

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

ANTHONY W. HIGHMAN, ET AL, on behalf of himself and all other similarly situated individuals,	:	
	:	Case No.: 2:23-cv-1757-EAS-EPD
Plaintiffs,	:	
	:	
v.	:	Judge Edmund A. Sargus, Jr.
	:	
NORTHSTAR CAFE EASTON LLC, ET AL,	:	Magistrate Elizabeth P. Deavers
	:	
	:	<b>JURY DEMANDED</b>
Defendants.	:	

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**FOURTH AMENDED COMPLAINT**

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Anthony Highman, Sarah Bates, and Sarah Taylor (collectively, “Named Plaintiffs”) bring this action on behalf of themselves and all current and former tipped employees of Defendant Northstar Café Easton LLC (“Defendant Easton”), Defendant Northstar Café Westerville LLC (“Defendant Westerville”), Defendant Northstar Café Liberty LLC, (“Defendant Liberty”), Defendant Northstar Café Shaker Heights LLC (“Defendant Shaker Heights”), Defendant Northstar Café Short North LLC (“Defendant Short North”), Defendant Northstar Café LLC (“Defendant Northstar”), and Defendant Organic Trails Cafes, LLC (“Defendant Organic Trails”) (collectively, “Defendants”) who worked for Defendants at any between June 12, 2020, through May 24, 2023, in the State of Ohio to recover unpaid minimum and overtime wages, unlawfully retained tips, liquidated damages, treble damages, penalties, interest, and other damages, as well as attorneys’ fees and costs, under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201 *et seq.*, the Ohio Minimum Fair Wage Standards Act (the “Ohio Wage Act”), O.R.C. §§ 4111, *et seq.*, the Ohio Prompt Pay Act (“OPPA”), O.R.C. § 4113.15, the Ohio Constitution, Art. II Section 34a (collectively referred to herein as the “Ohio Wage Laws”), O.R.C. § 2307.60, and the Ohio common law for unjust enrichment. Named Plaintiffs assert their FLSA claims on behalf of

themselves and all current and former similarly situated employees of Defendants (collectively “Plaintiffs”) pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b). The following allegations are based on personal knowledge as to Plaintiffs’ own conduct and are made on information and belief as to the acts of others.

## **I. INTRODUCTION**

1. Defendants’ companywide practice is to regularly pay Named Plaintiffs and Opt-in Plaintiffs a tipped hourly wage less than the statutory \$7.25 per hour federal minimum wage and the relevant Ohio minimum wage and rely on the “tip credit” provisions of the FLSA and Ohio Wage Laws to satisfy their federal and Ohio minimum wage obligations. However, Defendants

a. require Plaintiffs to participate in a tip pooling arrangement that takes their tips and pays them to non-customarily and regularly tipped employees and to Defendants’ management and supervisory employees, in violation of both the FLSA and the Ohio Wage Laws and resulting in Defendants’ unjust enrichment at the Plaintiffs’ expense;

b. only compensate Plaintiffs for their hours worked in excess of forty (40) hours in a workweek at either (a) one-and-a-half times the direct cash wage after application of the tip credit under the relevant Ohio minimum wage instead of one-and-a-half times the relevant Ohio minimum wage minus the tip credit (“Defendants’ On-Service OT Rate”), or (b) one-and-a-half times the federal minimum wage instead of the relevant Ohio minimum wage (“Defendants’ Off-Service OT Rate”);

c. pay Plaintiffs below the relevant Ohio minimum wage when not utilizing a tip credit; and

d. apply a tip-credit to Plaintiffs’ pay even when they perform work that directly supports tip-producing work for a substantial amount of time that exceeds either twenty

percent (20%) of the hours worked during their respective workweeks or for a continuous period of time that exceeds thirty (30) minutes.

2. Plaintiffs seek to recover unpaid minimum and overtime wages, unlawfully retained tips, liquidated damages, treble damages, penalties, interest, and other damages, as well as attorneys' fees and costs, that Defendants owe to them and have failed to pay, in violation of 29 U.S.C. § 207 of the FLSA, the Ohio Wage Laws, O.R.C. § 2307.60, and the Ohio common law.

3. Accordingly, Named Plaintiffs bring this action on behalf of themselves and all current and former tipped employees who worked for Defendants at any time between June 12, 2020, through May 24, 2023, in the state of Ohio.

4. Named Plaintiffs also pray that all similarly situated current and former employees ("Putative Opt-In Plaintiffs") be promptly notified of the pendency of this action pursuant to Section 216(b) to apprise them of their rights and provide them an opportunity to opt into this lawsuit.

## **II. JURISDICTION AND VENUE**

5. The jurisdiction of this Court is invoked pursuant to federal question jurisdiction under 28 U.S.C. § 1331, in that this case arises under a federal law of the United States.

6. This Court has supplemental jurisdiction over Plaintiffs' and the Putative Opt-In Plaintiffs' Ohio and common law claims pursuant to 28 U.S.C. § 1367 because these claims are so related to Plaintiffs' and the Putative Opt-In Plaintiffs' claims under the FLSA that they form part of the same controversy.

7. Venue in the Southern District of Ohio is proper pursuant to 28 U.S.C. § 1391(b) because a substantial part of Defendant's conduct giving rise to Named Plaintiffs' and the Putative Opt-In Plaintiffs' claims occurred within Franklin County in this District.

