

I. SUMMARY OF CASE

1. Defendants Brinker Restaurant Corporation and Brinker International, Inc. d/b/a Maggiano's Little Italy (hereafter "Maggiano's" or "defendants") is a publicly traded company that owns and operates casual dining restaurants, including Maggiano's Little Italy and Chili's Grill & Bar. Defendants have over 1500 restaurants in 32 countries and more than 100,000 employees. (www.brinker.com) Defendants own and operate 44 Maggiano's Little Italy restaurants throughout the United States. (www.maggianos.com)

2. The named plaintiffs are current or former banquet service employees who worked at Maggiano's in Colorado. They bring this action on behalf of themselves and all other similarly situated banquet service employees of Maggiano's to recover tips wrongfully withheld by defendants.

3. Plaintiffs bring this action on behalf of themselves and a national class of similarly situated employees under the FLSA, and state statutory and common law, who have served customers under an agreement between the customers and the defendants as described below in paragraphs 21-22, where defendants misrepresent that a fee charged to the customer includes a tip for the server(s).

4. Plaintiffs also bring this action on behalf of themselves and a subclass of similarly situated employees whose tips are wrongfully withheld by defendants in violation of the laws of the state of Colorado and all other states in which such

employees work and which prohibit employers from withholding tips from employees under the circumstances alleged in this Complaint.

5. Plaintiffs bring this action on behalf of themselves and all other similarly situated banquet service employees (collectively “BSEs”) of Maggiano’s to obtain declaratory and injunctive relief and recover unpaid tips and overtime, liquidated damages, penalties, fees and costs, pre- and post-judgment interest, and any other remedies to which they may be entitled.

II. JURISDICTION AND VENUE

6. A party may bring a private action on behalf of himself or herself and other employees similarly situated for violations of the FLSA. 29 U.S.C. §216(b).

7. The court has original jurisdiction over this matter under 29 U.S.C. §216(b) and 28 U.S.C. §1331.

8. A private party may also bring an action for damages for violations of the CWA. *See*, Colo. Rev. Stat. § 8-4-101, *et seq.* and Colorado Minimum Wage Order 29, and the laws of other states in which Maggiano’s does business.

9. Plaintiffs’ state claims originate from the same facts that form the basis of their federal claims. The court has supplemental jurisdiction over plaintiffs’ state law claims pursuant to 28 U.S.C. §1367.

10. This court has personal jurisdiction over defendants because Brinker Restaurant Corporation and Brinker International, Inc. d/b/a Maggiano's Little Italy do business within the state of Colorado.

11. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c) because defendants own and operate Maggiano's restaurants within this district, it employs banquet service employees in this district, and a substantial portion of the events that give rise to the plaintiffs' claims occurred in this district. Additionally, the named plaintiffs reside within this district.

III. PARTIES

12. Individual and representative plaintiff, Sarah Hickey is an adult resident of the state of Colorado and former BSE who worked at Maggiano's restaurant at 7401 South Clinton Street, Englewood, CO 80112. Ms. Hickey worked for Maggiano's from approximately June 2009 to December 2012. Her signed consent form to join this lawsuit is attached to this Complaint as Exhibit A.

13. Individual and representative plaintiff, Amy Gulden, is an adult resident of the state of Colorado. She began her employment in or around September 2009 as a BSE at the Maggiano's restaurant located at 7401 South Clinton, Street, Englewood, CO 80112. Ms. Gulden is still employed by Maggiano's, however, in or around August 2012, she transferred to the downtown Denver restaurant located at 500 16th Street #150 Denver, CO 80202 and no longer does banquet service due to the issues raised in this

Complaint. Ms. Gulden's signed consent form to join this lawsuit is attached to this Complaint as Exhibit B.

14. Individual and representative plaintiff, Jay Ragsdale, is an adult resident of the state of Colorado and former BSE who worked at the Maggiano's restaurant located at 7401 South Clinton Street, Englewood, CO 80112. Mr. Ragsdale began his employment with Maggiano's in or around May of 2009. He was terminated in approximately January of 2013 when the restaurant removed him from the schedule and stopped scheduling him shifts. Mr. Ragsdale's signed consent form to join this lawsuit is attached to this Complaint as Exhibit C.

