

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT COLUMBUS**

ELECTRONICALLY FILED

RODNEY MITCHELL AND RHONDA)	CLASS AND COLLECTIVE ACTION
THOMAS, On Behalf of Themselves and All)	
Others Similarly Situated,)	CIVIL ACTION NO. 2:22-cv-2123
)	
<i>Plaintiffs,</i>)	JUDGE MICHAEL H. WATSON
)	
v.)	MAGISTRATE JUDGE
)	KIMBERLY A. JOLSON
BOB EVANS RESTAURANTS, LLC,)	
)	
<i>Defendant.</i>)	

THIRD AMENDED CLASS ACTION AND COLLECTIVE ACTION COMPLAINT

COME the Plaintiffs, Rodney Mitchell and Rhonda Thomas, on behalf of themselves and all others similarly situated, and for their second amended complaint against Defendant Bob Evans Restaurants, LLC (“Defendant” or “Bob Evans”), hereby state as follows.

Plaintiffs submit this Third Amended Complaint in conformity with the Court's Order and Opinion dated July 2, 2024, ECF No. 74 at PageID 1131-1132. Plaintiffs do not waive any causes of action asserted in any previously tendered complaint. Specifically, Plaintiffs do not waive their claims for forced labor by fraud pursuant to the Kentucky Wage and Hour Act; conversion under Kentucky, Indiana, or Tennessee law; or unjust enrichment under Tennessee law, by omitting them from this Third Amended Complaint.

INTRODUCTION

1. Plaintiffs bring this action against Defendant to recover unpaid minimum wages, liquidated damages, attorneys' fees, costs, and all other available relief under the Fair Labor

Standards Act (“FLSA”), 29 U.S.C. §§ 201 *et seq.*; the Kentucky Wages and Hours Act (“KWHHA”), Ky. Rev. Stat. Ann. § 337.010 *et seq.*; the Indiana Wage Payment Statute (“IWPS”), Ind. Code §§ 22-2-5-1 *et seq.*; and the common law of Kentucky, Indiana, and Tennessee. Plaintiffs assert their FLSA claims as a collective action pursuant to 29 U.S.C. § 216(b), and their KWHHA, IWPS, and common law claims as a class action pursuant to Fed. R. Civ. P. 23.

2. Plaintiffs and those they seek to represent in this action are current and former employees of Defendant at its locations in Kentucky, Indiana, and Tennessee, who earned less than \$7.25 per hour and received customer tips (“Tipped Employees”).

3. Defendant generally pays tipped employees a tipped hourly wage less than the statutory \$7.25 per hour minimum wage and relies on the “tip credit” provisions of the FLSA and KWHHA to satisfy its statutory minimum wage obligations.

4. Defendant has a practice of overriding or adjusting the rate of pay for hours worked by Tipped Employees of Defendant’s Kentucky, Indiana, and Tennessee locations located within Bob Evans’ Region 2 Area 6. These after-the-fact adjustments reduce the rate of pay for class members who believe they are clocked in at a classification that provides a rate of pay without Bob Evan’s deduction of a tip credit, but results in their rate of pay being subsequently reduced to less than \$7.25 per hour whether or not the class members are performing work that is eligible for the tip credit under federal or state law. The overrides have been performed both on-site by store management and off-site by Bob Evans’ corporate management. These pay adjustments were accomplished both by changing the job classifications to a lower paying job classification and by directly overriding the rate of pay, sometimes to an amount of \$0 per hour.

5. Defendant has a practice of requiring Tipped Employees of Defendant's Kentucky, Indiana and Tennessee locations to perform work that is not part of their tipped occupation nor directly supporting their tip-producing work, at a rate less than the statutory \$7.25 per hour minimum wage, in violation of the FLSA and KWHHA.

6. Defendant has a practice of requiring Tipped Employees of Defendant's Kentucky, Indiana, and Tennessee locations to perform work that is not directly supporting their tip-producing work but which was performed for a substantial amount of time (i.e., more than 20% of a single shift or at any time for a duration of 30 minutes or longer), in violation of the FLSA and KWHHA.

PARTIES, JURISDICTION, AND VENUE

A. Plaintiff Rodney Mitchell

7. Plaintiff Rodney Mitchell is a resident and citizen of Louisville, Jefferson County, Kentucky.

8. Defendant employed Plaintiff Rodney Mitchell at its Store Number 0437-Hillview ("Hillview"), located in Louisville, Kentucky, from September 2019 to the present.

9. Throughout his employment, Plaintiff Rodney Mitchell has been employed as a tipped employee and was paid hourly wages less than \$7.25 per hour plus tips. Plaintiff Rodney Mitchell was previously promoted to manage Defendant's Hillview location; however, he was demoted on April 28, 2022, after Defendant discovered he was contemplating filing this lawsuit.

