

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Yu Peng Lu, individually and on behalf of all other
employees similarly situated,

Plaintiff,

- against -

NISEN SUSHI OF COMMACK, LLC d/b/a Nisen Sushi,
TOM LAM, and ROBERT BEER,

Defendants.

Case No.

COLLECTIVE ACTION
COMPLAINT

Plaintiff Yu Peng Lu (“Plaintiff”), on his own behalf and on behalf of all others similarly situated, by and through his undersigned attorneys, Hang & Associates, PLLC, hereby files this complaint against the defendants, alleges and shows the Court the following:

NATURE OF THE ACTION

1. This action is brought by Plaintiff, on behalf of himself as well as other employees similarly situated, against Defendants for alleged violations of the Federal Labor Standards Act, (“FLSA”) 29 U.S.C. §§ 201 *et seq.*, and of New York Labor Law §§190 *et seq.* (“NYLL”), arising from Defendants’ various willful and unlawful employment policies, patterns and/or practices.

2. Upon information and belief, Defendants have willfully and intentionally committed widespread violations of the FLSA and NYLL by engaging in a pattern and practice of failing to pay their employees, including Plaintiffs, compensation for all hours worked, overtime compensation for all hours worked over forty (40) each workweek and spread of hours, as well as

failing to provide their employees, including Plaintiff, with wage notice at the time of hiring and wage statements.

3. Plaintiff alleges pursuant to the FLSA, that he is entitled to recover from the Defendants: (1) unpaid overtime wages, (2) liquidated damages, (3) prejudgment and post-judgment interest; and/or (4) attorneys' fees and costs;

4. Plaintiff further alleges pursuant to NYLL §190 et seq. and Title 12 of New York Codes, Rules and Regulations Part 146 ("NYCRR") that he is entitled to recover from the Defendants: (1) unpaid overtime compensation, (2) unpaid spread of hours compensation, (3) compensation for failure to provide wage notice at the time of hiring and failure to provide paystubs in violation of the NYLL, (4) liquidated damages equal to the sum of unpaid overtime and unpaid spread of hours compensation pursuant to the NY Wage Theft Prevention Act; (5) prejudgment and post-judgment interest; and (6) attorney's fees and costs.

JURISDICTION AND VENUE

5. This Court has original federal question jurisdiction over this action, pursuant to 29 U.S.C. § 201 et seq. and 28 U.S.C. § 1331, and has supplemental jurisdiction over the NYLL claims pursuant to 28 USC § 1367(a).

6. Venue is proper in the Eastern District of New York pursuant to 28 U.S.C. § 1391(b) and (c), because Defendants conduct business in this District, and that acts and omissions giving rise to the claims herein alleged took place in this District.

PLAINTIFF

7. Plaintiff is an individual residing in Queens, New York.

8. From in or around January 2013 to on or around August 3, 2014, and then from on or around April 1, 2016 to November 11, 2018, Plaintiff was employed by the Defendants as a teriyaki chef at Defendants' restaurant located at 5032 Jericho Turnpike, Commack, NY 11725.

DEFENDANTS

Corporate Defendant

9. Defendant Nisen Sushi of Commack, LLC d/b/a Nisen Sushi ("Corporate Defendant") is a New York corporation with a principal place of business at 5032 Jericho Turnpike, Commack, NY 11725. The Corporate Defendant operates a Japanese sushi restaurant under the name Nisen Sushi.

10. Upon information and belief, Corporate Defendant has about twenty (20) employees.

11. Upon Information and belief, Corporate Defendant at all relevant times is a business engaged in interstate commerce that has an annual gross sale in excess of Five Hundred Thousand Dollars (\$500,000.00) per year.

12. Upon information and belief, Corporate Defendant purchased and handled goods moved in interstate commerce. For instance, Corporate Defendant has employees who handled and worked on goods moved in commerce such as flour and food supplies.

13. At all times relevant times, Corporate Defendant was, and continues to be, an "enterprise engaged in commerce" within the meaning of FLSA.

Individual Defendants

14. Upon information and believe, Defendant Tom Lam (“Defendant Lam”) is an owner, officer, shareholder, and manager of the Defendant Corporation. Upon information and belief, at all times relevant to the allegations herein, Defendant Lam had the power to hire and fire employees, determine employee wages, establish employee work schedules, and maintain employment records of Defendants’ employees.

15. Upon information and believe, Defendant Robert Beer (“Defendant Beer”) is an owner, officer, and shareholder of Defendant Corporation, possesses or possessed operational control over the Defendant Corporation, has an ownership interest in Defendant Corporation, or has control over the operations of Defendant Corporation.

