

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
AT KANSAS CITY**

LARRY BLAIR)
)
And)
)
CHARLIE DAVIS,)
)
On Behalf Of Themselves And)
All Other Persons Similarly Situated,)
)
Plaintiffs,)
v.)
)
TRANSAM TRUCKING, INC.)
)
Defendant.)
)
Registered Agent:)
Russ McElliott)
15580 S. 169 Hwy.)
Olathe, KS 66062)

Case No: 09-CV-2442 EFM/DWB

JURY DEMANDED

**SECOND AMENDED COMPLAINT FOR DAMAGES – COLLECTIVE AND
CLASS ACTION**

Plaintiffs Larry Blair and Charlie Davis, by and through their undersigned counsel, bring this action on behalf of themselves and all other persons similarly situated for damages and relief under the Fair Labor Standards Act, 29 U.S.C. § 216(b), and representative actions for violations of the Kansas Wage Payment Act, K.S.A. §§ 44-312-327, pursuant to FED. R. CIV. P. 23 For their Collective and Class Action Complaint against this Defendant, Plaintiffs, upon their personal knowledge as to their own acts and status, and upon information and belief as to all of the members of the Class, allege as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action against Defendant as a collective action under 29 U.S.C. § 216(b) for violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, et seq., as well as class action claims for violations of the Kansas Wage Payment Act (“KWPA”), K.S.A. § 44-314(d) pursuant to K.S.A. § 60-223.

PARTIES

2. Plaintiff Larry Blair resides at 7491 Forney Hill Rd., Denver, North Carolina, and was employed by Defendant as a “Leased Driver”. Plaintiff Blair was misclassified by Defendant as an independent contractor, but under the FLSA and Kansas law should be considered an employee of Defendant.
3. Plaintiff Charlie Davis resides at 606 Montliew Ave., High Point, North Carolina, and was employed by Defendant as a “Leased Driver”. Plaintiff Davis was misclassified by Defendant as an independent contractor, but under the FLSA and Kansas law should be considered an employee of Defendant.
4. Defendant Transam Trucking, Inc. (“Transam” or “Defendant”) is a Missouri corporation registered to do business within the State of Kansas, with its principal place of business in Olathe, Kansas, and which may be served through its Registered Agent, Russ McElliott, located at 15580 S. 169 Hwy., Olathe, KS 66062. Transam is doing business within the state of Kansas and within the territorial jurisdiction of the court, and has employed plaintiffs and all other persons similarly situated. At all

relative times, Transam was engaged as an over-the-road freight carrier (i.e., trucking company).

5. Whenever reference in this complaint is made to any act or transaction by Defendant, such allegation shall be deemed to mean the principals, officers, directors and employees, agents or representatives of Defendant who committed, had knowledge of, performed, authorized, ratified, or directed such act or transaction on behalf of Defendant while actively engaged in the scope of their duties and responsibilities.

JURISDICTION AND VENUE

6. This Court has original federal question jurisdiction under 28 U.S.C. § 1311 for the claims brought under the FLSA, 29 U.S.C. § 201, *et seq.*
7. The United States District Court for the District of Kansas has personal jurisdiction because the Defendant conducts business in Johnson County, Kansas, which is within this District.
8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), inasmuch as the Defendant has offices, conducts business, has substantial business contacts and can be found in the District of Kansas. Also, the cause of action set forth herein has arisen and occurred in substantial part in the District of Kansas.
9. The claims for violations of the KWPA are based upon the statutory law of the State of Kansas.

10. Supplemental jurisdiction exists pursuant to 28 U.S.C. § 1367 for the pendant state law claims because they arise out of the same nucleus of operative facts as the FLSA claim.
11. All of the alleged causes of action can be determined in this judicial proceeding and will provide judicial economy, fairness and convenience for the parties.
12. The liability evidence establishing all causes of action will be similar and no issues will predominate or create confusion to a jury.
13. Furthermore, this Court has original jurisdiction of the Plaintiffs' state wage law claims pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). Such jurisdiction is proper because Plaintiffs have asserted a Class Action pursuant to Rule 23 of the Federal Rules of Civil Procedure, the amount in controversy exceeds \$5,000,000, and the Named Plaintiffs, Larry Blair and Charlie Davis, are not citizens of Kansas.
14. This Court may also exercise original jurisdiction over the Plaintiffs' state wage law claims pursuant to 28 U.S.C. § 1332(a). Such jurisdiction is proper because Plaintiffs have asserted a civil action in which the amount in controversy exceeds \$75,000 and the Named Plaintiffs and the Defendant are citizens of different states.