15. Plaintiffs bring this action on behalf of themselves and all other similarly situated BSEs employed by Maggiano's and who were subjected to the same unlawful pay policies described below within the last three (3) years.

16. Defendant Brinker Restaurant Corporation is a Delaware corporation with a principal office at 6820 LBJ Freeway, Dallas, TX 75240, and is licensed to do business in Colorado. It owns and operates restaurants in Colorado and throughout the United States. Its registered agent for service of process in Colorado is The Corporation Service Company, 1560 Broadway, Suite 2090, Denver, Colorado 80202.

17. Defendant Brinker International, Inc. is a Delaware corporation with a principal office at 6820 LBJ Freeway, Dallas, TX 75240. It owns and operates restaurants in Colorado and throughout the United States. Its registered agent for service of process is

The Prentice-Hall Corporation System, Inc., 2711 Centerville Road, Suite 400, Wilmington, Delaware, 19808.

IV. FACTUAL ALLEGATIONS FOR ALL CLAIMS

18. In addition to their normal restaurant operation, defendants have a separate banquet and private events division that hosts banquets and special events for customers (www.maggianos.com/en/Pages/Banquets.aspx).

19. Plaintiffs and other BSEs serve food and beverages to customers at banquets and private events, subject to written agreements between the defendants and its customers.

20. BSEs are tipped employees within the meaning of the FLSA, 29 U.S.C. §203(t) and the CWA, 7 CCR 1103-1.

21. As its policy, and as set out in its written agreements with its customers, Maggiano's charges its banquet customers an administrative fee which is typically 20% for those transactions affecting the members of the plaintiff class, misrepresents to its customers that the fee is a tip or gratuity (hereinafter "tip") that is given to the BSEs.

22. For example, the Banquet Event Order, which is the form that details the services that Maggiano's agrees to provide the customer and the costs that the customer agrees to pay and which the customer must sign, contains the following notices to customers:

“\$30 Inclusive of tax and tip”

“In addition to the food and beverage there will be a 20% service charge added on for gratuity for the staff. This is the tip.—per dw.”

“There will be a \$150.00 service charge or 20% of the final bill whichever is greater. This amount includes gratuity for your server and setup and breakdown of the room.”

Banquet Event Orders attached as Exhibits D-F.

23. Managers for Maggiano’s routinely convey this same message about the service charge verbally to banquet customers.
25. Through this messaging, Maggiano’s willfully misleads customers to believe that the 20% fee is a tip that is paid to BSEs.
26. BSEs do not receive any portion of the 20% fee.
27. Instead Maggiano’s retains the entire portion of the fee and/or distributes it to non-service, non-tipped employees.
28. A significant portion of customers do not leave a tip for BSEs because they are misled by defendants to believe that the 20% fee is a tip that is paid to the BSEs.
29. Because of the information that customers routinely receive from Maggiano’s both in writing and verbally (examples of which are contained in paragraph 22), and the prevailing custom of giving tips to wait staff employees such as plaintiffs and similarly situated employees, customers reasonably believe that the fee is a tip that is paid to the BSEs.
30. Defendants benefit from and are unjustly enriched by misrepresenting to customers that the fee is a tip that is paid to BSEs.
31. Defendants have unlawfully interfered with BSEs relationship with customers who reasonably believe and expect the fee to be paid to the BSEs as a tip.

32. Through their actions and willful misrepresentations, defendants have converted the fee to a tip based upon the reasonable expectation of its customers.

33. Despite defendants' misrepresentation to customers that the fee is paid to BSEs as a tip, customers will sometimes leave an additional tip for BSEs.

34. Once a customer designates a fixed amount of money as tip for the BSEs, such gratuity is the sole property of the employee. *See*, 29 CFR §531.52 and Colo. Rev. Stat. § 8-4-103(6).

35. When a customer leaves an additional tip for BSEs, as part of Maggiano's systemic policy and practice, defendants routinely contact the customer after he or she has left the tip to confirm whether the customer intended to leave a tip in addition to the 20% fee.

