

**SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY**

PEOPLE OF THE STATE OF NEW YORK,
BY THE ATTORNEY GENERAL OF THE
STATE OF NEW YORK,

Index No. 501585/2018

Plaintiff,

v.

U.S. AUTO WASH COMPANY, LLC d/b/a
Tropical Breeze Car Wash, BENNO
GMUER, PHILIP GMUER, and GREGORY
GMUER,

Defendants.

SETTLEMENT AGREEMENT

This Agreement shall constitute the full Settlement Agreement (“Settlement Agreement” or “Agreement”) between the PEOPLE OF THE STATE OF NEW YORK, BY THE ATTORNEY GENERAL OF THE STATE OF NEW YORK (“Plaintiff” or the “NYAG”) and Defendants U.S. AUTO WASH COMPANY, LLC d/b/a Tropical Breeze Car Wash (“Tropical Breeze”), BENNO GMUER, PHILIP GMUER, and GREGORY GMUER (collectively, “Defendants”), to settle, fully and finally, this Action (as defined below).

A. PEOPLE OF THE STATE OF NEW YORK, BY THE ATTORNEY GENERAL OF THE STATE OF NEW YORK v. U.S. AUTO WASH COMPANY, LLC d/b/a Tropical Breeze Car Wash, BENNO GMUER, PHILIP GMUER, and GREGORY GMUER, Index No. 501585/2018/ (the “Action”), is currently pending in the Supreme Court of the State of New York, Kings County. In the Verified Petition filed January 25, 2018 (the “Verified Petition”), Plaintiff brought eleven claims for relief against Defendants for: (1) non-payment of wages, in violation of New York Labor Law § 191; (2) failure to pay minimum wage, in violation of Labor Law § 652; (3) failure to pay required overtime, in violation of 12 N.Y.C.R.R. § 142-2.2; (4) failure to provide spread-of-hours pay, in violation of 12 N.Y.C.R.R. § 142-2.4; (5) failure to provide call-in pay, in violation of 12 N.Y.C.R.R. § 142-2.3; (6) failure to provide wage notices and payment statements, in violation of Labor Law §195(1)(a) and (3); (7) failure to provide uniform maintenance pay and to reimburse for cost of uniforms, in violation of 12 N.Y.C.R.R. § 142-2.5(c); (8) failure to provide earned sick time, in violation of N.Y.C.A.C. § 20-913(b); (9) failure to comply with New York

unemployment insurance law, in violation of Labor Law §§ 570-571; (10) failure to comply with New York Workers' Compensation Law §§ 3(14-a), 10, 50, 52(1)(d), and 131(1); and (collectively, the "Action Claims") (11) failure to comply with New York Workers' Compensation Law §§ 95 and 96. In their answer filed November 7, 2018, Defendants denied all of the substantive allegations asserted in the Verified Petition.

B. This Agreement is made in consideration of the facts and recitals set forth herein. Plaintiff and Defendants (collectively, the "Parties") understand, acknowledge, and agree that this Agreement constitutes a compromise of all the disputed claims at issue in the Action and that it is the desire and intention of each of the Parties to effect a final and complete resolution of the Action.

C. The NYAG finds the relief and agreements contained in this Settlement Agreement appropriate and in the public interest. Therefore, the NYAG is willing to accept this Agreement in lieu of continuing this Action for violations of New York law as described above.

D. Defendants deny any liability for any of the claims that have or could have been raised in the Action but believe that the Settlement as provided in this Agreement will avoid the substantial expense and disruption of continued litigation.

E. Acceptance of this Settlement Agreement by the NYAG is not an approval or endorsement by the NYAG of any of Defendants' practices or procedures.

F. The Parties believe that the Settlement is fair, reasonable, and adequate. The Parties arrived at this Settlement through arm's-length negotiations, taking into account all relevant factors. The NYAG has determined that the Settlement is in the public interest of the state and that the Settlement will materially benefit the Settlement Beneficiaries. The Parties recognize the uncertainty, risk, expense, and delay attendant to continuing the Action through discovery and trial, and any further appeals following trial. Accordingly, the Parties desire to fully, finally, and forever settle the Action.