### III. THE PARTIES

8. Plaintiff Anthony Highman (“Plaintiff Highman”) is an adult resident of Columbus, Ohio residing at 353 East 13th Avenue, Apartment 2B, Columbus, Ohio 43201, and a former employee at Defendant Easton’s establishment located at 4015 Townsfair Way, Columbus, OH 43219. Plaintiff Highman has given his written consent to bring this action to collect unpaid wages, unlawfully retained tips, and related damages under the FLSA, the Ohio Wage Laws, and the common law. Plaintiff Highman’s consent form is being filed along with this Complaint pursuant to 29 U.S.C. § 216(b) and was previously filed as ECF No. 1-1.

9. Plaintiff Sarah Bates (“Plaintiff Bates”) is an adult resident of Westerville, Ohio residing at 346 Park Street, Westerville, Ohio 43081, and a former employee at Defendant Westerville’s establishment located at 109 South State Street, Westerville, Ohio 43081. Plaintiff Bates has given her written consent to bring this action to collect unpaid wages, unlawfully retained tips, and related damages under the FLSA, the Ohio Wage Laws, and the common law. Plaintiff Bates’ consent form is being filed along with this Complaint pursuant to 29 U.S.C. § 216(b) and was previously filed as ECF No. 1-2.

10. Plaintiff Sarah Taylor (“Plaintiff Taylor”) is an adult resident of Westerville, Ohio residing at 5058 Smothers Road, Westerville, Ohio 43081, and a former employee at Defendant Westerville’s establishment located at 109 South State Street, Westerville, Ohio 43081. Plaintiff Taylor has given her written consent to bring this action to collect unpaid wages, unlawfully retained tips, and related damages under the FLSA, the Ohio Wage Laws, and the common law. Plaintiff Taylor’s consent form is being filed along with this Complaint pursuant to 29 U.S.C. § 216(b) and was previously filed as ECF No. 1-3.

11. Plaintiff Highman, Plaintiff Bates, and Plaintiff Taylor will be collectively referred to as “Named Plaintiffs.”

12. After filing the original complaint (ECF No. 1) on May 26, 2023, thirteen (13) Putative Opt-In Plaintiffs filed their consent ns to join this lawsuit as Opt-in Plaintiffs. These Opt-in Plaintiffs along with the Named Plaintiffs will be collectively referred to as “Plaintiffs.”

13. Defendant Northstar Café Easton LLC is a domestic for-profit limited single member liability company registered in the State of Ohio and is currently headquartered in Columbus, Ohio. Process may be served upon its registered agent, Darren Malhame, at 4241 North High Street, Columbus, Ohio 43214.

14. Defendant Northstar Café Westerville LLC is a domestic for-profit limited single member liability company registered in the State of Ohio and is currently headquartered in Westerville, Ohio. Process may be served upon its registered agent, Darren Malhame, at 4215 North High Street, Columbus, Ohio 43214.

15. Defendant Northstar Café Liberty LLC is a domestic for-profit limited single member liability company registered in the State of Ohio and is currently headquartered in Liberty Township, Ohio. Process may be served upon its registered agent, Murray, Murphy, Moul + Basil, at 1114 Dublin Road, Columbus, Ohio 43215.

16. Defendant Northstar Café Shaker Heights LLC is a domestic for-profit single member limited liability company registered in the State of Ohio and is currently headquartered in Shaker Heights, Ohio. Process may be served upon its registered agent, Darren Malhame, at 1442 West Lane Avenue, Columbus, Ohio 43221.

17. Defendant Northstar Café Short North LLC is a domestic for-profit single member limited liability company registered in the State of Ohio and is currently headquartered in Columbus, Ohio. Process may be served upon its registered agent, Darren Malhame, at 4215 North High Street, Columbus, Ohio 43214.

18. Defendant Northstar Café LLC is a domestic for-profit single member limited liability company registered in the State of Ohio and is currently headquartered in Columbus, Ohio. Process may be served upon its registered agent, Kevin J. Malhame, at 951 North High Street, Columbus, Ohio 43201.

19. Defendant Organic Trails Cafes, LLC is a domestic for-profit limited liability company registered in the State of Ohio and is currently headquartered in Columbus, Ohio. Process may be served upon its registered agent, Darren Malhame, at 1442 West Lane Avenue, Columbus, Ohio 43221.

20. Defendant Organic Trails Cafes, LLC owns and jointly operates Defendant Northstar Café Easton LLC, Defendant Northstar Café Westerville LLC, Defendant Northstar Café Liberty LLC, Defendant Northstar Café Shaker Heights LLC, Defendant Northstar Café Short North LLC, and Defendant Northstar Café LLC.

21. Defendant Organic Trails Cafes, LLC, Defendant Northstar Café Easton LLC, Defendant Northstar Café Westerville LLC, Defendant Northstar Café Liberty LLC, Defendant Northstar Café Shaker Heights LLC, Defendant Northstar Café Short North LLC, and Defendant Northstar Café LLC will be collectively referred to as “Defendants.”

#### **IV. STATEMENT OF FACTS**

22. During all times material to this Complaint, Defendants acted directly or indirectly, in the interest of a joint employer with respect to Plaintiffs and the Putative Opt-In Plaintiffs.