36. It is then defendants' policy and practice to offer to return the BSE's tips to customers without the express or implied consent of the BSE, as reflected in the records of defendants.

37. Defendants offer to return the BSE's tips to customers for public relations and marketing purposes to benefit the restaurant. Regardless of their reasoning, by doing so, defendants may misinform the customer that the 20% fee is a tip that is paid to the BSEs.

38. When contacted by defendants under these circumstances, customers frequently ask to have the tip that they left for the BSEs returned to them, and these transactions that affect the members of the plaintiff class are then reflected in defendant's business records.

39. Under these circumstances, it is defendants' policy and practice to return the BSE's tip to the customer.

40. By doing so, defendants unlawfully assert a right of ownership and control over the tip that is the sole property of the BSEs. *See*, 29 CFR §531.52 and Colo. Rev. Stat. § 8-4-103(6).

41. As a result of defendants' actions, BSEs who have been subjected to defendants' policies and practices described above have suffered damages.

V. CLAIMS FOR RELIEF

First Claim for Relief: Violation of the Fair Labor Standards Act

42. Plaintiffs reassert and incorporate all of the allegations set forth above.

43. Plaintiffs bring this second claim for relief as a collective action pursuant to 29 U.S.C. §216(b) on behalf of themselves and all other similarly situated BSE's who were employed by Maggiano's and subjected to the misrepresentation and return tip policies described above within the last three (3) years prior to the filing of this complaint, as demonstrated by defendants' own documents, including the Banquet Event Orders referenced in paragraph 22, above.

44. Defendants violated the FLSA and denied plaintiffs and similarly situated BSEs wages by withholding and returning tips to customers that were left for and belonged to BSEs.

45. Once the customer leaves a tip for the BSE, that amount belongs to the BSE. Tips are the property of the employee, and the employer is prohibited from using an employee's tips for any reason other than as a credit against its minimum wage obligations to the employee. 29 CFR §531.52.

46. The identity of all other similarly situated BSEs may be ascertained from defendants' records (such as the Banquet Event Order set out above in paragraph 22), and by which potential opt-in plaintiffs may be notified of this lawsuit.

47. At all relevant times BSEs are entitled to the rights, benefits and protections provided under the FLSA because they are individual employees who were employed by an enterprise engaged in commerce or in the production of goods for commerce within the meaning of 29 U.S.C. §§206 and 207.

48. Defendants are subject to the FLSA because it is an enterprise engaged in commerce or in the production of goods for commerce within the meaning of 29 U.S.C. §§ 203(r) and (s)(1). Defendants are engaged in the interstate conduct of business, and do and have done more than \$500,000 in business in each of the years at issue in this lawsuit.

49. BSEs were routinely subjected to the return tip policy—that is when Maggiano's returned to the customer tips that were left for and belonged to the BSEs.

50. Defendants willfully violated the FLSA by returning to its customers tips that were left for and belonged to BSEs in order to improve their sales and business operations.

51. Because defendants' actions were willful, plaintiffs' and the similarly situated BSEs' claims for relief are subject to a three-year statute of limitations, pursuant to 29 U.S.C. §255. The wrongful policies in violation of the federal and state wage and hour tip laws described above have been the intentional policies of defendants for several years throughout its operations in the United States. *See, e.g., Abba v. Brinker Restaurant Corp.*, Case No. 10-cv-10373-JLT, (Doc. 1, "Class Action Complaint," filed 03/03/10) (U.S. Dist. Ct., Mass).

52. Defendants failed to act in good faith or with reasonable grounds to believe that its acts or omissions were not a violation of the FLSA. As a result, plaintiffs and the similarly situated BSEs are entitled to liquidated damages under §216(b) of the FLSA.

53. As a result of defendants' willful violations of the FLSA, plaintiffs and similarly situated BSEs were unlawfully denied tips and are entitled to recover such unpaid amounts, liquidated damages, pre-judgment and post-judgment interest, attorneys' fees, costs, declaratory and injunctive relief and such other relief as the Court deems fair and equitable.

