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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

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MARIO DOS SANTOS, on behalf of himself and all	:	
others similarly situated,	:	
	:	
Plaintiff,	:	COMPLAINT
	:	
-against-	:	
	:	
ARCOS VISEU LLC d/b/a SEABRA'S	:	COLLECTIVE
MARISQUEIRA, MANUEL CERQUEIRA,	:	ACTION
JOAQUIM FERNANDES, and ANTONIO SOUSA,	:	
	:	
Defendants.	:	
-----		X

Plaintiff Mario Dos Santos ("plaintiff" or "Dos Santos"), individually and on behalf of all others similarly situated, by his attorneys Pechman Law Group, PLLC, complaining of defendants Arcos Viseu LLC d/b/a Seabra's Marisqueira ("Seabra's"), Manuel Cerqueira, Joaquim Fernandes, and Antonio Sousa, (collectively, "defendants"), alleges as follows:

NATURE OF THE ACTION

1. This action is brought to recover unpaid minimum and overtime wages and other monies pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"), and the New Jersey State Wage and Hour Law, N.J.S.A. 34:11-56a *et seq.* and N.J.A.C. 12:56 *et seq.* ("NJWHL") on behalf of plaintiff and all those similarly situated to him, including servers, bussers, runners, bartenders, and other tipped food service

workers (collectively “tipped employees”) who work or have worked at Seabra’s Marisqueira, located at 87 Madison Street, Newark, New Jersey 07105.

2. Seabra’s Marisqueira opened in 1989 and is one of Newark, New Jersey’s premier restaurants, and the first of its kind serving Portuguese-style seafood. The restaurant has drawn positive reviews from various sources, including the New York Times, NJ.com, Martha Stewart Living and Zagat, with the latter stating that fans know the restaurant as a “seafood heaven,” and telling readers “you are in for a treat.”

3. Plaintiff brings this action to remedy the wage-and-hour violations at Seabra’s. Specifically, as part of a mandatory tip pool, defendants unlawfully required tipped employees to share a percentage of their tips with owners Manuel Cerqueira (“Cerqueira”), Joaquim Fernandes (“Fernandes”) and Antonio F. Sousa (“Sousa”), in violation of the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1 *et seq.* (“NJWPL”) and 29 C.F.R. § 531.52.

4. Seabra’s also unlawfully misappropriated a percentage of the tipped employees’ gratuities by retaining an amount greater than the cost of processing the tipped employees’ credit card tips.

5. Moreover, defendants failed to compensate their tipped employees at the statutory minimum wage, and with overtime pay of one and one-half the regular hourly wage for hours worked in excess of forty, as required by the FLSA and NJWHL.

6. Defendants further required plaintiff and other tipped employees to pay for uniform maintenance and customer walkouts.

7. Plaintiff seeks unpaid minimum and overtime wages, liquidated damages, pre- and post-judgment interest, and declaratory relief against defendants’ unlawful actions, and attorneys’ fees and costs pursuant to the FLSA, NJWHL, and NJWPL.

JURISDICTION

8. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337, and supplemental jurisdiction over plaintiff's state law claims pursuant to 28 U.S.C. § 1367.

9. This Court also has jurisdiction over plaintiff's claims under the FLSA pursuant to 29 U.S.C. § 216(b).

10. The Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

VENUE

11. Venue is proper in the District of New Jersey under 28 U.S.C. § 1391 because defendants operate their business within the district and because a substantial part of the conduct alleged herein occurred in this judicial district.

THE PARTIES

Plaintiff

12. Plaintiff Mario Dos Santos is a resident of Essex County, New Jersey.

13. Defendants employed Dos Santos as a server at Seabra's from in or about November 4, 2013 through July 4, 2016.

14. At all relevant times to this action, Dos Santos has been a non-exempt employee who is engaged in commerce or the production of goods for commerce on behalf of defendants.

15. At all relevant times, Dos Santos has been a covered employee of defendants within the meaning of the FLSA and NJWHL.

Defendants

16. Defendant Arcos Viseu LLC is a New Jersey limited liability company that owns and operates and does business as Seabra's Marisqueira.

17. Seabra's Marisqueira has been at all relevant times an employer engaged in commerce or in the production of goods for commerce within the meaning of the FLSA.

