1895 advising Respondents that an answer must include "an admission or denial of each fact alleged in the Order of Determination and a statement of each relevant

defense to the allegations.” The Notice also included a reminder that responses must be mailed or hand-delivered and that “[f]ax responses are not accepted.”

7) On October 5, 2007, Respondent Sehat timely filed an answer to the Order of Determination on Respondent Corporation’s behalf stating, in pertinent part:

“I, Babak Sehat, as an authorized representative of Sehat Entertainment, an inactive corporation in the state of Oregon, deny exhibits A, B and C and request a hearing. Jodi Noelle was never an employee of Sehat Entertainment and was employed by private pleasures and the g-spot. Mike Gette was hired to do some contracting work and then was in the process of becoming an employee. In no way are the hours represented by Jodi and Mike correct. They were boyfriend and girlfriend who lived in my house. They owe me in excess of \$25,000 in rents and damage they caused to my house. They were know [sic] for domestic violence and drug use. Mike Gette is a convicted felon, who admitted to me personally [sic]. I tried to help him out and he damaged my house and would not leave, thus forcing me to get an eviction through the court system. This is their way of getting back at me. After I lost the bar I went in to gather my belongings and noticed that many items were stolen. The person, I believe stole those items, the only person with access to the bar other than myself [sic], was mike gette. After I called the police mike gette told the officer that he was my partner and had ‘invested \$20,000 in the bar.’ A complete lie. I will have the officer confirm this. Mike and Jodi were heavy into drug use and fabricated these numbers. I have no contract with either of them and never hired them as employees. Any moneys owed to mike gette were paid. Also the business is closed.”

8) On January 13, 2009, the Agency submitted a request for hearing. On January 15, 2009, a Notice of Hearing issued from the Hearings Unit stating the hearing would commence at 9:00 a.m. on March 3, 2009. With the Notice of Hearing, the forum included copies of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

9) On January 23, 2009, the ALJ ordered the Agency and Respondents each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence, and, for the

Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by February 20, 2009, and notified them of the possible sanctions for failure to comply with the case summary order. On the same date, the ALJ issued an order pertaining to fax filings and timelines for respondent to motions and service of documents.

10) The Agency timely submitted a case summary.

11) On February 24, 2009, the Agency filed an addendum to its case summary.

12) On February 26, 2009, the Agency filed a second addendum to its case summary.

13) On February 26, 2009, the Agency filed a "Notification of Mailing of Agency Case Summary" that stated:

"In order to avoid any misunderstanding, the Agency hereby notifies the Forum that the Agency Case Summary mailed to Babak M. Sehat (10865 Avocet Ct/Beaverton OR 97007-8391) on February 19, 2009, was returned by the US Postal Service on February 23, 2009. Due to an error by the undersigned in putting the incorrect address on the mailing label, the US Postal Service was unable to deliver the documents. The Agency Case Summary was mailed again on February 23, 2009, with the correct address and has not been returned by the US Postal Service as of the date of this notification. If the Forum needs an affidavit for the above information, the Agency will provide one."

14) Respondent did not appear at the time and place set for hearing and no one appeared on their behalf or advised the ALJ of any reason for their failure to appear. The ALJ ruled that Respondents were in default, having been properly served with the Notice of Hearing, and having failed to appear at the hearing.

15) At the start of hearing, the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) The ALJ issued a proposed order on July 8, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At times material, until December 15, 2006, Respondent Sehat Entertainment, Inc. (“Respondent Corporation”) was an active domestic corporation operating a bar and restaurant under the assumed business name of Sin Club Bar & Grill (“Sin Club”), located at 11445 SW Pacific Highway, Tigard, Oregon. Respondent Babak Sehat (“Respondent Sehat”) was Sehat Entertainment, Inc.’s president and secretary. In May 2006, Respondent Corporation obtained a liquor license for Sin Club from the Oregon Liquor Control Commission. Respondent Corporation involuntarily dissolved on December 15, 2006.

2) After Respondent Corporation dissolved, Respondent Sehat continued to operate the bar and restaurant located at 11445 SW Pacific Highway, Tigard, Oregon, using the same assumed business name.

