UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER WALTER, on behalf of himself and all others similarly situated, Plaintiff(s), v. FORT WASHINGTON PA 693, LLC; FRIENDLY'S RESTAURANT NORRISTOWN, PA (#897), LLC; KHALED KEZBARI; and DOE DEFENDANTS 1-10, Defendants.	Civil Action No. 2:17-cv-00178-ER **SECOND AMENDED CLASS AND COLLECTIVE ACTION COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiff Christopher Walter ("Walter" or "Plaintiff"), on behalf of himself and all others similarly situated, alleges as follows:

INTRODUCTION

1. This is class and collective action brought on behalf of "Tipped Employees" (defined below) who work or have worked at certain restaurants operating under the trade name of "Friendly's."[1]

2. Friendly's is a tradename for the restaurants that are either corporate-owned or franchises offered by FIC Holdings, LLC. Two such franchises are Fort Washington PA 693 LLC ("FW Friendly's") and Friendly's Restaurant – Norristown, PA (#897), LLC ("Norristown Friendly's"). Collectively, Defendants FW Friendly's and Norristown Friendly's are referred to herein as the "Subject Friendly's Restaurants."

3. Based upon publicly available information, the Subject Friendly's Restaurants are owned and/or operated by Defendant Khaled Kezbari.

[1] In the previously filed complaints in this matter, Plaintiff also brought claims against FIC HOLDINGS, LLC. However, that defendant was dismissed without prejudice pursuant to the stipulation of the parties and Order of the

4. Upon information and belief, the Subject Friendly's Restaurants operate under policies and procedures, including compensation policies/procedures.

5. The Subject Friendly's Restaurants employ individuals as "servers" ("waiters" and "waitresses") and "runners" (collectively, "Tipped Employees"), who are and/or were subjected to Defendants' (defined herein) unlawful pay practices.

6. As explained in detail below, Defendants systematically and willfully violated the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, ("FLSA" or the "Act"), the Pennsylvania Minimum Wage Act ("PMWA"), 43 P.S. § 333.101, *et seq.*, the Pennsylvania Wage Payment Collection Law ("WPCL"), 43 P.S. § 260.1, *et seq.*, and Pennsylvania common law.

7. As set forth below, Defendants violated the aforementioned laws by, *inter alia*,: (i) failing to pay Plaintiff and other Tipped Employees the applicable minimum wage; (ii) failing to pay premium overtime compensation for all hours worked in excess of forty (40) in a workweek; (iii) inappropriately retaining a portion of their tips in violation of federal and state law; and (iv) requiring employees to work "off-the-clock" for no compensation whatsoever.

8. Indicative of Defendants' wage and hour violations, Defendants failed to properly inform Tipped Employees of its intention to utilize a "tip credit," but nonetheless applied a "tip credit" against the wages paid to Plaintiff and other Tipped Employees – thereby paying Plaintiff and other Tipped Employees less than the mandated minimum wage.

9. As a result of the aforementioned pay practices, Plaintiff and the members of the Classes (defined below) were illegally under-compensated for their work.

Court. *See* Dkt. No. 35.

SUMMARY OF CLAIMS

10. Plaintiff brings this action as a collective action to recover unpaid wages, pursuant to the FLSA.

11. In particular, Plaintiff brings this suit on behalf of the following similarly situated persons:

> All current and former Tipped Employees who have worked for Defendants in the Commonwealth of Pennsylvania at one or more of the Subject Friendly's Restaurants within the statutory period covered by this Complaint, and elect to opt-in to this action pursuant to the FLSA, 29 U.S.C. § 216(b) ("Collective Class").

12. In addition, Plaintiff also brings this action as a state-wide class action to recover unpaid wages, including failing to pay the applicable minimum wage, pursuant to the PMWA, the WPCL, and common law (the "PA State Laws").

13. Specifically, Plaintiff brings this suit on behalf of a class of similarly situated persons composed of:

> All current and former Tipped Employees who have worked for Defendants in the Commonwealth of Pennsylvania at one or more of the Subject Friendly's Restaurants during the statutory period covered by this Complaint (the "PA Class").

14. The Collective Class and the PA Class are hereafter collectively referred to as the "Classes."

15. Plaintiff alleges on behalf of the Collective Class that they are: (i) entitled to unpaid minimum wages from Defendants for hours worked for which Defendants failed to comply with the notice provisions of the tip credit and pay the mandatory minimum wage, as required by law, (ii) entitled to unpaid premium overtime wages for all hours worked in excess of forty in a work week, and (iii) entitled to liquidated damages pursuant to the FLSA.

16. Plaintiff alleges on behalf of the PA Class that Defendants violated the PA State Laws by failing to comply with the tip credit provisions, as required by law, and consequently failing to pay them the appropriate minimum wages for all hours worked. In addition, Defendants violated the PA State Laws by failing to pay for all hours worked in excess of forty in a work week and requiring Plaintiff and other Tipped Employees to work off-the-clock. Lastly, Defendants violated the PA Stage Laws by inappropriately retaining a portion of the tips earned by Tipped Employees.