PLAINTIFFS' STATUS AS EMPLOYEES OF DEFENDANT

15. Defendant erroneously misclassifies its Leased Drivers as independent contractors, when they are in fact employees of Defendant under the FLSA and Kansas law.

16. The Leased Drivers perform the same function and service for Defendant as its other Drivers (“Company Drivers”) who are considered employees of Defendants. The skill and initiative of the Leased Drivers are no different than those of the Company Drivers, who perform the same functions.
17. Defendant supervises and controls the performance of services of its Leased Drivers, determines what services the Leased Drivers perform, and determines how the Leased Drivers perform such services in the same manner that it supervises and controls the performance of services of its Company Drivers.
18. The Leased Drivers’ opportunities for profit or loss are controlled and determined by Defendant, which assigns the loads and routes to Leased Drivers, and requires the same supervision of Leased Drivers that it requires over its Company Drivers.
19. The investment of Defendant in the form of capital and equipment far outweighs any investment by the Leased Drivers.
20. Leased Drivers are not free to perform services for companies other than Defendant.
21. The services rendered by Leased Drivers to Defendant are an integral part of Defendant’s business.
22. Plaintiffs and other Leased Drivers are employees of Defendant within the meaning of the Fair Labor Standards Act and under Kansas state law.

COLLECTIVE AND CLASS ACTION ALLEGATIONS

23. This Complaint may be brought and maintained as an “opt-in” collective action pursuant to Section 16 of the FLSA, 29 U.S.C. § 216(b), in that the claims of Plaintiffs are similar to the claims of the Putative Class Members.
24. The claims arising under the KWPA as set forth below may be properly maintained as a class action under FED. R. CIV. P. 23.
25. With respect to the FLSA and the KWPA claims, the Putative Class Members are those current and former Leased Drivers improperly misclassified as independent contractors who were issued compensation via ComData Cards provided by Defendant or otherwise had Charges Deducted from their compensation.
26. At all relevant times, Defendant has had a policy and practice of providing compensation to its Leased Drivers via ComData Payroll Cards that charged such Leased Drivers a transaction fee each time money was transferred or withdrawn from the ComData Card.
27. For each week, the Leased Drivers received a “Settlement Statement” that purportedly showed the amounts earned by the Leased Drivers for that period (the “Amount Due”), along with Reimbursed Expenses for that period. The Amount Due and the Reimbursed Expenses are added together to get a dollar amount of Total Revenue for the weekly Settlement Period. In addition the Settlement Statements reflect multiple deductions and chargebacks that were withheld by Defendant for its own benefit (the “Charges Deducted”). The Settlement statement also showed the

miles logged by the Leased Drivers, and the mileage rate paid per mile. The Leased Drivers also are required to fill out Driver's Daily Logs, in which the miles driven and the number of hours worked, as defined by Defendant, are recorded for each day.

28. The difference between the Total Revenue and the Charges Deducted are reflected on the Settlement Statement as "Total Amount Due". The dollar amount reflected as Total Amount Due on the Settlement Sheet purportedly was made available to the Leased Drivers each week via the ComData Payroll card. For numerous weekly settlement periods, however, the Total Amount Due reflected a negative number because the Charges Deducted exceeded the Total Revenue. In these instances the Total Amount Due reflected a dollar amount allegedly owed to Defendant. Accordingly, during these periods, Defendant failed to pay even a minimum wage to the Leased Drivers for the Settlement Period.
29. In addition, when a Settlement Statement reflected a negative Total Amount Due, that negative dollar amount was deducted from the Revenues of the Leased Drivers on the next Settlement Statement, often causing payment on the subsequent Settlement Statement to fall below the minimum wage.
30. With respect to the KWPA claims, the Putative Class Members are those current and former Leased Drivers improperly misclassified as independent contractors. Defendant violated the KWPA by deducting from their wages a transaction fee each time money was transferred or withdrawn from each Leased Driver's ComData Card

and by failing to pay such Leased Drivers minimum wages pursuant to the FLSA, which constitute “wages due” under the KWPA.

