IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Chris Gagliastre, *et al.*, *On behalf of themselves and others similarly situated*, Plaintiffs, v. Captain George's of South Carolina, LP, *et al.*, Defendants.	Case No. 2:17-cv-379 Judge Raymond A. Jackson Magistrate Judge Robert J. Krask

PLAINTIFFS' MOTION FOR APPROVAL OF FLSA SETTLEMENT

Plaintiffs move this Court for approval of the parties' Fair Labor Standards Act collective action settlement. Plaintiffs' memorandum in support of this motion and the parties' settlement agreement will follow.

Respectfully submitted,

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Certificate of Service

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR APPROVAL OF FLSA SETTLEMENT

After attending an all-day mediation with Judge Bradley Stillman (Ret.), the parties have reached an agreement that will resolve this Fair Labor Standards Act collective action. The Agreement allocates more than $2,400,000 to be divided among approximately 373 opt-in plaintiffs. Plaintiffs will seek, by separate motion, a fee award and expense reimbursement from this common fund. The parties ask that the Court approve the settlement and allow them to proceed with the settlement process outlined in the agreement, attached as Exhibit 1.

1. Standard for Approving Fair Labor Standards Act Settlements

Rights under the FLSA cannot be waived by private agreement unless either the Department of Labor supervises the waiver or a court approves the agreement. *Hargrove v. Ryla Teleservices, Inc.*, No. 2:11-cv-344, 2013 WL 1897027, at *2 (E.D. Va. Apr. 12, 2013, *report and*

recommendation adopted, No. 2:11-cv-344, 2013 WL 1897110 (E.D. Va. May 3, 2013). In evaluating FLSA settlements, the Court must determine three things:

- that FLSA issues are actually in dispute;
- that the settlement is a reasonable compromise over the issues; and
- if there is a clause of attorneys' fees, then the award must be reasonable and independently assessed.[1]

Brockman v. Keystone Newport News, LLC, No. 4:15-cv-74, 2018 WL 4956514, at *2 (E.D. Va. Oct. 12, 2018) (Jackson, J.).

In determining the fairness and reasonableness of an FLSA settlement, the Court has wide discretion to ensure the agreement is, in fact, fair and reasonable. The Court can approve an agreement, deny approving the agreement, or even strike portions of the agreement. *Id.* at *3. A hearing is not required to approve an FLSA settlement, though the Court may *sua sponte* order a fairness hearing. *Id.* at *2.

2. FLSA issues are actually in dispute.

FLSA issues in this case are in dispute. Given the complexity of the case, Plaintiffs present the case's background, procedural posture, and a detailed description of the claims.

2.1. General Case Background and Procedural Posture

Plaintiffs are current or former tipped-wage workers at one of Captain George's Seafood Restaurants. Captain George's restaurants consist of four seafood buffet-style restaurants—two in Virginia, one in North Carolina, and one in South Carolina.

[1] Plaintiffs will file a separate motion for an attorneys' fees award.

Plaintiffs originally filed this lawsuit in the U.S. District Court for the District of South Carolina, raising "hybrid" class/collective action that raised numerous wage and hour claims under both federal and state law.[2] By agreement, the parties transferred the case to this Court, which is located closer to Captain George's corporate headquarters. Following the transfer, Plaintiffs filed an Amended Complaint (Doc. 57), which also raised class and collective action claims under the FLSA, South Carolina law, and Virginia law. At about the same time, on August 17, 2017, Plaintiffs moved for conditional certification of an FLSA collective action. *See* Doc. 53.

On September 14, 2017, Defendants moved to dismiss Plaintiffs' Virginia state law claim and Sherry Pitsilides as an individual defendant. See Docs. 62–67. In response, Plaintiffs voluntarily dismissed their Virginia state law claims (Doc 74). On March 13, 2018, the Court denied Defendants' Motion to dismiss the claims against Mrs. Pitsilides. Doc. 125.

Also on March 13, 2018, the Court granted Plaintiffs' Motion for Conditional Certification and ordered the parties to initiate the proposed notice process. *See* Doc. 126. Accordingly, Plaintiffs sent notice of this action to approximately 2,722 employees. Of that, approximately 365 class members joined the lawsuit.