PARTIES

17. Plaintiff Christopher Walter ("Plaintiff") is a resident of the Commonwealth of Pennsylvania who was employed by Defendants as a "server" in their Fort Washington and East Norriton locations in the Commonwealth of Pennsylvania. While employed as a server, Defendants failed to compensate Plaintiff properly for all hours worked.

18. Pursuant to Section 216(b) of the FLSA, Plaintiff has consented in writing to be a plaintiff in this action. (*See* Dckt. No. 1, Ex. A).

19. Defendant Fort Washington PA 693 LLC ("FW Friendly's" or "Fort Washington") is a franchisee of FIC Holdings, LLC that operates the restaurant operating under the "Friendly's" trade name at 325 Pennsylvania Avenue, Fort Washington, Pennsylvania.

20. As set forth more fully below, Defendant FW Friendly's paid Plaintiff for a portion of the Class Period. As such, Defendant FW Friendly's has transacted business within the Commonwealth of Pennsylvania, including within this district, during the statutory period covered by this Complaint.

21. Defendant Friendly's Restaurant – Norristown, PA (#897), LLC ("Norristown Friendly's" or "Norristown") is a franchisee of FIC Holdings, LLC that operates the restaurant

operating under the "Friendly's" trade name at 150 W. Germantown Pike, East Norriton, Pennsylvania.

22. As set forth more fully below, Defendant Norristown Friendly's paid Plaintiff for a portion of the Class Period. As such, Defendant Norristown Friendly's has transacted business within the Commonwealth of Pennsylvania, including within this district, during the statutory period covered by this Complaint.

23. Defendant FW Friendly's and Defendant Norristown Friendly's share common ownership and control. Indeed, a review of health inspection reports during the applicable statutory period reveals that both Defendant FW Friendly's and Defendant Norristown Friendly's are both owned by Defendant Khaled Kezbari.

24. Defendant Khaled Kezbari ("Kezbari") is a natural person residing in the State of New Jersey. In certain health inspection reports for both Defendant FW Friendly's and Defendant Norristown Friendly's, Defendant Kezbari is identified as the corporate entities "Owner." *See* http://webapp02.montcopa.org/health/Inspections/default.asp, last visited on January 3, 2017.

25. In these corporate capacities, upon information and belief, Defendant Kezbari exercises sufficient control over the labor policies and practices complained of herein to be considered the employer of Plaintiff and the Classes for the purposes of the FLSA and PA State Laws.

26. Together Defendants Defendant FW Friendly's, Defendant Norristown Friendly's, and Defendant Khaled Kezbari are employers of Tipped Employees and are responsible for the employment practices complained of herein.

27. Upon information and belief, Defendants are a single and joint employer with a

high degree of interrelated and unified operations, sharing common officers with a common address.[2] Further, each of these Defendants share the common labor policies and practices complained of herein.

28. Plaintiff is unaware of the names and the capacities of those defendants sued as DOES 1 through 10 but will seek leave to amend this Complaint once their identities become known to Plaintiff. Upon information and belief, Plaintiff alleges that at all relevant times each defendant was the officer, director, employee, agent, representative, alter ego, or co-conspirator of each of the Defendant. In engaging in the alleged conduct herein, defendants acted in the course, scope of, and in furtherance of the aforementioned relationship. Accordingly, unless otherwise specified herein, Plaintiff will refer to all defendants collectively as "Defendants" and each allegation pertains to each of the defendants.

JURISDICTION AND VENUE

29. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 201 *et seq*.

30. Further, this Court also has supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367 because those claims derive from a common nucleus of operative facts.

31. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(ii) as a substantial part of the acts or omissions giving rise to the claims alleged herein occurred within this judicial district, and Defendants are subject to personal jurisdiction in this district.

32. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

[2] Indeed, counsel for Defendants FW Friendly's and Norristown Friendly's served their previous motion to dismiss on Defendant Kezbari at the same address as Plaintiff identified in his Complaint for Defendant FW Friendly's.

FACTUAL ALLEGATIONS

33. The crux of the FLSA and PA State Laws is, *inter alia*, that all employees are entitled to be paid mandated minimum wages for all hours worked.

34. Contrary to these basic protections, Plaintiff and the members of the Classes were deprived of the mandated minimum wage for all hours they worked.

35. Plaintiff and the members of the Classes are, or were, Tipped Employees employed by Defendants.

36. According to the Friendly's corporate website, there are at least 24 restaurants operating under the Friendly's brand in the Commonwealth of Pennsylvania. *See* http://www.friendlys.com/locate/ (last visited August 2, 2016).