B. Plaintiff Rhonda Thomas

10. Plaintiff Rhonda Thomas is a resident and citizen of New Albany, Floyd County, Indiana.

11. Defendant employed Plaintiff Rhonda Thomas at its Store Number 575-New Albany (“New Albany”), located in New Albany, Indiana, from April 1, 2012, until it closed on March 21, 2022.

12. Plaintiff Rhonda Thomas is now employed by Defendant at its Store Number 78-Clarksville (“Clarksville”), located in Clarksville, Indiana.

13. Throughout her employment, Plaintiff Rhonda Thomas has been employed as a tipped employee and was paid hourly wages less than \$7.25 per hour plus tips.

C. Defendant Bob Evans Restaurants, LLC

14. Defendant Bob Evans Restaurants, LLC, is a Delaware limited liability company, with its principal place of business at 8111 Smith’s Mill Road, New Albany, OH 43054, and it conducts business within this judicial district. Defendant’s registered agent for service of process is CT Corporation System, 4400 Easton Commons Way, Suite 125, Columbus, Ohio 43219.

15. At all times and for all acts stated herein, Defendant acted through its agents, servants, and employees.

16. Defendant has at all relevant times herein been an employer within the meaning of the FLSA, KWAHA, and IWPS.

D. Jurisdiction and Venue

17. This Court has jurisdiction over Plaintiffs’ claims because they are brought pursuant to FLSA, 29 U.S.C. § 216(b), and because they raise a federal question pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over Plaintiffs’ supplemental state law claims pursuant to 28 U.S.C. § 1367.

18. Venue for this action properly lies in the Southern District of Ohio, pursuant to 28 U.S.C. § 1391, because Defendant’s headquarters is located in Ohio.

FACTS

19. Plaintiffs' allegations in paragraphs 1-18 are incorporated by reference as if fully set forth herein.

20. Plaintiffs and other Tipped Employees are current and former employees of Defendant at its locations in Kentucky, Indiana, and Tennessee, who earned less than \$7.25 per hour and received customer tips.

21. Plaintiffs and other Tipped Employees are engaged in a tipped occupation insofar as they customarily and regularly earn more than \$30 per month in tips for the work they perform for Defendant.

22. Defendant pays Plaintiffs and other Tipped Employees a wage below the \$7.25 per hour minimum wage.

23. Defendant purports to utilize a tip credit for each hour worked by Plaintiffs and other Tipped Employees to comply with the FLSA and KWHHA's required minimum wage of \$7.25 per hour. 29 U.S.C. §§ 203(m), 206; 29 C.F.R. § 531.51; Ky. Rev. Stat. Ann. § 337.275.

24. Plaintiffs and other Tipped Employees performed work for Defendant which does not qualify as work that is part of their tipped occupation and does not directly support their tip-producing work. *See* 29 C.F.R. § 531.56(f)(5); 803 Ky. Admin. Regs. 1:080 § 3(7); Ind. Code § 22-2-2-4.

25. Plaintiffs and other Tipped Employees performed work at an hourly rate at or above the \$7.25 per hour minimum wage for work that is not part of their tipped occupation nor directly supporting their tip-producing work.

26. At certain times throughout their employment with Defendant, Plaintiffs and other Tipped Employees were required to clock in at a rate less than the \$7.25 per hour minimum wage to perform work that is not part of their tipped occupation.

27. Defendant has a practice of adjusting or overriding Plaintiffs and other Tipped Employees' hourly wage rate to an amount less than the \$7.25 per hour minimum wage for work performed during shifts when employees clocked in with a representation that the hourly wage for the shift would be more than (and often substantially more than) \$7.25 an hour, including but not limited to time spent performing work that is not part of their tipped occupation nor directly supporting their tip-producing work after Plaintiffs and other Tipped Employees had clocked in at an hourly rate greater than or equal to the \$7.25 per hour minimum wage. Many of those adjustments or overrides appear to have occurred at a location away from the restaurant where the employee clocked in, or at the direction of a superior away from the restaurant where the tipped worker clocked in.

28. Plaintiffs and other Tipped Employees performed work in the following non-tipped roles that was not part of their tipped occupation: trainer (training new servers), host, carry-out, cash-out, various opening duties (including, but not limited to, wiping down, restocking, preparing, and/or setting up all appliances, beverage machines, bread warmer, food containers, condiment containers, salad station, cold rail, steamtable, steam wells), dishwasher, cook, kitchen prep (including, but not limited to, slicing tomatoes and fruit, slicing bread, making biscuits and gravy, making desserts, preparing soup, and making salads), various closing duties (including, but not limited to, wiping down, cleaning and/or disassembling all appliances, beverage machines, bread warmer, food containers, condiment containers, salad station, cold rail, steamtable, steam wells, and shelves), janitor (including, but not limited to, cleaning bathrooms,

cleaning windows, cleaning blinds, taking out kitchen trash, cleaning chairs, sweeping, and mopping) and loading and unloading trucks.