Second Claim for Relief-Violation of the Colorado Wage Act

54. Plaintiffs reassert and incorporate all of the allegations set forth above.

55. Plaintiffs bring this First Claim for Relief for violations of the Colorado Wage Act, Colo. Rev. Stat. §8-4-101, *et seq.* and Colorado Minimum Wage Order 29, 7 CCR 1103-1 as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following class: All current and former BSEs who were employed by Maggiano's and subjected to the misrepresentation and return tip policies described above within the last three (3) years prior to the filing of this complaint, as demonstrated by defendants' own documents, including the Banquet Event Orders referenced in paragraph 22, above.

56. The proposed class satisfies the numerosity, commonality, typicality, adequacy and superiority requirements of Fed. R. Civ. P. 23.

57. The class satisfies the numerosity standard because it involves hundreds to thousands of employees who are located throughout Colorado and the U.S., which makes joinder of all members impracticable.

58. The class meets the commonality requirement because questions of law or fact that are common to the class predominate over any questions affecting individual members. The questions of law and fact common to the class include but are not limited to the following:

- (a.) Whether the fee is a tip under the CWA, Colo. Rev. Stat. §8-4-103(6).
- (b.) Whether defendants unlawfully withheld and failed to pay BSEs tips as required by the CWA.

- (c.) Whether by misrepresenting to its banquet customers that the fee is or contains a tip that is paid to BSEs, defendants unlawfully interfered with the BSEs' relationship with customers.
- (d.) Whether defendants' actions and violations of the CWA were willful.
- (e.) Whether defendants failed to act in good faith or with reasonable grounds to believe that its acts or omissions were not a violation of the CWA.

59. Plaintiffs' claims are typical of the class because they have been employed in the same or similar BSE position, performed the same or similar work duties and have been subject to the same unlawful policies and practices regarding tips and gratuity as the class.

60. The class satisfies the commonality requirement because defendants are expected to raise common defenses to these claims and the pay policies and practices complained of herein.

61. The named plaintiffs will fairly and adequately protect the interests of the class, and they have retained counsel experienced and competent in handling wage and hour class action litigation.

62. Prosecuting this action on behalf of each class member individually will result in inconsistent or varying adjudications with respect to individual class members that would

establish incompatible standards of conduct for the party opposing the class and would substantially impair or impede individual class members' ability to protect their interests.

63. Defendants have acted or refused to act on grounds that apply generally to the class, and therefore final injunctive relief or declaratory relief is appropriate with respect to the class as a whole.

64. Maintaining this lawsuit as a class action is superior to litigating each individual class member's claim separately and will result in a fair and efficient adjudication of this controversy.

65. At this time, plaintiffs do not have any information that suggests that any class member has an interest in individually controlling the prosecution of his or her claim(s). It is unlikely that individual class members will want to prosecute his or her claim individually considering the relatively small value of each claim and the difficulty of bringing individual litigation against his or her employer. However, if any such class member wants to prosecute his or her claim individually, he or she may "opt out" of the litigation upon receipt of the class action notice in this case pursuant to Fed. R. Civ. P. 23(c)(2).

66. The Court has the resources and ability to effectively manage this class action.

67. At all relevant times, plaintiffs and similarly situated BSEs are entitled to the rights, benefits and protections provided under the CWA because they were employees performing labor or services for the benefit of defendants. Colo. Rev. Stat. §8-4-101(4), 7 CCR 1103-1.

68. Defendants are subject to the CWA because it is a corporation that employs persons in Colorado. Colo. Rev. Stat. §8-4-101(5), 7 CCR 1103-1.

69. Under the CWA, it is unlawful to deny tips intended for employees. Colo. Rev. Stat. §8-4-103(6).

70. Under the CWA, tips and gratuities are the sole property of the employee unless the employees posts in his or her place of business in a conspicuous place a printed card, at least twelve inches by fifteen inches in size, containing a notice to the general public in letters at least on-half inch high that all presents, tips, or gratuities given by any patron of said business to an employee thereof are not the property of said employee but belong to the employer. Colo. Rev. Stat. § 8-4-103(6); 7-CCR-1103-1. Defendants did not display such a notice in their Maggiano's restaurants.