37. The Fort Washington and Norristown locations are two of these locations.

38. Upon information and belief, the Subject Friendly's Restaurants are/were operated under uniform policies/procedures applicable to all members of the Classes.

Plaintiff's Experience Working For Defendants

39. As set forth above, Plaintiff was employed by Defendants as a "server" at the Subject Friendly's Restaurants.

40. Plaintiff worked at the Fort Washington location from about June 2015 through February 2016.

41. Prior to his employment at the Fort Washington location, Plaintiff worked at the Norristown location from May 2014 through December 2014.

42. Plaintiff does not ever recall receiving a copy of the "Friendly's Consolidated Employee Handbook."[3]

[3] A purported page of this handbook was attached by Defendants FW Friendly's and Norrsitown Friendly's to their motion to dismiss. *See* Dkt. No. 22-2. However, there is no indication as to which Defendant allegedly utilized this

43. Indeed, although the handbook references "server assistants, a/k/a bussers, expeditors, and servers," Plaintiff does not ever recall working work with a dedicated "busser" or "expeditor."

44. Rather, on rare occasions, a dishwasher would be pulled from the kitchen and act as a "busser" when the restaurant was extremely busy. Further, the servers would help gather and "expedite" each other's food orders, with managers helping out when it was very busy.

45. Further, Plaintiff does not recall servers pooling their tips as described in the handbook.

46. Accordingly, Plaintiff does not believe that the handbook applied to the locations where he worked.

47. Plaintiff was paid an hourly cash wage rate from Defendants and earned tips from customers, who chose to leave him a gratuity.

48. Plaintiff's hourly wage rate from Defendants was $2.83. Plaintiff does not ever recall his hourly wage being raised above $2.83 for any day he worked for Defendants, irrespective of how little tips he earned.

49. Unless he worked a double shift, Plaintiff's typical shift lasted approximately six (6) to seven (7) hours. If Plaintiff worked a double shift, his typical shift time was approximately thirteen (13) hours.

50. Plaintiff typically worked anywhere from four (4) to six (6) shifts per week and worked, on average, approximately thirty (30) to thirty-five (35) hours or more per week.

51. To minimize/avoid the amount of overtime recorded, Defendants would have Plaintiff work "off-the-clock" ("OTC work"). Such OTC work included having Plaintiff work as the host when he worked on weekends and, thus, not "clock in" until the scheduled host arrived

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handbook at their restaurant location.

and the restaurant was sufficiently busy for Plaintiff to begin waiting on tables.

52. Further, when he would work a swing shift and the restaurant was not sufficiently busy when he arrived for his shift, Plaintiff was told not to "clock in" until his first table arrived. Plaintiff estimates that this happened one to two times per month, resulting in Plaintiff usually working two (2) to four (4) hours of this type of OTC per month.

53. In addition, Plaintiff would also perform closing duties through OTC work as the manager would clock him and the other Tipped Employees out, so that the manager could finalize and tally the receipts for the day, while the Tipped Employees performed their end-of-shift "break down" work (*e.g.*, cleaning and re-stocking the restaurant for the following day).

54. It was Plaintiff's experience that each manager would routinely clock all Tipped Employees out as soon as the last customer left for the evening, so that the manager could begin running the "end of day" reports.

55. Plaintiff estimates that he spent forty-five (45) minutes to one (1) hour doing closing side work at the end of such shifts while not clocked in. Accordingly, Plaintiff estimates that he spent up to five (5) hours a week performing such closing work off-the-clock.

56. Combined, Plaintiff estimates that in an average month, he worked anywhere from twenty (20) to twenty-five (25) hours off-the-clock. Plaintiff was not paid for this OTC work.

57. Because Plaintiff was not paid or credited for this OTC work, when this OTC work is added to his weekly hours, Plaintiff occasionally worked in excess of 40 hours in a workweek.

58. Plaintiff estimates that he worked once or twice per month in excess of forty (40) hours in a given work week.

59. When combining the OTC work and his hours recorded in Defendants' timekeeping system, Plaintiff estimates that he worked approximately two (2) hours of overtime when he worked over forty hours in a given week. Plaintiff does not recall ever being paid for this overtime.

60. Plaintiff also recalls spending a significant amount of his shift (in excess of 20%) performing non-tip generating work. This work included cleaning tables after a dining party left, stocking supplies and toiletries, and ensuring that all condiments were filled.

61. Although Plaintiff worked at two different Friendly's restaurants, Plaintiff does not recall any material differences between: (a) the way the Defendant FW Friendly's and Defendant Norristown Friendly's operated; or (b) his work experiences at the two locations.

The Tip Credit Provision & Requirements

FLSA Requirements

62. Rather than pay its Tipped Employees the applicable minimum wage (either the applicable state minimum wage or the federal minimum wage, whichever is higher), Defendants chose to take a tip credit and pay these employees less than the applicable minimum wage.

