

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

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| <p>Jennifer Hope Montgomery, on behalf of herself and all others similarly situated,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>Lovin’ Oven Catering Suffolk, Inc., 21 Main North Beach, LLC, William Riley, Gerard Scollan and Matthew Scollan</p> <p style="text-align: center;">Defendants.</p> | <p style="text-align: center;">CLASS ACTION COMPLAINT (Jury Trial Demanded)</p> |
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1. Plaintiff, Jennifer Hope Montgomery (“Plaintiff”), on behalf of herself and all other similarly situated, alleges as follows:

JURISDICTION AND VENUE

2. This Court has original federal question jurisdiction under 28 U.S.C. § 1331 because this case is brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* (“FLSA”). This Court has supplemental jurisdiction over the South Carolina state law claims under 28 U.S.C. § 1367, as they are so related in this action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

3. Venue is proper in this District because Defendants’ conduct business in this District, and the acts and/or omissions giving rise to the claims herein alleged took place in this District. Furthermore, this action is filed in this division pursuant to Local Rule 3.01(A)(1).

PARTIES

4. All Defendants are hereinafter collectively referred to as “Defendants.”

5. Defendant Lovin' Oven Catering Suffolk, Inc. ("Lovin' Oven") is a Delaware corporation, with its principal place of business in Sayville, New York. Upon information and belief, Lovin' Oven owns and operates 21 Main Events at North Beach through 21 Main North Beach, LLC, a South Carolina corporation. Located in North Myrtle Beach, 21 Main Events at North Beach is set in the Plantation House at North Beach Plantation. Lovin' Oven is the food & beverage service provider at North Beach Plantation's locations, including Seaside Café, BLU, Poolside Bar & Grill and 21 Main Prime Steak House and Sushi Bar. In addition, Lovin' Oven also owns and operates Cinzia Spa and Beach Fit Fitness Center which are both located in the Plantation House.

6. Upon information and belief, Lovin' Oven has an annual gross volume in sales in excess of \$500,000.

7. Defendants William Riley ("Riley") and Gerard Scollan and Matthew Scollan (collectively "Scollan") are owners and operators of Lovin' Oven. Upon information and belief, Defendants Riley and Scollan exercise sufficient control of each location's day-to-day operations to be considered employers of Plaintiff and those similarly situated under FLSA and South Carolina's labor laws.

8. Plaintiff was employed by Defendants as a massage therapist at Lovin' Oven's Cinzia Spa within the relevant limitations periods.

FLSA COLLECTIVE ACTION ALLEGATIONS

9. Plaintiff brings the First Claim for Relief as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of all individuals employed by Defendants who were misclassified as independent contractors and who were not paid at least minimum wage or

overtime compensation as required by FLSA on or after the date that is three years before the filing of the Complaint in this case as defined herein (“FLSA Collective Plaintiffs”).

10. Plaintiff also brings the First Claim for Relief as a collective action pursuant to Section 16(b), 29 U.S.C. § 216(b), on behalf of all individuals employed by Defendants who were misclassified as independent contractors at any time within the three years prior to joining this lawsuit, and who were required to pay any portion of their compensation to the owners, managers, employees, or agents of Defendants or had any compensation deducted for mandatory payments to owners, managers, employees, or agents of Defendants, tip-outs, or other similar charges, without receiving written notice of such deductions pursuant to the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, *et seq.*

11. At all relevant times, Plaintiff and the FLSA Collective Plaintiffs are and have been similarly situated, have had substantially similar job requirements and pay provisions, and are and have been subject to Defendants’ decision, policy, plan and common policies, programs, practices, procedures, protocols, routines, and rules willfully failing and refusing to pay them for unpaid minimum wages, overtime compensation at the legally required one and one half times their regular rates for work in excess of forty (40) hours per work week, liquidated damages, and other relief under FLSA. Plaintiff’s claims stated herein are essentially the same as those of the other FLSA Collective Plaintiffs.

12. The First Claim for Relief is properly brought under and maintained as an opt-in collective action pursuant to § 16(b) of the FLSA, 29 U.S.C. 216(b). The FLSA Collective Plaintiffs are readily ascertainable. For purpose of notice and other purposes related to this action, their names and addresses are readily available from the Defendants. Notice can be provided to the FLSA Collective Plaintiffs via first-class mail to the last address known to Defendants.

CLASS ACTION ALLEGATIONS

13. Pursuant to Federal Rule of Civil Procedure 23, Plaintiff brings the Second Claim for Relief on behalf of all non-exempt persons employed by Defendants in any tipped position on or after the date that is three years before the filing of the Complaint in this case as defined herein (the “Class Period”).

