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16 *Attorneys for Plaintiffs and those similarly situated*

17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE DISTRICT OF ARIZONA**

19 Andrew Harrington; Katie Liammaytry;
20 Jason Lenchert, and Dylan Basch,
21 individually and behalf of themselves
22 and all other persons similarly situated,

23 *Plaintiffs,*

24 v.

25 Cracker Barrel Old Country Store, Inc.,

26 *Defendant.*

§ Case No. 2:21-CV-00940-DJH
§
§ **SECOND AMENDED FLSA**
§ **COLLECTIVE ACTION**
§ **COMPLAINT**

§ JURY TRIAL DEMANDED

27 **INTRODUCTION**

28 1. Cracker Barrel, a nation-wide restaurant chain with over 650 stores around the
country, has employed tens of thousands of servers over the past three years who

1 have been paid less than minimum wage so that Cracker Barrel can *try* to take
2 advantage of a “tip credit” under the Fair Labor Standards Act (FLSA). But
3 Cracker Barrel does not comply with the tip credit requirements, and it violates the
4 FLSA in at least three different ways.
5

- 6 2. First, Cracker Barrel pays its servers less than minimum wage while forcing them
7 to perform time-intensive, non-tipped duties to avoid employing or paying more to
8 back-of-house employees. In appropriate circumstances, the FLSA allows
9 employers to take a tip credit and pay certain employees (servers) less than
10 minimum wage but only if: a) they spend enough time (at 80%) performing tipped
11 duties; b) they do not spend *any* time performing non-tipped duties that are
12 unrelated to the servers’ occupation; and c) as of December 28, 2021, no more than
13 30 minutes is spent on continuous non-tipped work, even if the total non-tipped
14 work is less than 20%. Back-of-house employees, by contrast, are paid at least
15 minimum wage per hour. By forcing servers to do more non-tipped work, Cracker
16 Barrel is able to save money in labor costs and increase its profitability, at the
17 detriment of its employees. Cracker Barrel intensified this scheme recently by
18 implementing nationwide policies that require servers to spend even more time on
19 non-tipped duties, and more so during the COVID-19 pandemic. Cracker Barrel is
20 essentially taking advantage of the COVID-19 pandemic to make its servers work
21 more for less money. In fact, a recent Cracker Barrel quarterly earnings reports
22 (issued on February 22, 2022) indicate significantly higher revenue (\$862 million)
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1 and net income (\$37.6 million) compared to prior quarters, while simultaneously
2 having a disproportionately lower increase in labor costs.¹

- 3
4 3. Second, Cracker Barrel failed to timely provide the required “tip-credit notice” to
5 its servers that it would be paying them less than minimum wage and taking a “tip
6 credit” for the first week of their employment as a server. Although the tip credit
7 notice is eventually placed on the servers’ paystubs, such notice is late for the first
8 week of the servers’ pay because the servers had already worked at least a week
9 before being notified about Cracker Barrel’s payment scheme.
10
11 4. Third, servers are often required to work off-the-clock. This may be either before
12 their shifts starts or after they clock-out. They may be performing non-tipped
13 duties during these time periods or being forced to wait at the store in order to
14 collect their tips. This is blatant off-the-clock work, where servers are being paid
15 nothing for this time.
16
17

18 **PARTIES**

- 19 5. Defendant, Cracker Barrel Old Country Store, Inc., is a Tennessee corporation with
20 its principal offices located at 305 Hartman Drive, Lebanon, TN, 37807. It
21 regularly conducts business in several states throughout the country, including
22 Arizona. Cracker Barrel has already made an appearance in this case via its
23 attorneys of record.
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27 ¹ <https://investor.cbirlgroup.com/news-releases/news-release-details/cracker-barrel-reports-second-quarter-fiscal-2022-results>
28

- 1 6. Plaintiff Andrew Harrington was employed by Defendant as a tipped employee at
2 one of Defendant's Cracker Barrel restaurants in Ohio within the past three years
3 preceding the filing of this class action lawsuit (Andrew Harrington's Consent to
4 join this collective action was previously filed in *Docket #5-1*, p. 25.)
5
- 6 7. Plaintiff Katie Liammaytry was employed by Defendant as a tipped employee at
7 one of Defendant's Cracker Barrel restaurants in North Carolina within the past
8 three years preceding the filing of this class action lawsuit (Katie Liammaytry's
9 Consent to join this collective action was previously filed in *Docket #3-1*, p. 62.)
10
- 11 8. Plaintiff Jason Lenchert is employed by Defendant as a tipped employee at one of
12 Defendant's Cracker Barrel restaurants in Florida within the past three years
13 preceding the filing of this class action lawsuit (Jason Lenchert's Consent to join
14 this collective action was previously filed in *Docket #3-1*, p. 61).
15
- 16 9. Plaintiff Dylan Basch is employed by Defendant as a tipped employee at one of
17 Defendant's Cracker Barrel restaurants located in Arizona within the past three
18 years preceding the filing of this class action lawsuit. He has worked at two
19 different Cracker Barrel stores located in Arizona since 2019. (Dylan Basch's
20 Consent to join this collective action is attached as *Exhibit #1*). Furthermore, based
21 on the Court's prior rulings regarding potential arbitration, Basch's declaration
22 confirming he is not bound to arbitration is attached as *Exhibit #2*.
23
- 24 10. The above-referenced plaintiffs are collectively referred to as "Named Plaintiffs."
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PUTATIVE CLASS MEMBERS

