

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION**

DEMARIO KINARD, Individually, and on
behalf of all others similarly situated,

Plaintiff,

-against-

MIGDALAS IP HOLDING, LLC d/b/a
“MIGS” and KESS, LLC d/b/a “MIGS OF
NEWBERRY”,

Defendants.

**COLLECTIVE ACTION
COMPLAINT**

JURY DEMAND

Plaintiff DEMARIO KINARD (“Plaintiff”), individually and on behalf of all other
similarly situated, by and through his attorneys JTB Law Group, LLC and Callison Tighe, does
hereby allege this Class and Collective Action Complaint against MIGDALAS IP HOLDING,
LLC and KESS, LLC (“Defendants”) for willful violations of the Fair Labor Standards Act, 29
U.S.C. § 201 *et seq.* “FLSA”

PRELIMINARY STATEMENT

1. Defendants, MIGDALAS IP HOLDING, LLC (“MIGDALAS”) and KESS, LLC
 (“KESS”) (collectively “Defendants”), have cooperated for the common purpose of operating
 “MIGS” franchise restaurants started by Migdalas Brothers in 1988, including MIGS OF
 NEWBERRY, MIGS OF LAURENS, MIGS OF GREENWOOD d/b/a MIGS PIZZA CASTLE,
 MIGS OF SALUDA, MIGS OF ABBEYVILLE, MIGS NINETY-SIX, and MIGS OF
 GREENVILLE.

2. Defendants have willfully and continually violated 29 U.S.C§ 207 by establishing a payroll process which compensates employees only a portion of their hourly wages via payroll check “on the books”, and the remainder of any hourly wages, including overtime, “off the books” at straight time pay.

3. Defendants rarely, if ever, paid proper overtime compensation of one and half (1.5) times the employees current pay rate due for hours in excess of forty worked in one week, in direct contravention of FLSA 29 U.S.C§ 207.

4. On information and belief, this policy has been in operation for at least ten (10) years.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, based upon the Federal Statute, the Fair Labor Standard Act, 29 U.S.C. § 201 *et seq.*

6. Defendant is subject to personal jurisdiction in South Carolina, pursuant to S.C. Code Ann. § 36-2-803(1), because it regularly transacts business in the State, solicits business in this State, derives substantial revenue from services rendered in this State, and the causes of action alleged herein arise from such conduct.

7. Venue is proper in this District pursuant to 28 U.S.C § 1391 (b) and (c) because a substantial part of the acts or omissions giving rise to the action occurred in this District and Defendants are subject to personal jurisdiction in this District.

THE PARTIES

8. Defendant MIGDALAS IP HOLDING, LLC. d/b/a “MIGS” is a business incorporated and existing under the laws of the State of South Carolina located at 1415 Hwy 72 Bypass Greenwood, South Carolina 29649.

9. MIGDALAS IP HOLDING, LLC is actively doing business in the State, owning and operating at seven (7) restaurant locations: MIGS OF NEWBERRY, MIGS OF LAURENS, MIGS OF GREENWOOD d/b/a MIGS PIZZA CASTLE, MIGS OF SALUDA, MIGS OF ABBEYVILLE, MIGS NINETY-SIX, and MIGS OF GREENVILLE.

10. Defendant MIGDALAS IP HOLDING, LLC “MIGDALAS” is engaged in interstate commerce as that term is defined under the FLSA.

11. Defendant MIGDALAS IP HOLDING, LLC has annual gross revenues exceeding \$500,000.

13. On information and belief, Kostas and Thomas Migdalas are the only officers of MIGDALAS IP HOLDING, LLC.

14. Defendant KESS, LLC d/b/a Migs of Newberry is a businesses incorporated and existing under the laws of the State of South Carolina.

15. Defendant KESS, LLC “KESS” has annual gross revenues exceeding \$500,000.

16. On information and belief, Kostas Vasilaras is the only officer of KESS, LLC.

17. KESS, LLC is actively doing business in the State with its principal place of business at 2895 Main St. Newberry, South Carolina 29108.

18. Defendant KESS, LLC is engaged in interstate commerce as that term is defined under the FLSA.

19. Plaintiff DEMARIO KINARD is a resident of South Carolina who worked for MIGS OF NEWBERRY from 2004 through 2014.

FACTUAL ALLEGATIONS

20. At all times relevant herein, Defendants have been an enterprise, “engaged in commerce or in the production of goods for commerce” as defined under 29 U.S.C § 203 (s) (1).

21. At all times relevant herein, Defendants were/are the joint employer of Plaintiff and all other similarly situated employees, within the meaning of 29 U.S.C § 203 (d).

22. At all times relevant herein, Defendants directly or indirectly hired Plaintiff and all other similarly situated hourly employees.

23. At all times relevant herein, Plaintiff and all other similarly situated employees were paid an hourly rate of compensation.

24. At all times relevant herein, Defendants controlled the work schedule and duties of Plaintiff and all other similarly situated employees.

