UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. _____

AARON NELSON, individually and on behalf of similarly situated persons,

Plaintiff,

v.

TEAM WOW, LLC, MOUNTAINSIDE PIZZA, INC., PRIMA PIZZA, INC. and LONGHORN PIZZA, INC.,

Defendants.

COLLECTIVE AND CLASS ACTION COMPLAINT

Plaintiff Aaron Nelson, individually and on behalf of all other similarly situated pizza delivery drivers, for his Complaint against Defendants, alleges:

1. Defendants Team Wow, LLC, Mountainside Pizza, Inc., Prima Pizza, Inc. and Longhorn Pizza, Inc. together operate approximately 37 Domino's Pizza stores in Colorado, California and Texas. Defendants employ delivery drivers who use their own automobiles to deliver pizza and other food items to Defendants' customers. Instead of reimbursing their delivery drivers for the reasonably approximate costs of the business use of their vehicles, Defendants use a flawed method to determine reimbursement rates that provides such an unreasonably low rate beneath any reasonable approximation of the expenses they incur that the drivers' unreimbursed expenses cause their wages to fall below the minimum wage during some or all workweeks (nominal wages – unreimbursed vehicle costs = sub-minimum net wages).

2. Plaintiff brings Count I of this lawsuit as a collective action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, to recover unpaid minimum wages owed to himself and similarly situated delivery drivers employed by Defendants at all of their Domino's Pizza stores.

3. Plaintiff also brings Count II of this lawsuit as a class action under the Colorado Minimum Wage of Workers Act ("CMWWA"), C.R.S.A. § 8-6-101 *et seq.,* to recover unpaid minimum wages owed to himself and similarly situated delivery drivers employed by Defendants at their Domino's Pizza stores located in Colorado.

Jurisdiction and Venue

4. The FLSA authorizes court actions by private parties to recover damages for violation of the FLSA's wage and hour provisions. Jurisdiction over Plaintiff's FLSA claim is based on 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

5. The CMWWA authorizes court actions by private parties to recover damages for violation of the wage provisions of the CMWWA. Jurisdiction over Plaintiff's CMWWA claim is based on 28 U.S.C. § 1367 and C.R.S.A. § 8-6-118.

6. Venue in this District is proper under 28 U.S.C. § 1391 because Defendant Mountainside Pizza, Inc. resides in this District, Defendants employed Plaintiff in this District, substantial events and occurrence giving rise to the claims occurred in this District, and all Defendants are subject to personal jurisdiction in this District.

Parties

7. Defendant Team Wow, LLC is a California limited liability company which, along with the other Defendants, operates a chain of Domino's Pizza stores including stores located in this District.

8. Defendant Mountainside Pizza, Inc. is a Colorado corporation which, along with the other Defendants, operates a chain of Domino's Pizza stores including stores located in this District.

9. Defendant Prima Pizza, Inc. is a California corporation which, along with the other Defendants, operates a chain of Domino's Pizza stores including stores located in this District.

10. Defendant Longhorn Pizza, Inc. is a Texas corporation which, along with the other Defendants, operates a chain of Domino's Pizza stores including stores located in this District.

11. Defendants comprise a "single employer" or "single integrated enterprise" and jointly operate a chain of Domino's Pizza stores as Defendants maintain interrelated operations, centralized control of labor relations, common management, common ownership and common financial control.

12. Alternatively and/or cumulatively, Defendants constitute "joint employers" as they share power to hire and fire delivery drivers, supervision and control of their work schedule or conditions of employment, determination of their rate and method of payment and/or reimbursement, and maintenance of their employment records.

13. Alternatively and/or cumulatively, because the work performed by the delivery drivers simultaneously benefited both Defendants and/or directly or indirectly furthered their joint interests, Defendants are collectively the joint employers of the delivery drivers under the FLSA's broad definition of "employer." 29 U.S.C. § 203(d).

14. From about August to September 2016, Plaintiff Aaron Nelson was employed by Defendants as a delivery driver in at their Domino's Pizza store in Littleton, Colorado.

Plaintiff Nelson's Consent to Become a Party Plaintiff under 29 U.S.C. § 216(b) is attached hereto as "Exhibit 1."

