

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

David Meller and Kerstin Robinson,)
 individually and on behalf of all others)
 similarly situated,)
)
 Plaintiffs,)
)
 v.)
)
 Wings Over Spartanburg, LLC; Wings)
 Over America, Inc.; Aetius Companies,)
 LLC; Aetius Franchising, LLC; Aetius)
 Holdings, LLC; Aetius Restaurant)
 Holdings, LLC, Aetius Restaurant Group,)
 LLC,)
)
 Defendants.)
 _____)

**AMENDED COMPLAINT
Class/Collective Action
(JURY TRIAL DEMANDED)**

C.A. No. 2:15-cv-02094-PMD

Plaintiffs David Meller and Kerstin Robinson (collectively “Plaintiffs”), individually and on behalf of all similarly situated employees, bring this Class/Collective action lawsuit against Wings Over Spartanburg, LLC, Wings Over America, Inc., Aetius Companies, LLC, Aetius Franchising, LLC, Aetius Holdings, LLC; Aetius Restaurant Holdings, LLC and Aetius Restaurant Group, LLC doing business as Wild Wing Café (collectively “Defendant”); seeking to recover for Defendant’s violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, and the South Carolina Wages Act, S.C. Code Ann. §§ 41-10-10 to 110., and/or equitable remedy of unjust enrichment. Plaintiffs, on behalf of themselves and all others similarly situated, allege as follows:

PARTIES AND JURISDICTION

1. Plaintiff David Meller is a resident of the State of South Carolina, County of Spartanburg.

2. Plaintiff Kerstin Robinson is a resident of the State of South Carolina, County of Spartanburg.

3. Pursuant to 29 U.S.C. § 216(b), Plaintiffs have consented in writing to be a party to the FLSA claims asserted in this action, and Plaintiffs' signed consent forms are attached. (See Exhibits A & B - Plaintiffs' Consent to Sue Forms).

4. Defendant Wings Over Spartanburg, LLC is a South Carolina Limited Liability Company operating the Wild Wing Café located at 111 West Main Street in Spartanburg, South Carolina.

5. Wings Over Spartanburg, LLC is one of approximately twelve (12) Operating Entities of the parent corporation Wings Over America, Inc. (hereinafter "WOA").

6. Aetius Companies, LLC and its subsidiaries Aetius Franchising, LLC, Aetius Holdings, LLC, and Aetius Restaurant Holdings, LLC, Aetius Restaurant Group, LLC (hereinafter "Aetius") are Delaware Limited Liability Companies with their principal place of business in the State of South Carolina.

7. In January of 2012, WOA sold a controlling interest in the restaurant chain to Aetius.

8. WOA together with Aetius own and operate approximately twelve (12) Wild Wing Cafés through various operating entities and serve as franchisor to approximately twenty-four (24) franchised restaurants located in South Carolina, North Carolina, Georgia, Tennessee, Virginia, Texas, and Florida.

9. The operating entities of WOA and Aetius include but are not limited to: Wings Over Spartanburg, LLC; Greenville Wings, LLC; Bluffton Wings, LLC; Columbiana Wings, LLC; Vista Wings, LLC; Mt. Pleasant Wings, LLC; and SW Charlotte, LLC.

10. The above-named Operating Entities and other yet to be determined operating entities of WOA and Aetius have no separate legal existence as a matter of economic reality, as those entities have no other business purpose, function, or economic viability except as to serve as instruments for conducting the operations giving rise to claims asserted in this Complaint.

11. WOA and Aetius, either directly or through intermediaries that they own and control, are the true operators of the Operating Entities in that WOA and Aetius maintain a complete level of control over restaurant chains operations to include: supervisory authority over all of Wild Wing Café's employees, the company's daily operations, their ability to make hiring and firing decisions, and their authority over the employees wage payment methods.

12. Further, to ensure uniformity, WOA and Aetius have implemented a comprehensive operating system for all Wild Wing Café franchisees which lays forth mandatory detailed instructions and specifications on operating standards including acceptable payment methods for the company's servers.

13. By virtue of their complete control of the Operating Entities and the franchised restaurants, WOA and Aetius have assumed the status of joint employer of the Plaintiffs and similarly situated individuals. The imposition of joint employer status is justified by the level of control and the directing of decisions regarding day-to-day employment matters at the operating entities including the pay policies at issue here.

14. WOA and Aetius and their various other operating entities, to include but not limited to, Wings Over Spartanburg, LLC, (hereinafter collectively referred to as "Defendant") are a single enterprise under the FLSA because the entities perform related activities through unified operation and common control for a common business purpose.