63. Under applicable law, in certain circumstances, it is permissible for an employer to take a tip credit and pay its employees less than the mandated minimum wage, provided that the employee's tips received from customers plus the tip credit wage paid by the employer equals at least the applicable minimum wage.[4]

64. According to the Department of Labor's ("DOL") Fact Sheet #15: Tipped

[4] An employer is not relieved of their duty to pay an employee wages at least equal to the minimum wage by virtue of taking a tip credit or by virtue of the employee receiving tips from customers in an amount in excess of the applicable minimum wage. That is, an employer in the restaurant industry must pay the employee wages at least equal to the minimum wage or equal to the minimum wage less the tip credit, provided the tips claimed exceed the tip credit. Under no circumstances is the employer relieved of paying at least the minimum wage for all hours worked, regardless of how much an employee earns in tips.

Employees Under the Fair Labor Standards Act (FLSA) ("Fact Sheet #15"):

> the maximum tip credit that an employer can currently claim under the is $5.12 per hour (the minimum wage of $7.25 minus the minimum FLSA required cash wage of $2.13).

65. As is made plain in Fact Sheet #15, in order to claim a tip credit, the employer must comply with five strict notification requirements.

66. First, the employer must notify the employee of the amount of the cash wage the employer is paying the Tipped Employee and that amount must equal at least $2.13 per hour.

67. Second, the employer must notify the Tipped Employee of the amount the employer is claiming as a tip credit. In accordance with the FLSA, the tip credit claimed cannot exceed $5.13 per hour.

68. Third, the employer must inform the Tipped Employee that the tip credit claimed cannot exceed the actual amount of tips received by the employee. In effect, the employer must inform the employee that the employee must still earn the mandated minimum of $7.25 per hour between the amount of the tip credit taken by the employer and the amount of tips earned by the employee.

69. Fourth, the employer must notify the Tipped Employee that all tips received are to be retained by the employee except for a valid tip pooling arrangement.

70. Finally, the Tipped Employee must be informed by the employer that the tip credit will not apply unless the employee has been informed of these provisions.

71. The DOL Fact Sheet #15 is in conformity with the regulations regarding tip notification. *See* 29 CFR § 531.59(b).

72. An employer bears the burden of showing that it has satisfied ***all*** of the

notification requirements before any tips can be credited against the employee's hourly wage.[5] If an employer cannot demonstrate its compliance with all of the notification requirement, no credit can be taken and the employer is liable for the full minimum wage.

73. Further, where a tipped employee earns less in tips than the tip credit claimed, the employer is required to make up the difference. Stated another way, if a tipped employee earns less than $5.12 per hour in tips (the maximum tip credit permissible where the employer pays the employee $2.13 per hour), the employer must raise that tipped employee's hourly cash component the necessary amount above $2.13 per hour so as to ensure that the employee earns at least $7.25 per hour – the mandated minimum wage.

74. As set forth herein, Defendants failed to comply with certain of the FLSA's provisions regarding the claiming of a tip credit.

Pennsylvania's Requirements

75. Pennsylvania state law has a substantially similar requirement to the FLSA's tip notification requirements. *See* 43 P.S. § 333.103(d).

76. Importantly, however, Pennsylvania mandates a higher minimum cash wage and requires employers to pay at least $2.83 per hour. Thus, under Pennsylvania law, the maximum tip credit is $4.42 per hour.[6]

77. As such, an employer cannot be said to have complied with Pennsylvania's tip credit notification requirements where the employer simply relies on Department of Labor mandated posters as said posters do not explicitly identify the tip credit amount in Pennsylvania (as it differs from the FLSA tip credit amount).

[5] Courts have strictly construed this notification requirement. Accordingly, some courts have held that a generic governmental poster (which is required by the DOL) does not satisfy the tip credit notification requirement.

[6] Like the FLSA, Pennsylvania law states that the tip credit claimed by the employer cannot exceed the amount of

78. In addition, 34 Pa. Code § 231.34 also requires employers to maintain payroll records that contain the following information:

(a) A symbol or letter placed on the pay records identifying each employee whose wage is determined in part by tips:

(b) Weekly or monthly amount reported by the employee, to the employer, of tips received. This may consist of reports made by the employees to the employer on IRS Form 4070;

(c) Amount by which the wages of each tipped employee have been deemed to be increased by tips, as determined by the employer, not in excess of 45% of the applicable statutory minimum wage until January 1, 1980 and thereafter 40% of the applicable statutory minimum wage;

(d) Amount per hour which the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week;

(e) Hours worked each workday in any occupation in which the tipped employee does not receive tips and total daily or weekly straight-time payment made by the employer for such hours; and

(f) Hours worked each workday in occupations in which the employee received tips and total daily or weekly straight-time earnings for the hours.

Defendants' Failure to Notify Tipped Employees

79. As explained above, the DOL has very specific requirements regarding what an employer must notify his/her employee of if that employer intends to claim a tip credit.

