SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

HOWARD RHODES, on behalf of himself and all others similarly situated, Plaintiff, - against - FAIRCHESTER SNACKS CORP., LORENZ SCHNEIDER CO., INC., and YORKSHIRE FOOD SALES CORP., Defendants.	Index No.: **CLASS ACTION COMPLAINT**

Plaintiff Howard Rhodes, on behalf of himself and all others similarly situated, by and through their attorneys Shulman Kessler LLP and the Hayber Law Firm LLC, complaining of Fairchester Snacks Corp., Lorenz Schneider Co., Inc., and Yorkshire Food Sales Corp. (collectively, "Defendants "), alleges as follows:

PRELIMINARY STATEMENT

1. This a class action on behalf of Defendants' current and former drivers ("drivers"), challenging their unlawful misclassification as independent contractors instead of as employees. Plaintiff brings this action on behalf of himself and a class of similarly situated persons who have worked as drivers for Defendants. As such, this lawsuit seeks unpaid wages for Plaintiff pursuant to New York Labor Law ("N.Y. Lab. Law" or "NYLL"), related regulations, and the common law.

2. Defendants sell and distribute chips and other snack foods to customers.

3. Defendants employ Plaintiff and similarly situated drivers to deliver the merchandise to their customer's businesses.

4. Plaintiff and similarly situated drivers work exclusively for Defendants.

5. Although Defendants purported to classify Plaintiff and the other similarly situated drivers as independent contractors rather than as employees pursuant to a Distributor Agreement, Plaintiff and other similarly situated drivers were Defendants' employees under New York law.

6. Defendants do not pay Plaintiff and other similarly situated drivers' proper wages because they illegally make deductions from their wages truck-related expenses, including but not limited to truck-related expenses such as gasoline, repairs, maintenance, inspections and insurance, and in violation of the New York law.

7. Plaintiff (the "Class Representative") brings this action on behalf of himself and on behalf of a class of similarly situated persons who have worked as drivers in Connecticut and New York pursuant to Article 9 of the New York Civil Practice Law and Rules to remedy violations of the NYLL.

JURISDICTION & VENUE

8. This Court has jurisdiction over this matter pursuant to the forum selection clause contained in Plaintiff's Distributor Agreement with Defendants, specifically:

> This agreement shall be governed by the laws of the State of New York and any action or controversy hereunder must be brought in the Supreme Court of the State of New York, County of Nassau.

9. This Court also has jurisdiction over this matter pursuant to N.Y. Lab. Law, Article 9, §§ 190 *et seq*.

THE PARTIES

Plaintiff

10. Plaintiff Howard Rhodes is a resident of New Haven County, Connecticut.

11. Plaintiff worked for Defendants as a driver.

12. At all relevant to this Complaint, Plaintiff was an “employee” within the meaning N.Y. Lab. Law § 190(2) and 863-b.

Defendant Fairchester Snacks Corp.

13. Upon information and belief, Fairchester Snacks Corp. was and still is a domestic corporation, authorized to do business pursuant to the laws of the State of New York.

14. Upon information and belief, Fairchester Snacks Corp.’s principal place of business is located at 2000 Plaza Avenue, New Hyde Park, New York 11040.

15. At all times hereinafter mentioned, Fairchester Snacks Corp. was and still is an “employer” within the meaning of N.Y. Lab. Law § 190(3).

16. Upon information and belief, Fairchester Snacks Corp. maintains control, oversight, and direction over its operations and employment practices.

Defendant Lorenz Schneider Co., Inc.

17. Upon information and belief, Lorenz Schneider Co., Inc. was and still is a domestic corporation, authorized to do business pursuant to the laws of the State of New York.

18. Upon information and belief, Lorenz Schneider Co., Inc.’s principal place of business is located at 2000 Plaza Avenue, New Hyde Park, New York 11040.

19. At all times hereinafter mentioned, Lorenz Schneider Co., Inc. was and still is an “employer” within the meaning of N.Y. Lab. Law § 190(3).

