

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

**SUENDY ZAVALA**, individually, and on  
behalf of others similarly situated,

Plaintiff,

vs.

**PORT TO PORT INTERNATIONAL  
CORPORATION**,

Defendant.

Case No.

**COLLECTIVE ACTION COMPLAINT WITH  
JURY DEMAND**

Plaintiff, SUENDY ZAVALA, individually and on behalf of all others similarly situated, by and through her attorneys GELLERT, SCALI, BUSENKELL & BROWN and JTB LAW GROUP LLC, hereby brings this Collective Action Complaint against Defendant, PORT TO PORT INTERNATIONAL CORPORATION, and states as follows:

**INTRODUCTION**

1. This is a collective action brought pursuant to 29 U.S.C. § 216(b) by Plaintiff, SUENDY ZAVALA (hereinafter referred to as “Plaintiff”), individually and on behalf of all similarly situated persons employed by Defendant, PORT TO PORT INTERNATIONAL CORPORATION., arising from Defendant’s willful violations of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*

2. Defendant is a full service non-vessel operating common carrier shipping company, international freight forwarder and terminal operator specializing in the export and transport of containers, bulk cargo, vehicles, trucks, construction, agriculture and forestry machinery, as well as all kind of goods in containers to any destination worldwide.

3. Plaintiff and similarly situated other employees employed by Defendant were victims of Defendant's common unlawful policy of misclassifying employees as "employed as a seaman" for purposes of 29 U.S.C. § 213(b)(6) (which provides a narrow exemption to the FLSA overtime requirement), and paying such employees their regular hourly rate for hours worked in excess of forty (40) in a workweek, instead of time-and-a-half of their regular rate for hours worked in excess of forty (40) in a workweek as required under the FLSA.

4. Plaintiff brings this collective action pursuant to 29 U.S.C. § 216(b) on behalf of herself and all other similarly situated other individuals employed by Defendant in the applicable time period, and seeks unpaid overtime wages, in addition to liquidated damages, fees and costs, and any other remedies to which they may be entitled.

#### **JURISDICTION AND VENUE**

5. This Court has subject-matter jurisdiction over Plaintiff's FLSA claims pursuant to 28 U.S.C. § 1331 because Plaintiff's claims raise a federal question under 29 U.S.C. § 201, *et seq.*

6. The Court has personal jurisdiction over Defendant because it is incorporated and headquartered in Delaware.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) and (3) because Defendant employed Plaintiff in this district and because a substantial portion of the events that give rise to the Plaintiff's claims occurred in this district.

#### **PARTIES**

8. Plaintiff SUENDY ZAVALA is a resident of New Castle, Delaware, and was employed by Defendant as a Lead Specialist from approximately January 2014 to April 2017. Plaintiff signed a consent form to join this lawsuit, which is attached as *Exhibit 1*.

9. Defendant is a corporation incorporated and registered in Delaware with a principal business address located at 32 Pyles Lane, New Castle, Delaware 19720,

**FACTUAL ALLEGATIONS**

10. The FLSA applies in this case on an enterprise basis.

11. Defendant's annual sales exceed \$500,000.

12. Defendant has had and presently has more than two employees engaged in interstate commerce.

13. Defendant contracts with other companies and/or individuals to provide the transportation of goods.

14. Defendant does not own any ocean vessels.

15. Defendant does not operate any ocean vessels.

16. Defendant does not have any employees who work on ocean vessels once those vessels set sail from port.

17. Plaintiff and other employees engaged in interstate commerce during their employment and therefore they were/are also covered by the FLSA on an individual basis.

18. Plaintiff was employed by Defendant as a Lead Specialist from approximately January 2014 to April 2017.

19. Throughout her employment with Defendant, Plaintiff worked in New Castle, Delaware.

20. As a Lead Specialist, Plaintiff's duties were to receive incoming calls from customers of Defendant, process orders for shipment of goods, and relay the orders to Defendant's shippers.

21. Defendant considered Plaintiff to be "employed as a seaman" for purposes of 29

U.S.C. § 213(b)(6)'s exemption to the FLSA overtime requirement.