18. At all relevant times, Seabra's Marisqueira has had an annual gross volume of sales in excess of \$500,000.

19. Seabra's Marisqueira's tipped employees, including plaintiff, handle, and sell goods that have been moved in, or produced for, commerce, such as food items and beverages.

20. Defendant Manuel Cerqueira is a person engaged in business in Newark, New Jersey, who is an owner, officer, and/or agent of Seabra's.

21. Defendant Cerqueira exercises sufficient control over Seabra's operations to be considered plaintiff's employer under the FLSA and NJWHL.

22. At all times material herein, defendant Cerqueira established and exercised authority regarding the pay practices and employee relations at Seabra's.

23. Cerqueira hired and fired employees, established and implemented pay practices, work assignments and scheduling, controlled labor relations and personnel policies and practices, and maintained time and payroll records.

24. Cerqueira is jointly and severally liable for the violations of the FLSA and NJWHL by Seabra's Marisqueira.

25. Defendant Joaquim Fernandes is a person engaged in business in Newark, New Jersey, who is an owner, officer, and/or agent of Seabra's.

26. Defendant Fernandes exercises sufficient control over Seabra's operations to be considered plaintiff's employer under the FLSA and NJWHL.

27. At all times material herein, defendant Fernandes established and exercised authority regarding the pay practices and employee relations at Seabra's.

28. Fernandes hired and fired employees, established and implemented pay practices, controlled labor relations and personnel policies and practices, and maintained time and payroll records.

29. Defendant Fernandes controlled work assignments and scheduling, including making changes to the tipped employees' schedules and requiring them to fill in for other employees as needed.

30. For example, on one occasion, Fernandes personally adjusted a server's schedule, and when that server did not appear for his re-scheduled shift, Fernandes terminated his employment at Seabra's.

31. Fernandes is listed as the registered agent of Arcos Viseu LLC.

32. Fernandes is jointly and severally liable for the violations of the FLSA and NJWHL by Seabra's.

33. Defendant Antonio Sousa is a person engaged in business in Newark, New Jersey, who is an owner, officer, and/or agent of Seabra's.

34. Defendant Sousa exercises sufficient control over Seabra's operations to be considered plaintiff's employer under the FLSA and NJWHL, and at all times material herein established and exercised authority regarding the pay practices and employee relations at Seabra's.

35. For example, Sousa hired tipped employees, directed tipped employees' work and disciplined the tipped employees.

36. Sousa is jointly and severally liable for the violations of the FLSA and NJWHL by Seabra's.

37. For example, prior to beginning work at Seabra's, plaintiff first spoke with Cerquiera, and was later told to start work by Sousa.

COLLECTIVE ACTION ALLEGATIONS

38. The claims in this Complaint arising out of the FLSA are brought by plaintiff on behalf of himself and similarly situated persons who are current and former employees of defendants since the date three years prior to the filing of this action who elect to opt-in to this action (the "FLSA Collective").

39. The FLSA Collective consists of approximately twenty-five employees who have been victims of defendants' common policies and practices that have violated their rights under the FLSA by, *inter alia*, willfully denying them minimum wage, overtime pay, and other monies.

40. The FLSA Collective consists of employees who, during their employment with defendants, worked as tipped employees, including servers, bussers, runners, bartenders, and other tipped food service workers.

41. As part of their regular business practice, defendants have intentionally, willfully, and repeatedly engaged in a pattern, practice, and/or policy of violating the FLSA with respect to plaintiff and the FLSA Collective. This policy and pattern or practice includes, but is not limited to:

- a. willfully failing to pay its non-exempt employees, including plaintiff and the FLSA Collective, the appropriate minimum wage for all hours worked;
- b. willfully failing to pay its non-exempt employees, including plaintiff and the FLSA Collective, overtime wages for all hours worked in excess of 40 hours per workweek;
- c. willfully misappropriating gratuities belonging to plaintiff and the FLSA Collective; and
- d. willfully failing to reimburse its non-exempt employees, including plaintiff and the FLSA Collective, for the cost of maintaining and laundering required uniform items, including a custom shirt with a stitched-in "Marisqueira Restaurant" emblem.

42. Defendants' unlawful conduct, as described in this Complaint, is pursuant to a corporate policy or practice of minimizing labor costs by failing to properly compensate plaintiff and the FLSA Collective for the hours they worked.