16. Plaintiff has fulfilled all conditions precedent to the institution of this action and/ or conditions have been waived.

COLLECTIVE ACTION ALLEGATIONS

17. Pursuant to 29 U.S.C. §207, Plaintiff seek to prosecute their FLSA claims as a collective action on behalf of all persons who are or were formerly employed by Defendants since January 2013 to the entry of judgment in this case (the “Collective Action Period”), who were non-exempt employees within the meaning of the FLSA and who were not paid wages for all hours worked and overtime compensation at rates not less than one and one-half times their regular rate of pay for hours worked in excess of forty hours per workweek (the “Collective Action Members”).

18. This collective action class is so numerous that joinder of all members is impracticable. 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 the Defendants, upon

information and belief, there are at least twenty (20) members of the collective action during the Collective Action Period, most of whom would not be likely to file individual suits because they lack adequate financial resources, access to attorneys or knowledge of their claim.

19. Plaintiff will fairly and adequately protect the interests of the Collective Action Members and has retained counsel that is experienced and competent in the fields of employment law and class action litigation. Plaintiffs have no interests that are contrary to or in conflict with those members of this collective action.

20. A collective action is superior to other available methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable. Furthermore, inasmuch as the damages suffered by individual Collective Action Members may be relatively small, the expense and burden of individual litigation make it virtually impossible for the members of the collective action to individually seek redress for the wrongs done to them. There will be no difficulty in the management of this action as a collective action.

21. Questions of law and fact common to the members of the collective action predominate over questions that may affect only individual members because Defendants have acted on grounds generally applicable to all members. Among the common questions of law and fact common to Plaintiff and other Collective Action Members are:

- a. whether the Defendants employed the Collective Action members within the meaning of the FLSA;
- b. whether the Defendants failed to keep true and accurate time records for all hours worked by Plaintiffs and the Collective Action Members;
- c. what proof of hours worked is sufficient where the employer fails in its duty to maintain time records;

- d. whether Defendants failed to pay the Collective Action Members minimum wages for all hours worked as well as overtime compensation for hours worked in excess of forty hours per workweek, in violation of the FLSA and the regulations promulgated thereunder;
- e. whether Defendants' violations of the FLSA are willful as that term is used within the context of the FLSA;
- f. whether Defendants are liable for all damages claimed hereunder, including but not limited to compensatory, punitive and statutory damages, interest, costs and disbursements and attorneys' fees; and
- g. whether Defendants should be enjoined from such violations of the FLSA in the future.

22. Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a collective action.

STATEMENT OF FACTS

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

24. Defendants knew that the nonpayment of overtime pay, spread of hours, failure to provide the required wage notice at the time of hiring, that the failure to provide the required wage statement with every payment of wages would financially injure Plaintiff and similarly situated employees and violate state and federal laws.

25. At all relevant times, Defendants operated a Japanese sushi restaurant under the name of Nisen Sushi located at 5032 Jericho Turnpike, Commack, New York, 11725.

26. From in or around January 2013 to on or around August 3, 2014, and then

from on or around April 1, 2016 to on or around November 11, 2018, Plaintiff was employed by the Defendants as a teriyaki chef at Defendants' restaurant located at 5032 Jericho Turnpike, Commack, NY 11725.

27. Defendant Lam hired Plaintiff, controlled and determined the work schedule of Plaintiff, determined the rates of compensation of Plaintiff and methods of payment, handled wage payments to Plaintiff, and maintained Plaintiff's payroll records.

28. Plaintiff was not provided a written wage notice, in English and in Chinese (the primary language identified by Plaintiff) when he was hired, including but not limited to information about his rate of pay and basis thereof, allowances, including tip and meals credits, claimed by Defendants, and the regular pay day designated by Defendants.

29. From in or around January 2013 to on or around August 3, 2014, and then from on or around April 1, 2016 to in or around April 2018, Plaintiff worked six days of a week with a day off on either Monday, Tuesday or Wednesday. From Mondays to Wednesdays on which Plaintiff worked, he worked from around 10:00 am to 10:00 pm, with a one-and-half-hour break from 3:00 pm to 4:30 pm. On Thursdays and Fridays, Plaintiff worked from around 11:00 am to 11:00 pm with a one-and-half-hour break from 3:00 pm to 4:30 pm. On Saturdays, Plaintiff worked without a break from 1:00 pm to 9: 30 pm. On Sundays, Plaintiff worked without a break from 2:00 pm to 9:30 pm. Plaintiff therefore worked about fifty-eight (58) hours per week during this stated employment period.