22. Plaintiff never performed any service for Defendant that was rendered primarily as an aid in the operation of a vessel as a means of transportation.

23. Plaintiff never performed any service for Defendant as master or subject to the authority, direction, and control of a master aboard a vessel.

24. All of the work Plaintiff performed for Defendant was of a different character than the work of an employee "employed as a seaman" within the meaning of 29 U.S.C. § 213(b)(6).

25. Plaintiff typically worked five (5) days per week.

26. Plaintiff typically worked shifts lasting from 8:30 a.m. to 5:30 p.m., and occasionally worked after her shifts to respond to calls from customers.

27. Plaintiff regularly worked over forty (40) hours per week during the applicable statutory time period.

28. Defendant paid Plaintiff a weekly salary.

29. Plaintiff's weekly salary was intended to compensate her for forty (40) hours of work.

30. Plaintiff's weekly salary started at approximately \$520.00 at the beginning of her employment and ended at \$582.40 when she left the company.

31. In addition to her weekly salary, Plaintiff received compensation for hours worked in excess of forty (40) in a workweek at the same rate per hour that she received from her weekly salary for hours below forty (40).

32. As a non-exempt employee, Plaintiff was entitled to full compensation for all overtime hours worked at a rate of 1.5 times her "regular rate" of pay.

33. Under FLSA, the regular rate is the "keystone" to calculating the overtime rate.

*Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945). It is “the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed.” 29 C.F.R. §778.108.

34. No matter how an employee is paid—whether by the hour, by the piece, on a commission, or on a salary—the employee’s compensation must be converted to an equivalent hourly rate from which the overtime rate can be calculated. 29 C.F.R. §778.109. “The regular hourly rate of pay is determined by dividing the employee’s total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid.” *Id.*

35. Plaintiff’s salary did not fall within any of the statutory exclusions from the regular rate as provided in 29 U.S.C. §§ 207(e)(1)-(8).

36. A salaried employee’s regular rate of pay is computed by reference to the number of hours the salary is intended to compensate. 29 C.F.R. §778.113.

37. There is a statutory presumption that remuneration in any form must be included in the regular rate calculation. The burden is on Defendant to establish that any payment should be excluded. *Madison v. Resources for Human Dev. Inc.*, 233 F.3d 187 (3rd Cir. 2000). Thus, determining the regular rate starts from the premise that all payments made to Plaintiff for work performed are included in the base calculation unless specifically excluded by statute.

38. Once the total amount of an employee’s “regular” compensation is deduced, “the determination of the regular rate becomes a matter of mathematical computation.” *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 425 (1945). The regular rate must be expressed as an hourly rate because, although any method of compensating an employee is permitted, the FLSA imposes its overtime requirements in terms of hourly wages. Thus, if

necessary, an employer must convert an employee's wages to rate per hour to determine compliance with the statute.

39. For example, in the week of March 8, 2017 through March 14, 2017, Plaintiff worked 45.80 hours. Plaintiff's first forty (40) hours were compensated by her weekly salary of \$582.40, which equates to an hourly rate of \$14.56. Plaintiff's 5.8 hours in excess of forty (40) in a workweek were compensated at an hourly rate of \$14.56 per hour, resulting in total pay for such hours of \$84.44.

40. Plaintiff's "total remuneration" was her weekly salary \$582.40, which was intended to compensate Plaintiff for working forty (40) hours per week.

41. However, Defendant completely failed to multiply this regular rate by 1.5 in determining the rate it paid to Plaintiff for the 5.8 hours she worked in excess of forty (40). Pursuant to the FLSA, Defendant was required to pay Plaintiff a rate \$21.84 per hour for the 5.8 hours in excess of forty (40) she worked in the week of March 8, 2017 through March 14, 2017, but did not.

