

SUMMARY OF SUIT

1. The Fair Labor Standards Act (“FLSA”) is designed to eliminate “labor conditions detrimental to the maintenance of minimum standard of living necessary for health, efficiency and general well-being of workers” 29 U.S.C. § 202(a). To achieve its goals, the FLSA sets minimum wage and overtime requirements for covered employees. 29 U.S.C. §§ 206(a) and 207(a).

2. The FLSA allows employers to pay less than the minimum wage to employees who receive tips. 29 U.S.C. § 203(m). In doing so, employers may take a “tip credit,” which allows employers to include in their calculation of tipped employees’ wages the amount that an employee receives in tips. *Id.* An employer must advise an employee *in advance of its use of the tip credit* pursuant to the provisions of section 3(m) of the FLSA. That is, the employer must inform the employee (1) the amount of the cash wage that is to be paid to the tipped employee (2) the amount by which the wages of the tipped employee are increased on account of the tip credit (3) that all tips received by the employee must be retained by the employee except for tips contributed to a valid tip pool and (4) that the tip credit shall not apply to any employee who does not receive the notice.

3. It is illegal for employers to require waiters to share tips with ineligible employees such as food expeditors, kitchen staff, management and the employer itself. The Fifth Circuit Court of Appeals recently affirmed a jury verdict and judgment in favor of wait staff when Chili’s Restaurant required the staff to share tips with food expeditors. *See Roussell v. Brinker Intl. Inc.* 2011 WL 4067171 (5th Cir. Sept. 14, 2011).

4. It is also illegal for an employer to require wait staff to pay for breakage or “walked tabs” because doing so brings the employee’s wage below the \$2.13 per hour minimum requirement under the FLSA in the context of tipped employees.

5. Defendants violated the FLSA by (a) forcing wait staff to participate in a tip pool and requiring a percentage of such tips be shared with food expeditors and other employees who are not eligible to receive tips, (b) requiring wait staff to pay for broken dishes and glasses, (c) not correctly informing the wait staff of the tip pool it was using, and (d) not paying the wait staff the required time and one-half premium pay when they worked more than 40 hours in a work week. As a result, Defendants lose their right to rely on the tip credit and must compensate them for the minimum wage rate and overtime pay.

6. Iron Cactus II L.P., Cactus Entertainment Management, Inc., Iron Cactus Hill Country Galleria, L.P., Hill Country Cactus Management, Inc., Dallas Cactus Management, Inc., Iron Cactus San Antonio Riverwalk, L.P., Riverwalk Cactus Management, Inc., Iron Cactus Dallas, L.P., Iron Cactus, Iron Cactus, and Gary Manley, Individually, (hereinafter “Defendants and/or “Iron Cactus”) required and/or permitted the Plaintiffs to work as waiters at its Mexican food restaurants Iron Cactus in excess of forty (40) hours per week, but refused to compensate them at the applicable overtime rates. Furthermore, as stated above, Plaintiffs were required to divide their tips with Defendants and other employees who do not regularly and customarily receive tips. Therefore, Defendants have failed to compensate Plaintiffs at the federally-mandated minimum wage rate.

7. Defendants’ conduct violates the Fair Labor Standards Act (FLSA), which requires non-exempt employees to be compensated for their overtime work at a rate of one and one-half times their regular rate of pay. *See* 29 U.S.C. § 207(a).

8. Furthermore, Defendants’ practice of failing to pay tipped employees pursuant to 29 U.S.C. § 203(m), violates the FLSA’s minimum wage provision. *See* 29 U.S.C. §§ 203, 206.

9. Plaintiffs bring a collective action to recover the unpaid wages owed to them and all other similarly situated employees, current and former, of Defendants throughout Texas. Members of the Collective Action are hereinafter referred to as “Class Members.”

SUBJECT MATTER JURISDICTION AND VENUE

10. This Court has jurisdiction over the subject matter of this action under 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

11. Venue is proper in the Western District of Texas because a substantial portion of the events forming the basis of this suit occurred in this District.