General Allegations

Defendants' Business

15. Defendants own and operate approximately 37 Domino's Pizza franchise stores in Colorado, California and Texas.

16. Defendants' Domino's Pizza stores employ delivery drivers who all have the same primary job duty: to deliver pizzas and other food items to customers' homes or workplaces.

Defendants' Flawed Reimbursement Policy

17. Defendants require their delivery drivers to maintain and pay for safe, legally-operable, and insured automobiles when delivering pizza and other food items.

18. Defendants' delivery drivers incur costs for gasoline, vehicle parts and fluids, repair and maintenance services, insurance, depreciation, and other expenses ("automobile expenses") while delivering pizzas for the primary benefit of Defendants.

19. Defendants' delivery driver reimbursement policy reimburses drivers based on a per-mile rate, but that per-mile rate falls far below the IRS business mileage reimbursement rate or any other reasonable approximation of the cost to own and operate a motor vehicle. This policy applies to all of Defendants' delivery drivers.

20. The result of Defendants' delivery driver reimbursement policy is a reimbursement of much less than a reasonable approximation of their drivers' automobile expenses.

21. During the applicable FLSA limitations period, the IRS business mileage reimbursement rate ranged between $.54 and $.575 per mile. Likewise, reputable

companies that study the cost of owning and operating a motor vehicle and/or reasonable reimbursement rates, including the American Automobile Association ("AAA"), have determined that the average cost of owning and operating a sedan ranged between $.574 and $.608 per mile during the same period for drivers who drive 15,000 miles per year. These figures represent a reasonable approximation of the average cost of owning and operating a vehicle for use in delivering pizzas.

22. The driving conditions associated with the pizza delivery business cause more frequent maintenance costs, higher costs due to repairs associated with driving, and more rapid depreciation from driving as much as, and in the manner of, a delivery driver. Defendants' delivery drivers further experience lower gas mileage and higher repair costs than the average driver used to determine the average cost of owning and operating a vehicle described above due to the nature of the delivery business, including frequent starting and stopping of the engine, frequent braking, short routes as opposed to highway driving, and driving under time pressures.

23. Defendants' reimbursement policy does not reimburse their delivery drivers for even their ongoing out-of-pocket expenses, much less other costs they incur to own and operate their vehicle, and thus Defendants uniformly fail to reimburse their delivery drivers at any reasonable approximation of the cost of owning and operating their vehicles for Defendants' benefit.

24. Defendants' systematic failure to adequately reimburse automobile expenses constitutes a "kickback" to Defendants such that the hourly wages they pay to Plaintiff and their other delivery drivers are not paid free and clear of all outstanding obligations to Defendants.

25. Defendants fail to reasonably approximate the amount of their drivers' automobile expenses to such an extent that their drivers' net wages are diminished beneath the federal minimum wage.

26. In sum, Defendants' reimbursement policy and methodology fail to reflect the realities of delivery drivers' automobile expenses.

Defendants' Failure to Reasonably Reimburse Automobile Expenses Causes Minimum Wage Violations

27. Regardless of the precise amount of the per-delivery reimbursement at any given point in time, Defendants' reimbursement formula has resulted in an unreasonable underestimation of delivery drivers' automobile expenses throughout the recovery period, causing systematic minimum wage violations.

28. Plaintiff Nelson was paid the exact Colorado minimum wage of $8.31 per hour during his employment with Defendants.

29. The federal minimum wage has been $7.25 per hour since July 24, 2009.

30. Colorado's hourly minimum wage was $7.78 in 2013, $8.00 in 2014, $8.23 in 2015 and $8.31 in 2016.

31. During Plaintiff Nelson's employment, Defendants provided him a per-mile reimbursement of approximately $.23.

32. Throughout his employment with Defendants, Plaintiff Nelson experienced an average delivery distance of at least 5 miles.

33. During this same time period, the IRS standard business mileage reimbursement rate was $.54 per mile, which reasonably approximates the automobile expenses incurred delivering pizzas. Using the IRS rate as a reasonable approximation of Plaintiff Nelson's automobile expenses, every mile driven on the job decreased his net wages by

approximately $.31 ($.54 - $.23) per mile. Considering Plaintiff's estimate of at least 5 miles per delivery, Defendants under-reimbursed him at least $1.55 per delivery ($.31 x 5 miles).