11. The class of similarly situated employees or putative class members (“Putative Class Members”) sought to be certified is defined as follows:

All current and former tipped employees (servers, waiters, and waitresses) of Cracker Barrel Old Country Store, Inc. who work (or have worked) at Cracker Barrel Old Country Store restaurants (“Cracker Barrel restaurants”) in the past three years and are not subject to arbitration.²

JURISDICTION AND VENUE

12. The FLSA authorizes court actions by private parties to recover damages for violations of the FLSA’s wage and hour provisions. Jurisdiction over Plaintiffs’ FLSA claims is based on 29 U.S.C. § 216 (b) and 28 U.S.C. § 1331. Three of the Named Plaintiffs were originally identified as opt-in plaintiffs before Defendant made its initial appearance in this case.³

13. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) and (c) because Basch works for Defendant in this District, Defendant regularly conducts business in this District, Defendant has already consented to venue in this district, and

² This definition has been modified to comply with the Court’s prior ruling that only servers not subject to arbitration may have their claims adjudicated in this court. Also in compliance with the Court’s rulings, a list of opt-in plaintiffs who are subject to arbitration was filed on March 9, 2022. *See Docket #60*.

³ The addition of a new named plaintiff, Basch (who works for Defendant in Arizona), resolves the personal jurisdiction concern raised in the Court’s order issued on July 22, 2022. *Docket #73*. Defendant has conceded that it cannot challenge personal jurisdiction if there is an Arizona named plaintiff. *See Docket #72, p. 3*. Given that Basch is now also a Named Plaintiff, all other plaintiffs (including the other Named Plaintiffs and all opt-in plaintiffs also not subject to arbitration) should be allowed to continue pursuing their claims in this lawsuit. *See Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022).

1 several plaintiffs who are not bound to arbitration are already part of this lawsuit.
2 Furthermore, Defendant has approximately 14 stores in Arizona with hundreds of
3 employees. Named Plaintiff Dylan Basch has also worked at two stores in Arizona
4 as a server and is currently employed by Defendant in Arizona.
5

6 **FACTUAL BACKGROUND**

7 **The FLSA applies to Cracker Barrel**

8
9 14. Cracker Barrel is an enterprise engaged in commerce or in the production of goods
10 for commerce within the meaning of the FLSA. 29 U.S.C. § 203(b), (r).

11 15. Cracker Barrel is an employer as defined by the FLSA. 29 U.S.C. § 203(d).

12 16. Cracker Barrel has annual gross business of over \$500,000.

13
14 17. Cracker Barrel employed Named Plaintiffs at all relevant times within the meaning
15 of the FLSA. 29 U.S.C. § 203(g).

16 18. In performing their duties for Cracker Barrel, Named Plaintiffs were engaged in
17 commerce or in the production of goods for commerce.
18

19 **FLSA Tip Credit**

20 19. Section 3(m) of the FLSA allows restaurants to pay its tipped employees less than
21 minimum wage if certain conditions are met. The gross amount of money, below
22 minimum wage, withheld from a server's pay is called a "tip credit."
23

24 20. The FLSA tip credit privilege, however, has explicit requirements that employers
25 must follow.
26

27 21. As a condition of the privilege of paying servers less than minimum wage, the
28 FLSA requires that they must be doing work capable of making tips. The FLSA

1 allows restaurants to oblige its servers to do some non-tipped work that is related
2 to their occupation, but that work may not exceed 20% of the employee's time (the
3 "80/20 Rule"). Furthermore, servers cannot spend any time performing duties that
4 are unrelated to their occupation. Finally, as of December 28, 2021, servers paid
5 on a tip-credit rate cannot spend more than 30 continuous minutes on non-tipped
6 duties even if their total time spent on non-tipped work is 20% or less.
7

8
9 22. Cracker Barrel, like most restaurants, has two classifications of pay for its non-
10 management employees—tipped and non-tipped.⁴

11 23. Servers are tipped employees. Cracker Barrel pays its servers less than minimum
12 wage in most of the states in which it operates, including Arizona. The FLSA
13 allows Cracker Barrel to do this under the tip credit scheme.
14

15 24. Each state determines its tip credit. For example, Arizona's tip credit is \$3.00 an
16 hour. Its minimum wage is \$12.80 an hour. Under the FLSA, then, Cracker Barrel
17 in Arizona subtracts \$2.95 from \$12.00 and pay its servers \$9.05 an hour. As other
18 examples, in Tennessee, Alabama, Texas, South Carolina, and Mississippi, servers
19 are paid as little as \$2.13 an hour as the Federal minimum wage is \$7.25.
20

21
22 **Cracker Barrel requires its servers to do excessive non-tipped work.**

23 25. Cracker Barrel's servers, including those who work or worked in Arizona, spend
24 more than 20% of their work time performing non-tipped duties, described as
25 follows.
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27
28 ⁴ Non-tipped employees are paid the either the federal minimum or their state's minimum wage, whichever is greater.

