

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ROBERT AILSWORTH, III, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

Harbor Inn Richland, Inc., Harbor Inn Seafood
Restaurant, Inc., Harbor Inn Columbia, LLC,
Harbor Inn/Brevard, LLC, Harbor Inn
Seafood, Inc., Harbor Inn Seafood Restaurant,
Inc. Harbor Inn Buying Group, Inc., Chris
Fotinos, Inc., Chris Fotinos Harbor Inn
Seafood, Inc., Chris Fotinos SC, Inc. and
Athansios H. Leloudis, ET. AL., LLC.

Defendants.

C.A. No. ~~XXXXXX~~ 3:16-cv-02946-CMC

**FLSA
COLLECTIVE ACTION
COMPLAINT**

JURY TRIAL DEMANDED

Plaintiff Robert Ailsworth, III (“Plaintiff”) brings this collective action complaint on behalf of himself and all other similarly situated persons who are or were employed at the Harbor Inn restaurants located in Columbia, South Carolina, Greenville, South Carolina, Lexington, South Carolina, Asheville, North Carolina, Morganton, North Carolina, Charlotte, North Carolina and Augusta, Georgia and owned and/or managed by Defendants (“Defendants”) and, by counsel, alleges as follows:

NATURE OF ACTION

1. This is an action brought individually and as a collective action for unpaid minimum wages, liquidated damages, and other relief under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (the “FLSA”).

2. Defendants violated the FLSA by paying less than the minimum wage to Plaintiff and other similarly situated employees and claiming a tip credit when the Defendants required them to participate in an invalid tip pool.

3. Specifically, Defendants required Plaintiff and other tipped employees to give ten (10%) of tips received during their shift to the manager or employee closing the shift with the understanding that those tips would be shared with the bus boys working that shift.

4. The management person responsible for closing tells the Plaintiff and other similarly situated employees how much they had made in tips on the credit cards processed by the customers they served on that shift¹ and asks them how much they made in cash tips on that shift.

5. The management person responsible for closing takes that information and then retains ten percent (10%) of those tips to purportedly be shared with the bus boys on that shift.

6. Upon information and belief, the bus boys on that shift do not receive the ten percent (10%) received by Defendants.

7. Upon information and belief, Defendants keep the ten percent (10%) of the server tips from that shift.

8. Defendants' bus boys were paid \$7.25 an hour and do not receive tips.

9. The collective action provisions of the FLSA provide for opt-in class participation. 29 U.S.C. § 216(b). Plaintiff's consent/opt-in form is attached hereto as **Exhibit A-1**.²

¹ Recently, Defendants have installed a point of sale system, which also shows the servers their total credit card tips on the shift.

² Subsequent consent/opt-in forms will be filed as A-2, A-3, A-4, etc. as they are received.

10. Section 7 of the National Labor Relations Act (NLRA) provides that “[e]mployees shall have the right to self-organization, to form, join, or assistant labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Section 8 enforces Section 7 unconditionally by deeming it “ shall be an unfair labor practice for an employer...to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].

11. Under the NLRA arbitration agreements seeking to prohibit an employee from participating in a collective action under the FLSA are unlawful and unenforceable. *Lewis v. Epic Systems Corp.*, _____ F.3d _____ (7th Cir. 2016)(2016 WL 3029464); *Morris v. Ernst & Young, LLP*, 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016).

PARTIES, JURISDICTION, AND VENUE

12. Plaintiff Ailsworth is a citizen and resident of Kershaw County, the State of South Carolina. Plaintiff has been employed by Harbor Inn Richland Inc. at its restaurant located at Two Notch Road location in Columbia, South Carolina (“HI Columbia”) since March 11, 2015 and the tip share policy described herein has been in place since his employment began.