23. During all times material to this Complaint, Defendants were joint “employers” within the meaning of the FLSA and the Ohio Wage Laws.

24. During all times material to this Complaint, Defendants were a joint enterprise engaged in commerce or in the production of goods for commerce within the meaning of Section 3(s)(1) of the FLSA, 29 U.S.C. § 203(s)(1), in that said joint enterprise has had employees engaged

in commerce or in the production of goods for commerce, or has had employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and in that said joint enterprise has had and has an annual gross volume of sales made or business done of not less than \$500,000 per year (exclusive of excise taxes at the retail level).

25. During all times material to this Complaint, Plaintiffs have been Defendants' employees pursuant to the Ohio Wage Laws and have been individual employees who were engaged in commerce or in the production of goods for commerce as required by 29 U.S.C. §§ 206-207.

26. Plaintiffs and the Putative Opt-In Plaintiffs are current and former tipped employees who worked for Defendants at any time between June 12, 2020, through May 24, 2024, in the State of Ohio (the "Putative Opt-In Plaintiffs").

27. Upon information and belief, Defendants utilize common pay policies and practices which commonly apply to all their employees, regardless of establishment location.

28. At all material times, Defendants pay and have paid Plaintiffs an hourly wage at either the federal minimum wage of \$7.25 per hour or below the federal minimum wage and the then-applicable Ohio minimum wage (2023 — \$10.10 per hour; 2022 — \$9.30 per hour; 2021 — \$8.80 per hour; 2020 — \$8.70 per hour).

29. Defendants jointly created two types of pay rates for the Plaintiffs and the Putative Opt-In Plaintiffs:

- a. for "Off-Service Hours" (i.e., hours worked before the first customer of the day enters the restaurant and after the last customer of the day leaves the restaurant), Defendants compensate Plaintiffs and the Putative Opt-In Plaintiffs below the relevant Ohio minimum wage;

b. for “On-Service Hours” (i.e., hours worked after the first customer of the day enters the restaurant and before the last customer of the day leaves the restaurant), Defendants purport to utilize a Tip Credit for each hour worked by Plaintiffs and the Putative Opt-In Plaintiffs.

30. Upon information and belief, Defendants companywide policies and procedures with regard to how Plaintiffs and the Putative Opt-In Plaintiffs were paid were created, implemented, and enforced by the same individual(s).

31. Upon information and belief, Defendants are under common ownership and therefore all have authority to hire and fire employees, determine employees’ rates and method of payments, operate under identical pay practices and policies, maintain employees’ employment records, and supervise and control employees’ work schedules or conditions of employment to a substantial degree.

**Defendants’ Tip Pool**

32. Defendants have a policy and practice of requiring Plaintiffs and the Putative Opt-In Plaintiffs to contribute a portion of the tips they receive from customers to a tip pool that is distributed to other employees.

33. The individuals who receive a portion of the tip pool include supervisors and members of management in that said supervisors and members of management hold jobs in which (i) their primary duty is to manage Defendants’ enterprises or a customarily recognized department or subdivision of the enterprises, (ii) they customarily and regularly direct the work of at least two (2) or more other full-time employees, and (iii) they have the authority to hire or fire other employees, or at a minimum, their suggestions and recommendations as to the hiring or firing of other employees are given particular weight.



34. Further, the individuals who receive a portion of the tip pool also includes non-customarily and regularly tipped employees and individuals subject to the Tip Credit who spend more than 30 continuous minutes of each shift (some spending as much as their entire shift) and/or more than 20 % of their workweek performing tipped supporting work.

35. Remitting tips to other employees, including management, non-customarily and regularly tipped employees and individuals subject to the Tip Credit who spend more than 30 continuous minutes of each shift and/or more than 20 % of their workweek performing tip supporting work, is not voluntary; rather, it is a condition of employment and, therefore, mandatory.

36. Defendants jointly receive the benefit of these tips at the expense of Plaintiffs and the Putative Opt-In Plaintiffs who earn tips.

**Defendants' Failure to Calculate the Correct Overtime Rate**

37. During On-Service Hours, Defendants purport to utilize a tip credit for each hour worked by Plaintiffs and the Putative Opt-In Plaintiffs who join this case to comply with the minimum wage obligations under the FLSA and Ohio Wage Laws.

38. By way of example, in 2023, Defendants compensate Plaintiffs and the Putative Opt-In Plaintiffs at a rate of \$5.05 per hour during On-Service Hours under a purported tip credit.

39. However, upon information and belief when Plaintiffs and the Putative Opt-In Plaintiffs work in excess of forty (40) hours in a workweek during On-Service Hours, it is Defendants' companywide practice to pay them at the incorrect overtime rate of one-and-a-half times the relevant Ohio minimum wage when a tip credit is applied and not at the correct overtime rate of one-and-a-half times the relevant Ohio minimum wage minus the tip credit. For example, in 2023:

a. Defendants would calculate overtime pay for On-Service Hours at one-and-a-half times Plaintiffs' direct cash wage after the tip credit is applied as the regular rate of pay, therefore paying Plaintiffs at \$5.05 times 1.5 (equating to approximately \$7.58 per hour) as their overtime hourly rate.

b. Defendants should have calculated Plaintiff's overtime rate for overtime On-Service Hours worked as one-and-a-half times the 2023 Ohio minimum wage (\$10.10) minus the tip credit (\$5.05) which equals an overtime rate of \$10.10 per hour.

