

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

ROBERT SPALLONE, on behalf of)
himself and all others similarly situated,)
)
Plaintiff,)
)
v.)
)
CHEN SUSHI KING, LLC)
d/b/a SOHO 544; and JOHN DOE 1-10,)
individually,)
)
Defendants.)
_____)

C/A: _____

**FLSA COLLECTIVE ACTION
AND
RULE 23 CLASS ACTION
JURY TRIAL DEMANDED**

Plaintiff, Robert Spallone (“Spallone”), on behalf of himself and all others similarly situated, and all of the filed Opt-Ins to date (all jointly “Plaintiffs”), complaining of the acts of Defendants Chen Sushi King, LLC d/b/a Soho 544 (“Soho”); and John Doe 1-10, individually (“Doe”) (Soho and Doe collectively “Defendants”), alleges as follows:

NATURE OF CLAIM

1. This action is brought individually and as a collective action for actual damages, liquidated damages, attorneys’ fees and costs, and for other relief under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, et seq. (“FLSA”). The collective action provisions under the FLSA, § 216(b), provide for opt-in class participation.

2. This action is also brought individually and as a class action for unauthorized deductions from wages, and for other relief under the South Carolina Payment of Wages Act, South Carolina Code Ann. § 41-10-10, et. seq. (“SCPWA”). These claims are proposed as opt-out class claims under Rule 23 of the Federal Rules of Civil Procedure.

PARTIES, JURISDICTION, and VENUE

3. Plaintiffs reallege each and every allegation contained in the above paragraphs as if repeated here verbatim.

4. Spallone is a citizen and resident of the State of South Carolina, County of Horry.

5. Spallone was employed at Soho in the County of Horry, State of South Carolina.

A substantial part of the events giving rise to these claims occurred in Horry County.

6. Upon information and belief, Soho is a South Carolina limited liability company maintaining offices and agents and otherwise doing business in the County of Horry, State of South Carolina.

7. Upon information and belief, John Doe 1-10 are citizens and residents of the County of Horry, State of South Carolina, and owners of Soho.

8. This court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 based upon Spallone's claims under the FLSA.

9. This Court has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over Plaintiffs' pendent claims, which are brought pursuant to the statutory law of the State of South Carolina, because those claims arise out of the same transaction or occurrence as the federal claims alleged herein.

10. Spallone brings this action, as an opt-in Collective Action pursuant to 29 U.S.C. § 216(b), on behalf of a class of individuals who were employed by Soho at any time within the three (3) years prior to joining this lawsuit, who were nonexempt employees paid a direct, or hourly, rate less than the minimum wage of Seven and 25/100 dollars (\$7.25) per hour, and either received tips or shared in the mandatory tip pool created by Soho ("Tip Pool").

11. Spallone also brings this action as an opt-out class action under Rule 23 of the

Federal Rules of Civil Procedure, on behalf of a class of all individuals employed by Soho, at any time within the three (3) years prior to the commencement of this lawsuit, who received “wages” in the form either of tips or funds from a tip pool, and from which Soho deducted amounts from these wages without written or legal authorization.

12. Upon information and belief, this action satisfies the requirements of Fed. R. Civ. P. 23(a), as alleged in the following particulars:

a. The proposed Plaintiff class is so numerous that joinder of all individual members in this action is impracticable;

b. There are questions of law and/or fact common to the members of the proposed Plaintiff class;

c. The claims of Spallone are typical of the claims of the proposed Plaintiff class; and

d. Spallone will fairly and adequately protect the interests of the class.

13. In addition, upon information and belief, this action satisfies one or more of the requirements of Fed. R. Civ. P. 23(b), because the questions of law and/or fact common to the members of the proposed Plaintiff class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

14. Based upon the above, jurisdiction and venue are proper in this court and division.

15. The work and pay records, including the “tip-out” reports, of Spallone and the members of the Plaintiff class are in the possession, custody, and/or control of Defendants, and Defendants are under a duty, pursuant to section 11(c) of the FLSA, 29 U.S.C. § 211(c), and the regulations of the United States Department of Labor, to maintain and preserve such payroll and

other employment records from which the amount of Defendants' liability can be ascertained. Spallone requests an order of this Court requiring Defendants to preserve such records during the pendency of this action.

FACTS

16. Plaintiffs reallege each and every allegation contained in the above paragraphs as if repeated here verbatim.

17. Soho owns and operates a restaurant in Horry County.

18. Doe 1-10 exercise operational control over Soho; they have the authority to hire, discipline, and fire employees of Soho; they were involved in the decisions to set the wages and pay, including the rules and procedures of the Tip Pool, for Spallone, therefore, Doe 1-10 are individually liable to Spallone.

19. Spallone has been employed by Soho beginning in November 2014. During some of the weeks during this time, Spallone worked in excess of forty (40) hours in various work weeks.

20. Soho paid Spallone a direct, or hourly, wage less than the statutory minimum wage by taking the "Tip Credit" under the FLSA, 29 U.S.C. § 203(m).

21. Soho required Spallone to remit, from the tips he received, a portion of the tips at the end of each shift into the Tip Pool.

22. From the Tip Pool, Soho required Spallone and other employees to contribute three percent (3%) of their net sales each evening to employees who worked in the kitchen, who are not employees who customarily and regularly receive tips.

