SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

CHRIS LEAHY, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. RETRIEVER MEDICAL/DENTAL PAYMENTS, INC., FRANK SHINER, DOMINICK COLABELLA, and SCOTT LOPRESTI, Defendants.	**Index No. 51975/2017** **CLASS ACTION COMPLAINT** Place of Trial: Westchester County The basis of venue is: Defendants' Principal Place of Business and Forum Selection Clause

Plaintiff Chris Leahy ("Plaintiff") alleges as follows:

NATURE OF THE ACTION

1. This is a class action against defendants Retriever Medical/Dental Payments, Inc. ("Retriever"), Frank Shiner ("Mr. Shiner"), Dominick Colabella ("Mr. Colabella"), and Scott Lopresti ("Mr. Lopresti," collectively, "Defendants") for misclassification of Plaintiff and all Sales Representatives who worked for Defendants from February 13, 2011 through the date a judgment is entered in this action (the "Class" or the "Sales Reps") as independent contractors.

2. Although Defendants purport to classify the Sales Reps as independent contractors, their treatment of the Sales Reps strongly suggests an employment relationship. Defendants exercised overwhelming day-to-day, hour-to-hour control—the most important factor in determining whether a worker is an employee—over every aspect of the Sales Reps' work including their appearance (brown or black polished shoes, clean shaven, sideburns not past the earlobe); setting the Sales Reps' daily appointment schedule and requiring that all

communications with potential customers go through Retriever; requiring Sales Reps to review each unsuccessful sales appointment with their supervisor; setting multiple minimum performance standards, the failure to follow which may result in pay deductions or "probation;" limiting the Sales Reps to fifteen days off per year; requiring the Sales Reps to report to "supervisors;" and prohibiting the Sales Reps from working for other companies during and after their employment through an overbroad non-compete clause.

3. As a result of Defendants' misclassification, the Sales Reps have been subject to unlawful deductions from their wages including paying "fines" that Retriever deducted from their pay, paying Retriever's business expenses including the cost of its employees and other expenses that the Sales Reps would not pay if they were properly classified as employees, and improper taxation.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to CPLR §§301 and/or 302. Venue is proper in this County because Defendants' principal office is located in this County and the Representative Agreement that Retriever requires all Sales Reps to sign has a forum selection clause choosing "the Courts of the State of New York and more particularly, the Supreme Court, Westchester County."

THE PARTIES

5. Plaintiff Chris Leahy worked as a Sales Rep in Defendants' employ from in or about 2010 until his resignation in January, 2017.

6. Retriever is a credit card processing company that "provides an exclusive credit card processing program for medical and dental offices." According to its website, Retriever processes $2 billion in credit card transactions annually, making it the largest credit card

processor, worldwide, that is exclusively dedicated to the healthcare industry. Retriever's principal office is located at 115 E. Stevens Avenue, Valhalla, NY. Retriever employs as many as 50 Sales Reps at any given time.

7. Defendant Frank Shiner is the Founder and Chief Marketing Officer of Retriever. As alleged below, Mr. Shiner, among other things, exercises control over the Sales Reps' work, including the method and manner of obtaining their results.

8. Defendant Dominick Colabella is the President and Chief Executive Officer of Retriever. As alleged below, Mr. Colabella, among other things, exercises control over the Sales Reps' work, including the method of manner of obtaining their results.

9. Defendant Scott LoPresti is the Controller, Director of Mobile Payment Technology & Director of Human Resources. As alleged below, Mr. LoPresti, among other things, exercises control over the Sales Reps' work, including the method of manner of obtaining their results.

FACTS

10. Plaintiff and the Sales Reps work from home offices throughout the country.

11. Despite Defendants' classification of Plaintiff and the Class as independent contractors, and despite their remote work, Defendants exercise overwhelming control over Plaintiff and the Class in a manner that can only suggest an employment relationship. That control begins with Retriever's Representative Agreement (the "Agreement")—a standard form contract that all Sales Reps are required to sign—which sets out elaborate requirements for the Sales Reps to follow and for which the Sales Reps receive "strikes" and probation if they fail to comply.