20. Upon information and belief, Lorenz Schneider Co., Inc. maintains control, oversight, and direction over its operations and employment practices.

Defendant Yorkshire Food Sales Corp.

21. Upon information and belief, Yorkshire Food Sales Corp. was and still is a domestic corporation, authorized to do business pursuant to the laws of the State of New York.

22. Upon information and belief, Yorkshire Food Sales Corp.'s principal place of business is located at 2000 Plaza Avenue, New Hyde Park, New York 11040.

23. At all times hereinafter mentioned, Yorkshire Food Sales Corp. was and still is an "employer" within the meaning of N.Y. Lab. Law § 190(3).

24. Upon information and belief, Yorkshire Food Sales Corp. maintains control, oversight, and direction over its operations and employment practices.

All Defendants

25. Defendants constitute a unified operation.

26. Defendants constitute a common enterprise.

27. Defendants have interrelated operations.

28. Defendants have common management.

29. Defendants have a centralized control of labor relations.

30. Defendants have common ownership.

31. Defendants share employees.

32. Defendants commingled funds with each other.

33. Defendants share the same corporate headquarters at the same physical address in the State of New York: 2000 Plaza Avenue, New Hyde Park, New York 11040. *See* Contact Us, http://www.nysnacks.com/contact-us (last accessed July 10, 2016).

34. Defendants share the same warehouses from which drivers deliver Defendants' merchandise to customers in New York and Connecticut. The locations of these warehouses include:

a. 1915 Stratford Ave, Stratford, CT 06615 ("Stratford warehouse"); and

b. 100 Lafayette Ave, White Plains, NY 10603 ("White Plains warehouse").

35. Defendants constitute a single employer.

36. Defendants constitute an integrated enterprise.

37. Defendants advertise as a single integrated enterprise on their website: http://www.nysnacks.com/ (last accessed July 10, 2016).

38. Defendants advertise as a single integrated enterprise on their Facebook page: https://www.facebook.com/NYSnacks/ (last accessed July 10, 2016).

39. Defendants advertise as a single integrated enterprise on their YouTube channel: https://www.facebook.com/NYSnacks/ (last accessed July 10, 2016).

40. Defendants advertise as a single integrated enterprise on their Twitter account: https://www.twitter.com//NYSnacks/ (last accessed July 10, 2016).

41. Defendants advertise as a single integrated enterprise through use of their mascot "Peppy The Owl."

42. At all relevant times, Defendants have maintained control, oversight, and direction over Plaintiff and similarly situated employees, including timekeeping, payroll and other employment practices that applied to them.

43. Defendants apply the same employment policies, practices, and procedures to all drivers, including policies, practices, and procedures with respect to payment of wages and classification of drivers as independent contractors.

CLASS ACTION ALLEGATIONS

44. The Class Representative brings the First, Second, Third, and Fourth Causes of Action on his own behalf and as a class action, pursuant to Article 9 of the New York Civil Practice Law and Rules on behalf of the following class of persons:

> All current and former drivers who performed delivery services for Defendants, at any time during the 6 years prior to the filing of this Complaint, to the entry of the judgment in the case (the "Class").

45. The persons in the Class are so numerous that joinder of all members is impracticable. Although, the precise number of such persons is unknown, and facts on which the calculation of that number can be based are presently within the sole control of Defendants.

46. Upon information and belief, the size of the Class is at least 200 individuals.

47. Common questions of law and fact exist as to the Class that predominate over any questions only affecting them individually and include, but are not limited to:

a. Whether the Class Representative and the Class were Defendants' employees under N.Y. Lab. Law § 191, et seq., and N.Y. Lab. Law § 862-b;

b. Whether Defendants made unlawful deductions from the wages of the Class Representative and the Class;

c. Whether Defendants failed to keep accurate records for the Class Representative and the Class;

d. Whether Defendants failed to provide accurate wage notices and wage statements to the Class Representative and the Class;

e. Whether Defendants acted willfully or with reckless disregard in their unlawful deductions from the wages of Class Representative and the Class; and

f. The nature and extent of class-wide injury and the measure of damages for those injuries.