3) On June 14, 2006, Respondent Sehat, individually, entered into a lease agreement with Steven Merrill and two other co-owners (“landlords”) of the premises located at 11445 SW Pacific Highway, Tigard, Oregon. Respondent Corporation was not involved in the lease because the landlords intended to hold Sehat personally liable for any default on the agreement. The lease was for a 10 year term, unless otherwise terminated as provided under the agreement. The landlords allowed Sehat to occupy the premises rent free from June through November 2006. They also loaned Sehat \$35,000 to stock the bar and purchase food for the restaurant because they wanted to “prime the pump” and give the business every opportunity to succeed. The landlords believed Sehat would repay the loan after he “closed a deal” on land he claimed he had sold.

4) Starting in December 2006, the base rent for the premises housing the bar and restaurant was \$6,000 per month. Respondent Sehat paid the first month's rent in December 2006, but failed to pay the rent due each month thereafter. Sehat gave the landlords "the runaround" each time the rent was due and they eventually decided to terminate the lease. After giving the required notices, the landlords evicted Sehat from the premises and the business closed on or about April 20, 2007. Sehat never repaid the initial loan and owed the landlords an additional \$25,000 in back rent when the business closed. As of the hearing date, Sehat has not repaid the loan or overdue rent.

CLAIMANT DURFEE

5) Claimant Durfee worked at Sin Club from October 18 through December 31, 2006. Respondent Sehat hired her to work as a bartender and food server for the minimum wage rate of \$7.50 per hour. During that time, she worked the following hours for the weeks ending:

October 22, 2006 – 18 hours
October 29, 2006 – 32.5 hours
November 5, 2006 – 36 hours
November 12, 2006 – 18 hours
November 19, 2006 – 27 hours
November 26, 2006 – 18 hours
December 3, 2006 – 33 hours
December 10, 2006 – 36 hours
December 31, 2006 – 7 hours

Durfee worked 225.5 hours and earned gross wages of \$1,691.25. Respondent Sehat did not pay Durfee any wages during that period or anytime thereafter. When Durfee filed her wage claim, she was owed \$1,691.25 in unpaid, due and owing wages.

6) On February 27, 2007, the Agency mailed a "Notice of Wage Claim" to "Sin Club" that stated, in pertinent part:

"You are hereby notified that JODI N. DURFEE has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid statutory minimum wages of \$1,691.25 at the rate of \$7.50 per hour from October 18, 2006 to December 31, 2006.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation that supports your position, as well as payment of any amount which you concede is owed the claimant to the Bureau of Labor and Industries within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before March 13, 2007, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

The notice was mailed to 11455 SW Pacific Hwy, Portland, Oregon.ⁱ Neither Respondents nor anyone on their behalf responded to the notice.

7) In April and May 2007, Agency compliance specialist Pargeter sent three letters to Respondent Sehat reiterating the information provided in the Notice of Wage Claim and requesting that Sehat either:

"1. Submit to me a check payable to Jodi Durfee in the gross amount of \$1,691.25 along with an itemized statement of lawful deductions, if any.

"2. Submit to me evidence she did not work the hours claimed, or that she has been paid[, or]

"3. Submit evidence my computations are incorrect."

The first letter, dated April 13, 2007, was mailed to "11445 SW Pacific Hwy, Tigard, OR 97223." The second letter, dated April 30, 2007, was mailed to "11550 SW 72nd Ave., Tigard, OR 97223," with a "cc" to "Sehat Entertainment, Inc., 11580 SW 72nd Avenue, Tigard, OR 97223." The third letter, dated May 9, 2007, was mailed to 11550 SW 72nd Ave., Tigard, OR 97223." The letters were returned to Pargeter and she later determined through the U.S. Postal Service that Respondent Sehat had stopped picking up his mail from the 11580 SW 72nd Avenue, Tigard, OR 97223 address, and left no

forwarding address. Pargeter's supervisor at the time drove to the business site at 11445 SW Pacific Hwy, Tigard, Oregon, and determined that the business had closed. Pargeter contacted OLCC and confirmed that Sin Club was no longer in business.

8) On May 21, 2007, Pargeter sent Respondent Sehat a notice stating, in pertinent part:

"Available information indicates that your business operations have ceased and that you may have insufficient funds to pay this claim. For this reason, the Bureau is considering paying this claim from the Wage Security Fund.

" * * * * *

"So that we can determine whether Jodi Durfee is eligible to receive payment from the Wage Security Fund, your assistance is requested. Please complete the Employer's Questionnaire enclosed and return it to our office by May 31, 2007.