34. During his employment by Defendants, Plaintiff Nelson typically averaged approximately 2 deliveries per hour.

35. Thus, comparing Defendants' reimbursement rate to the IRS rate, Plaintiff Nelson "kicked back" to Defendants approximately $3.10 per hour ($1.55 per delivery x 2 deliveries per hour), for an effective sub-minimum hourly wage rate of approximately $5.21 ($8.31 per hour - $3.10 kickback).

36. All of Defendants' delivery drivers had similar experiences to those of Plaintiff Nelson. They were subject to the same reimbursement policy; received similar reimbursements; incurred similar automobile expenses; completed deliveries of similar distances and at similar frequencies; and were paid at or near the federal minimum wage before deducting unreimbursed business expenses.

37. Because Defendants paid their drivers a gross hourly wage at precisely, or at least very close to, the federal minimum wage, and because the delivery drivers incurred unreimbursed automobile expenses, the delivery drivers "kicked back" to Defendants an amount sufficient to cause minimum wage violations.

38. While the amount of Defendants' actual reimbursements per delivery may vary over time, Defendants have relied on the same flawed policy and methodology with respect to all delivery drivers at all of their other Domino's Pizza stores. Thus, although reimbursement amounts may differ somewhat by time or region, the amounts of under-

reimbursements relative to automobile costs incurred are relatively consistent between time and region.

39. Defendants' low reimbursement rates were a frequent complaint of at least some of Defendants' delivery drivers, including Plaintiff, yet Defendants continued to reimburse at a rate much less than any reasonable approximation of delivery drivers' automobile expenses.

40. The net effect of Defendants' flawed reimbursement policy is that they willfully fail to pay minimum wage to their delivery drivers. Defendants thereby enjoys ill-gained profits at the expense of their employees.

Collective and Class Allegations

41. Plaintiff brings his FLSA claim as an "opt-in" collective action on behalf of similarly situated delivery drivers pursuant to 29 U.S.C. § 216(b).

42. The FLSA claim may be pursued by those who opt-in to this case pursuant to 29 U.S.C. § 216(b).

43. Plaintiff, individually and on behalf of other similarly situated employees, seeks relief on a collective basis challenging Defendants' practice of failing to pay employees federal minimum wage. The number and identity of other plaintiffs yet to opt-in may be ascertained from Defendants' records, and potential class members may be notified of the pendency of this action via mail.

44. Plaintiff and all of Defendants' delivery drivers are similarly situated in that:

a. They have worked as delivery drivers for Defendants delivering pizza and other food items to Defendants' customers;

b. They have delivered pizza and other food items using automobiles not owned or maintained by Defendants;

c. Defendants required them to maintain these automobiles in a safe, legally-operable, and insured condition;

d. They incurred costs for automobile expenses while delivering pizzas and other food items for the primary benefit of Defendants;

e. They were subject to similar driving conditions, automobile expenses, delivery distances, and delivery frequencies;

f. They were subject to the same pay policies and practices of Defendants;

g. They were subject to the same delivery driver reimbursement policy that underestimates automobile expenses per mile, and thereby systematically deprived of reasonably approximate reimbursements, resulting in wages below the federal minimum wage in some or all workweeks; and

h. They were paid at or near the federal minimum wage before deducting unreimbursed business expenses.

45. Plaintiff brings his CMWWA claim as a class action on behalf of similarly situated delivery drivers in Colorado during the past two years pursuant to Fed. R. Civ. P. 23.

46. Plaintiff's CMWWA claim asserted in Count II satisfies the numerosity, commonality, typicality, adequacy, predominance and superiority requirements of a class action pursuant to Fed. R. Civ. P. 23.

47. The Class sought in Count II satisfies the numerosity standard as it consists of at least hundreds of persons who are geographically dispersed and, therefore, joinder of all Class members in a single action is impracticable.

48. Questions of fact and law common to the Class sought in Count II predominate over any questions affecting only individual members. The questions of law and fact common to the Class arising from Defendants' actions include, without limitation:

a. Whether they have worked as delivery drivers for Defendants delivering pizza and other food items;

b. Whether they have delivered pizza and other food items using automobiles not owned or maintained by Defendants;

c. Whether Defendants required them to maintain these automobiles in a safe, legally-operable, and insured condition;

d. Whether they incurred costs for automobile expenses while delivering pizza and other food items for the primary benefit of Defendants;

e. Whether they were subject to similar automobile expenses;

f. Whether they were subject to similar pay rates;

g. Whether they were subject to the same policy of failing to reimburse for automobile expenses; and

h. Whether Defendants' pay and reimbursement policies resulted in wages below the Colorado minimum wage in some or all workweeks.