31. The members of the class are so numerous that joinder of all members is impractical.

While the exact number of class members is unknown to Plaintiffs at the present time, upon information and belief the number of Class Members exceed 100, and furthermore the members of the class are widely geographically dispersed; thus the numbers and geographic locations of the Class Members render joinder of all Class Members in this action impractical.

32. There are questions of law and fact arising in this action which are common to plaintiffs and all Class Members, including

- a) Whether Plaintiffs and all other persons similarly situated are employees of Defendant;
- b) Whether Plaintiffs are entitled to minimum wages under the FLSA and whether such unpaid minimum wages constitute “wages due” under the KWPA;
- c) Whether Defendants’ pay policies as to Plaintiffs and all others similarly situated violate their rights to receive wages without improper deductions under the KWPA.

33. Plaintiffs’ claims are typical of the claims of the class in that all Leased Drivers were treated similarly.

34. Plaintiffs will fairly and adequately represent the interest of the members of the class. Plaintiffs have retained counsel who are competent and experienced in class action and complex litigation. Plaintiffs have no interest which is adverse to, or in conflict with, other members of the class.
35. The common questions of law and fact arising in this action predominate over any questions solely affecting individual Class Members. Without limiting the generality of the foregoing, the factual and legal issues concerning the scope and effects of Defendant's conduct alleged herein are:
- a) Central to Plaintiffs' claims;
 - b) Substantially identical with respects to each Class Members' burden of demonstrating liability; and
 - c) The most important and fundamental issues to be determined at trial.
36. The class action mechanism is superior to any alternatives that exist for the fair and efficient adjudication of this cause of action. Proceeding as a class action would permit the large number of injured parties to prosecute their common claims in a single forum simultaneously, efficiently, and without unnecessary duplication of evidence, effort and judicial resources. A class action is the only practical way to avoid the potentially inconsistent results that numerous individual trials are likely to generate. Numerous repetitive individual actions would also place an enormous

burden on the courts as they are forced to take duplicative evidence and repetitively decide the same issues relating to the conduct of Defendant.

37. There are no unusual difficulties likely to be encountered in the management of the case as a class action. Class Members can be easily identified from the records of Defendant, which it is required by federal law to maintain, enabling Class Members to have their claims fairly adjudicated by the Court.

**COUNT I – *Fair Labor Standards Act*
Failure to Pay Minimum Wages**

38. Plaintiffs hereby incorporate all of the relevant allegations of paragraphs 1 through 38 as though fully set forth herein.

39. Plaintiffs were employed by the Defendant. During the relevant time frame, Plaintiffs and other similarly situated Leased Drivers performed work for Defendant as employees and are properly classified as employees.

40. At all relevant times during their employment, Plaintiffs were employees required to be paid a minimum hourly wage for every hour worked for Defendant.

41. At all relevant times, Defendant has violated the provisions of the FLSA, 28 U.S.C. §206 and §215(a)(2) by failing to pay the Plaintiffs and other similarly situated Leased Drivers a minimum hourly wage during numerous applicable pay periods.

42. Prior to, during, and after the Plaintiffs' employment with Defendant, Defendant employed, in Kansas and throughout the nation, numerous other individuals who had the same job duties and compensation structures as Plaintiffs (the Putative Plaintiffs/Class Action Plaintiffs).

43. Plaintiffs bring this Complaint as a collective action pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b), on behalf of all persons who were, are or will be employed by the Defendant as Leased Drivers within three years from the commencement of this action and who have received compensation via ComData Cards provided by Defendant or otherwise had Charges Deducted from their compensation.
44. This Complaint may be brought and maintained as an “opt-in” collective action pursuant to Section 16 of the FLSA, 29 U.S.C. § 216(b), for all claims asserted by the Putative Representative Action Plaintiffs because the claims of Plaintiffs are similar to the claims of the Putative Plaintiffs of the representative action.
45. Plaintiffs and the Putative Representative Action Plaintiffs are similarly situated, have substantially similar job requirements and pay provisions and are subject to Defendant’s common policy and practice of paying compensation to Plaintiffs and the Putative Representative Action, and all were subject to Defendant’s failure to pay minimum hourly wages for numerous pay periods, in violation of the FLSA.
46. The names and addresses of the putative members of the representative action are available from Defendant. To the extent required by law, notice will be provided to said individuals via First Class Mail and/or by the use of techniques and a form of notice similar to those customarily used in representative actions.