"If the Bureau determines that an employee is eligible for payment from the Wage Security Fund and does, in fact, make payment to the employee from the Fund, the law allows the Bureau to perfect a security interest in the personal property of the employer. The law also allows the Bureau to recover any such amounts from employers as well as a penalty, attorney fees, costs and disbursements.

" * * * * *

"If, of course, your business operations have not ceased or you have sufficient assets to pay the full amount owing this employee as shown on your records, please immediately tender to this office the full amount due."

The notice was mailed to 11580 SW 72nd Ave., Tigard, Oregon. The notice included a "cc" to "Bob Sehat, c/o Town & Country Home Loans, Inc., 10228 S.W. Capitol Hwy, Suite 201, Portland, OR 97219." Neither Respondents nor anyone on their behalf responded to the notice.

CLAIMANT GETTE

9) Claimant Gette began working at Sin Club on or about September 13, 2006. He was hired by then general manager, Gary Swanson, to tend bar and perform general maintenance related to a remodel in progress when he was hired. There was no discussion about pay and Gette assumed he was earning minimum wage.

Respondent Sehat later fired Swanson and told Gette he would pay him \$10 per hour and \$400 per month as rent on a house Sehat owned near the business if Gette agreed to assume the duties of bar manager. Gette agreed and at the end of November 2006 moved into Sehat's house along with his girlfriend, Jodi Durfee. His duties as bar manager included: opening and closing the bar; weekly bar and kitchen inventory and ordering; scheduling events for the bar; and placing web advertisements on My Space.

10) Other than the rent credit totaling \$1,600, Gette received no wages from Respondents for the work he performed between September 2006 and April 2007. The only employee who received any wages during that period was the cook who was paid in cash after every shift. Based upon Respondent Sehat's representation that he planned to pay his rent, creditors and employees with the proceeds from an impending land deal, Gette was optimistic the business would thrive and eventually he would receive his wages. As time went on, Gette observed that there was enough coming in after daily sales to maintain inventory in the bar but not enough to continue the inventory and pay all the bills associated with the bar. Between January and April 2007, the landlords came to the bar often to collect overdue rent. Sehat usually asked Gette to take whatever he could out of the till to give the landlords, and to leave just enough money to maintain a cash flow for the day. In April 2007, the landlords told Gette they were evicting Respondents and closing the bar. When the business closed, Sehat evicted Gette from the rental house. On his last working day, Gette took with him a small safe he had loaned to Sehat during his employment. The safe contained \$100 and Gette kept the money as part of the wages Respondents owed him.

11) Gette's last working day was on or about April 12, 2007. From September 13, 2006, through April 12, 2007, Gette worked the following hours for the weeks ending:

September 16, 2006 – 30 hours
September 23, 2006 – 45 hours
September 30, 2006 – 75 hours
October 7, 2006 – 80.5 hours
October 14, 2006 – 79.5 hours
October 21, 2006 – 82 hours
October 28, 2006 – 73 hours
November 4, 2006 – 71 hours
November 11, 2006 – 70 hours
November 18, 2006 – 70 hours
November 25, 2006 – 67 hours
December 2, 2006 – 72 hours
December 9, 2006 – 73 hours
December 16, 2006 – 97 hours
December 23, 2006 – 94 hours
December 30, 2006 – 72 hours
January 6, 2007 – 57 hours
January 13, 2007 – 65 hours
January 20, 2007 – 63 hours
January 27, 2007 – 62.5 hours
February 3, 2007 – 65.5 hours
February 10, 2007 – 62 hours
February 17, 2007 – 82.5 hours
February 24, 2007 – 64.5 hours
March 3, 2007 – 68 hours
March 10, 2007 – 68.5 hours
March 17, 2007 – 65 hours
March 24, 2007 – 60 hours
March 31, 2007 – 63.5 hours
April 7, 2007 – 39 hours
April 14, 2007 – 42 hours

From on or about September 13 until the week ending December 2, 2006, Gette worked 815 hours, including 335 overtime hours, at the minimum wage rate of \$7.50 per hour, earning \$7,368.75 (480 hours @ \$7.50 per hour, plus 335 overtime hours @ \$11.25 per hour). From December 3, 2006 until the week ending April 14, 2007, Gette worked 1,264 hours, including 505 overtime hours, at the agreed upon rate of \$10 per hour, earning \$15,165 (759 hours @ \$10 per hour, plus 505 overtime hours @ \$15 per hour). Gette worked a total of 2,079 hours and earned gross wages of \$22,533.75. Other than providing a rent credit of \$1,600 and leaving \$100 in a safe that belonged to Gette, Respondents did not pay Gette any wages during that period or anytime thereafter. When Gette filed his wage claim, he was owed \$20,833.75 in unpaid, due, and owing wages (\$22,533.75, less the rent credit of \$1,600 and \$100 Gette retrieved from the safe).