Therefore, in consideration of the promises and agreements contained herein, the Parties agree and covenant as follows:

I. RELIEF

A. Settlement Payment

1. Defendants agree to pay to the State of New York a total of five hundred thirty thousand and 00/100 dollars (\$530,000.00) ("the Settlement Amount") in resolution of the Attorney General's pending litigation, which will be paid directly to the Office of the Attorney General and will be used for distribution as restitution to current or former employees.
2. Defendants shall pay the Settlement Amount as follows:

- a. Defendants shall pay twenty-five thousand dollars (\$25,000) (“Initial Payment”) within two weeks of the date of the execution of this Agreement (“Effective Date”).
 - b. Defendants shall pay another twenty-five thousand dollars (\$25,000) (“Second Payment”) on or before November 15, 2019.
 - c. Defendants shall pay the balance of the \$530,000 for 40 months with a monthly payment of twelve thousand dollars (\$12,000), beginning on or before January 1, 2010 (“Monthly Payments”).
 - d. Time is of the Essence Clause: Defendants agree that the time to pay the Settlement Amount in accordance with the aforementioned dates is of the essence. Failure to pay the Settlement Amount in accordance with the aforementioned dates constitutes a material breach of the Agreement.
3. The Initial Payment, Second Payment, Monthly Payments, and any other lump sum payment shall be made by attorney check, corporate or certified check, or bank draft, which shall be made payable to the “State of New York” and shall be addressed to the attention of Ming-Qi Chu, State of New York, Office of the Attorney General, Labor Bureau, 28 Liberty Street, 15th Floor, New York 10005.
4. Defendant Tropical Breeze has represented, and the NYAG expressly relies on the following material terms: (1) Tropical Breeze enters into this Agreement in good faith and ability to pay the full Settlement Amount; (2) Tropical Breeze has paid any and all outstanding amounts to the Internal Revenue Service (“IRS”); and (3) the NYAG is in the position of first creditor against Tropical Breeze and all of Tropical Breeze’s assets (with exception of the business’s gas pumps).
5. Defendants agree to pay and extinguish any outstanding IRS federal tax liens (the “IRS Liens”) by the Effective Date of the Agreement and that the existence of the IRS Liens will not affect Tropical Breeze’s ability to pay the full Settlement Amount.
6. Judgment by Confession:
 - a. To secure the payment described in paragraph I.A.1, Defendant Tropical Breeze shall execute and deliver, at the time of the Effective Date of this Settlement Agreement, the accompanying Affidavit for Judgment by Confession (attached hereto as Exhibit A), confessing judgment for the Settlement Amount of \$530,000, plus collection fees of twenty-two percent (22%) of any unpaid Settlement Amount at the time of any subsequent default, plus statutory costs of \$15.00. Plaintiff will reduce the Settlement Amount by the principal amount of payments made by Defendants to Plaintiff to calculate the Unpaid Settlement Amount at the time of any subsequent default.

- b. In the event that Defendants fail to timely and properly make payment as required by paragraph I.A.1, the NYAG shall provide Defendants with written notice, by e-mail or first class mail, of such failure. If Defendants do not cure such failure within 30 days of the NYAG's written notice, the NYAG may file and enter the applicable Affidavit for Judgment by Confession as a judgment against Tropical Breeze at any time and without further notice for the balance owed pursuant to this Agreement at the time of default, less any payments made prior to default, plus the collection fees and statutory costs described above.
 - c. Tropical Breeze represents and warrants that the signatory below has been duly authorized to and has the authority to sign an Affidavit for Judgment by Confession on behalf of Defendant Tropical Breeze, as per the corporate resolution attached hereto as Exhibit B.
7. Liens pursuant to the Uniform Commercial Code ("UCC Liens"):
 - a. As collateral in the event of default on performance of any material terms in this agreement, Defendant Tropical Breeze expressly consents to the NYAG filing UCC Liens against Tropical Breeze and all of the business's assets, equipment, and inventory for the amount of \$530,000.
 - b. Tropical Breeze shall provide the UCC-1 Financing Statement and any other documents required to be filed to the New York Department of State to perfect the UCC Liens on Tropical Breeze on the Effective Date of the Agreement.
8. Non-Dischargeable Judgement: In the event of bankruptcy, Defendants expressly agree not to seek discharge or extinguish the amounts owed as part of this Settlement.
- B. General Injunction: Defendants shall not engage, or attempt to engage, in conduct in violation of any applicable laws, including, but not limited to, intimidating beneficiaries of this settlement and expressly agree and acknowledge that any such conduct is a violation of the Agreement, and that the NYAG thereafter may commence a civil action or proceeding for breach of the Settlement Agreement in addition to any other appropriate investigation, action, or proceeding.
- C. Programmatic Relief:
 - 1. Defendants shall in good faith cooperate in contacting prior employees to facilitate the NYAG's distribution of the Settlement Payment.