### **COLLECTIVE ACTION ALLEGATIONS**

42. Plaintiff brings this action pursuant to 29 U.S.C. § 216(b) of the FLSA on her own behalf and on behalf of:

Any employee of Defendant PORT TO PORT INTERNATIONAL CORPORATION in the United States who, within the period of the three (3) years prior to the commencement of this action through the date of judgment:

- (i) Was considered by Defendant to be "employed as a seaman" for purposes of 29 U.S.C. § 213(b)(6)'s exemption to the FLSA overtime requirement; and
- (ii) Did not receive compensation calculated at time-and-a-half (1.5.) of his or her regular rate for any hours worked in excess of forty (40) in a workweek.

(hereinafter referred to as the “FLSA Collective”). Plaintiff reserves the right to amend this definition as necessary.

43. Excluded from the proposed FLSA Collective are Defendant’s employees employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salespersons, *see* 29 U.S.C. § 213(a)(1), Defendant’s employees employed in the capacity of “computer systems analyst, computer programmer, software engineer, or other similarly skilled worker,” *see* 29 U.S.C. § 213(a)(17), or Defendant’s employees with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service, *see* 29 U.S.C. § 213(b)(1) and who are not entitled to overtime pay pursuant to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users Technical Corrections Act of 2008 (TCA), P.L. 110-244 (June 6, 2008).

44. With respect to the claims set herein, a collective action under the FLSA is appropriate because the employees described above are “similarly situated” to Plaintiff under 29 U.S.C. § 216(b). The collective of employees on behalf of whom Plaintiff brings this collective action are similarly situated because: (a) they have been or are employed in the same or similar positions; (b) they were or are subject to the same or similar unlawful practices, policy, or plan; and (c) their claims are based upon the same factual and legal theories.

45. The employment relationships between Defendant and every FLSA Collective member are the same and differ only by name, location, and rate of pay. The key legal issues are the same for every FLSA Collective member, to wit:

- a. Whether FLSA Collective members performed any service for Defendant that was rendered primarily as an aid in the operation of a vessel as a means of transportation;
- b. Whether FLSA Collective members performed any service for Defendant as master

or subject to the authority, direction, and control of a master aboard a vessel;

- c. Whether FLSA Collective members performed a substantial amount of work of a different character than the work of an employee “employed as a seaman” within the meaning of 29 U.S.C. § 213(b)(6)

46. Plaintiff estimates the FLSA Collective, including both current and former employees over the relevant period, will include over one-hundred (100) members. The precise number of FLSA Collective members should be readily available from a review of Defendant’s personnel and payroll records.

**COUNT I**  
**(29 U.S.C. § 216(b) Collective Action)**  
**Violation of the Fair Labor Standards Act, 29 U.S.C. § 201, et seq.**  
**FAILURE TO PAY OVERTIME**

47. Plaintiff re-alleges and incorporates all previous paragraphs herein.

48. 29 U.S.C. § 207(a)(1) provides:

[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

49. Plaintiff and other FLSA Collective Members worked many workweeks in excess of forty (40) hours within the last three years.

50. At all times relevant to this action, Defendant failed to pay Plaintiff and other FLSA Collective members the federally mandated rate of time-and-a-half (1.5) of each employee’s regularly hourly wage for hours worked in excess of forty (40) in a workweek.

51. Defendant’s failure to pay Plaintiff and other FLSA Collective members overtime wages was knowing and willful. Defendant knew that its classification of Plaintiff and FLSA Collective members as “employed as [] seam[e]n” for purposes of 29 U.S.C. § 213(b)(6) was legally



improper and unjustified, yet nonetheless failed to pay such employees the federally mandated rate of time-and-a-half (1.5) of their regularly hourly wage for hours worked in excess of forty (40) in a workweek. *See* 29 U.S.C. § 255(a) (“[A] cause of action arising out of a willful violation [of the FLSA] may be commenced within three years....”).

52. Defendant’s failure to pay Plaintiff and other FLSA Collective members overtime was not done in good faith, or in conformity with or in reliance on any written administrative regulation, order, ruling, approval, or interpretation by the U.S. Department of Labor and/or any state department of labor, or any administrative practice or enforcement policy of such departments.