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tips actually received by the employee. See 43 P.S. § 333.103(d).

80. Rather than comply with the notification requirements set forth in Fact Sheet #15, Defendants chose to simply pay its Tipped Employees $2.83 per hour.

81. As set forth herein, Defendants failed to inform its Tipped Employees of all of the mandated requirements in order for it to properly claim a tip credit under either federal or Pennsylvania state wage and hour laws.

82. The Third Circuit and district courts across the country have held that where an employer fails to satisfy any one of the notification requirements, that employer forfeits the tip credit and must pay the employee the full minimum wage.

83. Indeed, Plaintiff does not ever recall being notified by Defendants that they intended to take a "tip credit," nor how much that amount would be. Evincing the magnitude of Defendants' abject failure to notify Tipped Employees of their intention to take a tip credit, until recently, Plaintiff never heard the term "tip credit."

84. Moreover, as set forth above, Plaintiff does not ever recall receiving a copy of the "Friendly's Consolidated Employee Handbook" nor page 11 of said handbook, which purports to provide notice to Tipped Employees.[7]

85. More importantly, the employee handbook itself fails to identify all the necessary requirements in order for Defendants to claim a tip credit.

86. As an initial matter, it fails to notify Tipped Employees that the tip credit cannot be claimed by Defendants unless they notify the Tipped Employees of all five provisions of the notice requirement. *See, e.g.*, Fact Sheet #15.

87. In addition, it does not expressly state that the tip credit cannot exceed the amount of tips actually received by the employee. Rather, it only states "[a]ssuming you have received *a*

[7] A single page of this handbook was attached by Defendants FW Friendly's and Norristown Friendly's to their motion to dismiss. *See* Dkt. No. 22-2. However, there is no indication as to which Defendant purported utilized this

sufficient amount of tips to cover the tip credit . . ." *See* Dkt. No. 22-2, p.3 (emphasis added).

88. The language in the handbook could be read to allow Defendants to carry tips from either one shift or one hour into another – effectively permitting Defendants to claim a tip credit in excess of $4.42 per hour for certain hours worked.

89. As set forth above, the tip notification requirements in Pennsylvania are strictly construed and Defendants are simply not permitted to claim a tip credit (i) above $4.42 per hour or (ii) the actual amount of tips received that hour, whichever is lower.

90. Defendants also failed to comply with 43 P.S. § 231.34 insofar as they failed to notify employees in writing whenever the tip credit claimed by Defendants changed. Rather, Defendants took the maximum tip credit permissible irrespective of whether its Tipped Employee actually earned sufficient tips to substantiate the tip credit claimed.

91. Defendants also failed to comply with 43 P.S. § 231.34 insofar as they failed to notify employees in writing of the hours worked where the Tipped Employee did not receive tips. Rather, Defendants took the maximum tip credit permissible for every hour worked by its Tipped Employees, including Plaintiff, irrespective of whether its Tipped Employee (i) actually earned sufficient tips to substantiate the tip credit claimed or (ii) whether the employee was engaged in tip generating work.

Additional Evidence of Defendants' Failure To Comply With The Tip Credit Provisions

92. Due to Defendants' requiring Plaintiff and other Tipped Employees to perform OTC work (including, for example, clocking Tipped Employees out but requiring them to continue working), Defendants cannot claim any tip credit as they did not pay their employees at least $2.83 for every hour worked.

93. Further, there is at least an implied contract that Plaintiff and other Tipped

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handbook at their restaurant location.

Employees would be paid the proper statutory rates for all time worked. Absent such an understanding, Defendants could receive the benefit of uncompensated work, which is against Pennsylvania law.

94. Accordingly, by failing to compensate Plaintiff and the other Tipped Employees for all hours worked, Defendants violated this implied contract.

95. Defendants also required Tipped Employees to perform non-tip generating work. Such work included stocking the salad area, stocking and cleaning the "rail area" (the area where dressings and condiments were kept), stocking toiletries, cleaning the booths, making coffee, bussing tables after a party left. This non-tip generating work comprised a substantial portion of the Tipped Employees' shift.

96. For example, Plaintiff estimates that he spent anywhere from 90 to 105 minutes of a 7-hour shift doing opening prep work, closing break down work, and running side work. Stated another way, Plaintiff spent, on average, 21-25% of his shift performing non-tip generating work.

97. As Fact Sheet #15 makes clear, "where a tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing" non-tip generating work, "no tip credit may be taken for the time spent in such duties."

98. Accordingly, for the 21-25% percent of his shift spent performing non-tip generating work, Plaintiff is entitled to the full minimum wage.

99. Further evidencing Defendants' requirement that Tipped Employees perform non-tip generating work without appropriate compensation, on three occasions, Defendants required Plaintiff and other Tipped Employees to clean and disinfect the Fort Washington location when a sewer line broke.