12. Among other things, the Agreement states that the Sales Reps' "responsibilities," including requirements that the Sales Reps must (1) "generate sales appointments which result in at least five (5) fully commissioned sales per month;" (2) "comply fully with" the Agreement and Defendants' "Compliance Awareness form and [] Ethics Statement;" (3) conduct an in-person consultation with each prospective customer "unless otherwise approved;" (4) conduct an in-person or phone installation of equipment and training of each customer; (5) attend "all of Retriever's training sessions unless otherwise excused;" and (6) "comply in all aspects" with Defendants' confidentiality agreement and non-compete clause which prevents the Sales Reps from working with any other company during or for years after their employment with Retriever.

13. Retriever also has an "Appointment Setter Program" whereby Retriever's employees—whose wages the Sales Reps are required to pay—schedule appointments for the Sales Reps. That program includes requirements such as (1) attend appointments on *all* sales leads generated by Retriever; (2) "review each pitched appointment that did not result in a sale with [the Sales Reps'] direct supervisor;" and (3) review all "unsold appointments" with a supervisor "at a minimum of once per week."[1]

14. Failure to comply with the Agreement's requirements will result in a "strike." After receiving nine "strikes" in a six-month period, the Sales Rep is placed on probation and, if the Sales Rep receives another strike while on probation, the Sales Rep is terminated.

15. In addition to setting appointments for the Sales Reps and requiring that the Sales Reps attend all such appointments, the Agreement—and Defendants' additional, uniformly applied policies conveyed in emails sent to all Sales Reps—controls the Sales Reps' schedules

[1] Although the Agreement implies that participation in the Appointment Setter Program is by choice, all Sales Reps were required to participate in the program; management repeatedly informed Plaintiff that participating in the program was not an option and all Sales Reps were required to do so.

by dictating that a Sales Rep many not take off more than 15 days in each calendar year over and above regularly approved holidays.

16. Defendants determine the Sales Reps' daily schedules, set up sales appointments for them with potential customers, and enter those appointments into the Sales Reps' calendars. The Sales Reps are not permitted to speak to potential customers before the appointment—if they do, they are disciplined—and are not permitted to reschedule the appointments or to give the potential customers their own contact information. Instead, any communications between the potential customer and the Sales Reps must go through Retriever. Indeed, the Agreement states that "all incoming merchant communication must go through Retriever's customer support phone lines and secure email server. Retriever will dispatch the communication to the representative when necessary."

17. Defendants carry out the control vested in them by the Agreement, and exercise additional control, over the Sales Reps in uniform communications that are transmitted to all Sales Reps.

18. Defendants write a sales script for the Sales Reps and require that they adhere to that script with precision. Defendants required Plaintiff to have a weekly FaceTime call to recite the script to his supervisor so the supervisor could be sure that he was staying on script.

19. In an email to all Sales Reps dated July 10, 2015, Mr. Shiner castigated the Sales Reps for not learning their sales scripts to his satisfaction, saying, among other things,

> I know you don't like penalties, rules, regulations, etc…. Well guess what? We dislike imposing them [] but some of you force us to do so.
>
> Effective immediately . . . I am sending [supervisors] Ryan and Trae out on the road with each and every one of you. If anyone doesn't know their script, you're paying for their entire trip . . . Including airfare, hotel and food. The same goes if they determined [*sic*] that you "crash learned" the script just for their visit. They will know that immediately. Also, each representative will periodically have to

> submit a recording of themselves at an actual presentation so we can verify that you remain on script.
>
> We are also working on fines and penalties for representatives who blatantly neglect customer service . . . This will include losing the deal, paying cancellation fees, paying the leases, and paying the company a multiple of unrealized monthly earnings if it is determined that the merchant is lost due to your neglect.
>
> ….Your supervisors have been called to ask for your performance failings. Your actions are a reflection on them. I would hope that you have more regard for them than what some of you have been demonstrating.
>
> Of course, this email is going out to all of sales. . . You know if you are an offender. . . Obviously, some are worse than others . . . However, you all can improve.
>
> ….**You have my word that nobody will be getting breaks on these issues.** (Emphasis in Original.)