30. From in around April 2018 to on or around November 11, 2018, Plaintiff worked five days per week with Wednesday and Sunday off, with the same work hour schedule each day as stated above. Plaintiff therefore worked about fifty and a half (50.5) hours per week for this stated employment period.

31. From in or around January 2013 to August 3, 2014, and then from on or around April 1, 2016 to in or around December 2017, Plaintiff was paid at a fixed rate of \$ 650 per week. Plaintiff was paid weekly via both cash and check, with the allocation of \$300- \$400 in check and the remaining amount in cash.

32. From in or around January 2018 to on or around November 11, 2018, Plaintiff was paid at a fixed rate of \$ 700 per week. Plaintiff was paid weekly by both cash and check, with the allocation of \$300- \$400 in check and the remaining amount in cash.

33. Throughout the Plaintiff's employment with the Defendants, Defendants maintained a fraudulent time-card punching policy that requires employees, including Plaintiff, to punch hours less than the amount of hours actually worked by employees.

34. Throughout Plaintiff's employment with the Defendants, Plaintiff was required on each of his pay day to sign on wage receipts that did not reflect the actual number of hours worked by Plaintiff.

35. Throughout his employment with Defendants, Plaintiff was not compensated for all hours worked above forty (40) in each workweek according to state and federal laws.

36. Throughout his employment with Defendants, Plaintiff was not compensated for spread of hours premium for work shifts exceeding ten hours per day, as required by NYLL.

37. Throughout his employment with Defendants, Plaintiff was not overtime-exempt under federal and state laws.

STATEMENT OF CLAIMS

COUNT I

[Violation of Fair Labor Standard Act- Overtime Wage

Brought by Plaintiff and the FLSA Collective]

38. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as though fully set forth herein.

39. The FLSA provides that no employer engaged in commerce shall employ a covered employee for a work week longer than forty (40) hours unless such employee receives compensation for employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he or she is employed, or one and one-half times the minimum wage, whichever is greater. 29 USC §207(a).

40. The FLSA provides that any employer who violates the provisions of 29 U.S.C. §207 shall be liable to the employees affected in the amount of their unpaid overtime compensation, and in an additional equal amount as liquidated damages. 29 U.S.C. §216(b).

41. At all relevant times, Defendants had, and continue to have, a policy of practice of refusing to pay overtime compensation at the statutory rate of time and a half to Plaintiff and Collective Action Members for all hours worked in excess of forty (40) hours per workweek, which violated and continues to violate the FLSA, 29 U.S.C. §§201, et seq., including 29 U.S.C. §§207(a)(1) and 215(a).

42. The FLSA and supporting regulations required employers to notify employees of employment law requires employers to notify employment law requirements. 29 C.F.R. §516.4.

43. Defendants willfully failed to notify Plaintiff and FLSA Collective of the requirements of the employment laws in order to facilitate their exploitation of Plaintiff's and

FLSA Collectives' labor.

44. Defendants knowingly and willfully disregarded the provisions of the FLSA as evidenced by their failure to compensate Plaintiff and Collective Class Members the statutory overtime rate of time and one half for all hours worked in excess of forty (40) per week when they knew or should have known such was due and that failing to do so would financially injure Plaintiffs and Collective Action members.

COUNT II

[Violation of New York Labor Law – Overtime Pay

Brought on behalf of Plaintiff]

45. Plaintiff re-alleges each and every allegation of the preceding paragraphs hereof with the same force and effect as though fully set forth herein.

46. Pursuant to the New York Wage Theft Prevention Act, an employer who fails to pay proper overtime compensation shall be liable, in addition to the amount of any underpayments, for liquidated damages equal to the total of such under-payments found to be due the employee.

47. Defendants' failure to pay Plaintiffs their overtime premiums violated the NYLL.

48. Defendants' failure to pay Plaintiffs was not in good faith.

COUNT III

[Violation of New York Labor Law- Time of Hire Notice Requirement

Brought by Plaintiff]

49. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as though fully set forth herein.

50. The NYLL and supporting regulations require employers to provide written notice of the rate or rates of pay and the basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as a part of minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer; the name of the employer; any “doing business as” names used by the employer; the physical address of employer’s main office or principal place of business, and a mailing address if different; the telephone number of the employer. NYLL §195-1(a).

51. Defendants intentionally failed to provide notice to employees in violation of New York Labor Law § 195, which requires all employers to provide written notice in the employee’s primary language about the terms and conditions of employment related to rate of pay, regular pay cycle and rate of overtime on his or her first day of employment.

