

**AMERICAN ARBITRATION ASSOCIATION**

JAMES SULLIVAN, individually and on	)	
behalf of other similarly situated persons,	)	
	)	Case No. 30 160 597 13
Claimant,	)	
	)	
v.	)	
	)	
PJ UNITED, INC., PJ CHEESE, INC.,	)	
PJ LOUISIANA, INC., PJ CHIPPEWA, LLC,	)	
OHIO PIZZA DELIVERY, INC., PJ UTAH	)	
LLC and DOUGLAS STEPHENS,	)	
	)	
Respondents.	)	

**STATEMENT OF CLAIM**

Claimant James Sullivan, individually and on behalf of all other similarly situated delivery drivers, for his Statement of Claim against respondents PJ United, Inc., PJ Cheese, Inc., PJ Louisiana, Inc., PJ Chippewa, LLC, Ohio Pizza Delivery Co., PJ Utah LLC, and Douglas Stephens, alleges as follows:

1. Respondents operate approximately 158 Papa John’s restaurants in Alabama, Louisiana, Texas, Mississippi, Tennessee, Illinois, Missouri, Ohio, Virginia, and Utah. Respondents’ restaurants employ delivery drivers who use their own automobiles to deliver pizza and other food items to customers. Instead of reimbursing delivery drivers for the reasonably approximate cost of the business use of their vehicles, Respondents 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 federal minimum wage rate during some or all workweeks.

2. Claimant James Sullivan, and all other similarly situated delivery drivers, work or previously worked as delivery drivers at Papa John's restaurants owned and operated by Respondents. This case is brought 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 Claimant and all other similarly situated workers employed by Respondents.

### **Jurisdiction and Venue**

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

4. Arbitration in this venue is provided for in Defendants' Dispute Resolution Program.

### **Parties**

5. Respondent PJ United, Inc. ("PJU") is a Delaware corporation headquartered in Birmingham, Alabama.

6. Respondent PJ Cheese, Inc. is an Alabama corporation headquartered in Montgomery, Alabama and is a subsidiary of PJU.

7. Respondent PJ Louisiana, Inc. is a Louisiana corporation headquartered in Baton Rouge, Louisiana and is a subsidiary of PJU.

8. Respondent PJ Chippewa, LLC is a Louisiana company headquartered in Baton Rouge, Louisiana and is a subsidiary of PJU.

9. Respondent Ohio Pizza Delivery Co. is an Ohio company headquartered in Ohio and is a wholly-owned subsidiary of PJ United.

10. Respondent PJ Utah, LLC is a Utah company headquartered in Murray, Utah and is a subsidiary of PJU.

11. Respondent Douglas Stephens is a *sui juris* individual who, during times relevant, has owned a substantial part of PJU; has served as PJU's President and Chief Executive Officer; has served as PJ Cheese's President; is an officer of PJ Louisiana; has been involved in the corporate Respondents' day-to-day operations; has held direct responsibility for supervising employees and/or has controlled significant aspects of the corporate Respondents' day-to-day functions including compensation of employees, reimbursement of employees or other matters in relation to employees. Respondent Stephens therefore falls within the FLSA's broad definition of "employer." 29 U.S.C. § 203(d).

12. Collectively, Respondents operate Papa John's restaurants in Alabama, Louisiana, Texas, Mississippi, Tennessee, Illinois, Missouri, Ohio, Virginia, and Utah and are together deemed joint employers under the FLSA.

13. Claimant James Sullivan was employed by Respondents from approximately May 2008 through November 2009 and November 2010 through January 2012 as a delivery driver at their Papa John's restaurant located in Northport, Alabama. To date, Elizabeth Sullivan, Jennifer Manhave, and John Trago have also filed consents to join this case under 29 U.S.C. § 216(b). These Claimants' consents to join this case are attached as Exhibit A.

## General Allegations

### ***Respondents' Business***

14. Respondents own and operate approximately 158 Papa John's restaurants in Alabama, Louisiana, Texas, Mississippi, Tennessee, Illinois, Missouri, Ohio, Virginia, and Utah.

15. The primary function of Respondents' Papa John's restaurants is to sell pizza and other food items to customers, whether they carry out the food or have it delivered.

16. Respondents' restaurants employ delivery drivers who all have the same primary job duty: to deliver pizzas and other food items to customers' homes or workplaces.

17. Claimant Sullivan, the Opt-In Claimants, and all other similarly situated persons have been employed by Respondents within three years of the filing of this action.