Following the conclusion of the notice period, on August 20, 2018, the Court set a schedule for the remainder of the case. *See* Doc. 179. Plaintiffs' discovery was to be complete by November 20, 2018, and Defendants' discovery completed by December 18, 2018. Trial was to commence on January 29, 2019.

Immediately after the Court entered the Pretrial Order, Plaintiffs sought to modify the Order for purposes of certifying a state law class action. *See* Doc. 180. In contrast, Defendants asked

[2] Plaintiffs will discuss each claim in detail below.

the Court to dismiss the state law claims entirely, without prejudice. *See* Doc. 182. The Court agreed with Defendants and dismissed Plaintiffs' state law claims on October 4, 2018. *See* Doc. 190. As a result, the only claims remaining before the Court are claims under the Fair Labor Standards Act.

As per the Court's Pretrial Order, the parties engaged in an extensive discovery process, described in further detail below. In addition, the parties discussed narrowing or resolving certain issues prior to trial. As a result of those discussions, Plaintiffs voluntarily dismissed their off-the-clock and "dual jobs" claims, without prejudice. Doc. 198. Moreover, the parties agreed in principle to settle Plaintiffs' overtime and "tools" claims. Those agreements are incorporated in the Agreement now before the Court for approval.

After Plaintiffs' discovery period had closed and Defendants' was nearly closed, on December 13, 2018, the parties participated in a mediation in Norfolk with retired judge F. Bradford Stillman. Through an all-day mediation, Judge Stillman was able to broker the Agreement before the Court. The Agreement resolves both this lawsuit and, through a proposed consolidation and transfer, an action in the District Court of South Carolina. Approximately eight plaintiffs are involved in that lawsuit.

2.2. Claims at Issue and Potential Damages

This case involves numerous, factually distinct, wage and hour claims. Almost all of the claims, however, revolve around a central premise: that Defendants did not meet the FLSA's requirements to pay tipped minimum wage. As this Court held, the requirements are:

(1) the employer must pay their tipped employees no less than $2.13 per hour;

(2) the credit taken for the employees' tips must not exceed the actual tips that the employee received;

(3) the employer must inform employees of the employer's intent to take the tip credit and the provisions of 29 U.S.C. § 203(m); and

(4) the employer must allow the employee to keep all of their tips, subject to very specific exceptions relating to tip pooling.

Order, Doc. 126, PAGEID 1919, *citing* 29 U.S.C. 203(m).

If an employer fails to meet any one of the FLSA's requirements, the employer loses the ability to claim a "tip credit," and, thus, must pay full minimum wage. *McFeeley v. Jackson St. Entm't, LLC*, 825 F.3d 235, 246 (4th Cir. 2016).[3] As the Fourth Circuit has held:

> What the Congress has said, in effect, to restaurant employers is that, if you precisely follow the language of 3(m) and fully inform your employees of it, you may obtain a 50 percent credit from the receipt of tips toward your obligation to pay the minimum wage. The corollary seems obvious and unavoidable: if the employer does not follow the command of the statute, he gets no credit.

Richard v. Marriott Corp., 549 F.2d 303, 305 (4th Cir. 1977).[4]

The effect of the FLSA's requirements is that Plaintiffs only need to prevail on one claim in order to be entitled to an award of the tip credit amount (and, potentially, liquidated damages). But, it is also true that prevailing on more than one tip credit claim has no additional effect—Plaintiffs would only be entitled to their unpaid wages and liquidated damages once.

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[3] "To be eligible for the 'tip credit' under the FLSA and corresponding Maryland law, defendants were required to pay dancers the minimum wage set for those receiving tip income and to notify employees of the 'tip credit' provision. 29 U.S.C. 203(m); Md. Code Ann., Lab. & Empl. § 3–419 (West 2014). The clubs paid the dancers no compensation of any kind and afforded them no notice. They cannot therefore claim the 'tip credit.'" *McFeeley*, 825 F.3d at 245–46.