43. The FLSA Collective would benefit from the issuance of a court supervised notice of the present lawsuit and the opportunity to join the present lawsuit. Those similarly situated employees are known to defendants, are readily identifiable by defendants, and are locatable through defendants' records. These similarly situated employees should be notified of and allowed to opt into this action, pursuant to 29 U.S.C. § 216(b).

**DEFENDANTS' FAILURE TO PAY TIPPED EMPLOYEES
MINIMUM WAGE AND OVERTIME PAY**

44. Throughout his employment at Seabra's, Dos Santos regularly worked approximately eighty-two hours per week, four days from approximately 11:30 a.m. to 1:00 a.m., one day from approximately 11:30 a.m. to 2:00 a.m., and one day from approximately 11:30 a.m. to 1:00 a.m.

45. From the commencement of his employment through in or about April 11, 2014, defendants paid Dos Santos a fixed salary of \$200 per workweek, regardless of how many hours he worked.

46. From in or about April 12, 2014 through the termination of Dos Santos' employment on July 4, 2016, defendants paid Dos Santos a fixed salary of \$300 per workweek, regardless of how many hours he worked.

47. As a result, defendants failed to pay Dos Santos at least the minimum wage under both the FLSA and NJWHL, in each and every week from November 2013 to July 2016.

48. During this period, defendants also failed to pay Dos Santos overtime pay at the rate of one and one-half times the applicable hourly rate for hours worked in excess of forty per workweek.

**DEFENDANTS' MISAPPROPRIATION OF
THE TIPPED EMPLOYEES' GRATUITIES**

49. Defendants established and imposed an unlawful tip pool upon its tipped employees, requiring them to pay a share of their gratuities to the owners Cerqueira and Sousa.

50. Throughout the liability period, defendants Cerqueira and Sousa participated in the tip pool.

51. Cerqueira and Sousa were each allocated a full waiter's share of the tip pool, equal to six points, and both appear on the tip logs of the restaurant.

52. Cerqueira and Sousa have been plaintiff's employers within the meaning of the FLSA and NJWHL, and have had the power to hire and fire plaintiff, controlled plaintiff's terms and conditions of employment, and exercised authority over the rate and method of any compensation of plaintiff.

53. Cerqueira and Sousa perform *de minimis* table service for customers and wear suits while the waitstaff wear black pants, and a white shirt with a "Marisqueira Restaurant" emblem.

54. Cerqueira and Sousa should not have received *any* share from the tip pool and as an "employer" within the meaning of the FLSA and NJWHL, their retention of tips deprived the tipped employees of their gratuities.

55. Defendants also deducted at least 9% from the credit card tips of the tipped employees, purportedly for credit card fees.

56. Defendants may deduct from the tipped employees' gratuities an amount equal to their proportionate share of the restaurant's credit card processing fees.

57. On information and belief, the average fee charged by credit card companies is approximately 2.5% percent.

58. By retaining an amount greater than the average cost of processing the employees' tips charged to credit cards, Seabra's unlawfully misappropriated a percentage of the tipped employees' gratuities.

UNLAWFUL DEDUCTIONS

59. Defendants required plaintiff and other tipped employees to wear a uniform consisting of a white shirt with a stitched-in "Marisqueira Restaurant" emblem, in addition to black pants.

60. Defendants failed to launder and/or maintain the required uniforms of plaintiff and other tipped employees.

FIRST CLAIM (Fair Labor Standards Act – Unpaid Minimum Wage)

61. Plaintiff repeats and realleges all foregoing paragraphs as if fully set forth herein.

62. Defendants were employers within the meaning of 29 U.S.C. § 203(e) and 206(a), and employed plaintiff and the FLSA Collective.

63. Defendants were required to pay plaintiff and the FLSA Collective at least the minimum wage rate for all work performed.

64. Defendants failed to pay plaintiff and the members of the FLSA Collective the minimum wage rate for all hours worked, to which they are entitled under the FLSA.

65. Defendants were aware or should have been aware that the practices described in this Complaint were unlawful and have not made a good faith effort to comply with the FLSA with respect to the compensation of plaintiff and the FLSA Collective.