29. Plaintiffs and other Tipped Employees performed the following tasks which directly supported their tip-producing work in excess of 20% of the time for each shift: rolling silverware, refilling condiment containers, setting tables, bussing and cleaning tables, cash-out, various opening duties (including, but not limited to, preparing glasses, condiments, caddies, napkins, and syrup containers at the employee's assigned tables), various closing duties (including, but not limited to, preparing steak knives, soup spoons, caddies, syrup containers, and trays, at the employee's assigned tables), and any of the tasks set out in paragraph 28, *supra*, that the Court later determines is work that directly supports the tipped occupation.

30. Defendant is able to make adjustments to employees' rate of pay off-site using its customizable point-of-sale system, Aloha POS ("Aloha POS").

31. Before clocking in using the Aloha POS system, Plaintiffs and other Tipped Employees were required to acknowledge that "all non-tipped issues in the last 30 days have been resolved" even though there had been no such resolution. Exhibit A (attached to Plaintiff's Complaint and incorporated here by reference) includes an image of the message Plaintiffs and other Tipped Employees were required to acknowledge before being permitted to clock in. [DE 1-1 at Page ID# 25].

32. Before clocking out using the Aloha POS system, Plaintiffs and other Tipped Employees were required to answer "No" to the following question: "Did you spend more than 20% of your server shift on non-tipped work?" Exhibit B (attached to Plaintiff's Complaint and incorporated here by reference) includes an image of the message to which Plaintiffs and other

Tipped Employees were required to agree before being permitted to clock out. [DE 1-1 at Page ID# 27.]

33. If Plaintiffs and other Tipped Employees answered “Yes” to the question identified in Exhibit B, management authorization via a manager card swipe was required to clock out. Management discouraged Plaintiffs and other Tipped Employees from answering “Yes.” In many instances, management went so far as to instruct Plaintiffs and other Tipped Employees always to answer “No” to this question, threatened employees with switching jobs or withholding tips if they answered “Yes”, and/or even instructed Plaintiffs and other Tipped Employees to change their answers to “No” in order to be allowed to clock out and receive their tips. At other times, employees would answer “No” and swipe an unattended manager’s card that was left near the POS station, and in those instances, there was no further acknowledgement or increase in rate of pay reflecting time in excess of 20% spent in non-tipped work. Exhibit C includes an image of the manager authorization required if Plaintiffs and other Tipped Employees answered “Yes” to the question identified in Exhibit B. [DE 1-1 at Page ID# 29.]

34. On or about April 25, 2022, Imad Mustafa, the Director of Operations of Bob Evans’ Region 2, Area 6, questioned a current employee of Defendant’s Hillview location in Louisville, Kentucky, about whether she or other Tipped Employees were contemplating filing this lawsuit.

35. On or about April 26, 2022, Plaintiff Rodney Mitchell was questioned by Zach Reed, the acting General Manager of the Hillview location in Louisville, Kentucky, about whether he or other Tipped Employees were contemplating filing this lawsuit.

36. On or about April 28, 2022, Plaintiff Rodney Mitchell was demoted from his role as a supervisor to a server, in retaliation for his intention to file this lawsuit.

37. Defendant knew, or should have known, that its compensation practices for Plaintiffs and other Tipped Employees violates the FLSA, KWHHA, and IWPS.

COLLECTIVE ACTION ALLEGATIONS

38. Plaintiffs' allegations in paragraphs 1-37 are incorporated by reference as if fully set forth herein.

39. Plaintiffs assert their FLSA claim pursuant to 29 U.S.C. § 216(b) as a collective action on behalf of the following similarly situated employees:

All employees of Bob Evans who worked in any store in Region 2 Area 6, after May 9, 2019, for whom Bob Evans paid a wage of less than \$7.25 per hour, and who (1) spent more than 20 percent of work time or more than 30 consecutive minutes performing non-tipped work that was directly supporting tipped work, or (2) who spent any time performing work that was not part of a tipped occupation, or both; and any other tipped employee during the same period whose hourly wage for any shift was reduced from the hourly wage represented at the time the employee clocked in for a shift.

(The "Collective Class.")

40. Plaintiffs' FLSA claims should proceed as a collective action because Plaintiffs and the Collective Class, having worked pursuant to the common practices described herein, are "similarly situated" as that term is defined in 29 U.S.C. § 216(b) and the associated decisional law.

CLASS ACTION ALLEGATIONS

41. Plaintiffs' allegations in paragraphs 1-40 are incorporated by reference as if fully set forth herein.

42. Plaintiffs bring this action on their own behalf, and pursuant to Fed. R. Civ. P. 23, on behalf of the following class of individuals:

All employees of Bob Evans who worked in any store in the Kentucky portion of Region 2 Area 6, after May 9, 2017, or in the

Indiana portion of Region 2 Area 6, after May 9, 2019, or in the Tennessee portion of Region 2 Area 6, after June 21, 2019, to whom Bob Evans paid a wage of less than \$7.25 per hour, and who (1) spent more than 20 percent of work time or more than 30 consecutive minutes performing non-tipped work that was directly supporting tipped work, or (2) who spent any time performing work that was not part of a tipped occupation, or both; and any other tipped employee during the same period whose hourly wage for any shift was reduced from the hourly wage represented at the time the employee clocked in for a shift.