53. The FLSA, 29 U.S.C. § 216(b), provides that as a remedy for a violation of the Act, an employee is entitled to his or her unpaid wages (and unpaid overtime if applicable) plus an additional equal amount in liquidated damages (double damages), plus costs and reasonable attorneys’ fees.

54. Defendant is in possession and control of necessary documents and information from which Plaintiff would be able to precisely calculate damages.

### **RELIEF REQUESTED**

WHEREFORE, Plaintiff, Suendy Zavala, requests an entry of an Order the following relief:

- a. Certifying this case as a collective action in accordance with 29 U.S.C. § 216(b) with respect to the FLSA claims set forth herein;
- b. Ordering Defendant to disclose in computer format, or in print if no computer readable format is available, the names and addresses of all FLSA Collective members, and permitting Plaintiff to send notice of this action to all those similarly situated individuals, including the publishing of notice in a manner that is reasonably calculated to apprise the collective members of their rights by law to join and participate in this lawsuit;
- c. Declaring Defendant willfully violated the FLSA and the Department of Labor’s

attendant regulations as cited herein;

- d. Granting judgment in favor of Plaintiff and against Defendant and awarding Plaintiff and the FLSA Collective the full amount of damages and liquidated damages available by law;
- e. Awarding reasonable attorneys' fees and costs incurred by Plaintiff in this action as provided by statute; and
- f. Awarding such other and further relief as this Court deems appropriate.

**JURY DEMAND**

Plaintiff, Suendy Zavala, individually and on behalf of all others similarly situated, by and through her attorneys, hereby demand a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure and the court rules and statutes made and provided with respect to the above entitled claims.

RESPECTFULLY SUBMITTED,

Dated: October 9, 2017

*/s/ Ronald S. Gellert*

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Ronald S. Gellert (DE 4259)  
**GELLERT, SCALI, BUSENKELL & BROWN LLC**  
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*Lead Counsel for Plaintiff*

# **EXHIBIT 1**

UNITED STATES DISTRICT COURT  
DISTRICT OF DELAWARE

**SUENDY ZAVALA**, individually, and on  
behalf of others similarly situated,

Plaintiff,

vs.

**PORT TO PORT INTERNATIONAL  
CORPORATION**,

Defendant.

Case No.

**CONSENT TO SUE**

I hereby consent to be a Plaintiff in the Fair Labor Standards Act case captioned above. I hereby consent to the bringing of any claims I may have under the Fair Labor Standards Act (for unpaid minimum wages, overtime, liquidated damages, attorney's fees, costs and other relief) and applicable state wage and hour law against the Defendant(s). I further consent to bringing these claims on a collective and/or class basis with other current/former employees of Defendant(s), to be represented by JTB Law Group LLC and Gellert, Scali, Busenkell & Brown, and to be bound by any settlement of this action or adjudication by the Court.

**Signed:**  **Dated:** 10/05/2017

**Name:** Suendy zavala

**Address:** 29 Altoona ave  
*Street*

New Castle DE 19720  
*City, State, Zip Code*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Suendy Zavala, individually, an on behalf of others similarly situated,

(b) County of Residence of First Listed Plaintiff New Castle County (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Ronald S. Gellert, Gellert Scali Busenkell & Brown, LLC, 1201 N. Orange St. Ste. 300, Wilmington, DE 19801; (302) 425-5806, rgellert@gssbllaw.com. Jason T. Brown, JTB Law Group, LLC, 155 2nd St., Ste. 4, Jersey City, NJ 07302, (877) 561-0000, jtb@jtblawgroup.com

DEFENDANTS

Port to Port International Corporation

County of Residence of First Listed Defendant New Castle County (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and business location (Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation).

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PRISONER PETITIONS, TORTS, PERSONAL INJURY, LABOR, IMMIGRATION, FORFEITURE/PENALTY, SOCIAL SECURITY, BANKRUPTCY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Fair Labor Standards Act, 29 U.S.C. § 201, et seq. Brief description of cause: Failure to pay proper overtime compensation to employees

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: X Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 10/09/2017 SIGNATURE OF ATTORNEY OF RECORD /s/ Ronald S. Gellert (DE 4259)

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RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

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