20. With the advent of FaceTime, a video-calling program, Sales Reps were required to have FaceTime calls with a supervisor so the supervisor could be sure they were properly adhering to the Company's sales script.

21. In an email to all Sales Reps dated July 7, 2015, Mr. Colabella sent an email stating that there "have been many errors on applications [for credit card processing equipment on behalf of customers submitted by the Sales Reps]." Mr. Colabella continued that if "deals come through in the month of July (beginning today) with ANY of the above mentioned mistakes or issues (or any other avoidable errors) you will be financially penalized." Mr. Colabella proceeded to set out 15 rules in his email, including one stating that if "you are requesting a 'rush' process on a deal—it MUST have supervisor approval. You MUST state [which] Supervisor approved it." Another rule stated that if a Sales Rep "received permission for any of the following: Use of my equipment, lower rates, lower statement fees, etc, you MUST include which supervisor gave you approval[.]" At the end of the email, Mr. Colabella stated that "You MUST read and respond to this email directly to me that you have read it (in its

entirety) and understand the policy going forward. Anyone that does not [respond] will not be paid [] until I have record of your acknowledgement."

22. Defendants also required the Sales Reps to enter into confidentiality agreements, and strictly enforced those agreements including threats of termination for a violation. In an October 6, 2016 email, Mr. LoPresti wrote that "We have been made aware that a person who formerly worked with our company was given information on our company by an active associate. This is a direct violation of the [Sales Rep] confidentiality agreement as well as a violation of the employee handbook. Any sales rep or employee who is found giving anyone company information on policy, rules, products, or any other issues will be immediately terminated."

23. In an email the next day concerning alleged confidentiality breaches that was sent to the Sales Reps with the subject "ALL REPRESENTATIVES MUST READ," Mr. LoPresti stated that Defendants would provide an "amnesty period" for confidentiality violators to come forward, saying that a former Sales Rep accused of violating the confidentiality policy has "already named some of your names to an attorney, which was then presented to us." Mr. LoPresti stated that, if a Sales Rep did not come forward during the "amnesty period" and was later found to have shared information, the Sales Rep would "be IMMEDIATELY terminated from their position with Retriever."

24. In an email dated December 6, 2016, Mr. LoPresti sent an email to all of the Sales Reps stating that when "we sat down at [the] last [mandatory] training . . . we warned everyone [] that we were going to look at individual performance for each rep. Yesterday, management reviewed the test results for November and as a whole they were dismal." Mr. LoPresti further stated that "Our management team will be having conversations with reps on an individual basis

to address these issues. Failure to do the job that you are handsomely paid to do will no longer be tolerated."

25. Defendants' exercise of control was a long-running policy and applied throughout Plaintiff's employment with Defendants. Indeed, in a June 18, 2010 email to all Sales Reps, Mr. Shiner wrote:

> Nothing pains me more than to go negative. However, sometimes I am forced to do so.
>
> Despite the fact that it is mandatory, some of you still do not follow the following policy: 1) Call [Mr. Shiner] after appointments that you pitched but did not sign. 2) Report to [Mr. Colabella], Joyce, your assistant and your supervisor when you go to a non qualified appointment. . . .
>
> If there is not an immediate improvement, we will stop making new appointment[s] for those not following the rules as of July 1."

26. Mr. Shiner stated at the end of the above email: "Nobody is exempt from this policy."

27. If a Sales Rep did not follow this policy, the Sales Rep would receive a strike. If a Sales Rep received nine strikes in six months, the Sales Rep would be fined $50 for each appointment that was set by Retriever's telemarketing department.