23. Spallone questioned management of Soho on the practices of whether the Tip Pool was legal, but Soho continued in reckless disregard in using the Tip Pool.

FOR A FIRST CAUSE OF ACTION
Violation of Fair Labor Standards Act
29 U.S.C. § 203(m), 206
(Violation of Tip Credit / Failure to Pay Proper Minimum Wage)

24. Plaintiffs reallege each and every allegation contained in the above paragraphs as if repeated here verbatim.

25. At all times pertinent to this Complaint, Soho engaged in interstate commerce or in the production of goods for commerce as defined by 29 U.S.C. § 203(r) and 203(s).

26. At all times relevant to this Complaint, Soho's annual gross volume of sales made or business done was not less than Five Hundred Thousand and 00/100 dollars (\$500,000.00). Alternatively, Spallone worked in interstate commerce so as to fall within the protection of the FLSA.

27. The business of Soho was and is an enterprise engaged in commerce as defined by 29 U.S.C. § 203(s)(1) and, as such, Soho is subject to, and covered by, the FLSA.

28. The FLSA, 29 U.S.C. § 206, requires employers to pay its nonexempt employees a minimum wage of Seven and 25/100 dollars (\$7.25) an hour.

29. The FLSA, 29 U.S.C. § 203(m), provides an exception allowing certain employers to take a "Tip Credit" and pay less than the statutory minimum wage to tipped employees, on the condition that any pooling, or sharing, of tips is shared only with other employees who customarily and regularly receive tips.

30. When the employer pools, or shares, these tips with employees, who are not employees who customarily and regularly receive tips, the tip pool is invalidated.

31. When the tip pool is invalidated, the employer can no longer enjoy the benefits of the Tip Credit provision, 29 U.S.C. § 203(m).

32. Defendants have violated the FLSA, 29 U.S.C. §§ 203(m), 206, in reckless

disregard of the rights of Spallone.

33. As such, Spallone seeks to recover from Defendants the following damages:

- a. actual damages;
- b. liquidated damages of an equal amount; and
- c. reasonable attorneys' fees and the costs and disbursements of this action.

FOR A SECOND CAUSE OF ACTION
Violation of Fair Labor Standards Act
29 U.S.C. § 207
(Failure to Pay Proper Overtime Wage)

34. Plaintiffs reallege each and every allegation contained in the above paragraphs as if repeated here verbatim.

35. Pursuant to the terms of the FLSA, 29 U.S.C. § 207, an employer must pay a nonexempt employee time and a half for all hours worked over forty (40) hours in a workweek.

36. Without the benefit of the Tip Credit provision, Defendants failed to pay Spallone and all other similarly situated employees the proper amount for all hours worked over forty (40) hours in a workweek or overtime hours worked.

37. Defendants have violated the FLSA, 29 U.S.C. § 207, in reckless disregard of the rights of Spallone.

38. As such, Spallone seeks to recover from Defendants the following damages:

- a. actual damages;
- b. liquidated damages of an equal amount; and
- c. reasonable attorneys' fees and the costs and disbursements of this action.

FOR A THIRD CAUSE OF ACTION
Violation of South Carolina Payment of Wages Act
S.C. Code § 41-10-10, et. al.
(Unauthorized Deductions from Wages)

39. Plaintiffs reallege each and every allegation contained in the above paragraphs as if repeated here verbatim.

40. Defendants are an “employer” as defined by the SCPWA.

41. Defendants employed Spallone and the members of the Plaintiff class within the State of South Carolina.

42. Money received by Plaintiffs directly as tips, or amounts received from the Tip Pool, were “wages” as defined by SCPWA, § 41-10-10(2).

43. Defendants illegally deducted amounts from the wages of Spallone and the members of the class without providing proper written notice as required by SCPWA § 41-10-30(A).

44. Defendants’ illegal deductions from the wages of Spallone were willful and were made in bad faith.

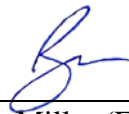
45. Pursuant to SC PWA § 41-10-80(C), Spallone and the members of the Plaintiff class are entitled to recover in this action an amount equal to three (3) times the full amount of their wages that were illegally deducted from their wages, plus reasonable attorneys’ fees and costs.

WHEREFORE, having fully set forth their allegations against Defendants, Spallone respectfully request that the Court enter judgment for the following relief:

a. An order authorizing the sending of appropriate notice to current and former employees of Defendants who are putative members of the collective action, but have yet “opted-in,” under the FLSA;

- b. An order prohibiting Defendants from violating the FLSA, particularly the Tip Credit, in the future;
- c. For Plaintiffs, under the first and second causes of actions:
 - i. actual damages in an amount to be determined;
 - ii. liquidated damages of an equal amount; and
 - iii. reasonable attorneys' fees and costs;
- d. An order certifying a class action under Rule 23 of the Federal Rules of Civil Procedure to remedy the class-wide violations of the South Carolina Payment of Wages Act;
- e. Actual damages in the amount of wages due under SCPWA;
- f. Treble damages pursuant to SCPWA;
- g. Reasonable attorneys' fees and costs;
- h. Injunctive relief ordering Defendants to amend their wage and hour policies to comply with applicable federal and state laws; and
- i. Such further relief as the Court deems just and proper.

Plaintiffs request a trial by jury.



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**ATTORNEY FOR ROBERT SPALLONE,
on behalf of himself and
all others similarly situated**

CHARLESTON, SC
May 25, 2016