13. Defendant Harbor Inn Richland, Inc. (“Harbor Inn Richland”) is a for-profit company incorporated in the State of South Carolina that owns and operates HI Columbia. HI Richland employs Plaintiff. HI Columbia has a gross annual volume of business of \$500,000 or more and is subject to the jurisdiction of the NLRA. HI Columbia is part of eight (8) restaurants owned in whole or part by George Fotinos and operated in North Carolina, South Carolina, and

Georgia by the current ownership group since on or about January 2010 with its headquarters located in Greenville, South Carolina, (the “Harbor Inn Restaurant Family”).

14. Defendant Harbor Inn Seafood Restaurant, Inc. is a for-profit company incorporated in the State of South Carolina that owns and operates the Harbor Inn Lexington South Carolina restaurant (“HI Lexington”). HI Lexington has a gross annual volume of business of \$500,000 or more and is subject to the jurisdiction of the NLRA. HI Lexington is part of the Harbor Inn Restaurant Family.

15. Defendant Harbor Inn Columbia LLC (HI Columbia LLC) is a for-profit company incorporated in the State of South Carolina that owns, operates, manages and directs policy, including but not limited to the tip share policy that is the subject of this case. HI Columbia LLC is part of the Harbor Inn Restaurant Family. HI Columbia LLC has a gross annual volume of business of \$500,000 or more and is subject to the jurisdiction of the NLRA

16. Defendant Harbor Inn/Brevard, LLC is a for-profit company incorporated in the State of South Carolina that owns and operates the Harbor Inn restaurant located in Asheville, North Carolina (“HI Asheville”). HI Asheville has a gross annual volume of business of \$500,000 or more and is subject to the jurisdiction of the NLRA. HI Asheville is part of the Harbor Inn Restaurant Family.

17. Defendant Harbor Inn Seafood, Inc. is a for-profit company incorporated in the State of Georgia that owns and operates the Harbor Inn restaurant located in Augusta, Georgia (“HI Augusta”). HI Augusta has a gross annual volume of business of \$500,000 or more and is subject to the jurisdiction of the NLRA. HI Augusta is part of the Harbor Inn Restaurant Family.

18. Defendant Harbor Inn Seafood Restaurant, Inc. (NC) is a for-profit company incorporated in the State of North Carolina that owns, operates, manages and directs policy,

including but not limited to the tip share policy that is the subject of this case, at the Harbor Inn restaurant located in Charlotte, Asheville, and Morganton, North Carolina (“HI North Carolina”). HI North Carolina has a gross annual volume of business of \$500,000 or more and is subject to the jurisdiction of the NLRA. HI North Carolina is part of the Harbor Inn Restaurant Family.

19. Defendant Harbor Inn Buying Group, Inc. is a for-profit company incorporated in the State of South Carolina that owns, operates, manages and directs policy, including but not limited to the tip share policy that is the subject of this case, at the Harbor Inn restaurants located in Columbia, Anderson, Lexington, and Greenville, South Carolina (“HI South Carolina Restaurants”). HI South Carolina Restaurants have a gross annual volume of business of \$500,000 or more and is subject to the jurisdiction of the NLRA. HI South Carolina Restaurants is part of the Harbor Inn Restaurant Family.

20. Defendant Chris Fotinos, Inc is a for-profit company incorporated in the State of North Carolina that owns, operates, manages and directs policy, including but not limited to the tip share policy that is the subject of this case, at the HI South Carolina Restaurants. HI South Carolina Restaurants are part of the Harbor Inn Restaurant Family. Chris Fotinos, Inc. has a gross annual volume of business of \$500,000 or more and is subject to the jurisdiction of the NLRA.

21. Defendant Chris Fotinos, Harbor Inn, Inc. is a for-profit company incorporated in the State of South Carolina that owns, operates manages and directs policy, including but not limited to the tip share policy that is the subject of this case, at the HI South Carolina Restaurants. HI South Carolina Restaurants are part of the Harbor Inn Restaurant Family. Chris Fotinos, Harbor Inn, Inc. has a gross annual volume of business of \$500,000 or more and is subject to the jurisdiction of the NLRA.