1 a) Cracker Barrel obliges its servers to do excessive “side-work.”

2 26. Cracker Barrel provides each store with a set of “side-work” charts. These charts
3 are created by Cracker Barrel’s corporate office and are **uniform across all stores**,
4 including those in Arizona.
5

6 27. During a shift, a server is assigned one or more side-work duties to perform.

7 28. The following is a list of the side-work duties that must be completed during and
8 after each shift:
9

10 i. Primary Delfield:⁵ This is the condiment and garnish refrigerator housed
11 along the server line.⁶ Servers must clean and restock every garnish and
12 dressing in the Primary Delfield.
13

14 ii. Secondary Delfield: This is a secondary condiment and garnish refrigerator
15 housed next to the Primary Delfield. Servers must clean and restock every
16 garnish and dressing in the Secondary Delfield.
17

18 iii. Tea and Soda Stations: There are two Tea and Soda Stations—one each end
19 of the server line. The Stations must be restocked (i.e., tea must be made,
20 and soda mix, ice, and drink garnishes must be kept stocked) and kept clean
21 during the day. At the end of the day, the tea urns must be thoroughly
22 cleaned with urn cleaner, and the soda fountains must be broken down and
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⁵ A “Delfield” is the industry term for a brand of waist-high refrigerators.

27 ⁶ The server line is the area in the back of house in which the servers get their customer’s
28 food and drink.

1 cleaned. The nozzles for both the Tea and Soda Stations must be soaked in
2 cleaner overnight.

3 iv. Coffee Stations: Industrial coffee and latte machines must be kept stocked
4 with coffee, hot tea, gallons of milk, espresso beans, syrups and sauces, iced
5 tea bags, coffee liners, and coffee mugs. The machines must be cleaned
6 throughout the day, and the pots must be cleaned with urn cleaner. The
7 adjacent sink and trash bin must also be cleaned. The serving trays kept near
8 the Stations must be wiped down throughout the day. At night, the servers
9 must send the trays to the dish room for cleaning.

10 v. Milk Delfield: Servers must keep milk stocked and rotated to prevent
11 spoilage. Cider, lemonade mix, and orange juice must be kept stocked. The
12 Milk Delfield must be kept clean, inside and out.

13 vi. Root Beer and Juice Pulls: root beer, juice, and single serve beverages (e.g.,
14 Stewart's Orange Soda) must be kept in stock.

15 vii. Bread Toaster, and Cereal: The bread toaster and warmer must be kept clean
16 and bread and cereal must be kept stocked.

17 viii. Server and Prep Server Pass "Thru" Windows: The window in which freshly
18 cooked food is placed to keep warm must be kept clean and wiped down.
19 The window through which cold items (e.g., salads) must be kept cleaned
20 and wiped down. The area in which plates are kept must also be cleaned.

21 ix. Condiment Shelves: There are two Condiment Shelves—one at each end of
22 the server line. Servers must rotate condiments and keep them cleaned and
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1 stocked. During COVID, each condiment bottle must be sanitized after
2 every use and at the end of the shift.

3 x. To Go and Silverware Stands: There is one To Go station. This station
4 contains the necessary containers, lids, and bags for carry out orders. This
5 station must be kept cleaned and stocked throughout the day.

6
7 xi. Juice Machine: The juice machine (which contains orange juice and
8 lemonade in separate hoppers) must be cleaned and stocked throughout the
9 day. At night, the machine must be broken down and each part must be
10 washed by hand and the machine must be reassembled.

11
12 xii. Break Room and Bus Carts: The Break Room must be swept, cleaned, and
13 any trash must be thrown away. The Bus Carts (the carts which hold the tubs
14 in which dirty dishes are deposited) must be wiped down thoroughly.

15
16 xiii. Preparing Food: After fried chicken was permanently added to Cracker
17 Barrel's menu two years ago, servers had to make biscuits, desserts, and
18 salads because the back-of-house employees were preoccupied with frying
19 chicken.

20
21 xiv. Washing Dishes: Servers often have to wash silverware prior to rolling them
22 in napkins.

23
24 29. None of these tasks are tipped-duties, and none of them are related to the servers'
25 occupation.
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b) Cracker Barrel requires its servers to maintain and deep clean their serving sections.