52. Due to the defendants’ violation of the NYLL, § 195(1), Plaintiff is entitled to recover from the defendants liquidated damages of \$50.00 per workweek that the violation occurred, up to a maximum of \$2,500.00, reasonable attorney’s fees, and costs and disbursements of the action, pursuant to the NYLL, § 198(1-b).

COUNT IV
[Violation of New York Labor Law—New York Pay Stub Requirement
Brought on Behalf of Plaintiff]

53. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as though fully set forth herein.

54. The NYLL and supporting regulations require employers to provide detailed paystub information to employees every payday. NYLL §195-1(d).

55. Defendants have failed to make a good faith effort to comply with the New York Labor Law with respect to compensation of each Plaintiff and did not provide the correct paystub on or after Plaintiff's payday.

56. Due to Defendants' violations of New York Labor Law, Plaintiff is entitled to recover from Defendants, jointly and severally, \$250 for each workday of the violation, up to \$5,000 for each Plaintiff together with costs and attorneys' fees pursuant to New York Labor Law N.Y. Lab. Law §198(1-d).

COUNT IV
[Violation of New York Labor Law—Spread of Hours
Brought on Behalf of Plaintiff]

57. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as though fully set forth herein.

58. The "spread of hours" is the number of hours from the time that an employee started working on a particular day until the time that he or she stopped working for the day. 12 NYCRR § 137-1.7, 12 NYCRR 146-1.6 (effective 1/1/2011, formerly 12 NYCRR § 137-1.7), New York State Department of Labor Regulations § 137-1.7 provides that an employer is required to pay an employee an extra hour of pay at the full minimum wage, without allowances, for each day in which the employee's spread of hours exceeds ten. This "spread of hours"

regulation is applicable even if there is a split shift.

59. Throughout Plaintiff's employment with Defendants, Plaintiff routinely worked a "spread of hours" of at least 10.5 hours per day.

60. Despite the fact that Plaintiffs routinely worked a "spread of hours" greater than ten hours per day during certain employment period with Defendants, Defendants did not pay Plaintiffs any additional compensation as required by the regulations.

61. Defendants' failure to pay spread of hours compensation was willful and intentional.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff on behalf of himself and all other similarly situated Collective Action Members, respectfully requests that this Court grant the following relief:

- a. Authorizing Plaintiff at the earliest possible time to give notice of this collective action, or that the Court issue such notice, to all persons who are presently, or have up through the extent allowable under the statute of limitations and including the date of issuance of court-supervised notice, been employed by Defendants as non-exempt employees. Such notice shall inform them that the civil notice has been filed, of the nature of the action, of their right to join this lawsuit if they believe they were denied premium overtime wages;
- b. Certification of this case as a collective action pursuant to FLSA;
- c. 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), and

appointing Plaintiff and his counsel to represent the Collective Action Members;

- d. A declaratory judgment that the practices complained of herein are unlawful under FLSA and NYLL;
- e. An injunction against the Defendants and its officers, agents, successors, employees, representatives and any and all persons acting in concert with Defendants, as provided by law, from engaging in each of the unlawful practices, policies and patterns set forth herein;
- f. An award of wages for all hours worked at agreed-to wage rates as well as overtime compensation and spread-of-hours compensation due under the FLSA and the New York Labor Law;
- g. An award of liquidated and/or punitive damages as a result of the Defendants' willful failure to pay for all hours worked as well as overtime compensation pursuant to 29 U.S.C § 216 and the New York Labor Law;
- h. An award of liquidated damages as a result of the defendants' failure to furnish a notice at the time of hiring, pursuant to the New York Labor Law;
- i. An award of liquidated damages as a result of the defendants' failure to furnish statements with each payment of wages, pursuant to the New York Labor Law;
- j. An award of prejudgment and post-judgment interest;
- k. An award of costs and expenses of this action together with reasonable attorneys' and expert fees; and
- l. Such other and further relief as this Court deems just and proper.

Dated: Flushing, New York December 17, 2018 HANG & ASSOCIATES, PLLC.

/S/ XIAOXI LIU

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**CONSENT TO SUE UNDER
FEDERAL FAIR LABOR STANDARDS ACT**

I am an employee currently or formerly employed by NISEN SUSHI OF COMMACK, LLC, Tom Lam, Robert Beer, and/or related entities and individuals.

I consent to be a plaintiff in an action to collect unpaid wages. I agree that I am bound by the terms of the Contingent Fee Retainer signed by the named plaintiff in this case.

Lu. Yu Peng
Full Legal Name (Print)

Lu. Yu Peng
Signature

11/13/2018
Date

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Nisen Sushi Named in Former Chef's Unpaid OT Lawsuit](#)