12) On May 24, 2007, Claimant Gette filed a wage claim, and on May 30, the Agency sent "Sin Bar & Grill" a notice stating, in pertinent part:

"Available information indicates that your business operations have ceased and that you may have insufficient funds to pay this claim. For this reason, the Bureau is considering paying this claim from the Wage Security Fund.

" * * * * *

"So that we can determine whether MICHAEL A. GETTE is eligible to receive payment from the Wage Security Fund, your assistance is requested. Please complete the Employer's Questionnaire enclosed and return it to our office by June 6, 2007.

" * * * * *

"If, of course, your business operations have not ceased or you have sufficient assets to pay the full amount owing this employee as shown on your records, please immediately tender to this office the full amount due."

The notice was mailed to "11445 SW Pacific Hwy, Tigard, OR 97223." The notice, marked as "not deliverable as addressed - unable to forward," was returned to the Agency by the U.S. Postal Service on June 4, 2007.

13) Based on her determination that Sin Club had ceased doing business and that Claimants had valid wage claims, Pargeter recommended that Claimants be paid their unpaid, due and owing wages from the Wage Security Fund.

14) On or about June 12, 2007, BOLI caused the WSF to issue a check in the amount of \$2,918.69 to Claimant Gette and on or about June 13, 2007, caused the WSF to issue a check in the amount of \$1,009.35 to Claimant Durfee.

15) All of the witnesses testified credibly.

ULTIMATE FINDINGS OF FACT

1) At times material, until December 15, 2006, Respondent Corporation was an Oregon corporation that engaged the personal services of one or more employees to perform work in Oregon, including Claimants Gette and Durfee.

2) At times material, Respondent Sehat was Respondent Corporation's president, registered agent, and sole principal.

3) Between December 16, 2006, and April 20, 2007, Respondent Sehat continued to conduct the same business in Oregon as his predecessor, Respondent Corporation, at the same location, using the same facilities, employees, and assumed business name.

4) In 2006, the state minimum wage was \$7.50 per hour.

5) Claimant Durfee worked for Respondents from October 18 through December 31, 2006, at the minimum wage rate.

6) Claimant Gette worked for Respondents from on or about September 13, 2006, through April 12, 2007, at the minimum wage rate and later at the agreed upon rate of \$10 per hour.

7) When Claimant Durfee's employment ended, Respondents owed her \$1,691.25 for the hours she worked between October 18 and December 31, 2006.

8) When Claimant Gette's employment ended, Respondents owed him \$20,833.75 for the hours he worked between September 13, 2006, and April 12, 2007, including overtime hours.

9) Claimants Durfee and Gette filed wage claims and the Agency mailed written notices of nonpayment of wages to Respondents on the Claimants' behalf. After investigation the Agency determined the wage claims were valid.

10) The Agency determined that Respondents ceased doing business on April 20, 2007, and, based on that determination, paid Claimant Durfee \$1,009.35 and Claimant Gette \$2,918.69 from the Wage Security Fund.

11) Respondent Corporation willfully failed to pay the wages due and owing Claimants and more than 30 days have elapsed since the wages were due.

12) Penalty wages, computed pursuant to ORS 652.150 and OAR 839-001-0470(1)(c), total \$4,200.00.

13) By failing to pay Claimant Gette for the hours he worked in excess of 40 per week, Respondent Corporation paid Claimant Gette less than the wages to which he was entitled and Claimant Gette is owed civil penalties totaling \$2,400.00.

CONCLUSIONS OF LAW

1) At all times material herein, until December 15, 2006, Respondent Corporation was an Oregon employer subject to the provisions of ORS 652.110 to 652.414 and ORS 653.010 to 653.261, and Claimants Durfee and Gette were Respondent Corporation's employees.