(The “Rule 23 Class”).

43. Plaintiffs bring this action on their behalf and, pursuant to Fed. R. Civ. P. 23(c)(5), on behalf of the following three subclasses:

- a. All class members who worked in any Kentucky restaurant included in the class during the class period (the “Kentucky Subclass”);
- b. All class members who worked in any Indiana restaurant included in the class during the class period (the “Indiana Subclass”); and,
- c. All class members who worked in any Tennessee restaurant included in the class during the class period (the “Tennessee Subclass”).

Individual class members may be members of one or more subclasses.

44. Plaintiffs are members of the Rule 23 Class they seek to represent. Plaintiff Rodney Mitchell is a member of the Kentucky Subclass. Plaintiff Rhonda Thomas is a member of the Indiana Subclass.

45. Defendant has employed hundreds of individuals as Tipped Employees at its locations in Kentucky and Indiana. Thus, the Rule 23 Class is sufficiently numerous that joinder of all members is impractical, satisfying Fed. R. Civ. P. 23(a)(1).

46. Plaintiffs and members of the Rule 23 Class share the same pivotal questions of law and fact, satisfying Fed. R. Civ. P. 23(a)(2), due to Defendant’s violations of the minimum

wage requirements as defined by 29 U.S.C. § 206, Ky. Rev. Stat. Ann. § 337.275, and Ind. Code § 22-2-2-4. As a result, the Rule 23 Class shares factual and legal questions, including, but not limited to, (1) whether Defendant required Tipped Employees to perform work outside of their tipped occupation or not directly supporting their tip-producing work for an hourly rate less than the \$7.25 per hour minimum wage, (2) whether Defendant retroactively changed the rate of pay for employees who believed they were earning an amount greater than \$7.25 per hour and for work not eligible for a tip credit, and (3) the duration of time in which Defendant conducted this practice of paying Tipped Employees an amount less than the \$7.25 per hour minimum wage for work performed outside of their tipped occupation and not directly supporting their tip-producing work.

47. Plaintiffs' claims are typical of the claims of the Rule 23 Class, satisfying Fed. R. Civ. P. 23(a)(3). Defendant's violation of the minimum wage, and other requirements of the KWHHA and IWPS, is not the result of any Plaintiff-specific circumstances. Rather, it arises from Defendant's common practices, which Defendant applied generally to all of its Tipped Employees in its Kentucky and Indiana locations, including the Plaintiffs. Thus, in advancing their own claims, Plaintiffs will also be advancing the claims of the Rule 23 Class.

48. Plaintiffs will fairly and adequately represent and protect the interests of the Rule 23 Class, satisfying Fed. R. Civ. P. 23(a)(4). Plaintiffs' interests are shared with the Rule 23 Class and Plaintiffs have no interests that conflict with those of the Rule 23 Class. Furthermore, Plaintiffs have retained competent counsel experienced in class action and other complex litigation, including the representation of classes of employees against their employers related to their employers' failure to pay them properly under the law.

49. By failing to pay Tipped Employees all required minimum wages pursuant to its common pay practices, Defendant has created a scenario in which questions of law and fact common to the Rule 23 Class predominate over any questions affecting only individual members. Thus, a class action is the superior method of fairly and efficiently adjudicating this matter. Plaintiffs are entitled to pursue their claims as a class action, pursuant to Fed. R. Civ. P. 23(b)(3).

FIRST CAUSE OF ACTION:
VIOLATION OF MINIMUM WAGE REQUIREMENTS OF THE FLSA BY REDUCING
EMPLOYEES' RATE OF PAY AFTER THE SHIFT HAS CONCLUDED

50. Plaintiffs' allegations in paragraphs 1-49 are incorporated by reference as if fully set forth herein.

51. Plaintiffs assert this claim on behalf of themselves and members of the Collective Class who opt in to this action by filing a consent form pursuant to 29 U.S.C. § 216(b).

52. Plaintiffs and the Collective Class are employees entitled to the FLSA's protections.

53. Defendant is an employer covered by the FLSA.

54. The FLSA entitles employees to a minimum hourly wage of \$7.25 per hour for every hour worked. 29 U.S.C. § 206(a).

55. While employers may utilize a tip credit to satisfy their minimum wage obligations to tipped employees, they forfeit the right to do so when certain requirements are not met. 29 U.S.C. § 203(m), (t).

56. Employers may not take a tip credit for work performed by a tipped employee that is not part of the employee's tipped occupation but directly supports tip-producing work if the tipped employee spends a substantial amount of time performing such work; that is, performing work which directly supports tip-producing work for more than 20 percent of the hours worked

during any week worked or performing any directly supporting work for any continuous period of time exceeding 30 minutes. 29 C.F.R. § 531.56(f)(4).