PARTIES AND PERSONAL JURISDICTION

12. Plaintiff Joshua Covey is an individual residing in Hays County, Texas. Plaintiff’s written consent to this action is attached to this Complaint as Exhibit A.

13. Plaintiff Jacob Hinojosa is an individual residing in Hays County, Texas. Plaintiff’s written consent to this action is attached to this Complaint as Exhibit B.

14. The Class Members are Defendants’ entire current and former wait staff and all others who participated in any tip pool who were denied their wages, including overtime pay and minimum wage pay from the beginning of such violation to the present.

15. Defendant Iron Cactus II L.P. d/b/a Iron Cactus is a limited partner in a Texas limited partnership duly licensed to do business in the State of Texas and doing business in the State of Texas for the purpose of accumulating monetary profit. Cactus Entertainment Management, Inc. is the general partner to this defendant. This Defendant may be served process through its registered agent: Gary Manley, 12912 Hill Country Blvd., Ste. F-255, Bee Cave, Texas 78738.

16. Cactus Entertainment Management, Inc. d/b/a Iron Cactus is a Texas corporation and the general partner to Iron Cactus II L.P., and is duly licensed to do

business in the State of Texas and doing business in the State of Texas for the purpose of accumulating monetary profit. This Defendant may be served process through its registered agent: Gary Manley, 12912 Hill Country Blvd., Ste. F-255, Bee Cave, Texas 78738.

17. Defendant Iron Cactus Hill Country Galleria, L.P. d/b/a Iron Cactus is a limited partner in a Texas limited partnership duly licensed to do business in the State of Texas and doing business in the State of Texas for the purpose of accumulating monetary profit. Hill Country Cactus Management, Inc. is the general partner to this defendant. This Defendant may be served process through its registered agent: Gary Manley, 12912 Hill Country Blvd., Ste. F-255, Bee Cave, Texas 78738.

18. Defendant Hill Country Cactus Management, Inc. d/b/a Iron Cactus is a Texas corporation and a general partner in a Texas limited partnership to Iron Cactus Hill Country Galleria, L.P., and is duly licensed to do business in the State of Texas and doing business in the State of Texas for the purpose of accumulating monetary profit. This Defendant may be served process through its registered agent: Gary Manley, 12912 Hill Country Blvd., Ste. F-255, Bee Cave, Texas 78738.

19. Defendant Dallas Cactus Management, Inc. d/b/a Iron Cactus is a Texas corporation and a general partner in a Texas limited partnership to Iron Cactus Dallas, L.P., and is duly licensed to do business in the State of Texas and doing business in the State of Texas for the purpose of accumulating monetary profit. This Defendant may be served process through its registered agent: Gary Manley, 8500 Blazyk, Austin, Texas 78737.

20. Defendant Iron Cactus San Antonio Riverwalk, L.P. d/b/a Iron Cactus is a limited partner in a Texas limited partnership with Riverwalk Cactus Management, Inc., the general partner, and is duly licensed to do business in the State of Texas and doing

business in the State of Texas for the purpose of accumulating monetary profit. This Defendant may be served process through its registered agent: Gary Manley, 8500 Blazyk, Austin, Texas 78737.

21. Defendant Riverwalk Cactus Management, Inc. d/b/a Iron Cactus is a Texas corporation and a general partner in a Texas limited partnership with Iron Cactus San Antonio Riverwalk, L.P., the limited partner, and is duly licensed to do business in the State of Texas and doing business for the purpose of accumulating monetary profit. This Defendant may be served process through its registered agent: Gary Manley, 8500 Blazyk, Austin, Texas 78737.

22. Defendant Iron Cactus Dallas, L.P. d/b/a Iron Cactus is a limited partner in a Texas limited partnership with Dallas Cactus Management, Inc., the general partner, and is duly licensed to do business in the State of Texas and doing business in the State of Texas for the purpose of accumulating monetary profit. This Defendant may be served process through its registered agent: Gary Manley, 8500 Blazyk, Austin, Texas 78737.