[4] *See also* DOL Field Operations Handbook, 30d01(b). ("Where an employer does not strictly observe the provisions of section 3(m) (the employer fails to provide adequate notice of the use of the tip credit, the employer does not pay a cash or direct wage of at least $2.13 per hour, the tips received by the employee are less than the amount of the tip credit claimed and the employer does not make up the difference during the pay period, or the employer utilizes the employee's tips for any purpose other than a valid tip pool) no FLSA 3(m) tip credit may be claimed, and the employee is entitled to receive the full cash minimum wage, in addition to retaining all tips he or she received.")

The maximum damages are straightforward to calculate because they are almost entirely based on Defendants losing the tip credit. Thus, the damages are equal to $7.25 minus the amount actually paid to each employee for each hour the employee worked, multiplied by two for liquidated damages.

Based on Defendants' payroll records, the opt-in plaintiffs, which include servers, bartenders, bussers, and buffet runners,[5] worked hours as follows:

Restaurant	**Position**	**Hours worked within a 2 year statute of limitations (see below discussion)**	**Hours worked outside of a 2 year statute of limitations (see below discussion)**
South Carolina	Server	124,784.57	28,577.07
South Carolina	BBB	16,430.55	5,471.28
Lideslambous	Server	67,725.56	15,245.63
Lideslambous	BBB	17,042.55	3,131.52
Pitsilambous	Server	33,744.40	13,516
Pitsilambous	BBB	9,455.04	3,408.93
Kill Devil Hills	Server	13,919.42	4,219.51
Kill Devil Hills	BBB	3,784.60	722.40

Defendants paid servers a rate of $2.125 prior to the lawsuit or $2.13 per hour thereafter. Defendants generally paid BBBs at a rate higher than $2.13 when taking into account the restaurants' additional payment (to make up the difference between the BBBs' promised wages and the amount of tips actually received). Thus, based on the hours above and minimum wage rates, the total potential unpaid wages are $1,671,722.84. With liquidated damages, the opt-in's maximum potential damages would be $3,343,445.69, plus the recovery of attorneys' fees and litigation costs.

2.2.1. Global Defenses

[5] Bartenders, bussers, and buffet runners are collectively referred to as BBBs.

Before discussing Plaintiffs' specific claims, it is worth addressing Defendants potential defenses that apply to all of the claims.

First, Defendants would have raised a statute of limitations defense to a portion of any awardable damages. Specifically, unlike a Rule 23 class action, filing an FLSA collective action does not stop the statute of limitations from running for putative class members. *See LaFleur v. Dollar Tree Stores, Inc.*, No. 2:12-cv-00363, 2012 WL 4739534, at * 6 (E.D. Va. Oct. 2, 2012), *citing MacGregor v. Farmers Ins. Exchange*, 2:10-cv-03088, 2011 WL 2731227, at *1 (D.S.C. July 13, 2011). Instead, the statute only tolls for each employee when that employee opts into the case under 29 U.S.C. § 216(b). *Houston v. URS Corp.*, 591 F.Supp.2d 827, 831 (E.D. Va. 2008) (citing 29 § U.S.C. 256). The maximum damages above assume that the statute of limitations tolled for all opt-ins upon filing the complaint.

Plaintiffs would have made an argument that the statute of limitations should be equitably tolled, and there are good grounds to make such an argument. But, still, absent the Court exercising its discretion to do so, a substantial amount of potential damages would be cut off by the statute of limitations. Specifically, if the opt-in period's midpoint is used as an approximate opt-in date, then the total unpaid wages plus liquidated damages would be approximately $2,564,000, about a $700,000 difference.

Second, Defendants would have argued that they did not act "willfully" under the FLSA. 29 U.S.C. § 255(a). If a jury found that Defendants' violations were not willful, a two-year statute of limitations would apply to Plaintiffs' claims. The maximum damages calculation above is based on a three-year statute of limitations. Assuming equitable tolling from the date the complaint was filed, with a two-year statute of limitations, the total possible unpaid wages plus liquidated damages

would be approximately $2,638,000. This defense could combine a "willfulness defense" with the above equitable tolling issue to substantially reduce Plaintiffs' damages.