40. During Off-Service Hours, it is Defendants' companywide practice to not apply a tip credit to Plaintiffs' rate of pay—however, Defendants only compensate Plaintiff and the Putative Opt-In Plaintiffs at the federal minimum wage of \$7.25 per hour rather than the relevant Ohio minimum wage for these hours worked, resulting in them receiving less than the relevant Ohio minimum wage for all hours worked.

41. Therefore, upon information and belief when Plaintiffs and the Putative Opt-In Plaintiffs work in excess of forty (40) hours in a workweek during Off-Service Hours, it is Defendants' companywide practice to pay them at the incorrect overtime rate of one-and-a-half times the federal minimum wage rate instead of one-and-a-half times the relevant Ohio minimum wage.

**Defendants' Failure to Pay the Ohio Minimum Wage When No Tip Credit is Utilized**

42. During Off-Service Hours, it is Defendants' companywide practice to not apply a tip credit to Plaintiffs' and the Putative Opt-In Plaintiffs' rate of pay—however, Defendants only compensate them at the federal minimum wage of \$7.25 per hour rather than the relevant Ohio minimum wage for these hours worked, resulting in Plaintiffs receiving less than the relevant Ohio minimum wage for all hours worked.

**Defendants' Improper Utilization of a Tip Credit**

43. Plaintiffs and the Putative Opt-In Plaintiffs spend more than 30 continuous minutes of each shift and/or more than 20 % of their workweek performing work that directly supports tip-producing work (“tip-supporting work”); however, it is Defendants’ companywide practice to still utilize a tip credit for all hours Plaintiffs and the Putative Opt-In Plaintiffs work in a workweek.

44. Post-Covid, Defendants devised an illegal scheme to replace employees whose primary duties were tip-supporting work and were paid at least minimum wage and/or employees who are not customarily and regularly tipped by dividing their duties and assigning them to customarily and regularly tipped employees paid using the Tip Credit.

45. Defendants’ companywide practice is to break the customarily and regularly tipped employee positions paid using the Tip Credit up into multiple different job titles and assign the job titles tip-supporting work and work typically performed by employees who are not customarily and regularly tipped.

46. The tip-supporting work which Plaintiffs and the Putative Opt-In Plaintiffs perform includes changing the trashcan near Defendants’ dishwasher, running trash to the dumpster, bringing dishes to the line, restocking glasses at the beverage station or bar, polishing wine glasses, polishing and rolling silverware, weeding the grass, cleaning the parking lot, cleaning bathrooms, inventory, among other job duties.

47. Plaintiffs and the Putative Opt-In Plaintiffs often perform tip-supporting work in excess of twenty percent (20%) of the hours worked during their respective workweeks or for a continuous period of time that exceeds thirty (30) minutes while still having a tip credit applied to their hourly rates.

48. Further, Defendants purport to require Plaintiffs and the Putative Opt-In Plaintiffs to take “rounds” every fifteen (15) minutes whereby they are required to stop performing tip-

supporting work and are to attempt to engage with customers. These “rounds” rarely occur given the multitude of tip-supporting tasks which Plaintiffs and the Putative Opt-In Plaintiffs and the Putative Opt-In Plaintiffs are expected to complete during their shifts.

**Defendants’ Illegal Scheme**

49. Defendants created a companywide scheme that enabled them to replace employees who were required to be paid at least the Ohio minimum wage for all hours worked by giving those duties to Plaintiffs and the Putative Opt-In Plaintiffs with no regard for how much time they spent performing the tip-supporting tasks.

50. Defendants created a companywide scheme that enabled them to replace employees who were required to be paid at least the Ohio minimum wage for all hours worked and 150% of their regular rate for all hours worked over 40 in a workweek by giving those duties to Plaintiffs and the Putative Opt-In Plaintiffs and paying them less than the minimum wage for “Off-Service Hours.”

51. Defendants paid most of their workforce improperly using the Tip Credit.

52. Defendants paid most of their workforce improperly from the Tip Pool because on every shift, Defendants paid employees not properly paid using a Tip Credit.

53. Defendants carried out their illegal, common compensation practices and policies with respect to Plaintiffs, the Putative Opt-In Plaintiffs, and the Ohio Rule 23 Class.

54. Because Defendants carried out their illegal scheme, Defendants should not be permitted to use the Tip Credit for any hours Plaintiffs and the Putative Opt-In Plaintiffs worked in violation of the law.

55. Because Defendants violated federal and Ohio wage laws through illegal retention of tips, the Tip Pool must be invalidated entirely, and the tips paid to the Plaintiffs and the Putative Opt-In Plaintiffs.

**V. CAUSES OF ACTION**

**A. COURT SUPERVISED NOTICE PURSUANT TO 29 USC § 216(b) ALLEGING FLSA VIOLATIONS**

56. Plaintiffs re-allege, and incorporate by reference, the allegations set forth in the preceding paragraphs.

57. The Plaintiffs request that the Court issue Court Supervised Notice to the following group of current and former employees defined as:

**All current and former tipped employees who worked for Defendants at any time between June 12, 2020 through May 24, 2023, in the State of Ohio (the “Putative Opt-In Plaintiffs”).**

58. Plaintiffs seek Court Supervised Notice (the “Motion”) to cover the period that would cover from June 12, 2020, to May 24, 2023.