47. At all relevant times, Defendant has been, and continues to be, an “employer” engaged in interstate “commerce” and/or in the production of “goods for “commerce” within the meaning of the FLSA, 29 U.S.C. § 203.
48. At all relevant times, Defendant has employed, and/or continues to employ, “employee[s]” within the meaning of the FLSA, including each of the putative members of the FLSA representative action.
49. At all relevant times, Defendant has had gross operating revenues in excess of \$500,000.00 (Five Hundred Thousand Dollars) per year.
50. Defendant’s violation of the FLSA is continual in nature, in that Defendant continues to pay its Leased Drivers under the same unlawful policies and procedures that are set forth in detail herein.
51. The foregoing conduct constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).
52. Plaintiffs, on behalf of themselves and all others similarly situated, seek damages in for their failure to receive at least minimum hourly wages for hours worked, plus liquidated damages, recovery of all attorney fees, costs and expenses incurred in this action, to be paid as provided by the FLSA, 29 U.S.C. § 216(b) and such other legal and equitable relief as the Court deems just and proper.

WHEREFORE, Plaintiffs, on behalf of themselves and all proposed putative members of the FLSA representative action, pray for relief as follows:

- (a) Designation of this action as a collective action on behalf of the proposed putative members of the FLSA representative action and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated members of the FLSA opt-in class, apprising them of the pendency of this action and permitting them to assert timely FLSA claims in this action by filing individual Consents to Sue pursuant to 29 U.S.C. § 216(b); and
- (b) Designation of Plaintiffs, Larry Blair and Charlie Davis, as Representative Plaintiffs of the proposed putative members of the FLSA representative action; and
- (c) Costs and expenses of this action incurred herein, including reasonable attorneys' fees and expert fees; and
- (d) An award of damages for amounts wrongfully deducted or charged against the Plaintiffs and the Putative Class Action Members and damages for failure to pay Plaintiffs the minimum hourly wage for hours worked, including liquidated damages, to be paid by Defendant; and
- (e) Pre-judgment and Post-Judgment interest, as provided by law; and
- (f) Any and all such other further legal and equitable relief as this Court deems necessary, just and proper.

COUNT II – Kansas Wage Payment Act

53. Plaintiffs hereby incorporate all of the relevant allegations of paragraphs 1 through 53 as though fully set forth herein.

54. Plaintiffs, on behalf of themselves and all others similarly situated, bring Count II under the KWPA, for all pay periods and/or Leased Drivers within the State of Kansas, for Defendant's violation of the Kansas Wage Payment Act ("KWPA"), K.S.A. § 44-313 *et seq.*
55. At all relevant times, Defendant has been, and will continue to be an, "employer" within the meaning of the KWPA, K.S.A. § 44-313(a).
56. At all relevant times, Defendant has employed, and/or continues to employ, "employee[s]," within the meaning of the KWPA § 44-313(b), including Plaintiffs and all others similarly situated.
57. At all relevant times, Defendant has had a policy and practice of violating K.S.A. § 44-314(d) by refusing to allow its Leased Drivers to receive all of their "wages due" by refusing to pay them minimum wages as required by the FLSA and by making improper deductions from their wages.
58. Defendant has violated and continues to violate the KWPA, K.S.A. § 44-314(d).
59. Class certification for claims under the KWPA is appropriate pursuant to FED. R. CIV. P. 23(a) in that:
- a. There are questions of law and fact arising in this action which are common to Plaintiffs and the putative members of the Class, including: (i) Whether Defendant's pay plan and pay policies for the employees who work as Leased Drivers violates their compensation rights afforded under the KWPA, K.S.A. § 44-313 *et seq.* (ii) Whether Defendant's conduct violated the KWPA; and

(iii) Whether Plaintiffs and other members of the class have suffered damages as a result of Defendant's violation of the KWPA; and

b. For all other relevant reasons set forth in this Complaint.

60. This class action is brought by the Plaintiffs, on behalf of themselves and all others similarly situated, for Defendant's failure to properly pay wages due under the KWPA, and is being brought pursuant to FED. R. CIV. P. 23(b)(2) and (b)(3).