15. During the relevant time period, Defendant employed individuals who handled, sold, or otherwise worked on goods or materials that have been moved in, or produced for, commerce.

16. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 216(b).

17. Plaintiffs also assert a state law cause of action pursuant to South Carolina Wage Payment Act and a state common law cause of action for Unjust Enrichment.

18. This Court has supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367 because those claims derive from a common nucleus of operative facts.

19. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(ii) because a substantial part of the acts or omissions giving rise to these Plaintiffs' claims occurred within Charleston County and because this Court has personal jurisdiction over one or more corporate Defendants.

SUMMARY OF CLAIMS

20. Plaintiffs bring this action as a collective action to recover unpaid wages, pursuant to the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et seq.* ("FLSA").

21. In particular, Plaintiffs bring this suit on behalf of the following similarly situated persons:

All current and former employees who have worked for the Defendants WOA and Aetius at their corporate owned and pay policy controlled locations in the capacity of a server within the statutory period covered by this Complaint, and who elect to opt-in to this action pursuant to FLSA, 29 U.S.C. § 216(b) ("Collective Class").

22. In addition, Plaintiffs also bring this action as a state class action to recover unpaid wages pursuant to South Carolina Payment of Wages Act, S.C. Code Ann. §§ 41-10-10 to 110 (“PWA”).

23. Defendants have willfully committed widespread violations of the FLSA and South Carolina Wages Act by engaging in a pattern, practice, and policy of failing to pay employees minimum wage and overtime pay.

24. Specifically, Plaintiffs bring this suit on behalf of a class of similarly situated persons composed of:

All current and former servers who have worked for Defendants in the state of South Carolina during the statutory period covered by this Complaint (“SC Class”)

25. Plaintiffs allege on behalf of the Collective Class and SC Class that Defendants violated Federal and South Carolina state laws by, *inter alia*:

- (i) failing to pay them the appropriate minimum wages for all hours worked;
- (ii) improperly calculating overtime wages for all hours worked in excess of forty (40) hours in a workweek; and
- (iii) improperly denying to pay all wages that have become due and owed.

FACTUAL ALLEGATIONS

26. Plaintiffs David Meller and Kerstin Robinson were hired by the Defendant as servers at the company’s Spartanburg, South Carolina location.

27. At all relevant times, Plaintiffs David Meller and Kerstin Robinson and the other members of the Collective Class have been similarly situated and have had substantially similar

job requirements and job duties. Moreover, they have been subject to Defendant's common decisions, policies, practices, procedures and rules that willfully violate the FLSA.

28. At all times relevant herein, Defendant paid Plaintiffs and all those similarly situated for their services pursuant to a tip credit scheme thereby relieving Defendant from paying them minimum wage (\$7.25 per hour) on account of Plaintiffs receiving tips or being a "tipped employee" under the FLSA.

29. Defendant paid Plaintiffs a direct wage that ranged from \$2.13 per hour to \$5.00 per hour depending on what capacity they were working. All direct wages were below minimum wage, and Defendant relied upon Plaintiffs and all other servers to receive enough tips to make at least minimum wage.

30. Defendant had a policy and practice of forcing all their servers to provide portions of their tips to the restaurant's bartenders, food runners, and expeditors.

31. Specifically, Plaintiffs, along with all the other members of the Collective Class are required to pay a percentage of their daily sales to the bartenders, food runners, and expeditors¹. The expeditors who are employed by Defendants are tasked with organizing and making presentable all the food that is ready to be distributed by the food runners to the customers.

32. The expeditors or, "expo", employees working at Defendant's restaurants are part of the kitchen staff. They are scheduled along with the kitchen staff or "back of the house"; they are not clothed in a Wild Wing uniform; they do not interact with the restaurant's customers; and they do not render a direct service to any customer of the Defendant.

¹ At the Spartanburg location, the servers are required to pay two percent (2%) of their alcohol sales to the bartenders, one and a quarter percent (1.25%) of their food sales to food runners, and one and half percent (1.5%) of their food sales to expeditors.

33. By law, these “expo” individuals are not considered “tipped employees” under the FLSA; therefore, they are forbidden from receiving tips directly from other tipped employees or pursuant to a tip pool. 29 U.S.C. § 203(m).

34. Despite such, the Defendant has carried on a willful policy of requiring all their servers at their corporate owned locations to pay a portion of their tips directly to the expeditors at the end of each shift. To facilitate this policy, each server is given a print out of each day’s shift which breaks down the exact dollar figure they are to pay to the expeditors.