2) Respondent Sehat is a successor to Respondent Corporation and therefore an employer under ORS 652.310(1) and subject to the provisions of ORS 652.310 to 652.405 and 652.409 to 652.414.

3) The actions, inaction, and statements of Respondent Sehat are properly imputed to Respondent Corporation.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter herein and Respondents herein. ORS 652.310 to 652.332; ORS 652.409 to 652.414.

5) Respondent Corporation violated ORS 652.140 by willfully failing to pay Claimants Durfee and Gette all wages or compensation earned and unpaid when their employment terminated.

6) Respondent Corporation paid Claimant Gette less than the wages to which he was entitled under ORS 653.261 and is liable under ORS 653.055 for the full amount of wages, less any amount actually paid to Claimant Gette, and for civil penalties as provided in ORS 652.150.

7) As a successor employer, Respondent Sehat is jointly and severally liable for Respondent Corporation's failure to pay Claimants Durfee and Gette all wages earned and unpaid when their employment terminated.

8) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to reimburse the Wage Security Fund in the amount of \$3,928.04, the amount paid to Claimants from the Wage Security Fund, plus a \$982.01 penalty on that sum, plus interest at the legal rate on both sums until paid. ORS 652.414.

9) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to pay Claimants Durfee and Gette their earned, unpaid, due and payable wages, less any amounts paid out of the Wage Security Fund, penalty wages, and civil penalties, plus interest, on all sums until paid. ORS 652.332.

OPINION

Respondents failed to appear at hearing and the forum found both in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency is required to establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Sue Dana*, 28 BOLI 22, 29 (2006). When making factual findings, the forum may consider unsworn assertions contained in a defaulting respondent's answer when making factual findings, but those assertions are overcome whenever controverted by other credible evidence. *Id.*

UNPAID WAGES

A. **The Agency presented prima facie evidence showing Respondents employed Claimant Durfee and failed to pay her all wages due and owing when her employment terminated.**

Credible evidence controverted Respondents' unsworn claim in their answer that they did not employ Claimant Durfee. Several witnesses credibly testified that they regularly frequented Sin Club between October 18 and December 31, 2006, and observed Durfee waiting on tables and bartending. Moreover, Durfee's credible testimony and documentary evidence established that she maintained an independent record of her work hours showing the amount and extent of the work she performed during that period. She was entitled to receive at least \$7.50 per hour for the hours she worked during that time and Respondents owed her \$1,691.25 when she terminated her employment on December 31, 2006.

B. **The Agency presented prima facie evidence showing Respondents employed Claimant Gette and failed to pay him all wages due and owing when his employment terminated.**

Credible evidence controverted Respondents' unsworn claim in their answer that Claimant Gette worked for Respondents as an independent contractor. Although Respondents claimed Gette "was hired to do some contracting work and then was in the

process of becoming an employee,” Gette’s credible testimony that he was hired to tend bar and do some general maintenance for what he assumed to be the minimum wage rate, and then later was asked to manage the bar for \$10 per hour and \$400 per month as rent on a house owned by Respondent Sehat, was corroborated by credible witness testimony that was not controverted by credible evidence. Gette maintained a written record of his work hours showing the amount and extent of the work he performed between September 13, 2006, and April 12, 2007, including overtime hours, and was owed \$22,533.75 at the minimum wage rate of \$7.50 per hour and later at the agreed upon rate of \$10 per hour. Respondents paid Gette \$1,700 of that amount and owed him \$20,833.75 when his employment ended in April 2007.

WAGE SECURITY FUND

In cases involving payouts from the Wage Security Fund (“Fund”), when 1) there is credible evidence that a determination on the validity of the claim was made; 2) there is credible evidence as to the means by which that determination was made; and 3) the Agency has paid out money from the Fund and seeks to recover that money, there is a rebuttable presumption that the Agency’s determination is valid for the sums actually paid out. *In the Matter of Kilmore Enterprises, Inc.*, 26 BOLI 111, 123 (2004), *citing In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999).