23. Defendant Iron Cactus is a domestic company operating in various locations in Texas as a restaurant and may be served with process by serving its owner, Gary Manley at 8500 Blazyk, Austin, Texas 78737.

24. Defendant Gary Manley is an individual residing in Texas and may be served with process at his place of residence: 8500 Blazyk, Austin, Texas 78737.

FLSA COVERAGE

25. At all material times, Defendants have been employers within the meaning of 3(d) of the FLSA. 29 U.S.C. § 203(d).

26. At all material times, Defendants have operated as a “single enterprise” within the meaning of 3(r)(1) of the FLSA. 29 U.S.C. § 203(r)(1). That is, Defendants perform related activities through unified operation and common control for a common

business purpose. *See Brennan v. Arnheim and Neely, Inc.*, 410 U.S. 512, 515 (1973); *Reich v. Bay, Inc.*, 23 F.3d 110, 113 (5th Cir. 1994).

27. Iron Cactus is a statewide chain of Mexican food restaurants under the central control of Gary Manley. Indeed, they advertise themselves as such.¹ The fact that they run each restaurant identically and their customers can expect the same kind of food and service regardless of the location is Defendants' main advertising selling point. In fact, Defendants use one website to list all of its locations and restaurant information.

28. Defendants represent themselves to the general public as one restaurant—Iron Cactus—operating at multiple locations. They share employees, have a common management, pool their resources, operate from the same headquarters, have common ownership, and have the same operating name. This is a family of restaurants that advertises together on the same website, provides the same array of food and services to its customers, and uses the same restaurant business model. The Iron Cactus family of restaurants exists under the control and direction of Defendants. This family of restaurants provides the same service and food to its customers by using a set formula when conducting its restaurant business. Part of that set formula is the wage violation alleged in this Complaint.

29. Additionally, the Defendants are subject to common control and management as Gary Manley oversees all of the restaurants.

30. Thus, the Defendants formed a “single enterprise” and are each liable for the violations of the other.

¹ On Defendants' website it states: “Established in 1996 on historic Sixth Street the Iron Cactus has been serving contemporary Mexican cuisine for over 13 years. We draw our inspiration for our cuisine from various regions in Mexico. The Iron Cactus can be found in 5 locations across Texas. Named one of the top 10 tequila bars in the country, we feature over 80 different types of tequila. With a deep passion for creating bold, unique and flavorful dishes the Iron Cactus stands apart as a premier dining and drinking destination.”

31. At all material times, Defendants have been an enterprise in commerce or in the production of goods for commerce within the meaning of 3(s)(1) of the FLSA because they have had employees engaged in commerce. 29 U.S.C. § 203(s)(1).

32. Furthermore, Defendants have had, and continue to have, an annual gross business volume in excess of the statutory standard.

33. At all material times, Plaintiffs were individual employees who engaged in commerce or in the production of goods for commerce as required by 29 USC § 206-207.

34. Defendant Gary Manley is the owner, president and manager of the Iron Cactus restaurants.

35. Defendant Gary Manley controlled the nature, pay structure, and employment relationship of the Plaintiffs and Class Members.

36. Further, Defendant Gary Manley had, at all times relevant to this lawsuit, the authority to hire and fire employees, the authority to direct and supervise the work of employees, the authority to sign on the business's checking accounts, including payroll accounts, and the authority to make decisions regarding employee compensation and capital expenditures. Additionally, he was responsible for the day-to-day affairs of the restaurants. In particular, he was responsible for determining whether the restaurants complied with the Fair Labor Standards Act.

37. As the owner and manager of Iron Cactus II L.P., Cactus Entertainment Management, Inc., Iron Cactus Hill Country Galleria, L.P., Hill Country Cactus Management, Inc., Dallas Cactus Management, Inc., Iron Cactus San Antonio Riverwalk, L.P., Riverwalk Cactus Management, Inc., and Iron Cactus Dallas, L.P., Gary Manley employed the Plaintiffs and Class Members as wait staff employees.