Third, Defendants would have attempted to wholly or partially decertify the collective action. Defendants would have argued that the BBBs were not similarly situated to the plaintiff servers. Plaintiffs concede this is true insofar as the servers have claims that the BBBs do not (*i.e.*, servers might have claims 1–8, but BBBs might only have claims 1–4). Although Plaintiffs do not believe this would warrant decertification, it was a risk. Moreover, the factual basis for the tip credit notice claim (described below) is somewhat different between the servers and the BBBs. Decertification posed a risk and, if granted, would have either further complicated and delayed the case or made some remedies unavailable as a practical matter.

2.2.2. Claims

2.2.2.1. Tipped Minimum Wage Underpayment

It is undisputed that, until Plaintiffs filed this lawsuit, Defendants paid its tipped employees a base wage of $2.125 per hour, rather than the required $2.13 per hour—a half-cent underpayment. It is Plaintiffs' position that employers must "strictly observe" all of 29 U.S.C. § 203(m)'s requirements. *See* DOL Field Operations Handbook, 30d01(b). One of those requirements is paying at least $2.13 per hour. *See* Order, Doc. 126, PAGEID 1919, *citing* 29 U.S.C. § 203(m), *and see McFeeley*, 825 F.3d at 246 ("The clubs paid the dancers no compensation of any kind and afforded them no notice. They cannot therefore claim the 'tip credit.'"). Thus, Plaintiffs argue that the result of the half-cent per hour underpayment is that Defendants lose the entirety of the tip credit and would be subject to a damages award of $10.24 per hour (the difference between

full minimum wage and the tipped minimum wage Defendants paid, multiplied by two for liquidated damages).

Defendants intended to argue that a half-cent error should not result in damages of $10.24 per hour as a matter of equity. Defendants' equitable argument addresses what appears to be a novel issue. As with any novel issue, there is substantial risk because the parties are unsure how the Court would decide the issue. Defendants could have used a similar argument to dispute liquidated damages.

During the course of the litigation, prior to the parties reaching the settlement before the Court, Defendants paid their employees back wages of $.01 per hour (*i.e.*, the half-cent and liquidated damages). This additional payment resulted in Defendants paying $36,335.59 to all putative class members, not just the opt-ins.

With the exception of the $.01 per hour that Defendants voluntarily paid to their employees, the damages for this claim overlap with all of the tip credit damages.

2.2.2.2. Tip Credit Notice Claim

Plaintiffs contend that Defendants did not provide adequate notice of the FLSA's tip credit provisions in 29 U.S.C. § 203(m). Plaintiffs deposed a corporate representative for each of Defendants' restaurants on this issue.

With respect to servers, the representatives generally testified that they informed servers that they would be paid a tipped minimum wage. Plaintiffs contend, however, that this is insufficient. Moreover, Plaintiffs would argue that Defendants did not comply with each of the requirements in 29 C.F.R. § 531.59(b), which mandates that tip credit notice include all of the following:

(1) the amount of the cash wage that is to be paid to the tipped employee by the employer;

(2) the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee;

(3) that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

(4) that the tip credit shall not apply to any employee who has not been informed of these requirements.

Plaintiffs would also argue that, given that the restaurants testified that they told servers that servers would be paid $2.13 per hour rather than the actual rate of $2.125, they could not have met their notice requirements as a matter of law.

With respect to BBBs, the notice was less clear because most of the restaurants' representatives testified to have told BBBs their wage was not actually a tipped minimum wage.[6]

Defendants, on the other hand, could argue that the notice they provided was sufficient to meet 203(m)'s requirements. Moreover, the issue of whether telling workers they would be paid $2.13 rather than their actual rate of $2.125 is a novel legal issue.

The damages for this claim overlap with all of the tip credit damages.