59. At all times hereinafter mentioned, Defendants have been a joint enterprise within the meaning of Section 203(r) of the FLSA, 29 U.S.C. § 203(r), the Ohio Constitution and the Ohio Wage Act.

60. At all times hereinafter mentioned, Defendants have been a joint enterprise engaged in commerce or in the production of goods for commerce within the meaning of Section 203(s)(1) of the FLSA, 29 U.S.C. § 203(s)(1), in that said joint enterprise has had employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, or in any closely related process or occupation directly essential to the production thereof, and in that that joint enterprise has had, and has, an annual gross volume of sales made or business done of not less than \$500,000.00 (exclusive of excise taxes at the retail level which are separately stated).

61. During the respective periods of Plaintiffs' and the Employees' Entitled to Notice joint employment by Defendants, these individuals have provided services for Defendants that involved interstate commerce for purposes of the FLSA.

62. In performing the operations hereinabove described, Plaintiffs and the Putative Opt-In Plaintiffs have been engaged in commerce or in the production of goods for commerce within the meaning of §§ 203(b), 203(i), 203(j), 206(a), and 207(a) of the FLSA. 29 U.S.C. §§ 203(b), 203(i), 203(j), 206(a), 207(a).

63. Specifically, Plaintiffs and the Putative Opt-In Plaintiffs are (or were) non-exempt employees of Defendants who assisted clients, wherever they were from. 29 U.S.C. § 203(j).

64. At all times hereinafter mentioned, Plaintiffs and the Putative Opt-In Plaintiffs are (or were) individual employees who were engaged in commerce or in the production of goods for commerce as required by 29 U.S.C. §§ 206-07.

65. The proposed group of similarly situated current and former employees, i.e., Putative Opt-In Plaintiffs, Plaintiffs seek to have the Court send supervised notice to pursuant to 29 U.S.C. § 216(b), is defined above.

66. The precise size and identity of the proposed Putative Opt-In Plaintiffs should be ascertainable from the business records, tax records, and/or employee and personnel records of Defendants.

67. Collective action treatment of Plaintiffs' and the Employees' Entitled to Notice claims is appropriate because Plaintiffs and the Putative Opt-In Plaintiffs have been subjected to the common business practices and policies referenced in the paragraphs above, and the success of their claims depends upon the resolution of common issues of law and fact, including *inter alia*, whether Defendants satisfied the FLSA's requirements for payment of the statutory overtime

wages, payment of the statutory minimum wages, application of a tip-credit, and compliance with all federal tip-related laws.

68. Plaintiffs and the Putative Opt-In Plaintiffs, having worked pursuant to the common policies described herein, are “similarly situated” as that term is defined in 29 U.S.C. § 216(b) and the associated decisional law.

69. Plaintiffs and the Putative Opt-In Plaintiffs have been similarly affected by Defendants’ companywide violations of the FLSA in workweeks during the relevant time period, which amount to a single decision, policy, or plan.

70. Plaintiffs are similarly situated to the Putative Opt-In Plaintiffs and will prosecute this action vigorously on their behalf.

71. Plaintiffs intend to send notice to all the Putative Opt-In Plaintiffs pursuant to Section 216(b) of the FLSA. The names and addresses of the Putative Opt-In Plaintiffs are available from Defendants’ records.

**B. FED. R. CIV. P. 23 CLASS ACTION ALLEGATIONS**

72. Plaintiffs re-allege, and incorporate by reference, the allegations set forth in the preceding paragraphs.

73. Plaintiffs bring their Ohio Wage Law and Ohio common law claims as a class action pursuant to Federal Rule of Civil Procedure 23 on behalf of:

**All current and former tipped employees who worked for Defendants at any time between June 12, 2020, through May 23, 2023, in the State of Ohio (the “Ohio Rule 23 Class”).**

74. Class action treatment of Plaintiffs’ Ohio Rule 23 Class claims is appropriate because, as alleged below, all of Federal Rule of Civil Procedures 23’s class action requisites are satisfied.

75. The Ohio Rule 23 Class, upon information and belief, includes over dozens of individuals, all of whom are readily ascertainable based on Defendants' standard payroll records and are so numerous that joinder of all class members is impracticable.

76. Plaintiffs are members of the Ohio Rule 23 Class, their claims are typical of the claims of other class members, the Putative Opt-In Plaintiffs, and they have no interests that are antagonistic to or in conflict with the interests of other class members.

77. Plaintiffs and their counsel will fairly and adequately represent the Ohio Rule 23 Class members and their interests.

78. Questions of law and fact are common to all class members, because, *inter alia*, this action concerns Defendants' companywide pay policies that apply to the Plaintiffs and the Ohio Rule 23 Class Members. The legality of these policies will be determined through the resolution of generally applicable legal principles to a common set of facts.

79. Class certification is appropriate under Federal Rule of Civil Procedure 23(b)(3) because common questions of law and fact predominate over questions affecting only individual class members and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

**COUNT I**  
**UNLAWFUL RETENTION OF TIPS UNDER THE FLSA**

80. Plaintiffs re-allege, and incorporate by reference, the allegations set forth in the preceding paragraphs.

81. Plaintiffs assert this claim on behalf of themselves and members of the Putative Opt-In Plaintiffs who opt into this action by filing a consent form, pursuant to 29 U.S.C. § 216(b).

