

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

2017 DEC 15 AM 11:42

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS, FLORIDA

CHARITY MACDERMOTT, on behalf of
Herself and all others similarly situated,

Plaintiff,

vs.

CASE NO.: 2:17-CV-692-PCM-38cm

NANE JAN, LLC, a Florida
Limited Liability Company,

Defendant.

_____ /

COMPLAINT

COMES NOW Plaintiff, CHARITY MACDERMOTT, on behalf of herself, other employees and former employees similarly situated, by and through the undersigned counsel, and files this Complaint against Defendant, NANE JAN LLC dba SEA SALT (hereinafter "Defendant" or "SEA SALT") and states as follows:

JURISDICTION

1. Jurisdiction in this Court is proper as the claims are brought pursuant to the Fair Labor Standards Act, as amended, (29 U.S.C. §201, et seq., hereinafter called the "FLSA") to recover unpaid tips, minimum wages, overtime wages and an equal amount of liquidated damages and reasonable attorney's fees and costs.

2. The jurisdiction of the Court over this controversy is based upon 29 U.S.C. §216(b).

PARTIES

3. At all times material hereto, Plaintiff, CHARITY MACDERMOTT, is and was a resident of Lee County, Florida.

4. At all times material hereto, NANE JAN LLC d/b/a SEA SALT was and continues to be a Florida Limited Liability Company. Further, at all times material hereto, SEA SALT was, and continues to be, engaged in business in Florida, with a principle place of business in Collier County, Florida.

5. At all times material hereto, Plaintiff was “engaged in commerce” within the meaning of §6 and §7 of the FLSA.

6. At all times material hereto, Plaintiff was an “employee” of the Defendant within the meaning of FLSA.

7. At all times material hereto, Defendant was the “employer” within the meaning of FLSA.

8. Defendant was and continues to be an “employer” within the meaning of FLSA.

9. At all times material hereto, Defendant, SEA SALT, was and continues to be “enterprises engaged in commerce” within the meaning of FLSA.

10. At all times material hereto, Defendant, SEA SALT, was and continues to be an enterprise engaged in the “production of goods for commerce” within the meaning of FLSA.

11. Based upon information and belief, the annual gross revenue of Defendant, SEA SALT, is in excess of \$500,000.00 per annum during the relevant time periods.

12. At all times material hereto, Defendant has two (2) or more employees handling, selling, or otherwise working on goods or materials that had been moved in or produced for commerce.

13. At all times material hereto, the Plaintiff was “engaged in commerce” and subject to individual coverage of the FLSA.

14. At all times material hereto, the Plaintiff was engaged in the “production of goods for commerce” and subject to individual coverage of the FLSA.

15. The additional persons who may become Plaintiffs in this action are/were “server” employees of Defendant, who held similar positions to Plaintiff and who paid out tips to persons that do not customarily receive tips and performed maintenance and cleaning work for less than minimum wage.

16. At all times material hereto, the work performed by Plaintiff was directly essential to the business performed by Defendant.

STATEMENT OF FACTS

17. On or about October 2015, Defendant hired Plaintiff to work as a non-exempt “server.”

18. From at least October 2015, and continuing through March 2016, the Defendant violated the FLSA 29 U.S.C. § 203 (m) tip credit provision, as Plaintiff’s tips were distributed to managers/assistant managers and not distributed in full amongst employees who customarily and regularly receive tips and therefore the Defendant violated the tip credit provision and is required to pay the Plaintiff a minimum wage for each hour worked.

19. Plaintiff also performed maintenance and cleaning work and was paid less than minimum wage.

20. At various material times hereto, Plaintiff worked for Defendants in excess of forty (40) hours within a work week.

21. From at least October 2015 and continuing through March 2016, Defendant failed to compensate Plaintiff at rate of one and one-half times Plaintiff's regular rate for all hours worked in excess of forty (40) hours in a single work week. Plaintiff should be compensated at the rate of one and one-half times Plaintiff's regular rate for those hours that Plaintiff worked in excess of forty (40) hours per week as required by the FLSA.

22. Defendant has failed to maintain proper time records as mandated by the FLSA.

23. Plaintiff has retained the BERKE LAW FIRM, P.A. to represent her in the litigation and has agreed to pay the firm a reasonable fee for its services.

COUNT I
VIOLATION OF THE FLSA 29 U.S.C. § 203 (m) TIP CREDIT PROVISION

24. Plaintiff, and others similarly situated, hereby incorporates Paragraphs 1 through 23 of this Complaint into this Count.

25. From on or about October 2015 and continuing until at least March 2016, Defendant distributed Plaintiff's tips without a valid tip-pool.

26. The tip-out included "managers/assistant managers" who do not customarily receive tips.

27. The Defendant violated the FLSA 29 U.S.C. § 203 (m) tip credit provision, as Plaintiff's tips were not distributed amongst employees who customarily and regularly

receive tips and therefore the Defendant violated the tip credit provision and are required to pay the Plaintiff a minimum wage for each hour worked.

28. The Plaintiff, and others similarly situated, seeks damages in the amount of minimum wages in the amount due to her, plus liquidated damages in an amount equal to the loss of minimum wages and pre-judgment interest.