28. In another email dated June 8, 2010, another member of management told the Sales Reps "I'm going to clearly state the company policy for communication. This is the absolute bare minimum of what is required for each [Sales Rep.]" The email stated that if the Sales Reps do not close a deal, "you are then required to call Frank to review the presentation. All calls to review presented appointments with Frank must be made during normal working hours (M-F, 9am-5pm EST). If you cannot reach Frank, call your Supervisor to review (during their normal business hours). If you speak to your Supervisor to review the appointment, you are required to email Frank to inform him of that conversation, regardless of time of day."

29. Defendants even went so far as to state, in strict terms, the appearance requirements for the Sales Reps. A September 14, 2010 email from Mr. Shiner to all Sales Reps stated that "a few of you need some work on your appearance both in clothing and in grooming. At least three of you will be approached individually by your immediate supervisors, but I want to give you some general rules and suggestions that will help everybody to be more aware of how they look." Mr. Shiner said he noticed many of the Sales Reps wearing clothing that looked warn and "yellowed, rather than crisp and fresh." Mr. Shiner "highly recommend[ed] the wearing of Retriever shirts." Mr. Shiner stated that "I don't want to make this mandatory, but if I continue to see sloppy, mismatched clothing, I will be forced to do so for your own good." Mr. Shiner stated that the Sales Reps "should have a CLEAN AND POLISHED pair of both brown and black shoes." He directed the Sales Reps to "properly cut" their hair, have a "clean" shave, sideburns not past the earlobe, neck hair trimmed, and "if you can make a pony tail with your eyebrows, you should consider trimming them." Although he attempted to phrase these policies with permissive wording such as "suggest" and "should," Mr. Shiner made it clear that he was enforcing a mandatory dress code, stating: "Clean up now and save yourself the embarrassment of having to be approached by your supervisor or me."

30. In a January 4, 2012 email, a member of management sent an email to all Sales Reps with the subject "Rules for Pricing." That email set out rules that "need to be followed" so the Sales Reps "know exactly what you can do **without** supervisory approval, and what you can **only do with** supervisor approval." (Emphasis in original.) In a June 20, 2012 email that same manager stated that Sales Reps who do not follow the Rules for Pricing will not be paid for any non-compliant sale they make; a waiver could be obtained from this punishment by asking a supervisor for permission to deviate.

31. In addition to the extensive daily control exercised by Defendants, Defendants exercised additional control over the Sales Reps. Defendants required the Sales Reps to enter into extensive, prohibitively overbroad non-compete agreements that prevent the Reps from working for a similar company to Retriever for *five years* in the entire United States, Canada, Mexico, and the Caribbean.

32. The Sales Reps were not permitted to work for other companies during their tenure with Retriever.

33. The Sales Reps received fringe benefits including a retirement plan that allowed a Sales Rep to retire "at or after age fifty-five (55) provided that he or she has completed fifteen (15) years of production with Retriever." Upon retirement, the Sales Rep may either continue to receive monthly residuals from sales made during employment or be "bought out" by Retriever. Notably, Retriever, through its retirement plan agreement, controls the Sales Reps even after they retire and can terminate residual payments for violation of the required non-compete agreement, among other things.

34. The Sales Reps were not permitted to develop or distribute their own marketing materials or deal with customers independently. Rather, the Agreement states that all "marketing, marketing materials, equipment, incentives, merchant refunds, and merchant reimbursements will originate from, and must be approved by, Retriever."

35. Defendants' misclassification of the Sales Reps caused great financial harm to each Sales Rep. As an initial matter, the Sales Reps were taxed incorrectly and, among other things, were required to pay the employer's share of FICA taxes.

36. In addition, Defendants regularly levied substantial fines on the Sales Reps for failure to comply with the Company's policies. Plaintiff estimates that he was fined over $40,000 during his employment by Retriever.