30. Servers operate in each dining room in “sections” of tables.

31. Servers are required to keep their tables clean, the sugar caddies filled, and keeping the salt and pepper shakers filled and wiped down. Servers must also sweep their sections throughout the day and at the end of the shift.

32. Before the Microsoft AX (“MAX”) program was implemented (discussed below) servers would typically have 2-3 table sections on the weekends. After MAX implementation, servers are responsible for anywhere from 4-6 tables.

33. Post-MAX implementation, servers spend more time cleaning their larger sections to clean, and during which, they cannot generate tips.

34. In some locations, servers are now required to mop their sections at some point during the shift.

35. None of these tasks are tipped-duties, and none of them are related to the servers’ occupation.

c) Cracker Barrel obliges its servers to perform MAC duties to maintain the restaurants.

36. Manager Assigned Cleaning or “MAC” duties are separate from “side-work.”

37. MAC duties are also non-tipped duties and they are different from, and in addition to, what Cracker Barrel considers side-work duties.

38. MAC duties are assigned to each shift. Each server must pitch-in to complete the MAC duty.

39. The following is a list of MAC duties assigned to each day’s servers:

- i. Cleaning the lantern globes on each table either glass cleaner or soap and water;
- ii. Scraping gum from the underside of the tables in each server's section;
- iii. Deep clean all tables and chairs including crossbars and legs;
- iv. Deep clean table tents (promotional insert holders) and replace soiled promotional inserts;
- v. Deep clean all walls on server aisle including behind tables and equipment;
- vi. Emptying and deep clean of salt and pepper shakers;
- vii. Sugar caddies must be emptied and deep cleaned at night. They are filled the following morning;
- viii. Refill cruets (condiment dispensers for vinegar);
- ix. Emptying and sanitizing the server line ice bins;
- x. Deep clean Delfields inside and out;
- xi. Deep clean all refrigerator gaskets;
- xii. Deep clean Coke machine, juice machine, and tea machine;
- xiii. Deep clean tea urns and coffee storage bins (holds bags of loose coffee grounds)
- xiv. Soak soda fountain nozzles in Urnex solution; and
- xv. Remove all glass and cup racks then clean and polish sides of rack stand with all-purpose degreaser.

40. None of these tasks are tipped-duties, and none of them are related to the servers' occupation.

1 d) Cracker Barrel requires its servers to roll silverware.

2 41. Cracker Barrel supplies its patrons with silverware in “rolls” containing a fork,
3 spoon, and knife.

4 42. Servers are required to create these rolls—called “rolling silverware”—every shift.

5 43. Rolling silverware takes a significant amount of time to complete.

6 44. This is not a tipped duty.

7 45. Servers are even punished by being required to roll extra silverware if they do not
8 meet management’s alcohol sales goals. *See Exhibit #6.*

9 e) Cracker Barrel has started to cross-train its servers on additional
10 non-tipped duties.

11 46. Recently, servers have started to actually be cross-trained on cooking positions,
12 such as back up cook and salad and dessert preparation. These are non-tipped
13 duties, and none of them are related to the servers’ occupation.

14 f) In the last five years, Cracker Barrel has significantly increased the
15 amount of non-tipped duties servers must perform.

16 47. Prior to 2017, Cracker Barrel exclusively used a computer program called
17 MICROS to relay food orders entered by servers to the kitchen.

18 48. In 2017, Cracker Barrel began implementing a program called Microsoft AX or
19 “MAX.” The MAX program was designed to replace MICROS and improve the
20 efficiency of Cracker Barrel’s stores as a whole. One of the goals of this program
21 was to reduce the number of servers needed per shift by issuing electronic tablets
22 to servers so they could “ring in” customers’ food orders and increase their
23 efficiency.
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1 49. The MAX program created a new position called “server assistants.” The server
2 assistants were intended to do what traditionally what was server’s side-work.

3 50. But Cracker Barrel eliminated the server assistant position from the MAX program
4 to reduce labor costs. With Cracker Barrel’s implementation of the MAX program
5 without server assistants, there are less servers to do the side-work each shift and
6 each server must do more side-work, on average, than before.
7

8 51. It is common for servers to be assigned more than one of the side-work duties
9 outlined above in addition to the other non-tip generating duties discussed above.
10

11 52. Furthermore, servers often have to run (or deliver food) for other servers and/or “to
12 go” orders. They do not get tips for this work. In fact, employees regularly
13 working the “to go” orders are paid at least minimum wage, but servers still often
14 end up doing their work while paid on a tip-credit basis.
15

16 53. Cracker Barrel reduced the number of servers even further when the COVID
17 pandemic struck in early 2020. During the pandemic, Cracker Barrel increased the
18 non-tipped duties that the reduced number of servers have to do. For example, at
19 closing time, servers have “deck brush” (a more-time intensive form of mopping)
20 the server alley and food preparation area. Servers are also being required to do
21 enhanced sanitizing of all condiments after each customer uses them.
22