100. At no time did Defendants have Plaintiff or other Tipped Employees clock in under a different code or pay these individuals the full minimum wage, instead electing to continue to pay them the minimum cash wage and continuing to claim the tip credit despite the fact that these employees could not earn tips during this time.

101. In addition, on certain nights, Defendants would claim more in tips than Plaintiff actually earned from customers. Thus, Defendants did not accurately record the tips earned by Plaintiff and other Tipped Employees.

102. Further, and in contravention of Pennsylvania law, Defendant failed to pay Plaintiff and other Tipped Employees the full minimum wage whenever they were performing non-tip generating work.

103. Finally, Defendants required Tipped Employees to cover customer walk-outs, cash shortages, and replacement uniform pieces (such as check holders). To pay for these items, Tipped Employees are required to forfeit a portion of their tips to cover these costs.

104. While Plaintiff did not have to pay for customer walk-outs or cash shortages, Plaintiff recalls instances where other Tipped Employees would complain that management would require them to cover such expenses.

105. The mere fact that Defendants had a policy requiring Tipped Employees to pay for customer walkouts – regardless of whether a Tipped Employee actually in fact did reimburse Defendants – is a violation of the tip credit notification provisions.

106. Indeed, Defendants' policy requiring Tipped Employees to cover customer walk-outs or cash shortages demonstrates Defendants' abject disregard for the tip credit notification provisions which explicitly state that an employer cannot require a Tipped Employee to forfeit any portion of their tips to the employer. *See, e.g.*, Fact Sheet #15, Fact Sheet #16.

107. Plaintiff did, however, have to pay for the replacement magnetic card used to clock in/out. A server cannot enter a food order into the system if they are not clocked in. Accordingly, this magnetic card was for the benefit or convenience of Defendants.

108. As such, under applicable law, Plaintiff could not be required to pay for such items. *See, e.g.*, Fact Sheet #16.

109. Further, Plaintiff and other Tipped Employees were threatened by Defendants to have to pay for any missing or lost server books or aprons. As set forth above, Defendants cannot require a Tipped Employee to forfeit any portion of their tips without violating the tip credit provisions.

CLASS & COLLECTIVE ACTION ALLEGATIONS

110. Plaintiff brings this action on behalf of the Collective Class as a collective action pursuant to Sections 207 and 216(b) of the FLSA. Plaintiff also brings this action as a class action pursuant to Fed. R. Civ. P. 23 on behalf of himself and the PA Class for claims under the PA State Laws.

111. The claims under the FLSA may be pursued by those who opt-in to this case pursuant to 29 U.S.C. §216(b). The claims brought pursuant to the PA State Laws may be pursued by all similarly-situated persons who do not opt-out of the PA Class pursuant to Fed.R.Civ.P. 23.

112. Upon information and belief, the members of each of the Classes are so numerous that joinder of all members is impracticable. While the exact number of the members of these Classes is unknown to Plaintiff at this time, and can only be ascertained through appropriate discovery, Plaintiff believes there are over 30 individuals in each of the Classes.

113. Defendants have acted or have refused to act on grounds generally applicable to

the Classes, thereby making final injunctive relief or corresponding declaratory relief with respect to the Classes as a whole, appropriate.

114. The claims of Plaintiff are typical of the claims of the Classes he seeks to represent. Plaintiff and the members of the Classes work or have worked for Defendants and were subject to the same compensation policies and practices.

115. Common questions of law and fact exist as to the Classes that predominate over any questions only affecting them individually and include, but are not limited to, the following:

(a) whether Defendants have failed to pay the full minimum wage for each hour worked;

(b) whether Defendants satisfied each of the requirements in order to claim a tip credit against each hour worked;

(c) whether Defendants were precluded from claiming the tip credit during the period encompassed by this Complaint; and

(d) whether Plaintiff and members of the Classes are entitled to compensatory damages, and if so, the means of measuring such damages.

116. Plaintiff will fairly and adequately protect the interests of the Classes as his interests are aligned with those of the members of the Classes. Plaintiff has no interests adverse to the Classes she seeks to represent, and has retained competent and experienced counsel.

117. The class action/collective action mechanism is superior to other available methods for a fair and efficient adjudication of the controversy. The damages suffered by individual members of the Classes may be relatively small when compared to the expense and burden of litigation, making it virtually impossible for members of the Classes to individually seek redress for the wrongs done to them.

118. Plaintiff and the Classes he seeks to represent have suffered and will continue to suffer irreparable damage from the illegal policy, practice and custom regarding Defendants' pay

practices.

119. Defendants have violated and, continue to violate, the FLSA.

120. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a) and willful violation of the PMWA.

FIRST CLAIM FOR RELIEF
FAIR LABOR STANDARDS ACT MINIMUM WAGE VIOLATIONS
(On Behalf of the Collective Class)

121. Plaintiff, on behalf of himself and the Collective Class, realleges and incorporates by reference the paragraphs above as if they were set forth again herein.