25. At all times relevant herein, Plaintiff and all others similarly situated were classified as non-exempt from overtime.

26. At all times relevant herein, Defendants routinely required Plaintiff to work more than 40 hours in one work week.

27. Plaintiff was required to work up to a total of 70 hours every workweek, which included up to 30 hours of overtime every week in a given workweek.

28. Plaintiff began working for MIGDALAS at the Migs of Newberry location as a cook on or about 2004.

29. Plaintiff was paid an hourly rate of \$7.00 from approximately 2004 through 2008.

30. Plaintiff was paid an hourly rate of \$8.00 from approximately 2008 through 2012.

31. Plaintiff was paid an hourly rate of \$8.75 from approximately July of 2012 through August of 2014.

32. Plaintiff was paid an hourly rate of \$9.25 from approximately April 2014 till September.

33. Plaintiff was terminated in September 2014 when he refused to serve undercooked chicken to a customer.

34. Plaintiff was required to work more than 40 hours the first week he began working for MIGDALAS.

35. MIGDALAS paid Plaintiff only a portion of Plaintiffs hourly wages via payroll check, with the remaining hours, including overtime, paid in cash “off the books” at his regular hourly rate.

36. KESS began operating MIGS OF NEWBERRY in conjunction with MIGDALAS in 2004.

37. Upon information and belief, KESS made regular payments beginning in 2004 through 2012 to the MIGDALAS brothers in order to operate MIGS OF NEWBERRY.

38. KESS continued to adhere to all policies and practices established by the MIGDALAS brothers.

39. KESS continued the policy of paying employees a portion of their hourly wages in a payroll check, while paying the remainder of the wages, including overtime, in cash “off the books” at the regular hourly rate.

40. KESS continued to adhere to the same name, trade dress, marketing, and advertising policies established by MIGDALAS.

41. KESS continued to adhere to the same menu established by MIGDALAS.

42. KESS continued to adhere to the same kitchen policies established by MIGDALAS.

43. MIGDALAS selected and controlled vendors who supplied all Migs locations, including Migs of Newberry.

44. The MIGDALAS brothers routinely stopped by Migs of Newberry to inspect operations and collect payment personally from KESS.

45. KESS paid all hourly employees of Migs of Newberry cash “off the books” for any hours over 40 at straight time pay.

46. KESS paid all hourly employees of Migs of Newberry cash “off the books” for some of the straight time hours.

47. For the payroll period ending 9/7/2014 Plaintiff worked forty (40) hours of regular time and (19.42) hours of overtime.

48. For the payroll week ending 9/7/2014, Plaintiff worked 59.42 hours.

49. For the payroll week ending 9/7/2014, Plaintiff worked 40 hours of regular time.

50. For the payroll week ending 9/7/2014, Plaintiff worked 19.42 hours of overtime.

51. Defendants issued a payroll check for the payroll week ending 9/7/2014, listing Plaintiff as working only .71 hours of overtime.

52. Defendants only paid Plaintiff for .71 hours of overtime at the correct time and a half (1.5) rate.

53. Defendants failed to pay a premium of time and half (1.5) for the 18.71 overtime hours worked.

54. For the payroll period ending 9/7/2014, Plaintiff was paid straight time in cash “off the books” for (18.71) hours of overtime worked.

55. For the payroll period ending 9/14/2014, Plaintiff worked (40) hours of regular time and (12.32) hours of overtime.

56. For the payroll period ending 9/14/2014, Plaintiff worked (52.32) hours.

57. For the payroll period ending 9/14/2014, Plaintiff worked (40) hours of regular time.

58. For the payroll period week ending 9/14/2014, Plaintiff worked (12.32) hours of overtime.

59. Defendant issued Plaintiff a payroll check for the week ending 9/14/2014, which lists Plaintiff as only working (30.53) hours total for the entire week.

60. Defendants paid Plaintiff for 9.47 hours of regular wages “off the books” in cash under the table.

61. Defendants failed to pay proper “on the books” wages for the 9.47 hours worked.

62. Defendants paid Plaintiff for 12.32 hours of overtime wages “off the books” in cash under the table at straight rates.

63. The Defendants failed to pay a premium of time and half (1.5) for the 12.32 overtime hours worked.

64. Further, Defendants saved money on payroll taxes and contributions that should be for the long term benefit of the employee by paying the employee “off the books.”

65. The practice of neglecting to pay employees overtime pay was continuous and pervasive during the statutory period.

66. The practice of paying employees overtime at a straight rate “off the books” was continuous and pervasive during the statutory period.

67. The practice of paying employees overtime at a straight rate “off the books” extended to all the other hourly employees during the statutory period.

68. Upon information and belief, during the three year statutory period, Defendants employed this customary practice in willful contravention of 29 U.S.C§ 207.

69. At all times relevant herein, Defendants controlled the work schedules and conditions of employment for Plaintiff and all other similarly situated hourly employees.