38. As such, pursuant to 29 U.S.C. § 203(d), Defendant Gary Manley acted directly or indirectly in the interest of Plaintiffs' and Class Members' employment as their employer, which makes him individually liable under the FLSA.

FACTS

39. Defendants operate various highend Mexican food restaurants throughout Texas under the name of Iron Cactus.

40. Said Texas locations include, but are not limited to their (1) Austin Downtown 6th Street location, (2) Austin North location, (3) Hill Country Galleria location, (4) Dallas location, and (5) San Antonio location.

41. Defendants employ waiters to serve their customers at all of its locations.

42. Plaintiff Joshua Covey currently works as a waiter at the Hill Country Galleria Iron Cactus location in Austin, Texas. He has worked there for approximately 10 months.

43. Plaintiff Jacob Hinojosa worked as a waiter at the Austin Downtown 6th Street Iron Cactus location. He worked there for approximately one year.

44. Defendants pay their waiters an hourly rate of \$2.13 plus tips divided amongst other restaurant employees in a tip-pool. By paying Plaintiffs and Class Members \$2.13 per hour, Defendants are taking advantage of a tip credit which allows Defendants to include in its calculation of their wages a portion of the amounts that Plaintiffs receive as tips. Defendants require its wait staff to participate in this tip pool.

45. Defendants violated the FLSA's tip-pool provision, 29 U.S.C. § 203(m), when they failed to notify each tipped employee about the tip credit allowance (including the amount to be credited) before the credit was utilized. That is, Defendants' wait staff was never made properly aware of how the tip credit allowance worked or what the amounts to be credited were.

46. Furthermore, Defendants violated 29 U.S.C. § 203(m) when it allowed its management and kitchen employees such as food expeditors to participate in the tip-pool.

47. By way of example, tips were pooled among the wait staff during a given shift. At the end of the shift, the manager on duty would divide up the tips. A portion of those tips were paid directly to the food expeditor, who had no interaction with the actual customers. Iron Cactus ironically did not claim a tip credit for the food expeditors. Instead, they were paid like non-tipped employees. Iron Cactus violated the FLSA by forcing the tipped employees to subsidize the compensation of other non-tipped employees. *See Rousell v. Brinker Intl. Inc.* 2011 WL 4067171 (5th Cir. Sept. 14, 2011).

48. Because Defendants violated the tip-pool law, Defendants lose the right to take a credit toward minimum wage requirements.

49. Defendants reduced Plaintiffs' pay for broken dishes and glasses, which resulted in their net pay falling below the minimum hourly rate requirement for Defendants to qualify for the tip credit.

50. Finally, Defendants required that the Plaintiffs and its wait staff attend periodic meetings without pay.

51. As a result of the aforementioned actions by Defendants, the Plaintiffs and wait staff were not compensated at the federally mandated minimum wage rate.

52. Although the Plaintiffs were required to and did in fact frequently work more than forty (40) hours per workweek, they were not compensated at the FLSA mandated time-and-a-half rate for hours in excess of forty (40) per workweek.

53. Defendant knows or should have known that its policies and practices violate the FLSA, and Defendants have not made a good faith effort to comply with the FLSA. Rather, Defendants knowingly, willfully, and/or with reckless disregard of the law carried and continue to carry out this illegal pattern and practice regarding tip-out to

employees who are ineligible to receive tips. Defendants' method of paying Plaintiffs in violation of the FLSA was not based on a good faith and reasonable belief that its conduct complied with the FLSA.

VIOLATION OF 29 U.S.C. § 207

54. Plaintiffs incorporate all allegations contained in the foregoing paragraphs.

55. Defendants' practice of failing to pay Plaintiffs time-and-a-half rate for hours in excess of forty (40) per workweek violates the FLSA. 29 U.S.C. § 207.

56. None of the exemptions provided by the FLSA regulating the duty of employers to pay overtime at a rate not less than one and one-half times the regular rate at which its employees are employed are applicable to the Defendants or the Plaintiffs.