22. Defendant Chris Fotinos SC, Inc is a for-profit company incorporated in the State of South Carolina that owns, operates, manages and directs policy, including but not limited to the tip share policy that is the subject of this case, at the HI South Carolina Restaurants. HI South Carolina Restaurants are part of the Harbor Inn Restaurant Family. Chris Fotinos SC, Inc has a gross annual volume of business of \$500,000 or more and is subject to the jurisdiction of the NLRA.

23. Defendants Athansios H. Leloudis, ET. AL., LLC. is a for-profit company incorporated in the State of North Carolina that owns, operates, manages and directs policy, including but not limited to the tip share policy that is the subject of this case, at the HI South Carolina Restaurants. Athansios H. Leloudis, ET. AL., LLC. has a gross annual volume of business of \$500,000 or more and is subject to the jurisdiction of the NLRA. HI South Carolina Restaurants are part of the Harbor Inn Restaurant Family.

24. Upon information and belief, Defendants operate and control relevant employment and payroll policies, including all the tip credit, tip share and tip polling policies at each restaurant within the Harbor Inn Restaurant Family, including at HI Columbia where Defendants have employed Plaintiff as a server and paid him less than the minimum wage in violation of the FLSA. The Defendants worked as a single enterprise consisting of related activities performed (either through unified operation or common control) by any person or persons for a common business purpose.

25. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the FLSA.

26. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because Defendants have operations located within this judicial district and division.

27. Defendants are subject to personal jurisdiction in the state of South Carolina. *See* S.C. Code Ann. § 36-2-803 (2011).

FACTS

28. Defendants are a group of family members and close associates that own, operate, and manage seafood Restaurants operating under the trade name Harbor Inn as a single enterprise under the FLSA at eight locations throughout South Carolina, North Carolina and Georgia.

29. Upon information and belief, the Defendant entities were formed with the same or very similar closely held shareholders or members that own, manage and set the policy through operational control over the Restaurants, including labor and employment practices.

30. Defendants employ Plaintiff as a server at the HI Columbia Restaurant and paid him less than the minimum wage in violation of the FLSA by requiring him to participate in an invalid tip pool.

31. Plaintiff and other similarly situated employees work as servers for Defendants at the Restaurants located in South Carolina, North Carolina, and Georgia as tipped employees. Their primary job duties included taking customers' food and beverage orders and delivering food from the kitchen to the customers.

32. Defendant HI Richland paid Plaintiff, and all other similarly situated employees, less than the statutory minimum wage by taking the "tip credit" under the FLSA, 29 U.S.C. § 203(m).

33. Defendant HI Richland paid Plaintiff and all other similarly situated employees an hourly wage of \$2.13. In addition to that hourly wage, Plaintiff and other similarly situated employees received tips from customers when working as servers.

34. In order to meet the FLSA minimum wage of \$7.25 for Plaintiff and other similarly situated employees, Defendants applied a so-called “tip credit” of \$5.12 based on tips received by Plaintiff and other similarly situated employees for their service to customers.

35. However, in violation of the FLSA, Defendants required Plaintiff and all other similarly situated employees to remit ten (10%) percent of their tips at the end of each shift based on their respective gross food and beverage sales to the restaurant manager who would then purportedly distribute that tip share to bus boys working that shift.

36. At all times relevant to this Complaint, Defendants’ managers and those closing out shifts for Defendants did not provide that ten (10%) percent tip share to the bus boys in whole or in part and did wrongfully retain those monies.

37. Bus boys at Defendants Restaurants were paid minimum wage and did not receive tips. Defendants’ management and owners wrongfully retained purported tip share and utilized the proceeds in a manner not permitted under the FLSA.

38. The tip share policy of taking monies earned by servers and retaining the money while purportedly giving the money to bus boys as a tip share is consistent throughout the Restaurants and is a policy directed by and carried out by Defendants.

FIRST CAUSE OF ACTION
Violation of the Fair Labor Standards Act
29 U.S.C. §§ 203(m), 206
(Violation of Tip Credit / Failure to Pay Proper Minimum Wage)

39. Plaintiff, on behalf of himself and all other similarly situate employees, realleges and incorporates by reference all preceding paragraphs as if specifically set forth herein.