2.2.2.3. Tip Misappropriation Claim

[6] BBBs were paid a total wage in excess of the FLSA minimum wage, but this total wage was comprised in part of monies "tipped out" by servers for pooling with BBBs. But for the "tipped out" funds, BBBs would have been paid less than the required minimum wage. Plaintiffs accordingly would have argued that BBBs, as well as servers, were "tipped employees" for purposes of FLSA. Defendants would have sought to dismiss BBBs from this action, on the grounds that they should not be considered "tipped employees," but have acknowledged that the fate of this defense was far from certain given the mixed nature of the funds utilized to pay BBBs' total wage rates.

Plaintiffs contend that Defendants misappropriated employee tips by sharing them with either non-tipped employees or the restaurant itself. Discovery revealed that some Defendants may have misappropriated tips, but that the relevant facts varied between the restaurants. These differences presented at least a modest risk of decertification.

Specifically, the South Carolina location appears to have retained some amount of employee tips in about 70% of the weeks at issue. The Lideslambous location appears to have required servers to share tips with bussers who were redeployed as security guards during the summer months, but continued to be paid a tipped employee minimum wage notwithstanding the reassignment of duties. And all locations may have included non-tipped bartenders in the tip pool at one time or another.

Defendants certainly had some arguments for at least some of these claims. For example, Defendants could argue that the bartenders were, in fact, tipped employees. Typically, bartenders *are* tipped employees. In this case, however, Plaintiffs argue that the bars in question only rarely served customers. Still, the parties recognize the strength of these tip pool claims and this strength is reflected in the overall settlement value.

The damages for this claim overlap with all of the tip credit damages.

2.2.2.4. Silverware Roller Claim

It is undisputed that Defendants gave servers a choice: roll between 150 and 200 sets of silverware or pay someone to do it. Defendants did not themselves pay the "silverware rollers" anything and did not treat them as employees. The legal effect of these facts is disputed.

Plaintiffs contend that it violates the FLSA for an employer to require an employee to pay for another persons' labor, which benefits an employer. Moreover, Plaintiffs contend that 29 U.S.C.

§ 203(m) does not authorize sharing tips with non-employees under any circumstances. And, finally, Plaintiffs argue that this situation amounts to kickback that violates the FLSA's requirement that wages be paid free and clear. *See* 29 C.F.R. 531.35.

Defendants argue that this situation is legal because Defendants are merely giving servers a choice, and the servers elect to pay the silverware rollers voluntarily. Defendants also argue that the money paid is not tip money.

The damages for this claim overlap with all of the tip credit damages if this is considered a tip pool violation. If, however, it is considered an anti-kickback rule violation, then the damages overlap with the tip credit damages and also include the amounts paid to the rollers, which is approximately $4 – $6 per server per shift.

2.2.2.5. "Tools" and Uniforms Claims

These related claims arise from two sets of facts. First, it is undisputed that Defendants required servers to pay for their first uniform shirt. After six months, if the server was still employed, Defendants gave the server a choice to either receive a second shirt for free or receive their money back. Second, Plaintiffs contend that Defendants required servers to purchase certain "tools" like pens, counterfeit pens, corkscrews, aprons, and replacement point-of-sale cards.

With respect to the uniform claim, the facts are undisputed, but the legal effect is disputed. Plaintiffs argue that, what Defendants characterize as a "deposit," is the equivalent of a late payment of wages. *See Gorden v. Maxim Healthcare Servs., Inc.*, 2014 WL 3438007, at *2 (E.D. Pa. July 15, 2014) ("late payment of wages is the equivalent of nonpayment for purposes of the FLSA"). Thus, Plaintiffs would be entitled to the value of the shirt in liquidated damages. Plaintiffs also argue that, because the uniform shirt charge took servers below minimum wage in a week, they

would be entitled to tip credit damages for that week for the same reason that the half-cent underpayment triggers tip credit liability. Defendants argue that the deposit is unrelated to unpaid wages or, at most, results only in damages for the time value of the money retained but ultimately returned.

Under Plaintiffs' theory, the uniform claim damages would be the value of the uniform (approximately $18) plus $10.24 per hour for one week for each server. Everything except for the $18 per server overlaps with the other tip credit damages.