29. The Plaintiff seeks recovery of all attorney's fees, costs, and expenses of this action, to be paid by the Defendant, as provided by the FLSA, 29 U.S.C. §216(b).

WHEREFORE, Plaintiff, CHARITY MACDERMOTT, on behalf of herself and all proposed members of the FLSA representative action pray for relief as follows:

- a. A determination that this action may be pursuant to the FLSA;
- b. A finding that the Defendant violated the various provisions of the FLSA set forth above;
- c. A finding that the Defendant acted willfully in each of the violations of the FLSA;
- d. An award to Plaintiff of damages for the amount of all unpaid compensation and tip credits as the law provides, including statutory liquidated damages and statutory wages;
- e. An award to the Plaintiff of reasonable attorney's fees and costs, or pre-judgment interest; and
- f. An award of such other and further relief as this Court may deem appropriate.

COUNT II
RECOVERY OF OVERTIME COMPENSATION

30. Plaintiff realleges and reincorporates all allegations contained in Paragraphs 1 — 23 as if incorporated herein.

31. From at least October 2015 and continuing through March 2016, Plaintiff worked in excess of the forty (40) hours per week for which Plaintiff was not compensated at the statutory rate of one and one-half times Plaintiff's regular rate of pay.

32. Rather, throughout her employment Defendant paid Plaintiff, and all employees similarly situated, tip credit wages for all hours worked including overtime wages.

33. Plaintiff was, and is entitled to be paid at the statutory rate of one and one-half times Plaintiff's regular rate of pay for those hours worked in excess of forty (40) hours.

34. Defendant's actions were willful and/or showed reckless disregard for the provisions of the FLSA as evidenced by its failure to compensate Plaintiff at the statutory rate of one and one-half times Plaintiff's regular rate of pay for the hours worked in excess of forty (40) hours per weeks when it knew, or should have known, such was, and is due.

35. Defendant has failed to properly disclose or apprise Plaintiff of her rights under the FLSA

36. Due to the intentional, willful, and unlawful acts of Defendants, Plaintiff suffered and continues to suffer damages and lost compensation for time worked over forty (40) hours per week, plus liquidated damages.

37. Plaintiff is entitled to an award of reasonable attorney's fees and costs

pursuant to 29 U.S.C. §216(b).

38. Based upon information and belief, Defendant has failed to properly pay Plaintiff, and those similarly situated to her, proper overtime wages at time and one half their regular rate of pay for such hours.

WHEREFORE, Plaintiff respectfully requests that judgment be entered in her favor against Defendants:

- a. Declaring that the acts and practices complained of herein are in violation of the maximum hour and minimum wage provisions of the FLSA;
- b. Awarding Plaintiff overtime compensation in the amount due to him for Plaintiff's time worked in excess of forty (40) hours per work week;
- c. Awarding Plaintiff liquidated damages in an amount equal to the overtime award;
- d. Awarding Plaintiff reasonable attorney's fees and costs and expenses of the litigation pursuant to 29 U.S.C. §216(b);
- e. Awarding Plaintiff pre-judgment interest;
- f. Granting Plaintiff an Order, on an expedited basis, allowing him to send Notice of this action, pursuant to 216(b) and/or FRCP 23, to those similarly situated to Plaintiff; and
- g. Ordering any other further relief the Court deems just and proper.

Respectfully submitted this 14th day of December 2017.

BERKE LAW FIRM, P.A.

By: /s/ Bill B. Berke
Bill B. Berke, Esq.
Florida Bar No. 0558011
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4423 Del Prado Boulevard S.
Cape Coral, FL 33904
Telephone: (239) 549-6689
Attorney for Plaintiff

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

RECEIVED

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
 CHARITY MACDERMOTT on behalf of herself
 and all others similarly situated.

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

(c) Attorneys (Firm Name, Address, and Telephone Number)
 Bill B. Berke, Esq., BERKE LAW FIRM, P.A., 4423 Del Prado Blvd. S.,
 Cape Coral, Florida 33904 (239) 549-6689

DEFENDANTS
 NANE JAN, LLC 2017 DEC 15 AM 11:42

County of Residence of First Listed Defendant _____
(EXCEPT IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN Eminent Domain and 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

3 Federal Question (U.S. Government as Not a Party)

2 U.S. Government Defendant

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)

| | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

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

| CONTRACT | TORTS | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES | |
|---|---|--|---|---|--|
| <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise | PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice | <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care - Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor-Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions | <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (13950) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC, DIWW (405(g)) <input type="checkbox"/> 864 SSDI Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609 | <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities Commodities Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes |
| REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property | CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education | PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement | | | |

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

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, as amended 29 U.S.C. §201, et seq.

Brief description of cause:
 Unpaid minimum and overtime wages

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: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions) JUDGE _____ DOCKET NUMBER _____

DATE: 12/14/2017 SIGNATURE OF ATTORNEY OF RECORD: /s/ Bill B. Berke

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLICANT: 2:17 - CV - 692 - PLM- JUDGE: 35 CM MAG. JUDGE: _____

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Florida Restaurant Sea Salt Facing Lawsuit Over Potential Tip Credit Missteps](#)