14. All said persons, including Plaintiff, are referred to herein as the “Class.” The Class members are readily ascertainable. The number and identity of the Class members are determinable from the records of Defendants. The hours assigned and worked, the positions held, and the rates of pay for each Class member are also determinable from Defendants’ records. For purposes of notice and other purposes related to this action, their names and addresses are readily available from Defendants. Notice can be provided by means permissible under said Fed. R. Civ. P. 23.

15. The proposed Class is so numerous that joinder of all members is impracticable, and the disposition of their claims as a class will benefit the parties and the court. Although the precise number of such persons is unknown, and the facts on which the calculation of that number are presently within the sole control of Defendants, upon information and belief, there are more than fifty (50) members of the Class.

16. Plaintiff’s claims are typical of those claims which could be alleged by any member of the Class, and the relief sought is typical of the relief which would be sought by each member of the Class in separate actions. All the Class members were subject to the same corporate practices of Defendants, as alleged herein, of failing to pay overtime compensation, and illegal retention of tips. Defendants’ corporate-wide policies and practices affected all Class members similarly, and Defendants benefited from the same type of unfair and/or wrongful acts as to each Class member.

Plaintiff and other Class members sustained similar losses, injuries, and damages arising from the same unlawful policies, practices, and procedures.

17. Plaintiff is able to fairly and adequately protect the interests of the Class and has no interests antagonistic to the Class. Plaintiff is represented by attorneys who are experienced and competent in both class action litigation and employment litigation and have previously represented plaintiffs in wage and hour cases.

18. A class action is superior to other available methods for the fair and efficient adjudication of the controversy – particularly in the context of wage and hour litigation where individual class members lack the financial resources to vigorously prosecute a lawsuit against corporate defendants. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of efforts and expense that numerous individual actions engender. Because the losses, injuries, and damages suffered by each of the individual Class members are small in the sense pertinent to a class action analysis, the expenses and burden of individual litigation would make it extremely difficult or impossible for the individual Class members to redress the wrongs done to them. On the other hand, important public interests will be served by addressing the matter as a class action. The adjudication of individual litigation claims would result in great expenditure of Court and public resources; however, treating the claims as a class action would result in significant saving of these costs. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent and/or varying adjudications with respect to the individual members of the Class, establishing incompatible standards of conduct for Defendants and resulting in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties. The issues in this

action can be decided by means of common, class-wide proof. In addition, if appropriate, the Court can, and is empowered to, fashion methods to efficiently manage this action as a class action.

19. Upon information and belief, Defendants and other employers throughout the state violate the South Carolina labor laws. Current employees are often afraid to assert their rights out of fear of direct or indirect retaliation. Former employees are fearful of bringing claims because doing so can harm their employment, future employment, and future efforts to secure employment. Class actions provide class members who are not named in the complaint a degree of anonymity which allows for the vindication of their rights while eliminating or reducing these risks.

20. There are questions of law and fact common to the Class which predominate over any questions affecting only individual class members, including:

- a. Whether Defendants employed Plaintiff and the Class within the meaning of South Carolina law;
- b. At what common rate, or rates subject to methods of calculation, was and is Defendants required to pay the Class members for their work;
- c. Whether Defendants illegally retained portions of Plaintiff's tips and the Class members' tips.

FACTS

21. Defendants committed the following alleged acts knowingly, intentionally, and willfully.

22. Defendants have misclassified Plaintiff and members of the Class as independent contractors, when in reality they are employees of Defendants under applicable legal standards.

23. At all times relevant to this Complaint, Defendants have exercised extensive control over the manner in which Plaintiff and the members of the Class perform their jobs and conduct

themselves on Defendants' premises, including when and how Plaintiff and the Class perform, what they are allowed to wear, how much they can charge or receive for massage therapy sessions, and how they can interact with customers.

24. Defendants knew that nonpayment of minimum wage, nonpayment of overtime, and improperly forcing and/or the Plaintiff, the FLSA Collective Plaintiffs, and Class members to share their tips with Defendants' agents would economically injure Plaintiff and violated federal and state laws.

FIRST CLAIM FOR RELIEF
(FLSA Overtime and Failure to Pay Minimum Wage Violations, 29 U.S.C. §§ 201 et seq.)
(Brought by Plaintiff on Behalf of Herself and the FLSA Collective Plaintiffs)

25. Plaintiff, on behalf of herself and other FLSA Collective Plaintiffs, realleges and incorporates by reference all previous paragraphs.

26. Throughout the state of limitations period covered by these claims, Plaintiff and the other FLSA Collective Plaintiffs regularly worked in excess of forty (40) hours per workweek.