66. Defendants' violations of the FLSA have been willful and not in good faith.

67. As a result of defendants' willful violations of the FLSA, plaintiff and the FLSA Collective suffered damages by being denied minimum wages and are entitled to recovery of such amounts, liquidated damages, pre- and post-judgment interest, attorneys' fees and costs, and other compensation pursuant to 29 U.S.C. § 216(b).

**SECOND CLAIM
(Fair Labor Standards Act – Unpaid Overtime)**

68. Plaintiff repeats and realleges all foregoing paragraphs as if fully set forth herein.

69. Defendants are required to pay plaintiff and the FLSA Collective one and one-half (1½) times the regular rate of pay for all hours worked in excess of forty in a workweek pursuant to the overtime wage provisions of the FLSA, 29 U.S.C. § 207, *et seq.*

70. Defendants have failed to pay plaintiff and the FLSA Collective the overtime wages to which they are entitled under the FLSA, even though plaintiff and the FLSA Collective regularly worked more than forty hours per workweek.

71. For example, Dos Santos worked more than forty hours each and every workweek from approximately November 4, 2013 until July 4, 2016.

72. For each of those workweeks, defendants failed to pay Dos Santos overtime wages to which he was entitled under the FLSA.

73. Defendants were aware or should have been aware that the practices described in this Complaint were unlawful and have not made a good faith effort to comply with the FLSA with respect to the compensation of plaintiff and the FLSA Collective.

74. As a result of defendants' willful violations of the FLSA, plaintiff and the FLSA Collective suffered damages by being denied overtime pay in accordance with the FLSA and are entitled to recovery of such amounts, liquidated damages, pre- and post-judgment interest, attorneys' fees and costs, and other compensation pursuant to 29 U.S.C. § 216(b).

**THIRD CLAIM
(New Jersey State Wage and Hour Law – Unpaid Minimum Wage)**

75. Plaintiff repeats and realleges all foregoing paragraphs as if fully set forth herein.

76. Defendants failed to pay plaintiff and the tipped employees minimum wages to which they were entitled to under the NJWHL. Specifically, defendants did not pay plaintiff an hourly base rate at the statutory minimum wage.

77. Defendants have been employers within the meaning of the N.J.S.A. § 34:11-56a, *et seq.* and the supporting New Jersey Department of Labor and Workforce Development Regulations, and employed plaintiff and the tipped employees.

78. The minimum wage provisions of the N.J.S.A § 34:11-56a, *et seq.*, and the supporting New Jersey Department of Labor and Workforce Development Regulations apply to defendants.

79. Defendants were required to pay plaintiff and the tipped employees a minimum wage at a rate of \$7.25 for all hours worked on or after July 24, 2009, \$8.25 for all hours worked on or after January 1, 2014, and \$8.38 for all hours worked on or after

January 1, 2015 under N.J.S.A. § 34:11-56a, *et seq.*, and the supporting New Jersey Department of Labor and Workforce Development Regulations, specifically 12:56-14.1 *et seq.* (Employment in Food Service Occupations).

80. Defendants were aware or should have been aware that the practices described in this Complaint were unlawful and have not made a good faith effort to comply with the NJWHL with respect to the compensation of plaintiff.

81. As a result of defendants' willful violations of the NJWHL, plaintiff and the tipped employees suffered damages by being denied minimum wages and are entitled to recovery of such amounts, and attorneys' fees and costs.

**FOURTH CLAIM
(New Jersey Wage and Hour Law – Unpaid Overtime)**

82. Plaintiff repeats and realleges all foregoing paragraphs as if fully set forth herein.

83. Under the NJWHL and supporting New Jersey State Department of Labor Regulations, defendants were required to pay plaintiff and other tipped employees one and one (1½) half times the regular rate of pay for all hours they worked in excess of 40 hours in a workweek.

84. Defendants have failed to pay plaintiff the overtime wages to which he was entitled under the NJWHL.

85. Defendants have failed to pay plaintiff and other tipped employees the overtime wages to which they were entitled under the NJWHL.

86. Defendants have wilfully violated the NJWHL by knowingly and intentionally failing to pay plaintiff and other tipped employees overtime wages.

87. Defendants were aware or should have been aware that the practices were unlawful and have not made a good faith effort to comply with the NJWHL with respect to the compensation of plaintiff and other tipped employees.