82. Plaintiffs and the Putative Opt-In Plaintiffs are employees entitled to the FLSA's protections.

83. Defendants are joint employers covered by the FLSA.



84. The FLSA prohibits employers from keeping tips received by employees for any purposes, regardless of whether or not the employer takes a tip credit 29 U.S.C. § 203(m).

85. Defendants have violated this provision companywide by keeping tips received by Plaintiffs and the Putative Opt-In Plaintiffs by intentionally creating and utilizing a business model in which wages for management, non-customarily and regularly tipped employees, and individuals subject to the Tip Credit who spend more than 30 continuous minutes of each shift and/or more than 20 % of their workweek performing tip supporting work are paid for by the tips of the tip producing employees.

86. The FLSA further prohibits employers from taking a tip credit if the employer allows non-customarily and regularly tipped employees in its mandatory tip pool. 29 U.S.C. § 203(m).

87. Defendants have violated this provision companywide by allowing management, non-customarily and regularly tipped employees, and individuals subject to the Tip Credit who spend more than 30 continuous minutes of each shift and/or more than 20 % of their workweek performing tip supporting work to participate in its mandatory tip pool.

88. Plaintiffs and the Employee Entitled to Notice are entitled to recover these unlawfully retained tips, an equal amount of liquidated damages, and attorneys' fees and expense, pursuant to 29 U.S.C. § 216(b).

89. Defendants violated the FLSA by instituting a business model in which the tip producing employees are forced to hand over their tips to management non-customarily and regularly tipped employees, and individuals subject to the Tip Credit who spend more than 30 continuous minutes of each shift and/or more than 20 % of their workweek performing tip supporting work to reduce Defendant's payroll expenses.

**COUNT II**  
**VIOLATION OF THE MINIMUM WAGE REQUIREMENTS OF THE FLSA**

90. Plaintiffs re-allege, and incorporate by reference, the allegations set forth in the preceding paragraphs.

91. Plaintiffs assert this claim on behalf of themselves and the Putative Opt-In Plaintiffs who opt into this action by filing a consent form, pursuant to 29 U.S.C. § 216(b).

92. Plaintiffs and the Putative Opt-In Plaintiffs are employees entitled to the FLSA's protections.

93. Defendants are joint employers covered by the FLSA.

94. The FLSA entitles employees to a minimum hourly wage of \$7.25 for every hour worked. 29 U.S.C. § 206(a).

95. While employers may utilize a tip credit to satisfy their minimum wage obligations to tipped employees, they forfeit the right to do so when certain requirements are not met. *See* 29 U.S.C. §§ 203(m) and 203(t).

96. The FLSA prohibits employers from keeping tips received by employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit. 29 U.S.C. § 203(m).

97. Employers may not take a tip credit if they violate the prohibition against unlawfully retaining any portion of their employees' tips. *E.g.*, 29 U.S.C. § 203(m)(2); 29 C.F.R. §§ 531.54, 531.59.

98. Employers may also not take a tip credit if they do not limit a mandatory tip pool to employees who customarily and regularly receive tips. *See* 29 U.S.C. § 203(m).

99. Here, through (i) the companywide practice of unlawfully keeping employees' tips and permitting management and supervisors to keep employees' tips and (ii) the companywide practice of permitting non-customarily and regularly tipped employees to participate in a tip pool,

Defendants have forfeited their right to utilize the tip credit in satisfying their minimum wage obligations.

100. As such, Defendants have violated the FLSA by failing to pay Named Plaintiffs and the Putative Opt-In Plaintiffs for all time worked at \$7.25 per hour.

101. Employers may also only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation. 29 C.F.R. § 531.56.

102. Employers may not take a tip credit for work performed by a tipped employee that directly supports tip-producing work when it is done for a substantial amount of time. *See* 29 C.F.R. § 531.56.

103. Here, through the companywide practice of utilizing a tip credit even when Plaintiffs and Putative Opt-In Plaintiffs to perform work that directly supports tip-producing work for a substantial amount of time, Defendants have forfeited their right to utilize the tip credit in satisfying their minimum wage obligations.

104. As such, Defendants have violated the FLSA by failing to pay Plaintiffs and Putative Opt-In Plaintiffs for all time worked at \$7.25 per hour.

105. Named Plaintiffs and the Putative Opt-In Plaintiffs are entitled to recover all unpaid minimum wages, an equal amount of liquidated damages, and attorneys' fees and expenses, pursuant to 29 U.S.C. § 216(b).

**COUNT III**  
**VIOLATION OF THE OHIO CONSTITUTION, ARTICLE II, SECTION 34a**

106. Plaintiffs re-allege, and incorporate by reference, the allegations set forth in the preceding paragraphs.

107. Plaintiffs assert this claim on behalf of themselves Plaintiffs assert this claim on behalf of themselves and members of the Ohio Rule 23 Class, pursuant to Fed. R. Civ. P. 23.

108. Plaintiffs and the Ohio Rule 23 Class who are employees within the meaning of O.R.C. §§ 4111.14(B) and Oh. Const. Art. II, § 34a protected by the mandates of the Ohio Constitution.