57. Employers may not take a tip credit for work performed by a tipped employee that is not part of the employee's tipped occupation and does not directly support tip-producing work. 29 C.F.R. § 531.56(f)(5).

58. Employers may not take a tip credit for hours worked by an employee that does not qualify the employee as a tipped employee. 29 C.F.R. § 531.59(b).

59. Employers are required to maintain and preserve, *inter alia*, payroll and other records reflecting tips received, hours worked each workday in any occupation in which the employee does not receive tips, and hours worked in each workday in any occupation in which the employee receives tips. 29 C.F.R. § 516.28(a).

60. No provision of the FLSA "shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter." 29 U.S.C. § 218,

61. By unlawfully adjusting or overriding the rate of pay for any work performed by Tipped Employees, including but not limited to work that is not part of their tipped occupation, not in direct support of tip-producing work, or is not work that directly supports tip-producing work for a substantial amount of time, to an hourly rate less than the \$7.25 per hour minimum wage after Plaintiffs and other Tipped Employees clocked in an hourly rate greater than or equal to the \$7.25 per hour minimum wage, Defendant has forfeited its right to utilize the tip credit in satisfying its minimum wage obligations.

62. By paying an employee a wage rate less than the wage rate agreed to at the time the employee clocked in for the shift, the employer has unlawfully attempted to use the FLSA to justify payment of a wage rate that is less than the minimum wage.

63. As a result of the conduct described above, Defendant has violated the FLSA by failing to pay Plaintiffs and the members of the Collective Class for time worked at or above the \$7.25 per hour minimum wage.

64. Plaintiffs and members of the Collective Class are entitled to recover all unpaid wages, an equal amount of liquidated damages, and attorneys' fees and expenses, pursuant to 29 U.S.C. § 216(b).

65. Defendant's violations of the FLSA are willful and with reckless disregard of applicable FLSA provisions.

SECOND CAUSE OF ACTION:
VIOLATION OF THE MINIMUM WAGE REQUIREMENTS OF THE FLSA BY
FAILING TO PAY MINIMUM WAGE FOR WORK WHICH IS NOT TIP-PRODUCING

66. Plaintiffs' allegations in paragraphs 1-65 are incorporated by reference as if fully set forth herein.

67. Plaintiffs assert this claim on behalf of themselves and members of the Collective Class who opt in to this action by filing a consent form pursuant to 29 U.S.C. § 216(b).

68. Plaintiffs and the Collective Class are employees entitled to the FLSA's protections.

69. Defendant is an employer covered by the FLSA.

70. The FLSA entitles employees to a minimum hourly wage of \$7.25 per hour for every hour worked. 29 U.S.C. § 206(a).

71. While employers may utilize a tip credit to satisfy their minimum wage obligations to tipped employees, they forfeit the right to do so when certain requirements are not met. 29 U.S.C. § 203(m), (t).

72. Employers may not take a tip credit for work performed by a tipped employee that is not part of the employee's tipped occupation but directly supports tip-producing work if the

tipped employee spends a substantial amount of time performing such work; that is, performing work which directly supports tip-producing work for more than 20 percent of the hours worked during any week worked or performing any directly supporting work for any continuous period of time exceeding 30 minutes. 29 C.F.R. § 531.56(f)(4).

73. Employers may not take a tip credit for work performed by a tipped employee that is not part of the employee's tipped occupation and does not directly support tip-producing work. 29 C.F.R. § 531.56(f)(5).

74. Employers may not take a tip credit for hours worked by an employee that does not qualify the employee as a tipped employee. 29 C.F.R. § 531.59(b).

75. Employers are required to maintain and preserve, *inter alia*, payroll and other records reflecting tips received, hours worked each workday in any occupation in which the employee does not receive tips, and hours worked in each workday in any occupation in which the employee receives tips. 29 C.F.R. § 516.28(a).

76. By compensating Plaintiffs and members of the Collective Class at a rate less than the \$7.25 per hour minimum wage while requiring Plaintiffs and the members of the Collective Class to perform work that is not part of their tipped occupations or directly supporting their tip-producing work, or requiring Plaintiffs and members of the Collective Class to perform work which was directly supporting their tip-producing work for a substantial amount of time, Defendant has forfeited its right to utilize the tip credit in satisfying its minimum wage obligations.

77. As a result of the conduct described above, Defendant has violated the FLSA by failing to pay Plaintiffs and the members of the Collective Class for time worked at or above the \$7.25 per hour minimum wage.

78. Plaintiffs and members of the Collective Class are entitled to recover all unpaid minimum wages, an equal amount of liquidated damages, and attorneys' fees and expenses, pursuant to 29 U.S.C. § 216(b).

79. Defendant's violations of the FLSA are willful and with reckless disregard of applicable FLSA provisions.

THIRD CAUSE OF ACTION:
VIOLATION OF THE MINIMUM WAGE REQUIREMENTS OF THE KWA

80. Plaintiffs' allegations in paragraphs 1-79 are incorporated by reference as if fully set forth herein.

81. Plaintiff Rodney Mitchell asserts this claim on behalf of himself and members of the Rule 23 Class, pursuant to Fed. R. Civ. P. 23.