23 54. Cracker Barrel used to have a “night-maintenance” position, which would be an
24 employee cleaning stores overnight while it was closed. Starting in 2020, that
25 position was eliminated and servers were then required to fulfill the job duties of
26 the “night-maintenance” position.
27
28

1 55. During COVID, it also became essential to spend much more time cleaning or
2 disinfecting almost everything in the restaurant, repeatedly. Cracker Barrel took
3 advantage of the servers' low pay rather than hiring additional employees who
4 should have been paid at least minimum wage. The only purpose was to increase
5 profits at the detriment of the servers and potential employees. Even if Cracker
6 Barrel hired just three extra minimum wage employees per store to perform non-
7 tipped work (instead of requiring servers to perform these jobs at below minimum
8 wage), that could have resulted in about 2,000 more jobs nationwide and allowed
9 servers to spend more time on tipped duties. Instead, servers are spending more
10 time on non-tipped duties and ultimately earning less money on an hourly basis
11 prior to COVID. Cracker Barrel chose profits over people.
12

13 56. Examples of servers performing other non-tipped duties are attached as *Exhibit #3*.
14

15 g) Cracker Barrel willfully chose to ignore its violations of the 80/20
16 Rule.
17

18 57. Upon information and belief, in or around 2016 or 2017, Joe Walsh, a member of
19 Cracker Barrel's upper management, removed a draft provision to the Cracker
20 Barrel store operations manual requiring Cracker Barrel store managers to ensure
21 employees were in compliance with the 80/20 Rule.
22

23 58. Upon information and belief, around the same time Joe Walsh removed the 80/20
24 Rule provision from the store operations manual, corporate employees at the home
25 office were actively discussing the 80/20 Rule.
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1 59. Cracker Barrel, therefore, knew it was violating the 80/20 Rule yet it chose to
2 maximize profits while overworking its servers.

3 60. Furthermore, Cracker Barrel does not track the amount of time servers spend on
4 tipped duties versus non-tipped duties. It is the employer's responsibility to track
5 such work time.
6

7 **Cracker Barrel does not properly inform its servers that it will take a tip-credit**
8 **until two weeks after they have already worked under the tip credit exception.**

9 61. If an employer is to utilize a proper tip credit exemption to the minimum wage
10 requirements of the FLSA, it is required to provide appropriate notice to these
11 employees with specific details. These are articulated in section 3(m) of the FLSA:
12 (1) the amount of sub-minimum wage cash wage that is to be paid to the respective
13 tipped employee; (2) the amount by which wages of the respective tipped employee
14 are decreased on account of the tip credit; (3) that all tips received by the employee
15 must be retained by the employee except for tips contributed to a valid tip pool;
16 and (4) that the tip credit shall not apply to any employee who does not receive the
17 Section 203(m) notice.
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21 62. The FLSA requires that the tip credit notice be provided *before* an employer takes
22 advantage of it.

23 63. But Cracker Barrel does not provide notice before each server begins performing
24 tipped work.
25

26 64. Servers do not get notice of the tip credit until two weeks after starting tipped work.
27 Cracker Barrel servers receive check-stubs every week for work performed the
28

1 previous week. For example, an employee is paid on December 31, 2020 for the
2 time he/she worked from December 19-25, 2020.

3 65. The servers' check-stubs provide a tip credit notice. But the first notice is sent too
4 late.

5
6 66. Therefore, the first two weeks an employee works as a server, he/she has not been
7 provided the proper tip credit notice required by Section 203(m) of the FLSA. This
8 violation applies to every Cracker Barrel employee and is a uniform injury.
9

10 **Cracker Barrel requires its servers to work off-the-clock.**

11 67. Hourly employees, such as servers, are required to be paid for all hours worked.

12 68. Cracker Barrel is obligated to maintain accurate time records of all hours its servers
13 work.
14

15 69. But servers are often required to work off-the-clock, so Cracker Barrel's time
16 records are actually not accurate. Examples of working of the clock include, but
17 are not limited to the following:
18

- 19 i. Servers often have to clock-out before being paid their tips. While waiting,
20 they remain at the store, usually interacting with customers and employees
21 or performing various job duties. The amount of time any particular server
22 spends waiting to be paid his/her tips frequently ranges from 10 – 45 minutes
23 per shift. Cracker Barrel has refused to implement the direct deposit of
24 server's tips to prevent servers from waiting off-the-clock to receive their
25 tips.
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1 ii. Servers are often required to clock-out and then perform various non-tipped
2 duties after their shifts are officially over.