71. Defendants had a policy and practice of unlawfully withholding and asserting a right to tips that belong to the BSEs in violation of the CWA. Colo. Rev. Stat. §8-4-103(6).

72. Defendants willfully violated the CWA by explicitly misrepresenting to customers that the fee was a tip that was paid to the BSEs. The named plaintiffs have witnessed non-tipped, management employees of defendants tell customers that the fee is a gratuity that is paid directly to the BSEs and that therefore additional tip is not necessary.

73. Through their deliberate misrepresentations to their customers and the prevailing custom of tipping wait staff employees, defendants converted the fee to a tip, which then immediately became the sole property of the BSE.

74. Defendants also willfully violated the CWA by returning tips to its customers, when such tips were left for and were the sole property of the BSEs.

75. Because defendants' actions were willful, plaintiffs' and similarly situated BSEs' claims for relief are subject to a three-year statute of limitations pursuant to Colo. Rev. Stat. §8-4-122.

76. Defendants failed to act in good faith or with reasonable grounds to believe that its acts or omissions were not a violation of the CWA. As a result, plaintiffs and the similarly situated BSEs are entitled to penalties under the CWA.

77. As a result of defendants' willful violations of the CWA, plaintiffs and similarly situated BSEs were unlawfully denied tips and are entitled to recover such unpaid amounts, penalties, pre-judgment and post-judgment interest, attorneys' fees, costs, declaratory and injunctive relief and such other relief as the Court deems fair and equitable.

Third Claim for Relief: Tortious Interference With Contractual Relations

78. Plaintiffs reassert and incorporate all of the allegations set forth above.

79. Defendants unlawfully and intentionally interfered with the express and/or implied contract that existed between BSEs and customers that the 20% fee was a tip that was paid to the BSEs.

80. By not paying BSEs any portion of the fee, defendants induced the customer to breach and/or made it impossible for the customer to perform the contract.

81. As a result of defendants' conduct, plaintiffs and similarly situated BSEs were unlawfully denied tips and are entitled to recover such unpaid amounts, penalties, pre-judgment and post-judgment interest, punitive damages, attorneys' fees, costs, declaratory and injunctive relief and such other relief as the Court deems fair and equitable.

Fourth Claim for Relief: Quantum Meruit and Unjust Enrichment

82. Plaintiffs reassert and incorporate all of the allegations set forth above.

83. Defendants received a benefit from misrepresenting to its customers that the fee was a tip that was paid to BSEs.

84. Defendants received a further benefit by withholding any tip that was left for and belonged to the BSEs and returning it to its customers.

85. The benefits that defendants received were at the BSEs' expense.

86. It is unjust for defendants to retain the benefit without commensurate compensation.

87. As a result of defendants' willful actions, plaintiffs and similarly situated BSEs were unlawfully denied tips and are entitled to recover such unpaid amounts, penalties, pre-judgment and post-judgment interest, attorneys' fees, costs, declaratory and injunctive relief and such other relief as the Court deems fair and equitable.

Fifth Claim for Relief: Breach of Contract

88. Plaintiffs reassert and incorporate all of the allegations set forth above.

89. There existed an express and/or implied contract between defendants and the customer that the defendants would pay the tip to the BSEs for services that the BSEs rendered.

90. Plaintiffs and similarly situated BSEs were third-party beneficiaries of the express and/or implied contract between defendants and the customers as evidenced by the contract itself and defendants' explicit misrepresentations to their customers that the fee was a tip that was paid to the BSEs as well as the surrounding circumstances, including but not limited to the fact that wait staff is customarily paid a tip.

91. This express and/or implied contract between the defendants and their customers was for the direct benefit of the plaintiffs and similarly situated BSEs.

92. Defendants breached this express and/or implied contract by unlawfully withholding the tip from the BSEs.

93. As a result of defendants' breach, plaintiffs and similarly situated BSEs suffered damages and are entitled to specific performance and such other relief as allowed under the law.