37. Defendants also required the Sales Reps to pay many of Retriever's expenses, including the cost of Retriever's own employees. In particular, the Agreement requires the Sales Reps to pay between 25-50% of an Appointment Setter's hourly wages.

38. Defendants also do not reimburse Sales Reps for their travel expenses incurred in traveling to and from sales calls scheduled by Retriever.

39. Plaintiff and the Sales Reps were on Defendants' payroll. The Sales Reps were required to submit commission sheets every two weeks, and were paid monthly. After each pay period, the Company would send the Sales Reps a statement showing the amount they were paid, the amount of fines applied by Defendants that were taken from their pay, and the amount of Retriever's expenses that the Sales Rep was being required to pay.

40. Plaintiff was required to pay over $2,000 per month to Retriever for Retriever's expenses including payments to reimburse Retriever for the cost of employing "Appointment Setters," who are defined in the Agreement as "individual[s] whose services will be provided to Sales Representative by Retriever to set appointments for the Sales Representative." The Agreement requires the Sales Reps to pay "between one fourth (1/4) and one-half (1/2) of the hourly wages of the Appointment Setter."

41. Plaintiff was also financially impacted by the improper taxation method imposed upon him over the course of his employment. Each of these costs is an unlawful deduction, in violation of New York Labor Law Section 193.

42. Defendants required the Sales Reps to attend three mandatory trainings at Defendants' principal office—in New York—and pay their own travel expenses. Defendants also do not reimburse Plaintiff and the Class for any of their work-related travel expenses on sales appointments.

CLASS ACTION ALLEGATIONS

43. Plaintiff brings this action as a class action pursuant to CPLR §§901 and 902, on behalf of all Sales Reps who worked for Defendants between February 13, 2011 and the date of a judgment in this action (the "Class").

44. The members of the Class are so numerous that joinder of all members is impracticable. On information and belief, Defendants employ up to 50 Sales Reps at any given time and have done so throughout the Class period. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believes that there are hundreds of members in the Class who may be identified from Defendants' records.

45. Plaintiff's claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendants' wrongful conduct in violation of New York State law that is complained of herein. Plaintiff's claims arise from the same practice and course of conduct that gives rise to the claims of the Class, and are based on the same or similar legal theories.

46. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and securities litigation. Neither Plaintiff nor his counsel has interests that are contrary to or conflicting with those of the Class. Defendants have no defenses unique to Plaintiff.

47. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. As an initial matter, the claims of all Class members will be subject to the same law and will arise in the same venue—New York law, in this Court—because the Agreement sets the venue for all disputes in this Court and chooses New York law. Among the questions of law and fact common to the Class are:

a. Whether Plaintiff and the Sales Reps were employees of Defendants;

b. Whether Defendants' deductions from the pay of the Sales Reps were unlawful deductions within the meaning of the NYLL;

c. Whether Defendants were unjustly enriched by their conduct;

d. Whether Defendants failed to comply with New York Labor Law Section 195(3); and

e. To what extent the members of the Class have sustained damages and the proper measure of damages.

48. Class action treatment is superior to other available methods for the fair and efficient adjudication of the controversy alleged herein. Treating this as a class action will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy.

49. This forum is ideal for the consolidation of this litigation. This forum has a direct connection to the subject matter of this action because Defendants' principal office is

located in this county, and substantially all of the events giving rise to this action took place in this county or emanated from this County.

50. Prosecuting separate or individual actions would unnecessarily tax the Court's resources, as well as those of the Defendants and individual Class members.

51. Without a class action, Defendants will likely retain the benefit of their wrongdoing and will continue a course of action that will result in further damages to Plaintiff and the members of the Class.