122. At all relevant times, Defendants have had gross revenues in excess of $500,000.

123. At all relevant times, Defendants have been and continue to be, an employer engaged in interstate commerce, within the meaning of the FLSA.

124. At all relevant times, Defendants have employed, and/or continue to employ, Plaintiff and each of the Collective Class Members within the meaning of the FLSA.

125. Pursuant to Defendants' compensation policies, rather than pay Tipped Employees the federally-mandated minimum wage, Defendants took a tip credit and paid Tipped Employees only the tip-credit wage.

126. In addition, Defendants required Plaintiff and other Tipped Employees to perform OTC work for which they received no compensation whatsoever from Defendants.

127. It is black letter law that the FLSA mandates that, unless otherwise exempt under the statute, employees receive at least the minimum wage for every hour worked.

128. Defendants have violated and, continue to violate, the FLSA.

129. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).

130. Due to Defendants' FLSA violations, Plaintiff, on behalf of himself and the

members of the Collective Class, are entitled to recover from the Defendants, compensation for unpaid wages; an additional equal amount as liquidated damages; and reasonable attorneys' fees and costs and disbursements of this action, pursuant to 29 U.S.C. § 216(b).

SECOND CLAIM FOR RELIEF
FAIR LABOR STANDARDS ACT OVERTIME WAGE VIOLATIONS
(On Behalf of the Collective Class)

131. Plaintiff, on behalf of himself and the Collective Class, realleges and incorporates by reference the paragraphs above as if they were set forth again herein.

132. At all relevant times, Defendants have had gross revenues in excess of $500,000.

133. At all relevant times, Defendants have been and continue to be, an employer engaged in interstate commerce, within the meaning of the FLSA.

134. At all relevant times, Defendants have employed, and/or continue to employ, Plaintiff and each of the Collective Class Members within the meaning of the FLSA.

135. At relevant times in the period encompassed by this Complaint, Defendants have a willful policy and practice of refusing to pay premium overtime compensation for all hours worked in excess of 40 hours per workweek.

136. Such time includes the OTC work performed by Plaintiff and other Tipped Employees that necessarily drove their compensable time above forty (40) in certain work weeks.

137. Defendants have violated and, continue to violate, the FLSA. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).

138. Due to Defendants' FLSA violations, Plaintiff, on behalf of himself and the members of the Collective Class, are entitled to recover from the Defendants, compensation for unpaid wages; an additional equal amount as liquidated damages; and reasonable attorneys' fees

and costs and disbursements of this action, pursuant to 29 U.S.C. § 216(b).

THIRD CLAIM FOR RELIEF
PENNSYLVANIA MINIMUM WAGE ACT– MINIMUM WAGE VIOLATIONS
(On Behalf of the PA Class)

139. Plaintiff, on behalf of himself and the members of the PA Class, realleges and incorporates by reference the paragraphs above as if they were set forth again herein.

140. At all relevant times, Defendants have employed, and/or continue to employ, Plaintiff and each of the PA Class Members within the meaning of the PMWA.

141. Pursuant to Defendants' compensation policies, rather than pay Tipped Employees the Pennsylvania mandated minimum wage, Defendants improperly took a tip credit and paid Tipped Employees at a rate well below the Pennsylvania minimum wage.

142. Pursuant to Defendants' compensation policies, rather than pay Tipped Employees the required minimum wage in Pennsylvania, Defendants took a tip credit and paid Tipped Employees only the tip-credit wage.

143. At relevant times in the period encompassed by this Complaint, Defendants had a willful policy and practice of failing to satisfy the notification requirements in order for Defendants to claim the tip credit.

144. As a result of Defendants' willful practices, Defendants were not entitled to claim the tip credit and pay Plaintiff and the members of the PA Class less than the Pennsylvania minimum wage for all hours worked.

145. In addition, Defendants required Plaintiff and other Tipped Employees to perform OTC work for which they received no compensation whatsoever from Defendants in contravention of Pennsylvania law.

146. Defendants have violated and, continue to violate, the PMWA.

147. Due to the Defendants' violations, Plaintiff, on behalf of himself and the members of the PA Class, are entitled to recover from Defendants the amount of unpaid minimum wages, attorneys' fees and costs.

FOURTH CLAIM FOR RELIEF
PENNSYLVANIA MINIMUM WAGE ACT– OVERTIME WAGE VIOLATIONS
(On Behalf of the PA Class)

148. Plaintiff, on behalf of himself and the members of the PA Class, realleges and incorporates by reference the paragraphs above as if they were set forth again herein.

149. At all relevant times, Defendants have employed, and/or continue to employ, Plaintiff and each of the PA Class Members within the meaning of the PMWA.

150. At relevant times in the period encompassed by this Complaint, Defendants had a willful policy and practice of refusing to pay premium overtime compensation for all hours worked in excess of 40 hours per workweek.