### ***Respondents' Flawed Reimbursement Policy***

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

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

20. Despite the relative ease of tracking actual miles driven by its drivers, Respondents do not do so. Instead, Respondents reimburse delivery drivers using a set amount for each delivery, regardless of length. This method underestimates not only the automobile expenses per mile incurred by Respondents' delivery drivers, but also the number of miles driven by delivery drivers, thereby causing drivers to receive a lower reimbursement rate than even that contemplated by Respondents' flawed reimbursement formula.

21. The net result of Respondents' delivery driver reimbursement policy is a reimbursement of much less than the reasonably approximated automobile expenses of Respondents' delivery drivers.

22. During the applicable limitations period, the IRS business mileage reimbursement rate ranged between \$.50 and \$.585 per mile. Likewise, reputable companies that study the cost of owning and operating a motor vehicle and/or reasonable reimbursement rates, including the AAA, have determined that the composite average cost of owning and operating a vehicle ranged between \$.566 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.

23. 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. Respondents' 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.

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

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

26. Respondents 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 requirements.

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

***Respondents' Failure to Reimburse Automobile Expenses Causes Minimum Wage Violations***

28. Regardless of the precise amount of the per-delivery reimbursement at any given point in time, Respondents' reimbursement formula has always resulted in an

unreasonable underestimation of delivery drivers' automobile expenses, causing systematic violations of the federal minimum wage.

29. Claimant Sullivan was at all times relevant paid precisely the federal minimum wage of \$7.25 per hour before deducting unreimbursed business expenses. Because Respondents claimed a tip credit to increase drivers' wages (before deducting unreimbursed vehicle expenses) to the federal minimum wage, Claimant alleges on information and belief that all delivery drivers were paid precisely the federal minimum wage before deducting unreimbursed business expenses.

30. Throughout his employment delivering pizzas for Respondents, Claimant Sullivan drove a 1999 Ford Escort, a 2000 Ford Taurus and a 2001 Jeep Cherokee.

31. During Claimant Sullivan's employment by Respondents, the per delivery reimbursement rate at the store where Claimant worked ranged from approximately \$0.90 to \$1.15 per delivery.

32. Throughout his employment with Respondents, Claimant Sullivan has experienced an average delivery distance of over 5 miles.

33. Thus, from November 2010 to January 2012, Respondents' average effective reimbursement rate for Claimant Sullivan ranged from approximately \$.18 per mile ( $\$0.90 \text{ per delivery} / 5 \text{ miles per delivery}$ ) to approximately \$.23 per mile ( $\$1.15 \text{ per delivery} / 5 \text{ miles per delivery}$ ), considering for the purpose of this calculation a conservative underestimate of 5 average miles per delivery.

34. During this same time period, the IRS business mileage reimbursement rate ranged from \$.50 to \$.585 per mile, which reasonably approximated the automobile

expenses incurred delivering pizzas. Using the IRS rate as a reasonable approximation of Claimant Sullivan's automobile expenses, every mile driven on the job decreased his net wages by approximately \$.27 (\$.50 - \$.23) per mile at a minimum to \$.405 (\$.585 - \$.18) per mile during the recovery period. Considering a conservative underestimate of 5 miles per delivery, Respondents under-reimbursed him at least between \$1.35 per delivery (\$.27 x 5 miles) and \$2.02 per delivery (.405 x 5 miles).

35. Respondents did not ask Claimant Sullivan to track his actual automobile expenses, nor is Claimant Sullivan an expert in calculating the cost of automobile usage. Because Respondents paid their delivery drivers precisely minimum wage, any under-reimbursement necessarily reduced their wages below the minimum wage.

36. During his employment by Respondents, Claimant Sullivan typically averaged approximately 3 deliveries per hour.

37. Thus, using the IRS rate as a reasonable estimate of Claimant Sullivan's actual expenses, Claimant Sullivan "kicked back" to Respondents between approximately \$2.55 per hour (\$.85 per delivery x 3 deliveries per hour) and \$6.06 per hour (\$2.02 per delivery x 3 deliveries per hour). Because Claimant Sullivan and other similarly situated drivers were paid precisely the federal minimum wage, the amount of this "kick back" represents the amount below minimum wage that Respondents paid Claimant and other similarly situated drivers in violation of the FLSA. The amount Claimant Sullivan "kicked back" to Respondents per hour from November 2010 to January 2012 remained within that range.

38. All of Respondents' delivery drivers had similar experiences to those of Claimant Sullivan. 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 precisely the federal minimum wage before deducting unreimbursed business expenses.