82. Plaintiff Rodney Mitchell and the Rule 23 Class are employees entitled to the KWA's protections.

83. Defendant is an employer covered by the KWA.

84. The KWA entitles employees to a minimum wage of \$7.25 per hour for every hour worked. Ky. Rev. Stat. Ann. § 337.275.

85. While employers may utilize a tip credit to satisfy their minimum wage obligations to tipped employees, they forfeit the right to do so when certain requirements are not met. Ky. Rev. Stat. Ann. §§ 337.010(2)(d), 337.275(2); 803 Ky. Admin. Regs. 1:080 § 3.

86. The KWA prohibits employers from taking the tip credit for hours worked by tipped employees in occupations in which the employees do not qualify as a tipped employee. Ky. Rev. Stat. Ann. § 337.275(b); 803 Ky. Admin. Regs. 1:080 § 3(1), (7).

87. Employers forfeit the tip credit by requiring tipped employees to perform work that does not qualify as part of their tipped occupation at an hourly rate less than the \$7.25 per hour minimum wage.

88. By requiring Plaintiff Rodney Mitchell and members of the Rule 23 Class to perform work that is not part of their tipped occupation at an hourly rate less than the \$7.25 per hour minimum wage, Defendant has forfeited its right to utilize the tip credit in satisfying its minimum wage obligations to Plaintiff Rodney Mitchell and members of the Rule 23 Class.

89. Defendant has violated KWHHA's minimum wage mandate by paying Plaintiff Rodney Mitchell and members of the Rule 23 Class less than the \$7.25 per hour minimum wage for work that does not qualify as part of their tipped occupation.

90. Pursuant to the KWHHA, "No employer shall withhold from any employee any part of the wage agreed upon." Ky. Rev. Stat. Ann. § 337.060(1).

91. Pursuant to the KWHHA, "[e]very employer doing business in this state shall, as often as semimonthly, pay to each of its employees all wages or salary earned to a day not more than eighteen (18) days prior to the date of that payment. . . Every such employee shall have a right of action against any such employer for the full amount of his wages due on each regular pay day." Ky. Rev. Stat. Ann. § 337.020.

92. Pursuant to the KWHHA, "[a]ny employee who leaves or is discharged from his employment shall be paid in full all wages or salary earned by him." Ky. Rev. Stat. Ann. § 337.055.

93. Defendant has violated KWHHA, including but not limited to Ky. Rev. Stat. Ann. §§ 337.020, 337.055, 337.060 and/or 337.275, by paying employees less than the rate agreed

upon when the wage rate for any shift was decreased after the employee clocked in for the shift at a higher wage rate.

94. Plaintiff Rodney Mitchell and members of the Rule 23 Class are entitled to recover all unpaid wages, including but not limited to, minimum wages, an equal amount of liquidated damages, and attorneys' fees and expenses, including interest thereon, pursuant to Ky. Rev. Stat. Ann. § 337.385.

95. Defendant's violations of the KWHHA are willful and with reckless disregard of applicable KWHHA provisions.

FOURTH CAUSE OF ACTION:
FORCED LABOR BY FRAUD PURSUANT TO THE KWHHA

96. Plaintiffs do not waive the claims pursued in this cause of action, but omit it from this Third Amended Complaint to conform with the Court's Order and Opinion dated July 2, 2024, ECF No. 74 at PageID 1131-1132.

FIFTH CAUSE OF ACTION:
VIOLATION OF THE INDIANA WAGE PAYMENT STATUTE ("IWPS")

97. Plaintiffs' allegations in paragraphs 1-96 are incorporated by reference as if fully set forth herein.

98. Plaintiff Rhonda Thomas asserts this claim on behalf of herself and members of the Rule 23 Class, pursuant to Fed. R. Civ. P. 23.

99. Plaintiff Rhonda Thomas and the Rule 23 Class are employees entitled to the IWPS's protections.

100. Defendant is a corporation doing business in Indiana, and therefore is covered by the IWPS. Ind. Code § 22-5-2-1(a).

101. The IWPS requires an employer to pay the full amount of wages earned to each employee who is currently employed or who has voluntarily left employment, within 10 days after the end of each pay period. Ind. Code § 22-5-2-1(b).

102. Rhonda Thompson and the members of the Indiana subclass she seeks to represent were each current employees of Bob Evans at the time they earned their wages and when payment came due 10 days after the end of each pay period.

103. Certain members of the Indiana subclass have left the employment of Bob Evans voluntarily during the period covered by the class definition.

104. When Bob Evans closed its New Albany, Indiana, location, it offered the class members who were employed there a transfer of employment to other locations operated by Bob Evans, so any class member who received such an offer yet chose not to accept it left the employment of Bob Evans voluntarily.