Respondents did not appear at the hearing to contest the recovery action and the Agency presented prima facie evidence showing that it determined the validity of the wage claims filed by Claimants Durfee and Gette; based its determination on the information available at the time; and paid out money from the Fund to Claimants. After confirming that Respondents had ceased doing business and had no visible means of paying Claimants, the Agency paid Claimant Durfee \$1,009.35 and Claimant Gette \$2,918.69 from the Fund, less lawful deductions. Consequently, Respondents are liable

to the Fund for \$5,245, plus an additional 25 percent of the sum paid from the Fund, or \$200, whichever is greater. In this case, Respondents owe an additional \$1,311.25, which is 25 percent of the sum paid from the Fund and greater than \$200. Respondents' total liability to the Fund is \$6,556.25.

PENALTY WAGES (ORS 652.150)

The forum may award penalty wages when it determines that a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission "willfully" if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

There is sufficient credible evidence from which the forum may reasonably infer that Respondents knew each Claimant was owed wages when each left their employment. Based on Claimant Durfee's credible testimony, corroborated by credible witness testimony, the forum finds Respondents knew she worked as a food server and bartender because Respondent Sehat hired her to perform those jobs. The forum may reasonably infer that Respondents knew she was not paid for the work she performed. Other than Respondents' unsworn assertions in their answer that Durfee was employed by "private pleasures" and "g-string" and "fabricated" her hours, Respondents proffered no evidence that controverted the credible evidence presented by the Agency.

Claimant Gette credibly testified that Respondent Sehat repeatedly assured him that when his purported land sale went through, the employees, including Gette, would be paid. Absent any contrary evidence, the forum concludes Respondents voluntarily and, collectively, as a free agent failed to pay Claimants all of the wages they earned for

the work they performed during their employment. Respondents acted willfully and are jointly and severally liable for penalty wages pursuant to ORS 652.150.

CIVIL PENALTIES (ORS 653.055)

If an employer pays an employee “less than the wages to which an employee is entitled under ORS 653.010 to 653.161,” the forum may award civil penalties to the employee. ORS 653.055. The Agency alleged Respondent failed to compensate Claimant Gette at one and one half times his regular rate of pay for each hour he worked that exceeded 40 hours in a given work week between September 13, 2006, and April 12, 2007. The Commissioner’s rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055. The Agency presented sufficient evidence to show Respondent failed to pay Claimant Gette overtime for the hours he worked in excess of 40 per week, as required under OAR 839-020-0030(1). Accordingly, Respondents are liable to Claimant Gette for \$2,400 in civil penalties as provided in ORS 652.150 (\$10 x 8 hours per day x 30 days). ORS 653.055(1)(b).

ORDER

NOW, THEREFORE, as authorized by ORS 652.414, and as payment of the amounts paid from the Wage Security Fund, under ORS 652.414(1), Respondents **Sehat Entertainment, Inc.** and **Babak Sehat** are hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of SIX THOUSAND FIVE HUNDRED FIFTY SIX DOLLARS AND TWENTY FIVE CENTS (\$6,556.25), representing \$5,245 paid to Jodi Durfee and Michael Gette from the Wage Security Fund, and a \$1,311.25 penalty on that sum, plus interest at the legal rate on the sum of \$6,556.25 from June 13, 2007, until paid.

FURTHERMORE, as authorized by ORS 652.332, and as payment of the unpaid wages, less amounts paid from the Wage Security Fund, Respondents **Sehat Entertainment, Inc.** and **Babak Sehat** are hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Jodi Durfee, in the amount of TWO THOUSAND TWO HUNDRED FORTY SIX DOLLARS AND TWENTY FIVE CENTS (\$2,246.25), less lawful deductions, representing \$446.25 in gross earned, unpaid, due and payable wages and \$1,800 in penalty wages, plus interest at the legal rate on the sum of \$446.25 from February 1, 2007, until paid, and interest at the legal rate on the sum of \$1,800 from March 1, 2007, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Michael Gette, in the amount of TWENTY ONE THOUSAND SIX HUNDRED THIRTY THREE DOLLARS AND SEVENTY FIVE CENTS (\$21,633.75), less lawful deductions, representing \$16,833.75 in gross earned, unpaid, due and payable wages, \$2,400 in penalty wages, and \$2,400 in civil penalties, plus interest at the legal rate on the sum of \$16,833.75 from May 1, 2007, until paid, and interest at the legal rate on the sum of \$4,800 from June 1, 2007, until paid.

ⁱ The mailing apparently was incorrectly addressed. Credible evidence showed the business location was 11445 SW Pacific Highway, Tigard, Oregon. See Finding of Fact – The Merits 1.