61. Class certification of the respective Class is appropriate under FED. R. CIV. P. 23(b)(3) because a class action is the superior procedural vehicle for the fair and efficient adjudication of the claims asserted herein given that:

- a. There is minimal interest of members of this class in individually controlling their prosecution of claims under the KWPA in that all claims will be similar in nature under the Court's analysis of the Defendant's pay plan and its compliance with these laws;
- b. There is no known prior litigation being prosecuted against the Defendant by this class of employees for violations of the KWPA;
- c. It is desirable to concentrate all litigation of these claims in this form within this Court since all class members were/are Kansas employees and all class members will have the same legal claims for violations of the KWPA;
- d. There are no unusual difficulties likely to be encountered in the management of this case as a class action and Plaintiffs and their counsel are not aware of

any reason why this case should not proceed as a class action on the claim that Defendant violated the KWPA; and

- e. Class members can be easily identified from Defendant's business records, enabling class members to have their claims fairly adjudicated by the court or enabling them to opt-out of this class.

62. Class certification is appropriate under FED. R. CIV. P. 23(b)(2) because Defendant has acted and refused to act on grounds generally applicable to the respective class members covered by the KWPA, thereby making class relief appropriate.

63. In the absence of a class action, the Defendant would be unjustly enriched because it would be able to retain the benefits and fruits of the wrongful violation of the KWPA.

64. Plaintiffs have met the requirements of FED. R. CIV. P. 23(a), 23(b)(2) and 23(b)(3).

WHEREFORE, Plaintiffs, on behalf of themselves and all proposed putative members, pray for relief as follows:

- (a) Declaring and certifying this action as a proper class action under FED. R. CIV. P. 23 for the claim that Defendant violated the KWPA and naming Plaintiffs, Larry Blair and Charlie Davis, as the proper class representatives;
- (b) Declaring and determining that Defendant violated the KWPA by failing to properly pay all wages due the Plaintiffs and the other members of the Class.;
- (c) Costs and expenses of this action incurred herein, including reasonable attorneys' fees and expert fees;

- (d) An award of damages for compensation due for the Plaintiffs and the Putative members of the Class;
- (e) Pre-judgment and Post-Judgment interest, as provided by law; and
- (f) Any and all such other further legal and equitable relief as this Court deems necessary, just and proper.

DESIGNATED PLACE OF TRIAL

Plaintiffs, by and through their counsel of record, and hereby designate the place of trial as follows: Kansas City, Kansas.

DEMAND FOR JURY TRIAL

Plaintiffs and demands a trial by jury on all issues so triable in the above captioned matter.

Respectfully submitted,

THE WOODY LAW FIRM PC

By s/ Teresa A. Woody
Teresa A. Woody, KS #16949
1621 Baltimore Avenue
Kansas City, Missouri 64108
(816) 421-4246
(816) 471-4883 (*Facsimile*)
teresa@woodylawfirm.com

SIRO SMITH DICKSON PC

By s/ Eric W. Smith
Eric W. Smith, KS #16539
Rik N. Siro, KS #77812
Athena M. Dickson, KS #21533
1621 Baltimore Avenue
Kansas City, Missouri 64108
816.471.4881
816.471.4883 (*Facsimile*)
esmith@sirosmithdickson.com
rsiro@sirosmithdickson.com
adickson@sirosmithdickson.com

BRADY & ASSOCIATES

By: s/ Mark A. Kistler
Michael F. Brady, KS #18630
Mark A. Kistler, KS #17171
10901 Lowell Avenue, Suite 280
Overland Park, Kansas 66210
(913) 696-0925
(913) 696-0468 (*Facsimile*)
brady@mbradylaw.com
mkistler@mbradylaw.com

**ATTORNEYS FOR PLAINTIFFS
AND OTHER PERSONS
SIMILARLY SITUATED**

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2014, a copy of the foregoing was filed electronically with the Court, with notice of the filing generated and sent electronically by the Court's CM/ECF system upon:

Rachel H. Baker
Julia M. Gilmore Gaughan
Seigfried, Bingham, Levy, Seltzer & Gee, P.C.
911 Main Street, Suite 2800
Kansas City, MO 64105
ATTORNEYS FOR DEFENDANT

s/ Mark A. Kistler
ATTORNEY FOR PLAINTIFFS