The "tools" claim's legal theory is essentially the same. The facts, however, are in dispute. Defendants' internal documents appear to require servers to purchase the tools noted above. But, Defendants' witnesses testified that they did not enforce those policies and, instead, either provided the tools to workers, or the workers already had the tools. Either way, the damages on this claim would be very low because the purchases were one-time purchases for inexpensive items. Any tip credit damages would overlap with the other tip credit claims.

To address these claims, the parties have agreed to settle them by crediting each server who made a uniform purchase/deposit with $20 to cover the cost of the uniform, plus the tip credit differential for the week in which they would have paid for the uniform. To calculate this, the parties assumed a 30-hour workweek for each opt-in, multiplied by two for liquidated damages, and offset by any amount the opt-in will have otherwise received under the minimum wage settlement for those 30 hours.

Depending on how the statute of limitations is calculated, each opt-in Plaintiff will receive approximately 144% or 187% of total possible unpaid wages under the minimum wage settlement. For purposes of this claim, each opt-in who purchased a uniform is entitled to an additional 13% of

their total possible unpaid wages for 30 hours, plus $20. The total amount that will be paid to eligible opt-in plaintiffs will be $39.97 per person, or a total of $9,992.00.

2.2.2.6. Overtime Claim

It is undisputed that Defendants underpaid overtime wages by using an incorrect overtime rate. Midway through the case, Defendants paid back wages to employees to address this issue. In addition and to settle this claim, Defendants agreed to pay every server an additional $8.15 per overtime hour. This, combined with Defendants prior payment, means that workers will receive their full overtime wages, full liquidated damages, *and* full wages and liquidated damages as though Defendants lost the tip credit entirely for these hours. Plaintiffs could not achieve a better result at trial. The total amount paid to employees for this claim is $34,812.55.

2.2.2.7. Off-the-Clock and Dual Jobs Claims

These claims involved work done off-the-clock and work done in non-tipped capacities but paid at a tipped wage rate. Plaintiffs voluntarily dismissed these claims without prejudice as a strategic decision grounded in a concern over decertification. Doc. 198. The Settlement does not release these claims, and Plaintiffs and opt-ins are able to pursue these claims individually.

2.2.2.8. South Carolina State Law Claims

After the Court dismissed Plaintiffs' South Carolina state law claims, Plaintiffs filed a state court action to pursue those claims. That action is currently pending. This Settlement does not affect those claims. That said, the parties did agree to work in good faith to try to separately resolve those claims promptly, if possible.

3. The Settlement is a reasonable compromise over the issues.

In examining whether an FLSA settlement is a reasonable compromise, courts consider the following:

- the extent of discovery that has taken place;
- the stage of the proceedings, including the complexity, expense, and likely duration of the litigation;
- the absence of fraud or collusion in the settlement;
- the experience of counsel who have represented the plaintiffs;
- the opinions of counsel; and
- the probability of plaintiffs' success on the merits and the amount of the settlement in relation to the potential recovery.

Brockman, 2018 WL 495614, at *2. After discussing the Settlement itself, Plaintiff will address each factor.

3.1. The Settlement Itself

Under the Settlement's terms, approximately 373 workers will divide a settlement fund of more than $2,400,000, before any attorneys' fees, incentive awards, or expenses are deducted. This means that workers will receive an average of approximately $6,500, again before the aforementioned deductions.

The damages in this case are relatively certain to calculate because they are based on the hours each worker worked. Those hours are in Defendants' payroll records. Based on those records, the maximum possible recovery is approximately $3,330,000, including full liquidated damages based on a three-year relevant time period, and with the statute of limitations tolled as of

the Complaint's filing date.[7] This amount assumes that (1) the Court grants full equitable tolling for the entire time period this case has been pending, and (2) the Court finds that Defendants acted willfully. If the Court did not find in Plaintiffs' favor on one or both issues, the maximum recovery would be somewhat lower.