2. Defendants shall, within three (3) months of the Effective Date of the Settlement Agreement, terminate the employment of all managers who are still employed by Defendants who were employed by Tropical Breeze during the time period when the events giving rise to the Action occurred (January 1, 2012-January 1, 2018).
3. Tropical Breeze agrees to notify the NYAG in writing at least five (5) business days in advance of any hiring or firing decisions in connection with any reorganization or closing of the business throughout the duration of the Settlement Amount payment period and provide (i) a description of the proposed decision, and (ii) the reasons, along with any supporting documentation or record, for the proposed decision.
4. Tropical Breeze agrees to revise its policies and practices for, and train its employees and managers on overtime, minimum wage, spread of hours, call-in pay, wage notice, payment statement, and anti-retaliation protections under the New York Labor Law and paid time off protections under the Earned Sick Time Act. Specifically, the NYAG will provide a written policy, and Tropical Breeze will distribute the policy to all of its employees and managers and train its managers and employees on the policy. Thereafter, Tropical Breeze will distribute the written policy to all employees upon hire and any time it modifies the policy in compliance with any future laws or regulations.

D. Oversight/Monitoring:

1. Defendants will provide to the Attorney General's Office, for a period of forty-two (42) months from the Effective Date of the Agreement, on a quarterly basis (four times a year), reports describing compliance with requirements of paragraphs I.C.(1-4) (Programmatic Relief) of this Agreement.
2. During the term of Agreement, Defendants shall retain all records relating to their obligations under the Agreement.
3. Defendants agree and acknowledge that a default in performance of any obligation under this paragraph is a violation of the Agreement and that the NYAG thereafter may commence a civil action or proceeding for breach of the Settlement Agreement in addition to any other appropriate investigation, action, or proceeding.

II. RELEASE AND STIPULATION OF DISCONTINUANCE

- A. The NYAG releases the Defendants as to the Action Claims as defined above up to and including the Effective Date.
- B. The NYAG agrees that it will, within seven (7) days of receipt of Defendants' Second Payment, file with the Court a Stipulation of Discontinuance with prejudice, executed by the Parties.

III. REPRESENTATIONS AND WARRANTIES

Each of the Parties represents and warrants to, and agrees with, each of the other Parties as follows:

- A. None of the Parties relies or has relied on any statement, representation, omission, inducement, or promise of any other party (or any officer, agent, employee, representative, or attorney for any other party) in executing this Agreement, or in making the Settlement provided for herein, except as expressly stated in this Agreement.
- B. Each of the Parties has investigated the facts pertaining to the Settlement and this Agreement, and all matters pertaining thereto, to the full extent deemed necessary by that party and its attorneys.
- C. Each of the Parties has carefully read, and knows and understands, the full contents of this Agreement and is voluntarily entering into this Agreement after having had the opportunity to consult with, and having in fact consulted with, its attorneys.
- D. Section titles or captions contained herein are inserted as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Settlement or any provision hereof.
- E. Each of the Parties has participated in the drafting of all provisions of this Agreement, has had an adequate opportunity to read, review, and consider the effect of the language of this Agreement, and has agreed to its terms. The Agreement and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.
- F. This Agreement constitutes and comprises the entire agreement among the Parties with respect to the subject matter hereof. It supersedes all prior and contemporaneous oral and written agreements and discussions.
- G. The Parties agree that any dispute regarding the interpretation or enforcement of the terms of this Settlement or in connection with this Agreement shall be resolved by the Court.
- H. In any action or proceeding by NYAG to enforce this Agreement or for violations of the Agreement, the Parties expressly agree and acknowledge that any statute of limitations or other time-related defenses are tolled from and after the Effective Date of the Agreement.

IV. MISCELLANEOUS

- A. Amendment: This Agreement may be amended only by written agreement signed by the Parties.

B. Cooperation in Implementation

1. Defendants, the NYAG, and their respective counsel agree to provide each other with any information and to prepare and execute any additional documents that may reasonably be necessary to effectuate the terms of this Agreement.
2. Any failure by any Party to insist upon the strict performance of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions hereof, and the Parties, notwithstanding any such failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Agreement to be performed.

C. Governing Law: This Agreement shall be construed and governed in accordance with the procedural and substantive law of the state of New York, without regard to any conflict of laws principles.

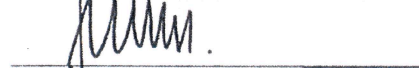
D. Signatures: This Agreement may be executed in counterparts, and, when so executed, shall constitute a binding original. The Parties represent and warrant, through the signatures below, that the terms and conditions of this Agreement are duly approved, and execution of this Agreement is duly authorized. A signature, or copy of a signature, transmitted electronically, including by facsimile or email, shall serve as an original for all purposes.

APPROVED AND ACKNOWLEDGED:


Plaintiff New York Attorney General

By: Ming-Qi Chen
Title: Civil Enforcement Section chief
Date: 10/9/19

APPROVED AND ACKNOWLEDGED:


Defendants U.S. Auto Wash Company, LLC
d/b/a Tropical Breeze Car Wash, Benno Gmuer,
Philip Gmuer, And Gregory Gmuer

By: Benno Gmuer
Title: President and Owner
Date: 9/28/19