39. Because Respondents paid their drivers a gross hourly wage at precisely the federal minimum wage, and because the delivery drivers incurred unreimbursed automobile expenses, the amount Respondents' delivery drivers "kicked back" to Respondents constituted minimum wage violations.

40. While the amount of Respondents' actual reimbursements per delivery vary over time, Respondents rely on the same flawed policy and methodology with respect to all of their delivery drivers. Thus, the amounts of under-reimbursements relative to automobile costs incurred are relatively consistent over time.

41. While the reimbursement amounts may differ somewhat by state or region, the amounts of under-reimbursements relative to automobile costs incurred are relatively consistent between state or region.

42. Many of Respondents' delivery drivers, including Claimant Sullivan, frequently complained about Respondents' low reimbursement rates, yet Respondents refused to reimburse to reasonably approximate delivery drivers' automobile expenses.

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

### **Collective Allegations**

44. Claimant Sullivan brings this FLSA claim as an "opt-in" collective action on behalf of similarly situated delivery drivers who opt-in to this case pursuant to 29 U.S.C. § 216(b).

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

46. Claimant Sullivan and all of Respondents' delivery drivers are similarly situated in that:

- a. They worked as delivery drivers for Respondents delivering pizza and other food items to Respondents' customers;
- b. They delivered pizza and food items using automobiles not owned or maintained by Respondents;
- c. Respondents required them to maintain these automobiles in a safe, legally-operable, and insured condition to use in delivering Respondents' pizzas and other food items;

- d. They incurred costs for automobile expenses while delivering pizzas and food items for the primary benefit of Respondents;
- 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 Respondents;
- g. They were subject to the same delivery driver reimbursement policy that systematically deprived them of reasonably approximate reimbursements, resulting in their wages falling below the federal minimum wage in some or all workweeks;
- h. They were reimbursed similar set amounts of automobile expenses per delivery, typically less than \$1.15 per delivery; and
- i. They were paid precisely the federal minimum wage before deducting unreimbursed business expenses.

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

47. Claimant reasserts and re-alleges the allegations set forth above.

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

49. Respondents 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.

50. Pursuant to 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.

51. As alleged herein, Respondents 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.

52. Respondents 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.

53. Respondents, pursuant to their policy, practice, and methodology, violated the FLSA by refusing and failing to pay federal minimum wage to Claimant and other similarly situated employees.

54. 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 Claimant or other similarly situated delivery drivers.

55. Claimant and all similarly situated delivery drivers are victims of a uniform and employer-based compensation policy. This uniform policy, in violation of the

FLSA, has been applied, and continues to be applied, to all delivery driver employees in Respondents' restaurants.

56. Claimant 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 Claimant joins this case, plus periods of equitable tolling, because Respondents acted willfully and knew, or showed reckless disregard for, whether their conduct was unlawful.

57. Respondents have acted neither in good faith nor with reasonable grounds to believe that their actions did not violate the FLSA, and as a result, Claimant 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 Respondents did not act willfully in failing to pay minimum wage, Claimant and all similarly situated employees are entitled to an award of prejudgment interest at the applicable legal rate.

58. As a result of the aforesaid willful violations of the FLSA's minimum wage provisions, minimum wage compensation has been unlawfully withheld by Respondents from Claimant and all similarly situated employees. Accordingly, Respondents 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, Claimant and all similarly situated delivery drivers demand judgment against Respondents 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 this Tribunal deems fair and equitable.

Dated: October 2, 2013

Respectfully submitted,

**HENINGER GARRISON DAVIS, LLC**

W. Lewis Garrison, Jr.

William L. Bross

Taylor C. Bartlett

2224 First Avenue North

Birmingham, AL 35203

Telephone: (205) 326-3336

Facsimile: (205) 326-3332

**PAUL McINNES LLP**

*s/Richard M. Paul III*

Richard M. Paul III (MO Bar #44233)

Jack D. McInnes (MO Bar #56904)

2000 Baltimore, Suite 100

Kansas City, Missouri 64108

Telephone: (816) 984-8100

Facsimile: (816) 984-8101

**WEINHAUS & POTASHNICK**

Mark A. Potashnick

11500 Olive Blvd., Suite 133

St. Louis, Missouri 63141

Telephone: (314) 997-9150

Facsimile: (314) 997-9170

**ATTORNEYS FOR CLAIMANT**

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was served on all counsel or parties of record via email on October 2, 2013.

William K. Hancock, Esq.  
Galloway Scott Moss & Hancock, LLC  
2200 Woodcrest Place, Suite 310  
Birmingham, AL 35209

*s/Richard M. Paul III*