3 iii. Servers are often required to help with non-tipped duties before clocking-in
4 at the start of their shifts.
5

6 70. Perhaps most troubling is that Cracker Barrel takes advantage of high-school aged
7 minors who are limited in the amount of time they can work based on state laws.
8 For example, a state may limit a minor to working a set number of hours per day
9 or require a break after a certain amount of time. Cracker Barrel knows this and
10 requires such children to clock-out yet continue working.
11

12 71. *Exhibit #4* to this Amended Complaint shows an example of Cracker Barrel's
13 mistreatment of a currently employed opt-in plaintiff in Kentucky, which does not
14 allow a minor to work more than five hours without a break. As shown, this
15 employee is automatically (and involuntarily) clocked-out at the five-hour mark
16 and immediately clocked back in. Similarly, Kentucky law prevents minors from
17 working more than six hours on a school day and not more than eight hours on a
18 non-school day; however, as shown in that same exhibit, Cracker Barrel violates
19 these rules. *See id.* This is an example of Cracker Barrel willfully violating wage
20 laws.
21 laws.
22

23 72. *Exhibit #5* shows an example of situations where employees are not paid for their
24 actual work times. In this exhibit, the employee's wage statement is less than her
25 actual time records. It is presumed that the reason for these involuntary deductions
26 is to keep labor costs low so that investors can benefit at the expense of employees.
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28

1 73. Cracker Barrel does not maintain any records of this unpaid time that servers spend
2 working off-the-clock. Furthermore, Cracker Barrel may often automatically
3 clock-out servers after a set amount of time, regardless as to whether such servers
4 are working more than their scheduled shift or working a double-shift.
5

6 74. Cracker Barrel should be paying these servers at least minimum wage for this
7 unpaid work.
8

9 **COLLECTIVE ACTION ALLEGATIONS**

10 75. Numerous other individuals who worked for Cracker Barrel were paid in the same
11 manner, performed similar work, and were not properly compensated as required
12 by the FLSA. Although the specific amount of damages may vary depending on
13 the specific state any particular plaintiff worked (based on the amount of tip credit),
14 Cracker Barrel's illegal policies and practices were applied to all employees
15 working in states where Cracker Barrel attempted to utilize a the tip credit under
16 section 3(m) of the FLSA. Therefore, Cracker Barrel's FLSA violations result
17 from systemic policies and practices which are not dependent on the personal
18 circumstances of Putative Class Members.
19

20
21 76. Accordingly, Named Plaintiffs bring this action on behalf of themselves and other
22 similarly situated employees as a collective action pursuant to the FLSA, 29 U.S.C.
23 §§ 206 and 216(b).
24

25 77. The claims under the FLSA may be pursued by other similarly situated employees
26 who opt-in to this case under 29 U.S.C. § 216 (b).
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1 78. In accordance with the Court's prior rulings (*Docket #47 and #55*), Plaintiffs are
 2 only proceeding in this lawsuit on behalf of those not subject to arbitration and
 3 have identified those who are subject to arbitration in a prior filing. *See Docket*
 4 *#60*. In addition to the Named Plaintiffs, there are several current opt-in plaintiffs
 5 who are not subject to arbitration.⁷

7 79. Named Plaintiffs have no interest contrary to, or in conflict with, the Putative Class
 8 Members, as they all have an interest in obtaining wages owed to them under the
 9 FLSA. Also, Named Plaintiffs are not subject to arbitration.

11 80. A collective action is superior to other available means for fair and efficient
 12 adjudication of the lawsuit.

14 81. Absent this action, many Putative Class Members will not be compensated for their
 15 damages, and Cracker Barrel will have unjustly benefitted for violating the FLSA.

16 82. Notices for approximately 400 opt-in plaintiffs have been filed,⁸ but there are
 17 possibly over 100,000 similarly situated tipped employees that could comprise the
 18 class.
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22 ⁷ These would include at least the following servers: 1) those who signed ADR Agreements
 23 as minors and/or are currently minors, 2) for whom Defendant did not obtain any ADR
 24 sign-offs, and 3) those who had previously signed-off on the ADR Agreement, their
 25 employment with Defendant ended, and they later came back to work for Defendant yet
 did not re-sign the ADR Agreement.

26 ⁸ These did include notices for those who are subject to arbitration based on the Court's
 27 prior ruling; however, plaintiffs have clarified who is subject to arbitration. *Docket #60*.
 28 Also, opt-in notices for four more plaintiffs, who are also not subject to arbitration, are
 being filed contemporaneously with this amended complaint.

1 83. Named Plaintiffs' claims are typical of the claims of the class. Named Plaintiffs
2 and Putative Class Members were subjected to the same operational, compensation,
3 and timekeeping policies and practices that are uniform across all stores, including
4 Defendant's: a) failure to provide them with a timely Section 203(m) tip credit
5 notice, b) failure to pay them the applicable minimum wage for non-tipped work
6 unrelated to the servers' occupation and non-tipped work which exceeded twenty
7 percent of their total time worked, and c) requirement for them to work off-the-
8 clock.
9

10
11 84. Common questions of law and fact exist as to the class as to the class which
12 predominate over any questions only affecting other members of the class
13 individually and include, but are not limited to, the following:
14

- 15 i. Whether Named Plaintiffs and Putative Class Members were required to
16 complete an excessive amount of non-tipped work;
17
- 18 ii. Whether Named Plaintiffs and Putative Class Members were given timely
19 notice that Defendant was taking a tip credit prior to their employment;
20
- 21 iii. Whether Named Plaintiffs and Putative Class Members worked off-the-
22 clock;
23
- 24 iv. Whether Named Plaintiffs and Putative Class Members worked in
25 violation of the FLSA standards; and
26
- 27 v. Whether Cracker Barrel willfully violated the FLSA.
28

COUNT I

Cracker Barrel violated the FLSA by forcing servers to perform non-tipped duties unrelated to their occupation, other non-tipped duties in excess of 20% of their working time even if such duties are related to their occupation, and/or spending more than 30 continuous minutes of non-tipped duties after December 28, 2021.