27. At all relevant times, Defendants had and operated under a decision, policy and plan, and under common policies, programs, practices, procedures, protocols, routines, and rules of willfully failing and refusing to pay the Class members an hourly rate of at least the minimum wage of \$7.25 per hour for each and every hour worked, as required by Section 6(a)(1)(C) of the FLSA, and one and one half times their regular rates for work in excess of forty (40) hours per workweek, and willfully failing to keep records required by the FLSA even though the FLSA Collective Plaintiffs have been and are entitled to minimum wage and overtime.

28. At all relevant times, Defendants willfully, regularly and repeatedly failed to pay Plaintiff and the FLSA Collective Plaintiffs at the required overtime rates, one and one half times their regular rates, for hours worked in excess of forty (40) hours per workweek.

29. Plaintiff and the Class members are entitled to back wages at the minimum wage rate of \$7.25 per hour for every hour worked, pursuant to the FLSA.

30. Plaintiff, on behalf of herself and the FLSA Collective Plaintiffs, seeks damages in the amount of their respective unpaid overtime compensation, liquidated (double) damages as provided by the FLSA for overtime violations, attorneys' fees and costs, and such other legal and equitable relief as this Court deems just and proper.

31. The work and pay records of Plaintiff and the Class members are in the possession, custody, and/or control of Defendants, and Defendants are under a duty pursuant to Section 11(c) of the FLSA, 29 U.S.C. § 211(c), and pursuant to the regulations of the United States Department of Labor to maintain and preserve such payroll and other employment records from which the amount of Defendants' liability can be ascertained. Plaintiff and the Class members request an Order of this Court requiring Defendants to preserve such records during the pendency of this action.

SECOND CLAIM FOR RELIEF
(FLSA Unlawful Kick-Backs, 29 U.S.C. §§ 201 et seq.)
(Brought by Plaintiff on Behalf of Herself and the FLSA Collective Plaintiffs)

32. Plaintiff, on behalf of herself and the Class members, realleges and incorporates by reference all previous paragraphs.

33. The mandatory deductions and tip-outs that Defendants required from Plaintiff and the Class members constitute unlawful "kick-backs" to an employer under the FLSA.

34. Plaintiff and the Class members are entitled to an award of back pay for all unlawful kick-backs required by Defendants.

35. Defendants' obtained the unlawful kick-backs knowingly, willfully, intentionally, or in bad faith.

36. Plaintiff and the Class members are entitled to liquidated damages equal to the amount of unlawful kick-backs, pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b).

37. Plaintiff and the Class members are also entitled to an award of reasonable attorneys' fees and costs incurred in prosecuting this action, pursuant to 29 U.S.C. § 216(b).

THIRD CLAIM FOR RELIEF

(South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 et seq.)
(Brought by Plaintiff on Behalf of Herself and the Class Members)

38. Plaintiff, on behalf of herself and the Class members, realleges and incorporates by reference all previous paragraphs.

39. Defendants are "employers" as defined by the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10(1), because they employ individuals within the State of South Carolina.

40. Defendants received gratuities from the customers for all private massages.

41. Defendants failed to provide written notice to Plaintiffs and the Class members of any and all deductions to their pay, as required by Section 41-10-30 of the Act.

42. Defendants have failed to pay Plaintiff and the Class members all wages due, as required by Sections 41-10-40 and 41-10-50 of the Act, because of the unlawful deductions to their pay.

43. As a result of Defendants' willful violations of the South Carolina Code, Plaintiff and the Class members are entitled to recover their respective withheld gratuities, liquidated (triple) damages as provided by S.C. Code § 41-10-80(c), attorneys' fees and costs, pre-and post-judgment interest, and such other legal and equitable relief as this Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and the FLSA Collective Plaintiffs and the Class members, pray for the following:

- a. Designation of this action as a collective action on behalf of the FLSA Collective Plaintiffs (asserting FLSA claims and state claims) and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated members of the FLSA opt-in class, apprising them of the pendency of this action, and permitting them to assert timely FLSA claims and state claims in this action by filing individual Consent to Sue forms pursuant to 29 U.S.C. § 216(b).
- b. Designation of Plaintiff as Representative of the FLSA Collective Plaintiffs;
- c. Designation of this action as a class action pursuant to Fed. R. Civ. P. 23;
- d. Designation of Plaintiff as Representative of the Class;
- e. An award of damages, according to proof, including liquidated damages, to be paid by Defendant;
- f. Penalties available under applicable laws;
- g. Costs of action incurred herein, including expert fees;
- h. Attorneys' fees, including fees pursuant to 29 U.S. C. § 216, S.C. Code § 41-10-80(c), and other applicable statutes;
- i. Pre-judgment and post-judgment interest, as provided by law; and
- j. Such other and further legal and equitable relief as this Court deems necessary, just, and proper.

Plaintiffs request a jury trial on all counts so triable.

Respectfully submitted,

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