109. Defendants are joint employers within the meaning of O.R.C. § 4111.14(B) and Oh. Const. Art. II, § 34a required to comply with the mandates of the Ohio Constitution.

110. Article II, Section 34a of the Ohio Constitution and O.R.C. § 4111.02 entitle employees to a minimum hourly wage that increases each year (2023 — \$10.10 per hour; 2022 — \$9.30 per hour; 2021 — \$8.80 per hour; 2020 — \$8.70 per hour).

111. Article II, Section 34a of the Ohio Constitution permits employers to utilize a “tip credit” to satisfy their minimum wage obligations to tipped employees.

112. In order to utilize the tip credit, an employer must comply with the requirements set forth in Section 3(m) of the FLSA, 29 U.S.C. § 203(m).

113. Section 3(m) of the FLSA prohibits employers from keeping tips received by employees for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips, regardless of whether or not the employer takes a tip credit. 29 U.S.C. § 203(m).

114. Employers may not take a tip credit if they violate the prohibition against unlawfully retaining any portion of their employees’ tips. *E.g.*, 29 U.S.C. § 203(m)(2).

115. Here, by unlawfully keeping and permitting management and supervisors to keep tips earned by Plaintiffs and the Ohio Rule 23 Class, Defendants have forfeited their right to utilize the tip credit in satisfying their minimum wage obligations.

116. The FLSA further prohibits employers from taking a tip credit if the employer allows non-customarily and regularly tipped employees in its mandatory tip pool. 29 U.S.C. § 203(m).

117. Defendants have violated this provision companywide by keeping tips received by Plaintiffs and the Ohio Rule 23 Class and by allowing non-customarily and regularly tipped employees to participate in its mandatory tip pool.

118. Employers also may not take a tip credit for work performed by a tipped employee that directly supports tip-producing work when it is done for a substantial amount of time. *See* 29 C.F.R. § 531.56.

119. Here, by utilizing a tip credit even when Plaintiffs and the Ohio Rule 23 Class perform work that directly supports tip-producing work for a substantial amount of time, Defendant has forfeited its right to utilize the tip credit in satisfying its minimum wage obligations.

120. Further, when not utilizing a tip credit during Plaintiffs' Off-Service Hours worked, Defendants compensated Plaintiffs and the Ohio Rule 23 Class at a rate below the relevant Ohio minimum wage, in violation of Ohio Wage Laws.

121. As such, Defendants have violated O.R.C. § 4111.14(B) and Oh. Const. Art. II, § 34a by paying Plaintiffs and the Putative Opt-In Plaintiffs who join this case an hourly wage below the required minimum wage.

122. Defendants violated Ohio Wage Laws provisions by instituting a business model in which the tip producing employees are forced to hand over their tips to management non-customarily and regularly tipped employees, and individuals subject to the Tip Credit who spend more than 30 continuous minutes of each shift and/or more than 20 % of their workweek performing tip supporting work to reduce Defendant's payroll expenses.

123. Plaintiffs and the Putative Opt-In Plaintiffs who join this case are entitled to unpaid minimum wages and two times those wages as additional statutory damages, interest, and attorneys' fees and expenses, and all other remedies available.

**COUNT IV**  
**FLSA AND OHIO OVERTIME VIOLATIONS**

124. Plaintiffs re-allege, and incorporate by reference, the allegations set forth in the preceding paragraphs.

125. Plaintiffs assert this claim on behalf of themselves and the Putative Opt-In Plaintiffs who join this case who opt into this action by filing a consent form, pursuant to 29 U.S.C. § 216(b).

126. Plaintiffs and the Putative Opt-In Plaintiffs who join this case are employees entitled to the FLSA's protections.

127. Defendants are joint employers covered by the FLSA.

128. Defendants' practice and policy of not paying Plaintiffs and the Putative Opt-In Plaintiffs who join this case the correct hourly minimum wage resulted in Defendants' failure to pay Plaintiffs and the Putative Opt-In Plaintiffs one and one-half times their regular rate of pay for all hours worked in excess of 40 hours per workweek, in violation of the FLSA and the Ohio Wage Act.

129. By engaging in the above-mentioned conduct, Defendants violated provisions of the FLSA and the Ohio Wage Act.

130. As a result of Defendants' practices and policies, Plaintiffs and the Putative Opt-In Plaintiffs who join this case have been damaged in that they have not received wages due to them pursuant to the FLSA and the Ohio Wage Act.

**COUNT V**  
**VIOLATION OF THE OHIO PROMPT PAY ACT**

131. Plaintiffs re-allege, and incorporate by reference, the allegations set forth in the preceding paragraphs.

132. Plaintiffs assert this claim on behalf of themselves and the Putative Opt-In Plaintiffs who join this case.

133. At all times relevant to this Complaint, Defendants were Plaintiffs' and the Putative Opt-In Plaintiffs who join this case's joint "employers" and were required to comply with the Ohio Prompt Pay Act's provisions. *See* O.R.C. § 4113.15.

134. The OPPA provides that employers shall pay covered employees all wages, on or before the first day of each month for wages earned during the first half of the preceding month ending with the fifteenth day thereof, and, on or before the fifteenth day of each month, for wages earned during the preceding calendar month. *See* O.R.C. § 4113.15(A).