85. Named Plaintiffs, on behalf of themselves and other members, repeat and re-allege each and every allegation above as if fully set forth herein.

86. At all times relevant herein, Cracker Barrel has been and continues to be an employer engaged in interstate commerce within the meaning of the FLSA, 29 U.S.C. §§ 206(a) and 207(a).

87. At all times herein, Cracker Barrel employed (and/or continues to employ) Named Plaintiffs and Putative Class Members.

88. At all times relevant and based on the aforementioned allegations, Cracker Barrel has had a centralized, uniform and common plan, policy and practice of willfully refusing to pay Plaintiffs and other members of the class minimum wage for: a) time spent in performing non-tipped duties unrelated to the servers' occupation; b) time spent in performing non-tipped duties in excess of twenty percent of their work time without receiving the applicable minimum wage; and/or c) spending more than 30 minutes of continuous non-tipped duties after December 28, 2021.

89. At all times relevant, Cracker Barrel has had actual and/or constructive knowledge of refusing to pay Named Plaintiffs and Putative Class Members the applicable minimum wage for the above-referenced violations.

1 90. As a result of Cracker Barrel's willful failure to compensate Named Plaintiffs and
 2 Putative Class Members appropriately, it has violated and continues to violate the
 3 FLSA.
 4

5 91. Named Plaintiffs and Putative Class Members are therefore entitled to
 6 compensation for unpaid minimum wages at an hourly rate required by the FLSA
 7 for: a) all the time spent performing unrelated, non-tipped duties; b) all the time
 8 spent performing related non-tipped producing job duties in excess of twenty
 9 percent of their work time; c) all the time spent that is more than 30 minutes of
 10 continuous non-tipped duties after December 28, 2021; d) an additional amount as
 11 liquidated damages; and e) interest, costs, and reasonable attorney's fees for the
 12 three-year statutory period under the FLSA.
 13
 14

15 **COUNT II**

16 **Cracker Barrel violated the FLSA by not providing** 17 **a timely tip-credit notice.**

18 92. Named Plaintiffs, on behalf of themselves and Putative Class Members, repeat and
 19 re-allege each and every allegation above as if fully set forth herein.

20 93. Named Plaintiffs and Putative Class Members were paid hourly rates of pay below
 21 the applicable minimum wage.
 22

23 94. Pursuant to Cracker Barrel's aforementioned failure to provide Named Plaintiffs
 24 and Putative Class Members with timely notice of the tip credit requirements under
 25 Section 203(m), it has disqualified itself from being eligible for such plan for the
 26 first two weeks each server began working as a tipped employee. Therefore,
 27
 28

1 Defendant is liable to Named Plaintiffs and Putative Class Members for all hours
2 worked within weekly pay periods during all times material at the applicable
3 minimum wage.
4

5 95. At all times relevant, Cracker Barrel has had actual or constructive knowledge of
6 failing to provide Named Plaintiffs and Putative Class Members and those similarly
7 situated of the aforementioned Section 203(m) four-point notice relating to its tip
8 credit compensation plan.
9

10 COUNT III

11 **Cracker Barrel violated the FLSA by not paying servers for** 12 **off-the-clock work.**

13 96. Named Plaintiffs, on behalf of themselves and other members, repeats and re-
14 alleges each and every allegation above as if fully set forth herein.

15 97. At all relevant time periods, Cracker Barrel employed and continues to employ the
16 Named Plaintiffs and Putative Class members within the definition of the FLSA.
17

18 98. The FLSA requires that employees are paid for all hours worked and at one and
19 one-half times their “regular rate” for all hours worked in excess of 40 hours in a
20 workweek. The “regular hourly rate of pay of an employee is determined by
21 dividing his or her total remuneration for employment (except statutory exclusions)
22 in any workweek by the total number of hours actually worked by him or her in
23 that workweek for which such compensation was paid.” 29 C.F.R. § 778.109.
24

25 99. Cracker Barrel violated the FLSA by failing to pay the Named Plaintiffs and
26 Putative Class Members and all other similarly situated employees for all
27
28

1 compensable hours worked at the applicable minimum wage rates for all hours
2 worked in a workweek, including overtime hours worked, if any.