40. At all times relevant herein, Plaintiff and all others similarly employed at Defendants’ Restaurants worked in interstate commerce so as to fall within the protections of the FLSA.

41. At all times relevant herein, Defendants have been:

- a. Regularly engaged in interstate commerce;
- b. Enterprises within the meaning of § 203(r) and § 203(s)(1) of the FLSA;
and
- c. Employers under the FLSA, 29 U.S.C. § 203.

42. At all times relevant herein, Defendants own and operate an enterprise engaged in interstate commerce or in the production of interstate commerce as defined by the FLSA, 29 U.S.C. § 203(r) and (s).

43. At all times relevant herein, the annual gross sales volume of Defendants' business was in excess of \$500,000.00.

44. The FLSA mandates that employers compensate non-exempt employees at a minimum wage rate of \$7.25 per hour.

45. Section 203(m) of the FLSA provides an exception allowing employers to pay less than the statutory minimum wage to tipped employees, on the condition that the pooling of tips is only amongst those who customarily and regularly receive tips.

46. When the employer, its owners, its managers, or other persons who hold job positions in the restaurant industry that do not customarily and regularly receive tip compensation (such as owners, managers, cooks, and kitchen staff) share in the tip pool, the tip pool exception is invalidated.

47. Without the benefit of the tip credit provision, Defendants must pay each non-exempt employee the statutory minimum wage of \$7.25 per hour.

48. Defendants paid Plaintiff and other similarly situated employees an hourly rate of \$2.13 and took the maximum tip credit of \$5.12 toward Defendants' minimum wage obligation.

Defendants paid tipped employees less than the minimum wage and took a tip credit to make up the difference under the FLSA.

49. Defendants' compensation of Plaintiff and other tipped employees violates the minimum wage provisions of the FLSA in several particulars, including but not limited to:

- a. Defendants did not permit Plaintiff and other similarly situated employees to retain all tips they received;
- b. Defendants mandated, controlled, and distributed the tip pool to employees who did not customarily and regularly receive tips;
- c. Defendants kept for management and owners the Plaintiff's and other similarly situated employees' contributions to the tip pool; and
- d. Defendants did not make a good faith effort to comply with the FLSA as Defendant knew or should have known that its policies and practices relating to the tip pool violated the FLSA.

50. Plaintiff, on behalf of himself and other similarly situated employees who are currently or have previously worked at the Restaurants are entitled to recover their damages as a result of the Defendants' violations of the minimum wage provisions of the FLSA, liquidated damages in an equal amount, and their reasonable attorneys' fees and costs incurred in bringing this action.

51. Defendants' violations of the tip-pool credit provisions of the FLSA have been willful, knowing, intentional, and reckless. Therefore, Plaintiffs, on behalf of themselves and all other similarly situated employees, are entitled to recover liquidated damages from Defendant, and the limitations period for the claims extends back accordingly.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all other similarly situated employees and former employees who join this action, demands the following:

- a. Designation of this action as a collective action on behalf of the FLSA collective class pursuant to 29 U.S.C. § 216(b);
- b. Declaring unlawful any arbitration agreement that prohibits employees within the Harbor Inn Restaurant Family from participating in a collective action under the FLSA;
- c. Judgment against Defendants for an amount equal to their unpaid minimum wages at the applicable hourly rate of \$7.25;
- d. Liquidated damages in an amount equivalent to the unpaid minimum wages owed to them;
- e. Judgment against Defendants for the amount of unlawfully redistributed portions of the tips they received from Plaintiff and the collective class;
- f. Judgment against Defendants that their violations of the FLSA and its implementing regulations were willful;
- g. Attorneys' fees and costs; and
- h. All such further relief as the Court deems just and equitable.

JURY TRIAL DEMANDED

Plaintiff, on behalf of themselves and on behalf of all other similarly situated employees hereby demands a trial by jury.

Respectfully submitted,

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By: s/Todd R. Ellis

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August 26, 2016
Columbia, South Carolina