48. The Class Representative fairly and adequately protects the interests of the Class and has no interests antagonistic to the class. The Class Representative is represented by attorneys who are experienced and competent in both class litigation and employment litigation.

49. A class is superior to other available methods for the fair and efficient adjudication of the controversy, particularly in the context of wage-and-hour litigation where an individual plaintiff lacks the financial resources to vigorously prosecute a lawsuit in court against

a defendant. The damages sustained by individual Class Members are small, compared to the expense and burden of individual prosecution of this litigation. Class action treatment will obviate unduly duplicative litigation and the possibility of inconsistent judgments.

50. Further, the Class Representative and the Class have been equally affected by Defendants' failure to pay proper wages. Moreover, members of the Class still employed by Defendants may be reluctant to raise individual claims for fear of retaliation.

51. Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class was a whole.

52. The Class Representative's claims are typical of those of the Class. The Class Representative and the other Class Members were subjected to Defendants' policies, practices, programs, procedures, protocols and plans alleged herein concerning the failure to pay proper wages and the failure to keep adequate records. Plaintiff's job duties are typical of those of the Class Members.

53. A class action is superior to other available methods for the fair and efficient adjudication of this litigation – particularly in the context of wage litigation like the present action, where individual Plaintiff may lack the financial resources to vigorously prosecute a lawsuit in court against a corporate defendant. The members of the Class have been damaged and are entitled to recovery as a result of Defendants' common and uniform policies, practices, and procedures. Although the relative damages suffered by individual members of the Class are not de minimis, such damages are small compared to the expense and burden of individual prosecution of this litigation. In addition, class treatment is superior because it will obviate the

need for unduly duplicative litigation that might result in inconsistent judgments about Defendants' practices.

54. This action is properly maintainable as a class action under Article 9 of the New York Civil Practice Law and Rules.

COMMON FACTUAL ALLEGATIONS

55. Plaintiff and the members of the Class ("Class Members") have been victims of Defendants' common, unlawful policy of making deductions from Plaintiff' and Class Members' pay. At all times relevant, Defendants' unlawful policy and pattern or practice has been willful.

56. Defendants failed to furnish Plaintiff and Class Members with an accurate statement of, inter alia, wages, hours worked, and rates paid as required by NYLL.

57. Defendants failed to furnish Plaintiff and Class Members with the annual notice required by NYLL.

58. As part of their regular business practice, Defendants intentionally, willfully, and repeatedly engaged in a pattern, practice, and/or policy that violates the FLSA and NYLL. Defendants' policy and pattern or practice includes but is not limited to:

a. Willfully misclassifying their employees, including Plaintiff and Class Members as exempt from the NYLL;

b. Willfully making improper deductions from Plaintiff's and Class Members' pay;

c. Willfully failing to keep payroll records as required by the NYLL

59. Defendants' failure to properly pay Plaintiff and Class Members their proper wages was willful, intentional and in bad faith.

60. Defendants' unlawful conduct has been widespread, repeated, and consistent.

INDIVIDUAL FACTUAL ALLEGATIONS

61. Defendants have employed Plaintiff since in or about October 2010 as a driver.

62. Plaintiff signed a distributor agreement with Defendants upon being hired by Defendants.

63. Plaintiff is an employee of Defendants, working under their direct supervision.

64. Plaintiff reports to the Stratford Warehouse.

65. Throughout Plaintiff's employment for Defendants, he has been required to purchase and use his own truck for deliveries and pay for all expenses related to the truck, which were necessary in order for him to complete his duties for Defendants.

66. Defendants also require Plaintiff to pay them to use their handheld computer and purchase the products that he had to deliver from them.