35. By maintaining such a policy Defendant may not avail themselves of the tip credit provisions of the FLSA; thereby, reducing each of the servers’ pay to what they received in direct wages (\$2.13 - \$4.50). These direct wages are less than the federally mandated \$7.25 minimum hourly wage.

36. In addition to maintaining a policy that invalidates the Defendant’s tip credit scheme, Defendant also miscalculated the overtime rate for all servers who worked in excess of forty (40) hours per week.

37. By law, when tipped employees paid pursuant to a tip credit scheme work overtime, the employer is to calculate the employees’ overtime rate at one-and-a-half (1.5) times minimum wage not the lower direct wage payment of the tip credit scheme. 29 U.S.C. § 203(m).

38. Defendant violated the aforementioned law by maintaining an overtime policy calculating the overtime rate at one-and-a-half (1.5) times Plaintiff’s direct wages and not one-and-a-half (1.5) times the federal mandated minimum wage, or \$10.88.

39. Defendant’s actions were not in good faith or based upon a reasonable belief that they were not violating applicable laws.

40. At no time did Plaintiffs or the Collective Class ever perform any executive, administrative, or professional duties that would weigh in favor of an exempt salaried employee.

41. Nor could Plaintiffs or the Collective Class be classified as independent contractors; and therefore, not subject to the FLSA's minimum wage and overtime requirements.

42. The Plaintiffs and the Collective Class worked for Defendant on a full time and continuing basis and did not sell or advertise their services to the general public or work as contractors for anyone other than the above named Defendant.

43. Plaintiffs and Collective Class had no control over the manner and method by which they were paid.

44. Defendant retained the right to discharge Plaintiffs and Collect Class without cause.

45. Plaintiffs and Collective Class had no opportunity for profit and no risk of loss.

46. Plaintiffs and Collective Class are clearly not exempt from the FLSA's minimum wage and overtime requirements.

FIRST CLAIM FOR RELIEF
FAIR LABOR STANDARDS ACT MINIMUM WAGE VIOLATIONS
(Collective Class)

47. Plaintiffs, on behalf of themselves and the Collective Class, re-allege and incorporate by reference the paragraphs above as if they were set forth herein.

48. At all relevant times, Defendant has had gross revenues in excess of \$500,000.00.

49. At all relevant times, Defendant has been, and continues to be, an employer engaged in interstate commerce within the meaning of the FLSA, 29 U.S.C. §§ 206(a) and 207(a).

50. At all relevant times, Defendant has employed, and/or continues to employ, each of the Collective Class members within the meaning of FLSA.

51. By maintaining a policy that invalidates the tip credit provision of the FLSA, Plaintiffs and the Collective Class were paid less than minimum wage with wages ranging from \$2.13 to \$4.50 per hour.

52. Defendant violated, and continues to violate, the FLSA, 29 U.S.C. §§ 201 *et seq.* The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).

53. Due to Defendant's FLSA violations, Plaintiffs, on behalf of themselves and the members of the Collective Class, are entitled to recover from the Defendant compensation for unpaid wages, an additional equal amount as liquidated damages, and reasonable attorneys' fees and costs of this action pursuant to 29 U.S.C. § 216(b).

SECOND CLAIM FOR RELIEF
FAIR LABOR STANDARDS ACT OVERTIME WAGE VIOLATIONS
(Collective Class)

54. Plaintiffs, on behalf of themselves and the Collective Class, re-allege and incorporate by reference the paragraphs above as if they were set forth herein.

55. At all relevant times, Defendant has had gross revenues in excess of \$500,000.00.

56. At all relevant times, Defendant has been, and continues to be, an employer engaged in interstate commerce within the meaning of the FLSA, 29 U.S.C. §§ 206(a) and 207(a).

57. At all relevant times, Defendant has employed, and/or continues to employ each of the Collective Class members within the meaning of FLSA.

58. At all relevant times in the period encompassed by this Complaint, Defendant has and maintains a willful policy and practice of refusing to pay the proper overtime compensation for all hours worked in excess of forty (40) hours per workweek.

59. Defendant has violated, and continues to violate, the FLSA, 29 U.S.C. §§ 201 *et seq.* The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).

60. Due to Defendant's FLSA violations, Plaintiffs, on behalf of themselves and the members of the Collective Class, are entitled to recover from the Defendant compensation for unpaid wages, an additional equal amount as liquidated damages, and reasonable attorneys' fees and costs of this action pursuant to 29 U.S.C. § 216(b).