The settlement fund of $2,400,000 is an excellent result for this case and accounts for the strength of Plaintiffs' claims as well as the fact that Plaintiffs only needed to prevail on one claim to trigger liability for the tip credit damages. With full tolling, the settlement fund is approximately 144% of unpaid wages. With no tolling, the settlement fund is approximately 187% of unpaid wages. Under either measure, this is a very positive result. *Compare with Brockman*, 2018 WL 4956514, at *4 (approving a settlement of around 40–50% and noting that courts have found 60–80% to be sufficient[8]).

Moreover, the settlement does not release the claims raised in the South Carolina state court case, nor the voluntarily dismissed off-the-clock and dual jobs claims. Thus, Plaintiffs (and others) are free to pursue those claims. And, as with any FLSA settlement, only the opt-in plaintiffs release their FLSA claims. Those employees who did not join this case will not be prejudiced by the settlement.

The settlement fund will be divided based on hours worked. This division will accurately reflect each plaintiff's alleged damages.

As discussed in detail in Plaintiffs' motion for an award of fees, Plaintiffs' counsel seek an award of 33% of the settlement fund, or approximately $815,000 and approximately $58,000 in

[7] This number does not include the nominal additional damages related to the uniform and tools claims and overtime, which are separately covered by the settlement.

[8] It is unclear whether these percentages are of unpaid wages or unpaid wages plus liquidated damages. Still, under either measure, the Settlement in this case is an excellent result.

expenses. Even after these deductions, the fund available to class members will be approximately $1,572,000, which is a substantial award to the workers.

3.2. Factors to Consider

Plaintiffs next turn to the other factors that courts examine.

The extent of discovery that has taken place. In this case, Plaintiffs completed their discovery. Defendants had approximately a week or so left in their discovery period at the time of settlement.

With respect to document discovery, Plaintiffs requested the typical sorts of documents in cases like this: payroll records, records tracking tip money, policy documents, and personnel records. Unfortunately, Defendants' recordkeeping made this a massive and complicated undertaking.

Defendants maintained general payroll records electronically, but those electronic records were stored in a proprietary system. As a result, Defendants created and provided Plaintiffs with electronically-addressable Excel spreadsheets of various payroll records. But, defendants' payroll records do not include individual servers' tip money, "tip out," and time worked by day, did not include electronic copies of pay stubs, and were not always reliable as to job position, given shifting of some employees between functions. For that information, Defendants made available over 100 banker's boxes of paper records. Those records were of various, irregular sizes, shapes, and conditions. Still, Plaintiffs' counsel traveled to Virginia and endeavored to scan all of the relevant records and analyze them to compare the paper records to the electronic records. Moreover, the state of the records required Plaintiffs to request additional records like bank account statements, which were again maintained by defendants almost entirely in physical, paper format.

Plaintiffs also deposed a corporate representative from each of the four restaurants, three corporate representatives from Defendants' management company, the two named Defendants, a subpoenaed third-party individual with knowledge of Defendants' records, and a couple of additional witnesses. This is in addition to Plaintiffs' counsels' own investigation of the case, which included interviewing numerous fact witnesses.

This robust discovery gave Plaintiffs a thorough understanding of the case's facts, strengths, and weaknesses. The Settlement reflects that knowledge and the certainty that comes with it.

The stage of the proceedings, including the complexity, expense, and likely duration of the litigation. As noted above, this case was essentially ready for summary judgment motions to be filed and a trial shortly thereafter. Thus, both parties had a concrete understand of their respective positions.

With respect to complexity, this is a wage and hour collective action, which are inherently complex. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981). But, this case in particular involved numerous, factually distinct claims, some raising novel issues of law. Moreover, the state of Defendants' records added another layer of complexity and labor.

Given the novel issues of law and the amount of money at stake in this case, it is very likely that one or both parties would appeal virtually any conceivable outcome in the lawsuit. Although the case was close to a trial date, the potential for appeals could greatly extend the case's lifespan. Moreover, an enormous amount of work would need to be done to complete summary judgment briefing and prepare for and conduct the trial.

The absence of fraud or collusion in the settlement. The parties assert that there has been no fraud or collusion in the settlement. The docket reflects a case that has been hotly contested and competently fought every step of the way. Moreover, the Settlement was reached only after an all-day mediation with (retired) Judge Stillman.