VIOLATION OF 29 U.S.C. § 206

57. Plaintiffs incorporate all allegations contained in the foregoing paragraphs.

58. Defendants' practice of failing to pay Plaintiffs at the required minimum wage rate violates the FLSA. 29 U.S.C. § 206.

59. None of the exemptions provided by the FLSA regulating the duty of employers to pay employees for all hours worked at the required minimum wage rate are applicable to the Defendants or the Plaintiffs.

VIOLATION OF 29 U.S.C § 211(c)

60. Plaintiffs incorporate all allegations contained in the foregoing paragraphs.

61. Defendants failed to keep adequate records of Plaintiffs' and Class Members' work hours and pay in violation of section 211(c) of the Fair Labor Standards Act. See 29 U.S.C. § 211(c).

62. Federal law mandates that an employer is required to keep for three (3) years all payroll records and other records containing, among other things, the following information:

- A. The time of day and day of week on which the employees' work week begins;
- B. The regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the FLSA;
- C. An explanation of the basis of pay by indicating the monetary amount paid on a per hour, per day, per week, or other basis;
- D. The amount and nature of each payment which, pursuant to section 7(e) of the FLSA, is excluded from the "regular rate";
- E. The hours worked each workday and total hours worked each workweek;
- F. The total daily or weekly straight time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation;
- G. The total premium for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under this section;
- H. The total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments;
- I. The dates, amounts, and nature of the items which make up the total additions and deductions;
- J. The total wages paid each pay period; and
- K. The date of payment and the pay period covered by payment.

29 C.F.R. 516.2, 516.5.

63. Defendants have not complied with federal law and have failed to maintain such records with respect to the Plaintiffs and Class Members. Because Defendants' records are inaccurate and/or inadequate, Plaintiffs and Class Members can meet their burden under the FLSA by proving that they, in fact, performed work for

which they were improperly compensated, and produce sufficient evidence to show the amount and extent of the work “as a matter of a just and reasonable inference.” See, e.g., *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

COLLECTIVE ACTION ALLEGATIONS

64. Plaintiffs have actual knowledge that Class Members have also been denied overtime pay for hours worked over forty hours per workweek and have been denied pay at the federally mandated minimum wage rate. That is, Plaintiffs worked with other wait staff who worked the following locations of the Iron Cactus family of restaurants: Austin Downtown 6th Street location, Austin North location, Hill Country Galleria location, Dallas location, and San Antonio location. These employees have reported that they were subject to the same illegal pay practice described above. Such other employees have also expressed an interest in joining this lawsuit.

65. Other employees similarly situated to the Plaintiffs work or have worked for Defendants’ restaurant businesses, but were not paid overtime at the rate of one and one-half their regular rate when those hours exceeded forty hours per workweek. Furthermore, these same employees were denied pay at the federally-mandated minimum wage rate.

66. Defendants required its waiters to divide their tips amongst other restaurant employees in a tip-pool at its Austin Downtown 6th Street location.

67. Defendants permitted food expeditors to participate in a tip-pool at its Austin Downtown 6th Street location during one or more workweeks during the last three years.

68. Defendants required its wait staff to pay for breakage or “walked tabs” at its Austin Downtown 6th Street location during one or more workweeks during the last three years.

69. Defendants required its waiters to divide their tips amongst other restaurant employees in a tip-pool at its Austin North location.

70. Defendants permitted food expeditors to participate in a tip-pool at its Austin North location during one or more workweeks during the last three years.

71. Defendants required its wait staff to pay for breakage or “walked tabs” at its Austin North location during one or more workweeks during the last three years.

72. Defendants required its waiters to divide their tips amongst other restaurant employees in a tip-pool at its Hill Country Galleria location.

73. Defendants permitted food expeditors to participate in a tip-pool at its Hill Country Galleria location during one or more workweeks during the last three years.

74. Defendants required its wait staff to pay for breakage or “walked tabs” at its Hill Country Galleria location during one or more workweeks during the last three years.