CLASS AND COLLECTIVE ALLEGATIONS

70. Plaintiff repeats and realleges all of the preceding paragraphs of this Complaint, as if fully set forth herein.

71. Plaintiff brings this action, individually and on behalf of all other similarly situated hourly employees, former and present, who were/ are affected by the Defendants willful and intentional violation of the FLSA, as described in this Complaint.

72. Plaintiff brings this class and collective action to recover monetary damages owed by Defendants to putative class and collective members for all unpaid overtime wages.

73. Plaintiff brings this claim for relief for Defendants’ willful violation of the FLSA, as a collective action pursuant to FLSA, 29 U.S.C. § 216 (b).

a. The collective is defined as follows:

1. All current and former hourly employees of MIGS OF NEWBERRY from November 17, 2011 to present who worked at least one hour of overtime.

74. This action is properly brought as a collective action pursuant to the collective action procedures of the FLSA because, Plaintiff and the putative class members are similarly situated in that they all are/ were subject to Defendants routine policy of not paying time and a half (1.5) of the regular hourly pay for hours worked in excess of forty (40) in one week.

FIRST CLAIM FOR RELIEF

(INDIVIDUAL VIOLATION OF FAIR LABOR STANDARDS ACT)

75. Plaintiff realleges each paragraph above as if set forth verbatim herein.

76. Plaintiff was required by Defendants to routinely work over 40 hours a week without proper overtime compensation of time and half their regular rate of pay in hours worked over 40, in violation of the FLSA.

77. Defendants' custom and policy of not paying overtime by giving employees straight time in cash "off the books" is a systemic willful and/or intentional violation.

78. Due to this willful violation of the FLSA the three year statute of limitations applies pursuant to 29 U.S.C. § 255.

79. As a result of the foregoing, Plaintiff was illegally denied proper overtime compensation earned, in such amounts to be determined at trial, and is entitled to recovery of total unpaid amounts including liquidated damages, pre judgment interests, costs, reasonable attorney's fees, and other compensation pursuant to 29 U.S.C. § 216 (b).

SECOND CLAIM FOR RELIEF

(COLLECTIVE ACTION VIOLATION OF FAIR LABOR STANDARDS ACT)

80. Plaintiffs reallege each paragraph above as if set forth verbatim herein.

81. Plaintiffs and putative collective members were required by Defendants to routinely work over 40 hours a week without proper overtime compensation of time and half their regular rate of pay in hours worked over 40, in violation of the FLSA.

82. Defendants custom and policy of evading lawful overtime pay by compensating employees straight time in cash “off the books” is a willful and/or intentional violation, which has been occurring for over ten years.

83. Due to this willful violation of the FLSA, the three year statute of limitations applies pursuant to 29 U.S.C. § 255.

84. As a result of the foregoing, Plaintiffs were illegally denied proper overtime compensation earned, in such amounts to be determined at trial, and are entitled to recovery of total unpaid amounts including liquidated damages, pre judgment interests, costs, reasonable attorney’s fees, fees, and other compensation pursuant to 29 U.S.C. § 216 (b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

(A) A declaratory judgment that Defendants’ wage practices alleged herein violate the FLSA, 29 U.S.C. § 201 *et seq.*, an attendant regulations at 29 C.F.R. § 516 *et seq.*

(B) An order for injunctive relief ordering Defendants to end all of the illegal wage practices alleged herein pursuant to FLSA, State statutes, and related laws and regulations.

(C) An order directing Defendants, at their own expense, to investigate and account for the number of overtime hours actually worked by Plaintiff and all class and collective members.

(D) Judgment for damages for all unpaid wages and overtime compensation under the FLSA 29 U.S.C. § 201, *et seq.*, and attendant regulations at 29 C.F.R. § 516 *et seq.*

(E) Judgment for liquidated damages pursuant to the FLSA 29 U.S.C. § 201, *et seq.*, and attendant regulations at 29 C.F.R. § 516 *et seq.*, in an amount equal to all unpaid wages and overtime compensation owed to plaintiff during the applicable statutory period.

(F) Judgment for lost wages pursuant to 29 U.S.C. § 15(a)(3).

(G) Judgment for liquidated damages pursuant to 29 U.S.C. § 15(a)(3).

(H) Judgment for any and all civil penalties to which Plaintiff and all class and collective members may be entitled.

(I) An order directing Defendants to pay Plaintiff and all class and collective members prejudgment interest, reasonable attorney's fees and all costs connected with his action.

(J) Incentive awards for the Lead Plaintiff.

(K) Certification of the FLSA collective.

(L) Equitable Tolling for the FLSA collective.

(M) Such other and further relief as to this Court may deem necessary, just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands trial by jury on all questions of fact raised by the complaint.

[Signature Block on Next Page]

Dated: December 16, 2014

Respectfully submitted,

s/Janet E. Rhodes

Janet E. Rhodes, Esquire (Fed. ID #10521)

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