The experience of counsel who have represented the plaintiffs. As discussed in Plaintiffs' counsel's declarations in support of their fee petition, they are highly experienced wage and hour lawyers, with nationwide practices. *Arledge v. Domino's Pizza, Inc.*, No. 3:16-cv-386, 2018 WL 5023950, at *5 (S.D. Ohio Oct. 17, 2018); *Castillo v. Morales*, No. 2:12-cv-650, 2015 WL 13021899, *5 (S.D. Ohio Dec. 22, 2015) (referring to Mr. Biller). As recently as October of last year, a court found Plaintiffs' counsel are "highly qualified and have substantial experience in federal courts and class action litigation." *Arledge*, 2018 WL 5023950, at *5.

The opinions of counsel. Plaintiffs' counsel supports approving the proposed Settlement. Indeed, Plaintiffs' counsel contends that this is an excellent result that will give workers a real measure of relief.

The probability of plaintiffs' success on the merits and the amount of the settlement in relation to the potential recovery. This factor is largely discussed above. Plaintiffs believe that they had a high chance of success on the merits. The Settlement appropriately reflects this.

It is perhaps worth noting that the actual economic harm to the class members is far lower than the Settlement amount. For example, one of Plaintiffs' claims was that Defendants paid a half-cent less than tipped minimum wage. The economic harm is $.005/hour. Plaintiffs contend, however, that the FLSA mandates damages of $10.24/hour, and that is what underlies the settlement, not the actual economic harm. If the economic harm is used, the collective action class

only suffered approximately $400,000 to $500,000 in economic harm arising from the half-cent underpayment, underpaid overtime wages, uniform costs, misappropriated tip money, and silverware roller payments. Plaintiffs will receive multiples of this amount, even after the proposed fee award. While technically not the correct measure of damages under the FLSA, it is worth mentioning, not least because it would have figured prominently in defendants' anticipated efforts, were the case tried, to persuade the Court that no award of liquidated damages be made.

4. Service Awards

Plaintiffs ask the Court to award a $10,000 service award to original named plaintiffs Chris Gagliastre, Zachary Tarry, and Olga Zayneeva, and a $2,000 service award to named plaintiff Norman Pentecost. As the Supreme Court recently recognized, a class representative "might receive a share of class recovery above and beyond her individual claim." *China Agritech, Inc. v. Resh*, ---U.S. ---, 138 S. Ct. 1800, 1811, n.7 (2018).

It is "fairly typical practice" to award an additional amount to class representatives. *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14-cv-238, 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016). This additional amount helps compensate class representatives for financial or reputational risk and "sometimes, to recognize their willingness to act as a private attorney general." *Id., quoting Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015).

In this case, the class representatives did everything required of them to resolve this case and recover a substantial fund for their fellow workers. They worked with counsel throughout the case and fully participated in discovery directed toward them. As one court held:

> The Court finds that, only through Plaintiff's efforts did a large group of low-wage workers receive a substantial amount of unpaid wages and liquidated damages. Plaintiff's efforts furthered the important public policies underlying the Fair Labor Standards Act. The Court further finds that it is appropriate to reward plaintiffs,

> particularly in wage and hour cases, who obtain excellent, tangible benefits for their fellow workers.

Dillow v. Home Care Network, Inc., No. 1:16-CV-612, 2018 WL 4776977, at *8 (S.D. Ohio Oct. 3, 2018) (finding an $8,500 award to be "modest.")

This settlement, which benefits many low-wage workers would not have happened but for class representatives' efforts and will to step forward. The service awards requested are appropriate. *See, e.g.*, *Manuel*, 2016 WL 1070819 at *6 (approving a $10,000 service award).

5. Conclusion

Plaintiffs have a strong case, but the case's success is certainly not guaranteed. Plaintiffs negotiated a good settlement that reflects the case's strengths. Plaintiffs respectfully ask the Court to approve the Settlement.

Respectfully submitted,

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Certificate of Service

I hereby certify that I will electronically file the foregoing, which will then send a notification of such filing (NEF) to the following:

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