75. Defendants required its waiters to divide their tips amongst other restaurant employees in a tip-pool at its Dallas location.

76. Defendants permitted food expeditors to participate in a tip-pool at its Dallas location during one or more workweeks during the last three years.

77. Defendants required its wait staff to pay for breakage or “walked tabs” at its Dallas location during one or more workweeks during the last three years.

78. Defendants required its waiters to divide their tips amongst other restaurant employees in a tip-pool at its San Antonio location.

79. Defendants permitted food expeditors to participate in a tip-pool at its San Antonio location during one or more workweeks during the last three years.

80. Defendants required its wait staff to pay for breakage or “walked tabs” at its San Antonio location during one or more workweeks during the last three years.

81. Although Defendants permitted and/or required the Class Members to work in excess of forty hours per workweek, Defendants have denied them full compensation for their hours worked over forty. Defendants have also denied them full compensation at the federally mandated minimum wage rate.

82. The Class Members perform or have performed the same or similar work as the Plaintiffs.

83. Class Members regularly work or have worked in excess of forty hours during a workweek.

84. Class Members are not exempt from receiving overtime and/or pay at the federally mandated minimum wage rate under the FLSA.

85. As such, Class Members are similar to the Plaintiffs in terms of job duties, pay structure, and/or the denial of overtime and minimum wage.

86. Defendants' failure to pay overtime compensation and hours worked at the minimum wage rate required by the FLSA results from generally applicable policies or practices, and does not depend on the personal circumstances of the Class Members.

87. The experiences of the Plaintiffs, with respect to their pay, are typical of the experiences of the Class Members.

88. The specific job titles or precise job responsibilities of each Class Member does not prevent collective treatment.

89. All Class Members, irrespective of their particular job requirements, are entitled to overtime compensation for hours worked in excess of forty during a workweek.

90. All Class Members, irrespective of their particular job requirements, are entitled to compensation for hours worked at the federally mandated minimum wage rate.

91. Although the exact amount of damages may vary among Class Members, the damages for the Class Members can be easily calculated by a simple formula. The claims of all Class Members arise from a common nucleus of facts. Liability is based on a systematic course of wrongful conduct by the Defendant that caused harm to all Class Members.

92. Due to the inherent nature of a tip pooling practice, all of the employees participating in such tip pools are similarly situated with respect to the violation.

93. As such, the class of similarly situated Plaintiffs is properly defined as follows:

All current and former wait staff employed by Defendants at any time during the time period from February 2, 2009 to the present.

DAMAGES SOUGHT

94. Plaintiffs and Class Members are entitled to recover compensation for the hours they worked for which they were not paid at the federally mandated minimum wage rate.

95. Additionally, Plaintiffs and Class Members are entitled to recover their unpaid overtime compensation.

96. Plaintiffs and Class Members are also entitled to all of the misappropriated funds.

97. Plaintiffs and Class Members are also entitled to an amount equal to all of their unpaid wages as liquidated damages. 29 U.S.C. § 216(b).

98. Plaintiffs and Class Members are entitled to recover their attorney's fees and costs as required by the FLSA. 29 U.S.C. § 216(b).

JURY DEMAND

99. Plaintiffs and Class Members hereby demand trial by jury.

PRAYER

100. For these reasons, Plaintiffs and Class Members respectfully request that judgment be entered in their favor awarding the following relief:

- a. Overtime compensation for all hours worked over forty in a workweek at the applicable time-and-a-half rate;
- b. All unpaid wages at the FLSA mandated minimum wage rate;
- c. All misappropriated funds;
- d. An equal amount as liquidated damages as allowed under the FLSA;
- e. Reasonable attorney's fees, costs and expenses of this action as provided by the FLSA;
- f. An order requiring Defendants to correct their pay practices going forward; and
- g. Such other relief to which Plaintiffs and Class Members may be entitled, at law or in equity.

Respectfully submitted,

KENNEDY HODGES, L.L.P.

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