67. Rhode's truck-related expenses include:

a. Gasoline;

b. Repairs, maintenance, and inspections; and

c. Insurance.

68. Throughout his employment, Plaintiff has been subjected to improper kick-backs by Defendants as a result of Defendants' failure to reimburse Plaintiff for these expenses related to his employment.

69. Defendants failed to furnish Plaintiff with an annual wage notice in February 2012, February 2013, and February 2014, as was required by the NYLL.

70. Defendants failed to furnish Plaintiff with a wage notice when Defendants hired him, as was required by the NYLL.

71. Defendants have failed to furnish Plaintiff with accurate statements of wages listing hours worked, rates paid, gross wages, allowances and deductions taken, and net wages paid.

DRIVERS ARE EMPLOYEES - FACTUAL ALLEGATIONS

72. Defendants are in the business of selling and distributing snack foods to their customers.

73. In order to carry out this central function, Defendants purport to contract with individuals such as Plaintiff, to drive a delivery truck and to deliver its retail merchandise to customers' places of business

74. Plaintiff and other drivers perform delivery services for Defendants.

75. In order to receive such work, Defendants required Plaintiff to sign an agreement which stated that he was an independent contractor.

76. Upon information and belief, Defendants require other drivers to enter into such agreements.

77. Although Plaintiff and other drivers were classified as independent contractors, Defendants retained the right to control and have controlled nearly every aspect of the drivers' work. Such control includes, but is not limited to, the following:

a. Defendants control the frequency in which Plaintiff and other drivers have to deliver to Defendants' customers. Defendants can seize an account on a driver's route and give it to another driver if that driver fails to abide by these requirements.

b. Defendants instruct Plaintiff and other drivers by what time they must make certain deliveries.

c. Defendants' district manager texts and emails Plaintiff and other drivers about particular issues with Defendants' customers or Defendants' product.

d. Plaintiff and other drivers do not negotiate with retail customers regarding the rates charged for their services, and they did not contract with the customers independent of Defendants.

e. Defendants train Plaintiff and other drivers how to make deliveries and interact with retail customers.

f. Defendants do not permit drivers to arrange for any person to service the accounts on their routes, other than those individuals approved by Defendants.

g. Plaintiff and other drivers are required to get signatures from customers when deliveries are made.

h. Defendants do not permit Plaintiff and other drivers to sell, assign or transfer, their delivery route without Defendants consent.

i. Defendants have the right to ride with Plaintiff and other drivers while they perform deliveries.

78. Plaintiff and other drivers provide transportation of commercial goods – Defendants' snack products – for Defendants. This work falls squarely within the normal course of Defendants' business.

79. Plaintiff and other drivers are not customarily engaged in an independently established trade, occupation, profession or business.

80. Drivers, such as Plaintiff, cannot engage in an independent business because they work full-time for Defendants. Moreover, Defendants restrict drivers from hauling other products in their trucks along with Defendants' merchandise.

81. Plaintiff and other drivers are dependent upon Defendants for their work and are unable to offer delivery services to other companies.

82. While employed by Defendants, Plaintiff and other drivers do not work for other entities as drivers.

FIRST CAUSE OF ACTION
NYLL – Unlawful Wage Deductions
(Brought on behalf of Plaintiff and the Class)

83. Plaintiff realleges and incorporates all allegations in all preceding paragraphs.

84. Plaintiff and similarly situated drivers were employees of Defendants pursuant to N.Y. Lab. Law §§ 190(2) and 862-b.

85. Defendants knowingly, willfully, and intentionally violated N.Y. Lab. Law § 193 by requiring that Plaintiff and the Class be subject to deductions from their compensation as described herein.

SECOND CAUSE OF ACTION
NYLL – Illegal Kick-Back of Wages
(Brought on behalf of Plaintiff and the Class)

86. Plaintiff realleges and incorporates all allegations in all preceding paragraphs.

87. Plaintiff and similarly situated drivers were employees of Defendants, pursuant to N.Y. Lab. Law § 190(2) and 862-b.

88. Defendants violated N.Y. Lab. Law § 198-b by requiring that Plaintiff be subject to deductions from their compensation as described herein.

