

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT  
IN AND FOR ORANGE COUNTY, FLORIDA

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CHRISTOPHER GRANT,	)	
BENJAMIN AGUDA, ANGEL DELUNA	)	
and WILBERTO REYES, on behalf of	)	
themselves and all others similarly situated	)	Civil Action No. 2011-CA-000594-O
	)	
Plaintiffs,	)	Judge: Stan Strickland
	)	
vs.	)	CLASS REPRESENTATION
	)	
HARD ROCK CAFE INTERNATIONAL	)	JURY TRIAL REQUESTED
(ORLANDO), INC.,	)	
	)	[The Florida Constitutional,
Defendant.	)	Article X, § 24, The Florida
	)	Minimum Wage Act; Rule 1.220
	)	of the Florida Rules of Civil
	)	Procedure]
	)	

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**FIRST AMENDED CLASS ACTION COMPLAINT**

Plaintiffs Christopher Grant, Benjamin Aguda, Angel DeLuna, and Wilberto Reyes (“Plaintiffs”) bring this class action complaint on behalf of themselves and others similarly situated to recover unpaid minimum wages under Florida law from Defendant Hard Rock Café International (Orlando), Inc. (“Defendant”).

**I. INTRODUCTION**

1. The Florida Constitution, Article X, Section 24(a) (“FMWA”) provides that “[a]ll working Floridians are entitled to be paid a minimum wage that is sufficient to provide a decent and healthy life for them and their families.” In doing so, FMWA permits employers to pay less than the Florida minimum wage to employees who receive tips *only if* the eligibility requirements for the tip credit under the Federal Fair Labor Standards Act (“FLSA”) are met. *Id.* at § 24(c). If an employer satisfies the tip credit

requirements, it may apply a portion of the employee's tips (up to a maximum of \$3.02 per hour) to satisfy its own minimum wage obligation.

2. To utilize the tip credit under the FLSA, and therewith the FMWA, the employer must allow its tipped employees to retain all the tips they receive, except when there is a valid arrangement for "pooling of tips among employees who customarily and regularly receive tips." 29 U.S.C. § 203(m). If an employer fails to satisfy this requirement, it may not take advantage of the tip credit and must directly pay its tipped employees the full minimum wage.

3. During the period from December 30, 2005 until approximately July 2009 (hereinafter, "the Relevant Time Period"),<sup>1</sup> Defendant utilized the tip credit to pay employees who served food and/or beverages to Defendant's customers an hourly wage rate that was less than the minimum wage required under Florida law even though those employees did not retain all of their tips and paid a portion of their tips to kitchen employees called "expeditors" who are not customarily and regularly tipped employees and are not engaged in service to customers (hereinafter, the employees who served food and/or beverages who were paid less than minimum wage and paid a portion of their tips to expeditors are referred to as "servers" and "bartenders"). By failing to satisfy the requirements of 29 U.S.C. § 203(m) during the Relevant Time Period, Defendant was not

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<sup>1</sup> The original complaint was filed on January 14, 2011. Pursuant to Florida Statute, Section 448.110(6)(a), "prior to bringing any claim for unpaid minimum wages pursuant to this section, the person aggrieved shall notify the employer alleged to have violated this section, in writing, of an intent to initiate such an action." Plaintiffs delivered Defendant notice of their class claims for unpaid minimum wages under the Florida Minimum Wage Act via overnight mail on December 16, 2010. Florida Statute, Section 448.110(6)(b) states, "The employer shall have 15 calendar days after receipt of the notice to pay the total amount of unpaid wages or otherwise resolve the claim to the satisfaction of the person aggrieved. The statute of limitations for bringing an action pursuant to this section shall be tolled during this 15-day period." Defendant did not respond to Plaintiffs' notice letter. Due to the tolling of the statute of limitations period for 15 calendar days, the Relevant Liability Period in this case is December 30, 2010 until approximately July 2009.

eligible for the tip credit and was required to pay its servers and bartenders the full minimum wage required under Florida law.

4. Pursuant to Florida Rule of Civil Procedure 1.220, Plaintiffs bring this class action on behalf of themselves and all similarly situated individuals employed by Defendant as servers and/or bartenders at the Hard Rock Café in Orlando, Florida during the Relevant Time Period. Plaintiffs seek on behalf of themselves and other similarly situated servers and bartenders unpaid minimum wages of which they were deprived, an equal amount of liquidated damages, reasonable attorneys' fees and costs, and all other relief the court deems appropriate.

## **II. JURISDICTION AND VENUE**

5. Jurisdiction is proper in this Court as the case raises claims under the Florida Constitution, Article X, Section 24, and the amount in controversy exceeds \$15,000.

6. Venue is proper in this Court as the Defendant conducts business in and maintains their corporate headquarters in Orange County, Florida.