THIRD CLAIM FOR RELIEF
SOUTH CAROLINA PAYMENT OF WAGES ACT
(SC Class)

61. Plaintiffs, on behalf of themselves and the members of the SC Class, re-allege and incorporate by reference the paragraphs above as if they were set forth again herein.

62. At all relevant times, Defendant has employed, and/or continues to employ, Plaintiffs and each of the SC Class Members within the meaning of the South Carolina Payment of Wages Act, S.C. Code Ann. §§ 41-10-10 to 110 ("PWA"). Plaintiffs and the SC Class members are "employees" and are not free from the control and direction of Defendant.

63. Plaintiffs and the SC Class worked for Defendant with the clear understanding and agreement by Defendant that their compensation would be consistent with all applicable laws, including federal and state wage and hour laws.

64. Pursuant to the PWA, “[a]n employer shall not withhold or divert any portion of the employee’s wages unless the employer is required or permitted to do so by state or federal law. . . .” S.C. Code Ann. § 41-10-40(C).

65. Further, “any changes [to] the terms [of wages] must be made in writing at least seven calendar days before they become effective.” S.C. Code Ann. § 41-10-30(A).

66. Accordingly, Plaintiffs and the members of the SC Class are entitled to receive all compensation due and owing to them.

67. As a result of Defendant’s unlawful policies and practices as set forth above Plaintiffs and the members of the SC Class have been deprived of compensation due and owing which Defendant promised to pay in their commitment to abide by applicable wage and hour laws and in violation of the PWA’s mandate that no wages be withheld or diverted unless required or permitted under applicable law.

68. Defendant has set and withheld wages of the Plaintiffs and SC Class members without providing advance notice of such amounts and absent any lawfully sufficient reason for such conduct.

69. As a direct and proximate result of Defendant’s conduct, Plaintiffs and the SC Class have suffered substantial losses and have been deprived of compensation to which they are entitled, including monetary damages in the amount of three (3) times the unpaid wages as well as costs and reasonable attorney’s fees.

FOURTH CLAIM FOR RELIEF
SOUTH CAROLINA COMMON LAW – UNJUST ENRICHMENT
(SC Class)

70. This Fourth Claim is brought in the alternative to the Third Claim (violation of the PWA), to the extent that Defendant disavows any agreement to pay SC Class in a manner consistent with state and federal law. Plaintiffs, on behalf of themselves and the members of the SC Class, re-allege and incorporate by reference the paragraphs above as if they were set forth again herein.

71. Plaintiffs and members of SC Class were employed by Defendant within the meaning of South Carolina Common Law.

72. At all relevant times, Defendant maintains a policy of denying their servers tips that, by law, and/or equitably belong to servers.

73. During the class period covered by this Complaint, Defendant had, and maintains, a willful policy and practice of having their servers subsidize Defendant's business expenses by requiring them to tip the expeditors employed by Defendant.

74. Defendant retained the benefit of their unlawful deductions from the tips of Plaintiffs and all other similarly situated servers which rendered it inequitable and unjust for Defendant to retain such benefits.

75. Defendant was unjustly enriched by subjecting Plaintiffs and other similarly situated servers to such unlawful deductions.

76. As a direct and proximate result of Defendant's unjust enrichment, Plaintiff and members of the SC Class have suffered an injury and are entitled to reimbursement, restitution, and disgorgement from Defendant of the benefits conferred by Plaintiff and SC Class.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of themselves and all other similarly situated members of the Collective Class and members of the SC Class, pray that 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 class members 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 Fed. R. Civ. P. 23 on behalf of the SC Class;
- C. Appointment of the undersigned as Class Counsel;
- D. Find that Defendant's FLSA violations were willful;
- E. An injunction against Defendant and its officers, agents, successors, employees, representative 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 in the future;
- F. For *disgorgement* of revenues, profits and money unjustly earned from the unlawful practices;
- G. An award of unpaid minimum wages to Plaintiffs and the members of the Classes;
- H. An award of unpaid overtime wages to Plaintiffs and the members of the Classes;
- I. Restitution of wages and gratuities improperly retained by Defendant;
- J. An award of liquidated damages to Plaintiffs and members of the Classes;

- K. An award of treble damages to Plaintiffs and members of the Classes to the extent permitted by S.C. Code Ann. § 41-10-80(C);
- L. An award of costs and expenses of this action together with reasonable attorneys' fees; and
- M. Such other and further equitable relief as this Court deems just and proper.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

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Spartanburg, South Carolina