THIRD CAUSE OF ACTION
NYLL – Notice and Record-Keeping Requirement Violation
(Brought on behalf of Plaintiff and the Class)

89. Plaintiff realleges and incorporates all allegations in all preceding paragraphs.

90. Defendants failed to supply Plaintiff and similarly situated drivers with a notice as required by N.Y. Lab. Law § 195, in English or in the language identified by them as their primary language, containing their rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; hourly rate or rates of pay and overtime rate or rates of pay if applicable; the regular pay day designated by the employer in

accordance with N.Y. Lab. Law § 191; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; the telephone number of the employer; plus such other information as the commissioner deems material and necessary.

91. Defendants failed to supply Plaintiff and similarly situated drivers with an accurate statement of wages as required by N.Y. Lab. Law § 195, containing the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; hourly rate or rates of pay and overtime rate or rates of pay if applicable; the number of hours worked, including overtime hours worked if applicable; deductions; and net wages.

92. Due to Defendants' violations of N.Y. Lab. Law § 195, Plaintiff and similarly situated drivers are entitled to damages of $50 for each workweek that Defendants failed to provide a wage notice, or a total of $2,500 per class member, and damages of $100 for each workweek that Defendants failed to provide accurate wage statements, or a total of $2,500 per class member, as provided for by N.Y. Lab. Law § 198, reasonable attorneys' fees, costs, and injunctive and declaratory relief.

FOURTH CAUSE OF ACTION
New York Common Law – Unjust Enrichment
(Brought on behalf of Plaintiff and the Class)

93. Plaintiff realleges and incorporates all allegations in all preceding paragraphs.

94. By misclassifying Plaintiff and other drivers as independent contractors when they are employees under New York law, Defendants were unjustly enriched or were conferred a benefit because they unlawfully shifted their business costs and expenses to the Plaintiff and

Class Members, including without limitations employer payroll taxes, administrative fees, fuel and vehicle maintenance costs, to the detriment of Plaintiff and Class Members. Defendants were aware that they received a benefit as a result of the misclassification, and it would be unjust to let Defendants keep the benefit of their savings in business costs and expenses.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the Class, seeks the following relief:

A. Certification of this case as a class action pursuant to Art. 9 of the CPLR;

B. Designation of Plaintiff as representatives of the Class, and counsel of record as Class Counsel;

C. Back wages as proved at trial for the illegal deductions and kick-backs;

D. Liquidated damages equal to 100% of the back wages owed under the NYLL since April 9, 2011, to the extent that the Act of Aug. 26, 2009, ch. 372, 2009 N.Y. Laws 1086, and the Wage Theft Prevention Act of 2010, ch. 564, 2010 N.Y. Laws 1446, changed the nature of liquidated damages under the NYLL as to render them no longer a penalty;

E. Pre-judgment interest and post-judgment interest as provided by law;

F. Attorneys' fees and costs of the action;

G. Statutory damages, as provided for by N.Y. Lab. Law § 198, for Defendants' violations of the notice and recordkeeping requirements pursuant to N.Y. Lab. Law § 195;

H. Appropriate equitable and injunctive relief to remedy violations, including but not necessarily limited to an order enjoining Defendants from continuing their unlawful practices;

I. Issuance of a declaratory judgment that the practices complained of in this action are unlawful under N.Y. Lab. Law § 198 *et seq.*;

J. Reasonable incentive awards for Plaintiff to compensate him for the time he spent attempting to recover wages for the Class and for the risks he took in doing so; and

K. Such other relief as this Court shall deem just and proper.

Dated: Melville, New York
August 16, 2016

Respectfully submitted,

By: /s/ Troy L. Kessler
Troy L. Kessler

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