## **III. PARTIES**

7. Plaintiff Christopher Grant is an adult resident of Sterling Heights, Michigan. Mr. Grant is an employee employed by the Defendant within the meaning of the FLSA and thereby the FMWA which adopts the FLSA's definition of employee. From approximately May 2003 to approximately March 2008, Mr. Grant worked for the Defendant as a server at the Hard Rock Café restaurant located in Orlando, Florida. From approximately 2006 to approximately March 2008, Mr. Grant also worked for the Defendant as a bartender at the Hard Rock Café restaurant located in Orlando, Florida.

As a server and as a bartender, Mr. Grant was paid a direct hourly wage that was less than the minimum wage required under Florida law and paid portions of his tips to expeditors who are not customarily and regularly tipped employees.

8. Plaintiff Benjamin Aguda is an adult resident of Orlando, Florida. Mr. Aguda was an employee employed by the Defendant within the meaning of the FLSA and thereby the FMWA which adopts the FLSA's definition of employee. From approximately March 2005 to approximately October 2009, Mr. Aguda worked for the Defendant as a server at the Hard Rock Café restaurant located in Orlando, Florida. As a server, Mr. Aguda was paid a direct hourly wage that was less than the minimum wage required under Florida law and paid portions of his tips to expeditors who are not customarily and regularly tipped employees.

9. Plaintiff Angel DeLuna is an adult resident of Orlando, Florida. Mr. DeLuna was an employee employed by the Defendant within the meaning of the FLSA and thereby the FMWA which adopts the FLSA's definition of employee. From approximately November 14, 2006 to approximately January 3, 2011, Mr. DeLuna worked for the Defendant as a server at the Hard Rock Café restaurant located in Orlando, Florida. As a server, Mr. DeLuna was paid a direct hourly wage that was less than the minimum wage required under Florida law and paid portions of his tips to expeditors who are not customarily and regularly tipped employees.

10. Plaintiff Wilberto Reyes is an adult resident of Orlando, Florida. Mr. Reyes was an employee employed by the Defendant within the meaning of the FLSA and thereby the FMWA which adopts the FLSA's definition of employee. From approximately June 6, 2006 to approximately December 25, 2009, Mr. Reyes worked for

the Defendant as a server at the Hard Rock Café restaurant located in Orlando, Florida. As a server, Mr. Reyes was paid a direct hourly wage that was less than the minimum wage required under Florida law and paid portions of his tips to expeditors who are not customarily and regularly tipped employees.

11. Defendant Hard Rock Cafe International (Orlando), Inc. employed the Plaintiffs within the meaning of the FLSA and thereby the FMWA which adopts the FLSA's definition of employer. Defendant owns and operates the Hard Rock Café located at 6050 Universal Boulevard in Orlando, Florida and is responsible for the management of and sets the pay policies and wages for the restaurant employees at this location, including, but not limited to servers, bartenders, and expeditors. The Defendant's corporate headquarters is located in Orange County at 6100 Old Park Lane, Orlando, Florida.

12. Pursuant to Florida Statutes, Section 448.110(6), Plaintiffs served notice to Defendant of their intent to file this class action on December 16, 2010. Plaintiffs received no response.

#### **IV. FACTUAL ALLEGATIONS**

13. Plaintiffs worked for the Defendant as servers and/or bartenders at the Hard Rock Café located at 6050 Universal Blvd. in Orlando, Florida. Defendant paid Plaintiffs less than the Florida minimum wage and utilized a portion of Plaintiffs' tips to satisfy its minimum wage obligations. All servers and bartenders were compensated in this manner.

14. During the Relevant Time Period, Plaintiffs and other servers and bartenders for the Defendant did not retain all their tips received from customers.

Instead, servers and bartenders tipped at least 1% of their total food and beverage sales each shift to other restaurant employees, including kitchen employees called “expeditors.” In approximately July 2009, Defendant directed servers and bartenders to discontinue paying a portion of their tips to expeditors.

15. Expeditors at the Orlando Hard Rock Café are not customarily and regularly tipped employees; instead, they are kitchen employees who are responsible for ensuring food is prepared and garnished properly and communicating food problems to the chef. It is not the job of expeditors at the Orlando Hard Rock Café to serve food and/or beverages to customers or to interact with customers. In fact, expeditors at the Orlando Hard Rock Café work in a pass-through area connected to the kitchen which is partially concealed from the view of the restaurant’s customers.

16. During the Relevant Time Period, Defendant was not entitled to the tip credit because Plaintiffs and other servers and bartenders did not retain all their tips and paid a portion of their tips to expeditors who were not customarily and regularly tipped employees.

17. Moreover, during the Relevant Time Period, Defendant willfully engaged in practices that denied Plaintiffs and other servers and bartenders minimum wages under Florida law.

18. Therefore, Plaintiffs seek to bring this action as a class action because during the Relevant Time Period other servers and bartenders were subjected to the same wrongful pay practices and policies.

**V. CLASS REPRESENTATION ALLEGATIONS**

19. Pursuant to Rule 1.220 of the Florida Rules of Civil Procedure, the named Plaintiffs seek certification and are members of the following putative class they seek to represent: All persons who worked for Defendant serving food and/or beverages at the Hard Rock Café in Orlando, Florida and were paid by Defendant a direct wage less than the Florida minimum wage during the Relevant Time Period.