3 100. Specifically, as discussed above, Cracker Barrel required employees to
4 perform off-the-clock work including, but not limited to, side work, MAC duties,
5 and waiting in line to collect their tips without being paid at the applicable
6 minimum wage rates for both regular and overtime hours.
7

8 101. Cracker Barrel also apparently deducts time when actually paying servers,
9 suggesting that its own wage records may not be accurate. *See Ex. #5*.
10

11 102. At all relevant times, Cracker Barrel had actual and/or constructive
12 knowledge of failing to compensate Named Plaintiffs and Putative Class Members
13 at the applicable minimum and overtime wage rates.
14

15 **COUNT IV**

16 **Willful violation of the FLSA and lack of good faith.**

17 103. Cracker Barrel's FLSA violations referenced above, and as follows,
18 constitute a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).
19

20 104. Cracker Barrel did not act in good faith when attempting to comply with the
21 FLSA.

22 105. As an example of Cracker Barrel's willful violations and/or lack of good faith
23 with respect to complying with the FLSA, Named Plaintiffs incorporate the above-
24 referenced facts, and especially note the following facts which further support the
25 FLSA violations:
26
27
28

1 i. Cracker Barrel operates in approximately 45 states, including California and
2 other states that do not allow a tip credit and/or otherwise require additional
3 wage-related benefits for employees. Upon information and belief, Cracker
4 Barrel is in compliance with FLSA requirements in California and,
5 therefore, is aware of the laws that require compliance with the tip credit
6 and preventing off-the-clock work. However, it chooses not to follow the
7 law with respect to Named Plaintiffs and Putative Class Members because
8 of the financial incentive.
9

10 ii. Cracker Barrel has been cross-training servers to perform non-tipped duties,
11 taking advantage of the COVID pandemic to increase the amount of time
12 servers spend performing non-tipped duties at sub-minimum wage rates and
13 to reduce the number of back-of-house employees that it has to employ at
14 minimum wage.
15

16 iii. A former Cracker Barrel Store Operations Supervisor has confirmed that
17 upper management had discussions internally about potential pay-related
18 violations relating to the tip-credit exemption; however, nothing was done
19 to fix the problem. This same former employee was privy to discussions
20 amongst upper management in about 2016 or 2017 referencing concerns
21 about servers having to clock-out to receive their tips, which resulted in off-
22 the-clock work. Despite this concern, no written policies or written
23 instructions were created or otherwise provided in order to prevent such an
24 FLSA violation.
25
26
27
28

- iv. Cracker Barrel conducted a third-party labor audit in approximately 2014 that apparently determined various tasks could be performed differently, thus reducing the amount of money allocated to each store for labor. This directly resulted in servers performing more non-tipped duties.
- v. Cracker Barrel requires its managers to try to circumvent child labor laws and not pay employees for all their actual work time. Documented examples were referenced above and are attached as *Exhibit #4 and #5*. Although this is not necessarily a direct FLSA violation, this is an example of Cracker Barrel being aware of wage laws, yet purposely choosing to violate them.
- vi. Cracker Barrel chooses not to hire more prep workers or bussers (who would earn at least minimum wage), yet forces servers to perform the work that would normally be performed by prep workers and bussers.
- vii. Cracker Barrel chooses not to track the amount of time servers spend on tipped duties versus non-tipped duties.
- viii. Cracker Barrel purposely limits the labor budget for each store, such that individual store managers have no choice but to require their underpaid servers to work in violation of the FLSA.
- ix. Moreover, Cracker Barrel issues significant yearly bonuses, sometimes well into the five figures, depending on whether managers meets their labor budget. Accordingly, this creates a perverse incentive for managers to ignore the servers' rights under the FLSA. Cracker Barrel benefits from this

1 D. An award of post-judgment interest at the applicable legal rate to Named
2 Plaintiffs and other members of the class;

3 E. An award of costs, expenses, and disbursements relating to this action
4 together with reasonable attorneys' fees and expert fees to Named Plaintiffs
5 and other members of the class;

6 F. A ruling that the three-year statutory period for willful violations under the
7 FLSA shall apply in this action; and
8

9 G. Such other general and specific relief as this Court deems just and proper,
10 including any equitable or injunctive relief such that it will prevent Cracker
11 Barrel from continuing its illegal scheme in the future.
12

13
14 **JURY TRIAL DEMAND**

15 Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Named Plaintiffs
16 demand a trial by jury on all issues so triable.
17

18 Dated: August 10, 2022

Respectfully submitted,

19 **SUD LAW P.C.**

20 /s/ Nitin Sud

21 Nitin Sud

22 *Attorney for Plaintiffs and those similarly*
23 *situated*
(pro hac vice)

24 **Law Offices of Monika Sud-Devaraj, PLLC**

25 /s/ Monika Sud-Devaraj

26 Monika Sud-Devaraj

27 *Attorney for Plaintiffs and those similarly*
28 *situated*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the following was served upon the following counsel of record via the Court's CM/ECF filing system on August 10, 2022:

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