105. Rhonda Thomas and each of the members of the Indiana subclass earned the greater of the minimum wage he or she was entitled to under the FLSA, or the higher amount contracted for at the start of each shift when Bob Evans agreed to pay a wage higher than the wage minimum required by the FLSA, for all time worked for Bob Evans.

106. Bob Evans violated the IWPS when it failed to pay Rhonda Thomas and each of the members of the Indiana subclass the “all wages earned” within 10 days after the end of the pay period during which the wages were earned or, for class members who had voluntarily left the employment of Bob Evans, within 10 days after the employee furnished Bob Evans with his or her address.

107. Plaintiff Rhonda Thomas and members of the Indiana subclass are entitled to recover the difference between the wages each of them earned, and the wages that were actually paid by Bob Evans, as well as attorneys' fees and costs, pursuant to Ind. Code § 22-2-5-2.

108. Bob Evans was not acting in good faith at the time it failed to pay its servers the amount of wages each of them had earned, because it systematically failed to pay all servers the amounts due under the FLSA and because its managers intentionally and unilaterally reduced the higher, agreed-upon rate of pay for servers after the servers and concluded their shifts and left the premises.

109. Because Bob Evans was not acting in good faith at the time it failed to pay its servers the amount of wages each of them had earned, the court shall order, as liquidated damages for the failure to pay wages, that Rhonda Thomas and each member of the Indiana subclass be paid an amount equal to two times the amount of wages due each employee, pursuant to Ind. Code § 22-2-5-2.

SIXTH CAUSE OF ACTION:
BREACH OF CONTRACT

110. Plaintiffs' allegations in paragraphs 1-128 are incorporated by reference as if fully set forth herein.

111. Rodney Mitchell and Rhonda Thomas, and the class members they represent, clocked in at the beginning of each shift at the behest of a manager appointed by Bob Evans. At or just before the time that each Plaintiff or class member clocked in, the Plaintiff or class member was directed by a manager to clock in for a specific position at a specific rate of pay.

112. When Bob Evans, through its managers, expected a Plaintiff or class member during a shift to perform non-tipped work that was unrelated to any tipped occupation, or non-tipped work that was related to their tipped occupation that was in excess of 20% of the work

hours for which Bob Evans takes a tip credit, Bob Evans' manager instructed the Plaintiff or class member to clock in for a position with a wage rate of more than the federal minimum wage.

113. This action constituted an offer by Bob Evans to employ the Plaintiff or class member at a specific rate of pay above the federal minimum wage for that shift.

114. The act of clocking in to a specific position with a defined wage rate by each Plaintiff or class member constituted an acceptance of the offer by Bob Evans, and resulted in the formation of a contract.

115. Each time a Plaintiff or class member clocked in for a shift for a specified wage rate (including when the wage rate was a result of the occupational title to which the employee clocked in, such as "server" or "host"), an express or implied contract was formed between the employee and Bob Evans, by which the employee agreed to work that shift for the specified wage rate and Bob Evans agreed to pay the specified wage rate.

116. Plaintiffs and class members would not have agreed to perform non-tipped work unrelated to any tipped work, or non-tipped work that was related to tipped work but in excess of 20% of the time for which Bob Evans took a tip credit, if Bob Evans did not offer to pay a wage rate in excess of the federal minimum wage.

117. When any person acting on behalf of Bob Evans subsequently reduced the Plaintiff's for class member's wage rate for that shift below that wage rate at which the employee had agreed to work, Bob Evans breached the contract between the employee and employer for that shift.

118. In all such circumstances, the employee is entitled to recover from Bob Evans the difference between the agreed-upon wage rate and the actual wage rate paid for all time worked.

SEVENTH CAUSE OF ACTION: CONVERSION
(Kentucky Subclass)

119. Plaintiffs do not waive the claims pursued in this cause of action, but omit it from this Third Amended Complaint to conform with the Court's Order and Opinion dated July 2, 2024, ECF No. 74 at PageID 1131-1132.

EIGHTH CAUSE OF ACTION: CONVERSION
(Indiana Subclass)

120. Plaintiffs do not waive the claims pursued in this cause of action, but omit it from this Third Amended Complaint to conform with the Court's Order and Opinion dated July 2, 2024, ECF No. 74 at PageID 1131-1132.

NINTH CAUSE OF ACTION: CONVERSION
(Tennessee Subclass)

121. Plaintiffs do not waive the claims pursued in this cause of action, but omit it from this Third Amended Complaint to conform with the Court's Order and Opinion dated July 2, 2024, ECF No. 74 at PageID 1131-1132.

TENTH CAUSE OF ACTION: UNJUST ENRICHMENT
(Kentucky Subclass)

122. Plaintiffs' allegations in paragraphs 1-121 are incorporated by reference as if fully set forth herein.

123. Through their labor as employees of Bob Evans, each of the members of the Kentucky Subclass conferred a benefit on Bob Evans that was equal in value to at least the federal minimum wage and/or the Kentucky minimum wage for each hour worked by the employee, or to any higher amount agreed upon between Bob Evans and the employee at the time the employee clocked in.