52. A class action is ideal because current and former employees are likely to fear retaliation by Defendants.

FIRST CAUSE OF ACTION
Unlawful Deductions in Violation of New York Labor Law Section 193

53. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

54. Plaintiff and the Sales Reps were, at all times, employees of Defendants. Plaintiff and the Sales Reps were, at all times, employed under the exclusive direction and control of Defendants not only as to the result to be accomplished by their work, but also as to the manner and means by which that result was accomplished, and, as such, are entitled to the rights and benefits of an employee, including the protections of the New York Labor Law.

55. New York Labor Law Section 193 prohibits deductions from employees' wages unless the deductions are (1) expressly authorized by and "for the benefit of the employee" and (2) are limited to the enumerated categories of permissible deductions listed in NYLL §193.

56. Defendants made deductions, from the pay of Plaintiff and the Sales Reps that were not for the benefit of Plaintiff and the Sales Reps and were not limited to the enumerated categories of permissible deductions listed in NYLL §193. Those deductions include, without

limitation, deductions to pay the wages of Defendants' employees, deductions for fines, deductions to reimburse Defendants for various expenses incurred by Defendants in running their business, and indirect deductions resulting from Defendants' failure to pay the employer's share of FICA taxes and Defendants' failure to reimburse Plaintiff and the Class for, among other things, travel costs in connection with their work for Defendants.

57. The indirect deductions made from Sales Reps' pay violate NYLL §193's command that no employer may require an employee to make any payment by a separate transaction unless such a payment would be a permissible deduction under NYLL §193.

58. Plaintiff and the Sales Reps have been harmed by Defendants' unlawful deductions.

SECOND CAUSE OF ACTION
Common Law Misclassification

59. Plaintiff repeats and realleges the allegations of the preceding paragraphs as if fully set forth herein.

60. Plaintiff and the Sales Reps were, at all times, employees of Defendants who were misclassified as independent contractors. Plaintiff and the Sales Reps were, at all times, employed under the exclusive direction and control of Defendants not only as to the result to be accomplished by their work, but also as to the manner and means by which that result was accomplished, and, as such, are entitled to the rights and benefits of an employee, including the protections of the New York Labor Law.

61. Defendants violated the New York State common law test by subjecting Plaintiff and the Sales Reps to misclassification at all relevant times.

62. Plaintiff and the Sales Reps have been harmed thereby.

THIRD CAUSE OF ACTION
Unjust Enrichment

63. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

64. Defendants have been financially enriched by subjecting Plaintiff and the Sales Reps to deductions, charges, and/or expenses that are typically borne by employers.

65. The financial enrichment enjoyed by Defendants has come at the expense of Plaintiff and the Sales Reps, all of whom have borne the improper deductions, charges, and/or expenses.

66. It is against equity and good conscience to permit Defendants to retain such improper deductions, charges, and/or expenses.

67. Defendants should be required to reimburse Plaintiff and the Sales Reps for such improper deductions, charges, and/or expenses.

FOURTH CAUSE OF ACTION
Violation of New York Labor Law Section 195(3)

68. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

69. New York Labor Law Section 195(3) requires an employer to send a statement itemizing, among other things, deductions made from an employee's pay.

70. Defendants failed to provide that statement to the Sales Reps and/or provided an incomplete statement to the Sales Reps because the statement did not include all deductions that were being made from the Sales Reps' pay.

71. Pursuant to New York Labor Law Section 198-d, Plaintiff and the Class are entitled to a maximum of $2,500 each plus costs and reasonable attorneys' fees for this violation.

WHEREFORE, plaintiff prays for relief and judgment, as follows:

A. For an order certifying this action as a class action, appointing Plaintiff as Class Representative and appointing Plaintiff's attorneys as Class Counsel;

B. For all damages on all applicable claims, including reimbursement of all charges, deductions, and expenses, liquidated damages and interest, and statutory damages, in an amount to be proven at trial;

C. For an order permanently enjoining Defendants from engaging in the unlawful practices alleged herein;

D. For an award of attorneys' fees, costs and expenses; and

E. For such other and further relief that the Court deems appropriate and just under the circumstances.

DATED: February 13, 2017

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