49. The questions set forth above predominate over any questions affecting only individual persons, and a class action is superior with respect to considerations of consistency, economy, efficiency, fairness, and equity to other available methods for the fair and efficient adjudication of the state law claim.

50. Plaintiff's claim is typical of those of the Class sought in Count II in that:

a. They have worked as delivery drivers for Defendants delivering pizza and other food items to Defendants' customers;

b. They have delivered pizza and other food items using automobiles not owned or maintained by Defendants;

c. Defendants required them to maintain these automobiles in a safe, legally-operable, and insured condition;

d. They incurred costs for automobile expenses while delivering pizzas and other food items for the primary benefit of Defendants;

e. They were subject to similar driving conditions, automobile expenses, delivery distances, and delivery frequencies;

f. They were subject to the same pay policies and practices of Defendants;

g. They were subject to the same delivery driver reimbursement policy that underestimates automobile expenses per mile, and thereby systematically deprived of reasonably approximate reimbursements, resulting in wages below the Colorado minimum wage in some or all workweeks; and

h. They were paid at or near Colorado's minimum wage before deducting unreimbursed business expenses.

51. Plaintiff is an adequate representative of the Class sought in Count II because he is a member of that Class and his interest does not conflict with the interest of the members of the Class he seeks to represent. The interests of the members of the Class sought in Count II will be fairly and adequately protected by Plaintiff and the undersigned counsel, who have extensive experience prosecuting complex wage and hour, employment, and class action litigation.

52. Maintenance of the claim asserted in Count II as a class action is superior to other available methods for fairly and efficiently adjudicating the controversy as members of the Class have little interest in individually controlling the prosecution of separate class actions, no other litigation is pending over the same controversy, it is desirable to concentrate the litigation in this Court due to the relatively small recoveries per member of the Class, and there are no material difficulties impairing the management of a class action.

53. It would be impracticable and undesirable for each member of the Class sought in Count II who suffered harm to bring a separate action. In addition, the maintenance of separate actions would place a substantial and unnecessary burden on the courts and could result in inconsistent adjudications, while a single class action can determine, with judicial economy, the rights of all Class members.

Count I: Violation of the Fair Labor Standards Act of 1938

54. Plaintiff reasserts and re-alleges the allegations set forth above.

55. At all relevant times herein, Plaintiff has been entitled to the rights, protections, and benefits provided under the FLSA, 29 U.S.C. §§ 201, *et seq.*

56. Plaintiff and all Defendants' other delivery drivers are "employees" within the scope and meaning of the FLSA. 29 U.S.C. § 203(e).

57. Defendants are "employers" of Plaintiff and their other delivery drivers within the scope and meaning of the FLSA. 29 U.S.C. § 203(d).

58. Section 13 of the FLSA, codified at 29 U.S.C. § 213, exempts certain categories of employees from federal minimum wage obligations. None of the FLSA exemptions apply to Plaintiff or other similarly situated delivery drivers.

59. The FLSA regulates, among other things, the payment of minimum wage by employers whose employees are engaged in interstate commerce, or engaged in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C. §206(a).

60. Defendants are subject to the FLSA's minimum wage requirements because they are an enterprise engaged in interstate commerce, and their employees are engaged in commerce.

61. Under Section 6 of the FLSA, codified at 29 U.S.C. § 206, employees have been entitled to be compensated at a rate of at least $7.25 per hour since July 24, 2009.

62. As alleged herein, Defendants have, and continue to, uniformly reimburse delivery drivers less than the reasonably approximate amount of their automobile expenses to such an extent that it diminishes these employees' wages beneath the federal minimum wage.

63. Defendants knew or should have known that their pay and reimbursement policies, practices and methodology result in failure to compensate delivery drivers at the federal minimum wage.

64. Defendants, pursuant to their policy and practice, violated the FLSA by refusing and failing to pay federal minimum wage to Plaintiff and other similarly situated delivery drivers.