124. Bob Evans received and appreciated the benefit of the labor of each of the members of the Kentucky Subclass.

125. By failing to pay the applicable minimum wage for each hour worked, or a higher wage agreed upon, Bob Evans accepted the benefit of each employee's labor under such circumstances that it would be inequitable to retain the benefit without payment of the value thereof.

126. As a result of Bob Evans' improper acts and omissions, Bob Evans was unjustly enriched and therefore owes to each member of the Kentucky Subclass an amount equal to the difference between the applicable federal minimum wage or Kentucky minimum wage, or the higher amount agreed upon at the time the employee clocked in, and the amount actually paid by Bob Evans to each member of the Kentucky Subclass.

127. Bob Evans acted with oppression, fraud or malice, and acted recklessly and with gross negligence, to deprive its employees of the wages due them and unjustly enrich itself. Therefore, each member of the Kentucky Subclass is entitled to an award of punitive damages against Bob Evans.

ELEVENTH CAUSE OF ACTION: UNJUST ENRICHMENT
(Indiana Subclass)

128. Plaintiffs' allegations in paragraphs 1-123 are incorporated by reference as if fully set forth herein.

129. Through their labor as employees of Bob Evans, each of the members of the Indiana Subclass conferred a measurable benefit on Bob Evans, at Bob Evans' express or implied request, that was equal in value to at least the federal minimum wage or Indiana minimum wage for each hour worked by the employee, or to any higher amount agreed upon between Bob Evans and the employee at the time the employee clocked in.

130. Bob Evans received and appreciated the benefit of the labor of each of the members of the Indiana Subclass.

131. Each of the members of the Indiana Subclass expected to be compensated at least the federal minimum wage or Indiana minimum wage for each hour worked by the employee, or to any higher amount agreed upon between Bob Evans and the employee at the time the employee clocked in.

132. By failing to pay the applicable minimum wage for each hour worked, or a higher wage agreed upon at the time the employee clocked in, Bob Evans accepted the benefit of each employee's labor under such circumstances that it would be inequitable to retain the benefit without payment of the value thereof.

133. As a result of Bob Evans' improper acts and omissions, Bob Evans was unjustly enriched and therefore owes to each member of the Indiana Subclass an amount equal to the difference between the applicable federal minimum wage or Indiana minimum wage, or the higher amount agreed upon at the time the employee clocked in, and the amount actually paid by Bob Evans to each member of the Indiana Subclass.

134. Bob Evans acted with malice, fraud, gross negligence, or oppressiveness, which was not the result of a mistake of fact or law, mere negligence, or other human failing, to deprive its employees of the wages due them and unjustly enrich itself. Therefore, each member of the Indiana Subclass is entitled to an award of punitive damages against Bob Evans.

TWELFTH CAUSE OF ACTION: UNJUST ENRICHMENT
(Tennessee Subclass)

135. Plaintiffs do not waive the claims pursued in this cause of action, but omit it from this Third Amended Complaint to conform with the Court's Order and Opinion dated July 2, 2024, ECF No. 74 at PageID 1131-1132.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief on behalf of themselves and all others similarly situated:

1. An order permitting this litigation to proceed as a collective action pursuant to 29 U.S.C. § 216(b);
2. An order permitting this litigation to proceed as a class action pursuant to Fed. R. Civ. P. 23;
3. Prompt notice of this litigation, pursuant to 29 U.S.C. § 216(b);
4. Prompt notice of this litigation, pursuant to Fed. R. Civ. P. 23, to the Rule 23 Class;
5. A finding that Defendant has violated the FLSA, KWHHA, and IWPS;
6. A finding that Defendant's FLSA, KWHHA, and IWPS violations are willful and not in good faith;
7. A judgment against Defendant in favor of Plaintiffs and all similarly situated employees for compensation of all unpaid and underpaid wages that Defendant has failed or refused to pay in violation of the FLSA, KWHHA, and IWPS;
8. Pre-judgment interest;
9. Post judgment interest;
10. Liquidated damages to the fullest extent permitted by the FLSA, KWHHA, and IWPS;
11. Litigation costs, expenses, and Plaintiffs' attorneys' fees to the fullest extent permitted by the FLSA, pursuant to 29 U.S.C. § 216(b); KWHHA, pursuant to Ky. Rev. Stat. Ann.

§ 337.385; IWPS, pursuant to Ind. Code § 22-2-5-2, the Federal Rules of Civil Procedure; and all other applicable law;

12. Punitive damages of not less than three times the full amount of wages due, pursuant to Ky. Rev. Stat. Ann. § 337.385(3), Kentucky, Indiana, and Tennessee common law, and all other applicable law; and

13. Such other and further relief as this Court deems just and proper in equity and under the law.

JURY DEMAND

Plaintiffs demand a jury as to all claims so triable.

Respectfully submitted,

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*Admitted *pro hac vice*