88. Defendants have willfully violated the NJWHL by knowingly and intentionally failing to pay plaintiff and the tipped employees overtime wages.

89. Due to defendants' willful violations of the NJWHL, plaintiff and the tipped employees are entitled to recover unpaid overtime wages, reasonable attorneys' fees and costs of the action, and pre- and post-judgment interest.

**FIFTH CLAIM
(New Jersey Wage and Hour Law – Uniform Violations)**

90. Plaintiff repeats and realleges all foregoing paragraphs as if fully set forth herein.

91. By failing to pay plaintiff for the maintenance of required uniforms, defendants have willfully violated the NJWHL.

92. Due to defendants' willful violations of the NJWHL, plaintiff and the tipped employees are entitled to recover from defendants the costs of maintaining uniforms, reasonable attorneys' fees, costs and pre-judgment and post-judgment interest.

**SIXTH CLAIM
(Fair Labor Standards Act – Unlawful Retention of Tips)**

93. Plaintiff repeats and realleges all foregoing paragraphs as if fully set forth herein.

94. Pursuant to the U.S. Department of Labor's regulations, 29 C.F.R. § 531.52, tips are the property of an employee.

95. By unlawfully participating in the tip pool or sharing arrangement and retaining customer tips belonging to plaintiff and other FLSA Collective members, defendants violated the FLSA, 29 C.F.R. § 531.52.

96. As a result of defendants' willful violations of the FLSA, plaintiff and the FLSA Collective are entitled to recovery of misappropriated gratuities, attorneys' fees and costs, and other compensation pursuant to 29 U.S.C. § 216(b).

**SEVENTH CLAIM
(NJWHL and NJWPL – Withholding Violations)**

97. Plaintiff repeats and realleges all foregoing paragraphs as if fully set forth herein.

98. Pursuant to the New Jersey Department of Labor's Regulations, N.J.A.C. 12:56-8.4(b), gratuities are the property of tipped employees.

99. Gratuity is defined as "cash received by an employee for services rendered for an employer or customer of an employer." N.J.A.C. 12:56-8.1.

100. Under the New Jersey Wage Payment Law, no employer may withhold or divert any portion of an employee's wages. N.J.S.A. 34:11-4.4.

101. Defendants illegally misappropriated, withheld, and diverted portions of plaintiff's and the tipped employees' tips in violation of N.J.A.C. 12:56-8.4(b) and the NJWPL, N.J.S.A. 34:11-4.4.

102. Due to defendants' willful violations of the NJWHL and NJWPL, plaintiff and the tipped employees are entitled to recover damages in the amount of unpaid wages, reasonable attorneys' fees and costs of the action, and pre- and post-judgment interest.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, on behalf of himself and the FLSA Collective, respectfully requests that this Court enter a judgment:

- a. authorizing the issuance of notice at the earliest possible time to all non-exempt tipped employees who are presently working, or who have worked at any time during the three years immediately preceding the filing of this suit, up through and including the date of this Court's issuance of court-supervised notice, at Seabra's Marisqueira. Such notice shall inform them that this civil action has been filed, of the nature of the action, and of their right to join this lawsuit if they believe they were denied proper wages;
- b. declaring that defendants have violated the minimum wage and overtime provisions of the FLSA and NJWHL;
- c. declaring that defendants' violations of the FLSA and NJWHL were willfull;
- d. awarding plaintiff and the tipped employees damages for tips which were unlawfully collected and retained by the defendants;
- e. awarding plaintiff and the tipped employees damages for unpaid minimum and overtime wages, and uniform maintenance costs.
- f. disgorging from defendants and order that defendants remit back the amount of the tips misappropriated from plaintiff and the tipped employees;
- g. awarding plaintiff and the FLSA Collective liquidated damages in an amount equal to the total amount of the wages found to be due, pursuant to the FLSA;
- h. awarding plaintiff and the FLSA Collective, and tipped employees, pre- and post-judgment interest under the FLSA and the NJWHL;

i. awarding plaintiff and the tipped employees reasonable attorneys' fees and costs pursuant to the FLSA and the NJWHL; and

j. awarding such other and further relief as the Court deems just and proper.

Dated: December 2, 2016

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ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Newark, NJ Portuguese Restaurant Facing FLSA Lawsuit](#)