20. This action is properly maintainable as a class action pursuant to Florida Rule of Civil Procedure 1.220(a) and 1.220(b)(3).

21. Numerosity: This action satisfies numerosity. The class defined in paragraph 19 is sufficiently numerous that separate joinder of each member is impracticable as the class will be comprised of more than one hundred absent class members.

22. Commonality: The named Plaintiffs' claims raise questions of law and fact common to each member of the class, which include, but are not limited to:

- a. whether servers and bartenders have been paid a direct hourly wage rate by Defendant that is less than the Florida minimum wage;
- b. whether servers and bartenders paid a portion of their tips to expeditors;
- c. whether the expeditors at the Orlando Hard Rock Café performed kitchen job duties such that they are not considered employees who are customarily and regularly tipped employees; and
- d. whether Defendant's conduct willfully violated the FMWA.

23. Typicality: The claims of the named Plaintiffs are typical of the claims of the class members because the representative Plaintiffs, Christopher Grant, Benjamin Aguda, Angel DeLuna, and Wilberto Reyes like all members of the class, were servers and/or bartenders who were denied the Florida minimum wage due to Defendant's improper utilization of the tip credit.

24. Adequacy: The named Plaintiffs will vigorously pursue the claims alleged herein on behalf of themselves and other servers and bartenders similarly situated. The named Plaintiffs' claims have no adverse interests to the proposed absent class members because they assert the same claims under the FMWA and seek the same relief as would the absent class members if each were to bring a similar action individually. The named Plaintiffs will adequately protect and represent the interests of each absent class member. Counsel who brings this action for the named Plaintiffs and proposed class are experienced in class action practice and procedure pursuant to Rule 1.220, F.R.C.P.

25. Predominance: Pursuant to Rule 1.220(b)(3), class certification is appropriate because the Florida minimum wage claims alleged on behalf of the class, as described in paragraphs 13-18, predominate over any question of law or fact affecting only individual members of the class. The predominance questions of law or fact are clear, precise, well-defined, and applicable to each named Plaintiff as well as every absent member of the proposed class.

26. Superiority: Class representation is superior to other available methods for the fair and efficient adjudication of the controversy for a number of reasons including, but not limited to, the following: (1) the case challenges the policy of a large

employer and many employees may be reluctant to bring claims individually for fear of retaliation; (2) some class members may have only worked for Defendant for a short period of time and their individual damages would not be substantial enough to be worth the effort of bringing individual claims; (3) class members do not have the resources to bring their claims individually; and (4) it would be an inefficient use of scarce judicial resources to require each employee affected by the practices challenged herein to bring his or her own individual claim.

### **COUNT I**

#### **FAILURE TO PAY MINIMUM WAGE IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE X, SECTION 24**

27. During the Relevant Time Period, Defendant willfully violated the Florida Constitution, Article X, § 24 by failing to pay servers and bartenders the minimum wage required by Florida law by claiming the “tip credit” for which it was not eligible. This claim is brought on behalf of a class of similarly situated individuals pursuant to Rule 1.220 of the Florida Rules of Civil Procedure.

28. The Defendant has been given notice of these claims pursuant to Florida Statutes, Section 448.110(6).

### **JURY DEMAND**

Plaintiffs request a trial by jury on all of their claims.

### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiffs request that this Court enter the following relief:

1. Certify this case as a class action pursuant to Fla. R. Civ. P. 1.220(b)(3);
2. Designate Plaintiffs as representatives of the class and Plaintiffs’ counsel as class counsel;

3. A finding that during the Relevant Time Period Defendant violated the FMWA by failing to pay Plaintiffs and members of the class the minimum wage required by Florida law;
4. A finding that during the Relevant Time Period Defendant acted willfully in violating the FMWA by failing to pay Plaintiffs and members of the class the minimum wage required by Florida law;
5. A finding that the statute of limitations under the FMWA for Plaintiffs and the class is five years because of the Defendant's willful violation of the FMWA;
6. An award to the Plaintiffs and class of unpaid minimum wages during the Relevant Time Period under the FMWA;
7. An award to the Plaintiffs and class of liquidated damages equal to the unpaid minimum wages under the FMWA or, if liquidated damages are not awarded, then prejudgment interest;
8. An award to the Plaintiffs and class of reasonable attorneys' fees and costs; and
9. An award of such other and further relief as this Court may deem appropriate.

Dated: February 7, 2011

Respectfully submitted,

/s/ Sam J. Smith

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Counsel for the Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of February 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. A true copy of the foregoing was sent via email and regular U.S. Mail to Kevin Shaughnessy, Esq., Baker & Hostetler L.L.P., P. O. Box 112, Orlando, Florida 32802-0112, kshaughnessy@bakerlaw.com, who has agreed to accept service on behalf of the Defendant.

/s/ Loren B. Donnell

Attorney