135. At all times material to this Complaint, Defendants have refused to pay the Plaintiffs and the Putative Opt-In Plaintiffs who join this case all owed overtime wages at one and one-half (1 ½) times their normal hourly rate and all wages at the statutorily mandated minimum wage rate, within thirty (30) days of performing the work. *See* O.R.C. § 4113.15(B).

136. Plaintiffs and the Putative Opt-In Plaintiffs who join this case's wages remain unpaid for more than thirty (30) days beyond their regularly scheduled payday.

137. Plaintiffs and the Putative Opt-In Plaintiffs who join this case are entitled to an additional six percent (6%) of the unpaid minimum wages as additional liquidated damages, and all other remedies available.

**COUNT VI**  
**UNJUST ENRICHMENT**

138. Plaintiffs re-allege, and incorporate by reference, the allegations set forth in the preceding paragraphs.

139. Plaintiffs assert this claim on behalf of themselves and the Putative Opt-In Plaintiffs who join this case.

140. Plaintiffs and the Putative Opt-In Plaintiffs who join this case are tipped employees paid an hourly rate plus tips they earn from customers.

141. Plaintiffs and the Putative Opt-In Plaintiffs who join this case earn these tips and are entitled to keep them.

142. Defendants' intentional creation and utilization of a companywide business model in which the tip producing employees are forced to hand over their tips to management, non-customarily and regularly tipped employees, and individuals subject to the Tip Credit who spend more than 30 continuous minutes of each shift and/or more than 20 % of their workweek performing tip supporting work unjustly confers a benefit to Defendants in the form of illegal reduction in payroll.

143. As a result, Defendants are unjustly enriched at the Plaintiffs' and the Putative Opt-In Plaintiffs who join the case's expense in the amount of tips Defendants unlawfully retain.

144. Defendants have knowledge of the benefit illegally conferred because Defendants instituted the business model for the purpose of obtaining the illegal benefit

145. Defendants retained the benefit illegally conferred upon them under circumstances where it would be unjust to do so without payment, as Defendants have allowed this illegal business model to increase the profits and decrease the payroll expenses every single day during the relevant time period.

146. It is against equity and good conscience to permit Defendants to benefit from these tips.

147. Thus, Defendants should be required to reimburse Plaintiffs and the Putative Opt-In Plaintiffs who join the case in the amount of these tips.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray that this Court enter the following relief:

A. For an Order sending Court Supervised Notice to the Putative Opt-In Plaintiffs as defined herein and requiring Defendants to provide the names, addresses, e-mail



addresses, telephone numbers, and social security numbers of all putative collective action members;

- B. In the event the Defendants seek to have discovery on the issues of whether the Putative Opt-In Plaintiffs are similarly situated to the Plaintiffs, that the Court issue an order tolling the FLSA statute of limitations for the Putative Opt-In Plaintiffs as of the filing of this Complaint or to a date prior.
- C. Expectation and damages for all missed payments taken from or applied to the Plaintiffs' and the Putative Opt-In Plaintiffs employees' pay;
- D. An order awarding the Plaintiffs, Putative Opt-In Plaintiffs, and the Ohio Rule 23 Class back pay equal to the amount of the Ohio Tip Credit from June 12, 2020, through May 24, 2023.
- E. Awarding Plaintiffs and the Putative Opt-In Plaintiffs who join this case the sum of 6% of the total unpaid wages or \$200.00 for each instance of failure to pay wages owed within thirty days, whichever is greater, pursuant to the Ohio Prompt Pay Act, § 4113.15(A);
- F. An order enjoining Defendants from retaliating, via discrimination, against the Putative Opt-In Plaintiffs for their engaging in the protected action of complaining about pay practices.
- G. Compensatory and punitive damages under O.R.C. § 2307.60;
- H. Pre-judgment and post-judgment interest;
- I. A finding that Defendants have violated the FLSA, the Ohio Constitution, the Ohio Wage Act, and the OPPA and that Defendants have been unjustly enriched with the repayment of tips illegally retained;

- J. A judgment against Defendants and in favor of the Plaintiffs, those Putative Opt-In Plaintiffs who join this lawsuit, and the Ohio Rule 23 Class for compensation for all unpaid and underpaid wages and tips that Defendants have failed and refused to pay in violation of the FLSA and the Ohio Wage Laws;
- K. Liquidated damages, treble damages, and monetary penalties to the fullest extent permitted under the FLSA and Ohio Wage Laws;
- L. A judgment against Defendants and in favor of Plaintiffs and those Putative Opt-In Plaintiffs who join this lawsuit for restitution for all earned tips kept by Defendants and by which Defendants were unjustly enriched;
- M. An award of costs and expenses in this action, together with reasonable attorneys' fees and expert fees; and,
- N. Any other relief to which the Plaintiffs, those Putative Opt-In Plaintiffs who join this lawsuit may be entitled.

Dated: April 14, 2024

Respectfully submitted,

**BARKAN MEIZLISH DEROSE COX, LLP**

/s/ Robert E. DeRose

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**JURY DEMAND**

Plaintiffs request a trial by jury on all of their claims.

/s/ Robert E. DeRose

Robert E. DeRose (OH Bar No. 0055214)