Sixth Claim for Relief: Unlawful Denial of Rest Breaks and Meal Periods

94. Plaintiffs reassert and incorporate all of the allegations set forth above.

95. BSEs regularly worked straight through their shifts, which often times were 8-12 hours long, without being afforded a rest break or meal break as required by the CWA, Minimum Wage Order 29, and Sections 7 and 8 of 7 CCR 1103-1.

96. BSEs are entitled to a paid 10-minute, uninterrupted rest period during each four (4) hour shift, or major part thereof, worked. Minimum Wage Orders 28 and 29 and Section 8 of CCR 1103-1.

97. BSEs are also entitled to at least a 30-minute, duty-free, meal period when their scheduled work shift exceeds five consecutive hours of work. Minimum Wage Orders 28 and 29 and Section 7 CCR 1103-1.

98. Defendants did not schedule or grant rest or meal breaks for BSEs.

99. Defendants and their agents knew or had reason to know that plaintiffs and similarly situated BSEs did not have the ability to take rest and meal breaks during their scheduled shifts due to customer demand and their work obligations.

100. Defendants' policy of not affording BSEs rest and meal breaks was willful, and therefore plaintiffs and similarly situated BSEs are entitled to a three-year statute of limitations pursuant to Colo. Rev. Stat. §8-4-122.

101. Defendants failed to act in good faith or with reasonable grounds to believe that its acts or omissions were not a violation of the CWA. As a result, plaintiffs and similarly situated BSEs are entitled to penalties under the CWA.

102. As a result of defendants' willful violations of the CWA, plaintiffs and similarly situated BSEs were unlawfully denied rest and meal breaks and are entitled to recover such unpaid amounts, overtime, penalties, pre-judgment and post-judgment interest, attorneys' fees, costs, declaratory and injunctive relief and such other relief as the Court deems fair and equitable, in all states where these claims have not been litigated already to conclusion.

VI. PRAYER FOR RELIEF

WHEREFORE, plaintiffs and similarly situated BSEs pray for judgment against defendants as follows:

- A. An order pursuant to §216(b) of the FLSA finding defendants liable to plaintiffs and similarly situated BSEs for unpaid tips and overtime;
- B. An order finding defendants liable to plaintiffs and similarly situated BSEs for unlawfully withheld tips and overtime pursuant to Colorado Wage Act, Colo. Rev. Stat. §8-4-103(6), and other applicable state laws;

- C. An order finding that defendants willfully denied plaintiffs and similarly situated BSEs' rest and meal breaks as required by the CWA, Minimum Wage Order 29 and Sections 7 and 8 of 7 CCR 1103-1, and such similar laws in the other states in which plaintiffs and similarly situated BSEs worked.
- D. An order finding that defendants' violations of the FLSA and CWA were willful;
- E. An order awarding plaintiffs and similarly situated BSEs liquidated damages under the FLSA;
- F. An order awarding plaintiffs and similarly situated BSEs pre- and post-judgment interest at the highest rates allowed by law;
- G. An order assessing a penalty against defendants under the CWA for each violation of the law;
- H. An order providing plaintiffs and similarly situated BSEs declaratory and injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure, ordering that Plaintiffs and similarly situated BSEs are entitled to and shall be given rest and meal breaks as required by applicable state law.
- I. An order finding defendants breached their express and/or implied contract with customers, that plaintiffs and similarly situated BSEs were the intended third-party beneficiaries of such contract and that plaintiffs and similarly situated BSEs are entitled to specific performance remedies.
- J. An order providing plaintiffs and similarly situated BSEs all legal and equitable relief available under the FLSA and CWA and other applicable state laws;

- K. An order awarding plaintiffs and similarly situated BSEs their costs and attorneys' fees;
- L. An order awarding plaintiffs all available actual damages, compensatory, liquidated and punitive damages as permitted by law; and
- M. An order granting such other and further relief as the Court deems fair and equitable.

VII. JURY DEMAND

Plaintiffs, individually and on behalf of similarly situated BSEs, request that this matter be tried to a jury.

Respectfully submitted this 12th day of April, 2013.

s/ David H. Miller

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April 2013, I electronically filed the foregoing Collective and Class Action Complaint with the Clerk of the Court using CM/ECF system.

s/ David H. Miller

David H. Miller