151. Pursuant to Defendants' policies and procedures, Plaintiff and the members of the PA Class were paid $2.83 per hour irrespective of whether a Tipped Employee worked in excess of forty hours in a particular week.

152. In addition, as set forth above, Defendants also required Plaintiff and members of the PA Class to perform OTC work which drove their compensable time above forty (40) hours in a work week. These individuals received no premium compensation for this work time.

153. Defendants did not compensate Tipped Employees premium overtime compensation in an amount at least equal to one and one-half times their regular rate for all hours worked in excess of forty in a workweek.

154. Defendants have violated and, continue to violate, the PMWA.

155. Due to the Defendants' violations, Plaintiff, on behalf of himself and the members

of the PA Class, are entitled to recover from Defendants the amount of unpaid overtime wages, attorneys' fees and costs.

FIFTH CLAIM FOR RELIEF
PENNSYLVANIA WAGE PAYMENT COLLECTION LAW
(On Behalf of the PA Class)

156. Plaintiff, on behalf of himself and the members of the PA Class, realleges and incorporates by reference the paragraphs above as if they were set forth again herein.

157. At all relevant times, Defendants have employed, and/or continue to employ, Plaintiff and each of the PA Class Members within the meaning of the WPCL.

158. Pursuant to the WPCL Plaintiff and the members of the PA Class were entitled to receive all compensation due and owing to them on their regular payday.

159. As a result of Defendants' unlawful policies, Plaintiff and the members of the PA Class have been deprived of compensation due and owing.

160. Indeed, Defendants' failed to perform their implied contract of paying Plaintiff and members of the PA Class for all time worked.

161. Further, due to Defendants' policy of deducting amounts from the tips of Plaintiff and the PA Class to offset business losses/expenses, Plaintiff and the PA Class were subject to improper deductions from their compensation.

162. Plaintiff, on behalf of himself and the members of the PA Class, are entitled to recover from Defendants the amount of unpaid compensation, and an additional amount of 25% of the unpaid compensation as liquidated damages.

SIXTH CLAIM FOR RELIEF
PENNSYLVANIA COMMON LAW –UNJUST ENRICHMENT
(On Behalf of the PA Class)

163. Plaintiff, on behalf of himself and the PA Class Members, realleges and incorporates by reference the paragraphs above as if they were set forth again herein.

164. Plaintiff and the members of the PA Class were employed by Defendants within the meaning of the PA State Laws.

165. At all relevant times, Defendants had a willful policy and practice of denying Tipped Employees their full share of gratuities.

166. During the class period covered by this Complaint, Plaintiff and Tipped Employees were subjected to unlawful deductions from their gratuities.

167. Defendants retained the benefits of its unlawful deductions from the gratuities from Plaintiff and Tipped Employees under circumstances which rendered it inequitable and unjust for Defendants to retain such benefits.

168. Defendants were unjustly enriched by subjecting Plaintiff and Tipped Employees to such unlawful deductions.

169. As direct and proximate result of Defendants' unjust enrichment, Plaintiff and the members of the PA Class have suffered injury and are entitled to reimbursement, restitution and disgorgement from Defendants of the benefits conferred by Plaintiff and the PA Class. Plaintiff, on behalf of himself and the members of the PA Class, are entitled to reimbursement, restitution and disgorgement of monies received by Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and/or on behalf of himself and all other similarly situated members of the Collective Class and members of the PA Class respectfully requests the Court grant the following relief:

A. Designation of this action as a collective action on behalf of the Collective Class, and prompt issuance of notice pursuant to 29 U.S.C. §216(b), apprising them of the pendency of this action, and permitting them to assert timely FLSA claims in this action by filing individual

Consents to Sue pursuant to 29 U.S.C. §216(b);

B. Designation of the action as a class action under F.R.C.P. 23 on behalf of the PA Class;

C. Designation of Plaintiff as representative of the Collective Class and the PA Class;

D. Designation of Plaintiff's counsel as class counsel for the Collective Class and the PA Class;

E. A declaratory judgment that the practices complained of herein are unlawful under the FLSA and PA State Laws;

F. An injunction against Defendants and their officers, agents, successors, employees, representatives and any and all persons acting in concert with it, as provided by law, from engaging in each of the unlawful practices, policies and patterns set forth herein;

G. An award of unpaid minimum wages to Plaintiff and the members of the Classes;

H. An award of unpaid overtime wages to Plaintiff and the members of the Classes;

I. An award of liquidated damages to Plaintiff and members of the Classes;

J. An award of costs and expenses of this action together with reasonable attorneys' and expert fees to Plaintiff and members of the Classes; and

K. Such other and further relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff hereby demands a trial by jury on all questions of fact raised by the complaint.

[SIGNATURES FOLLOW BELOW ON NEXT PAGE]

Dated: May 18, 2017

Respectfully submitted,

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