65. Plaintiff and all similarly situated delivery drivers are victims of a uniform and employer-based compensation and reimbursement policy. This uniform policy, in violation of the FLSA, has been applied, and continues to be applied, to all delivery driver employees in Defendants' stores.

66. Plaintiff and all similarly situated employees are entitled to damages equal to the minimum wage minus actual wages received after deducting reasonably approximated automobile expenses within three years from the date each Plaintiff joins this case, plus periods of equitable tolling, because Defendants acted willfully and knew, or showed reckless disregard for, whether their conduct was unlawful.

67. Defendants have acted neither in good faith nor with reasonable grounds to believe that their actions and omissions were not a violation of the FLSA, and as a result, Plaintiff and other similarly situated employees are entitled to recover an award of liquidated damages in an amount equal to the amount of unpaid minimum wages under 29 U.S.C. § 216(b). Alternatively, should the Court find Defendants did not act willfully in failing to pay minimum wage, Plaintiff and all similarly situated employees are entitled to an award of prejudgment interest at the applicable legal rate.

68. As a result of the aforesaid willful violations of the FLSA's minimum wage provisions, minimum wage compensation has been unlawfully withheld by Defendants from Plaintiff and all similarly situated employees. Accordingly, Defendants are liable under 29 U.S.C. § 216(b), together with an additional amount as liquidated damages, pre-judgment and post-judgment interest, reasonable attorneys' fees, and costs of this action.

WHEREFORE, Plaintiff and all similarly situated delivery drivers demand judgment against Defendants and request: (1) compensatory damages; (2) liquidated damages; (3) attorneys' fees and costs as allowed by Section 16(b) of the FLSA; (4) pre-judgment and post-judgment interest as provided by law; and (5) such other relief as the Court deems fair and equitable.

COUNT II

69. Plaintiff reasserts and re-alleges the allegations set forth above.

70. At all relevant times herein, Plaintiff and the Class have been entitled to the rights, protections, and benefits provided under the CMWWA, C.R.S.A. § 8-6-101, *et seq.* and the wage orders incorporated therein, 7 CCR § 1103-1.

71. During all times relevant to this action, Defendants were the "employers" of Plaintiff and the Class within the meaning of the CMWWA. *Id.*

72. During all times relevant to this action, Plaintiff and the Class were Defendants' "employees" within the meaning of the CMWWA. *Id.*

73. The CMWWA exempts certain categories of employees from Colorado's minimum wage and other obligations, none of which apply to Plaintiff or the Class. C.R.S.A. § 8-6-108.5, *et seq.*; 7 CCR 1103-1.

74. The CMWWA regulates, among other things, the payment of minimum wage by employers who employ any person in Colorado, subject to limited exemptions not applicable herein. C.R.S.A. § 8-6-108.5; 7 CCR 1103-1.

75. Pursuant to the CMWWA, employees were entitled to be compensated at a rate of $7.78 per hour in 2013, $8.00 per hour in 2014, $8.23 in 2015 and $8.31 in 2016. *Id.*

76. Defendants, pursuant to their policy and practice, violated the CMWWA by refusing and failing to pay Plaintiff and other similarly situated employees Colorado minimum wage. *Id*.

77. Plaintiff and the Class are victims of a uniform and employer-based compensation policy. Upon information and belief, this uniform policy, in violation of the CMWWA, has

been applied, and continues to be applied, to all Class members in Defendants' other Domino's Pizza stores in Colorado.

78. Plaintiff and all similarly situated employees are entitled to damages equal to the difference between the minimum wage and actual wages received after deduction for job-related expenses within the two years preceding the filing of this Complaint, plus periods of equitable tolling.

79. Plaintiff and the Class are entitled to an award of pre-judgment and post-judgment interest at the applicable legal rate.

80. Defendants are liable pursuant to C.R.S.A. § 8-6-118 for Plaintiff's costs incurred in this action.

WHEREFORE, on Count II of this Complaint, Plaintiff and the Class demand judgment against Defendants and pray for: (1) compensatory damages; (2) costs of litigation as allowed by C.R.S.A. § 8-6-118; (3) pre-judgment and post judgment interest as provided by law; and (4) such other relief as the Court deems fair and equitable.

Demand for Jury Trial

Plaintiff hereby requests a trial by jury of all issues triable by jury.

Dated: November 18, 2016

Respectfully submitted,

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