UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALYSSA TRUEHART, an individual; BRIGGETTE MUNNIS, an individual; and on behalf of all others similarly situated, Plaintiffs, v. DARTMOUTH CLUBS, INC. dba KING'S INN PREMIER GENTLEMEN'S CLUB, a Massachusetts Corporation; CRAIG J. CABRAL, an individual; CREEP DOE MANAGER, an individual; PAULIE DOE MANAGER, an individual; KIMBERLY DOE MANAGER, an individual; DOE MANAGERS 4-6; and DOES 7-10, inclusive, Defendants.	**Civil Action No.: 1:20-CV-10374-DJC** **COLLECTIVE ACTION** **PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR APPROVAL OF FLSA SETTLEMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Alyssa Truehart ("Truehart"), Briggette Munnis ("Munnis"), Malkiah Cunningham ("Cunningham"), Sienna Barboza ("Barboza"), Michaelia Davis ("Davis"), Cassia DePaula ("DePaula"), Jessica Fernandez ("Fernandez"), Telecia Franklin ("Franklin"), Briana McCants Phan ("Phan"), Abigail Quintal ("Quintal"), Clarissa Sanchez ("Sanchez"), and Sabrina Wright ("Wright") (collectively, "Plaintiffs") were exotic dancers at defendants Dartmouth Clubs, Inc. dba King's Inn Premier Gentlemen's Club and Craig J. Cabral's (collectively, "Defendants") club, King's Inn.[1] *See* Dkt. 1.

On February 24, 2020, plaintiffs Truehart and Munnis filed the instant action as a putative collective action with the following causes of action pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.*: (1) Failure to Pay Minimum Wage Pursuant to FLSA, 29 U.S.C. § 206; (2) Failure to Pay Overtime Wages Pursuant to FLSA, 29 U.S.C § 207; (3) Illegal Kickbacks in Violation of 29 C.F.R. § 531.35; and (4) Unlawful Taking of Tips in Violation of 29 U.S.C. § 203. *See* Dkt. 1. These causes of action were based on Defendants' misclassification of Truehart, Munnis, and other King's Inn exotic dancers as independent contractors.

II. FACTUAL BACKGROUND

Plaintiffs were exotic dancers at King's Inn within the three years prior to the filing of the lawsuit. Truehart worked at King's Inn from approximately 2017 to 2019. Munnis worked at King's Inn from approximately November 2017 to May 2018. Cunningham worked at King's Inn from approximately November 2019 to March 2020. Barboza worked at King's Inn from approximately October 2019 to February 2020. Davis worked at King's Inn from approximately January 2020 to March 2020. DePaula worked at King's Inn from approximately December 2017 to February 2020. Fernandez worked at King's Inn from approximately August 2019 to March

[1] Plaintiffs and Defendants will be referred to collectively as the "Parties."

2020. Franklin worked at King's Inn from approximately April 2017 to December 2019. Phan worked at King's Inn from approximately July 2018 to February 2019. Quintal worked at King's Inn from approximately October 2018 to December 2019. Sanchez worked at King's Inn from approximately October 2017 to March 2019. Wright worked at King's Inn from approximately October 2017 to January 2020. *See* Dkt. 1, 3, 5, 44-45, and 49.

III. THE SETTLEMENT AGREEMENT

Under the Agreements, Defendants have agreed to pay Plaintiffs a gross settlement of $292,000.00. *See* Declaration of John P. Kristensen ("Kristensen Decl.") ¶ 2, Exhibits ("Exs.") 1-12.

The allocations to the individual Plaintiffs are as follows:

PLAINTIFF	GROSS SETTLEMENT AMOUNT
Alyssa Truehart	$50,000.00
Briggette Munnis	$9,000.00
Malkiah Cunningham	$8,000.00
Sienna Barboza	$7,000.00
Michaelia Davis	$3,000.00
Cassia DePaula	$60,000.00
Jessica Fernandez	$25,000.00
Telecia Franklin	$45,000.00
Briana McCants Phan	$20,000.00
Abigail Quintal	$22,000.00
Clarissa Sanchez	$25,000.00
Sabrina Wright	$18,000.00
TOTAL	**$292,000.00**

Plaintiffs worked around four to six hours per shift, paid about $50 in house fees and paid

$10 to $60 in forced tips each shift. Plaintiffs and Defendants disputed the number of shifts worked by Plaintiffs. That played a role in weighing the value of each claim. *See* Kristensen Decl. ¶ 3.

Plaintiffs' counsel has significant experience in litigating employment cases. The settlement amounts and terms resulted in significant resolutions for the Plaintiffs. *See* Kristensen Decl. ¶¶ 6-35.

Plaintiffs' counsel incurred $11,037.54 in costs that are being allocated evenly to the Plaintiffs. Plaintiffs' counsel has a lodestar of $156,799.50[2] and pursuant to the retainer agreements and the release signed by the Plaintiffs, their counsel are entitled to 45% of the settlement. Here, Plaintiffs' counsel, however, are merely seeking $131,400 in attorneys' fees, which is less than their lodestar. Furthermore, Plaintiffs' counsel's hourly rates have been approved in Courts around the county, including most recently in the U.S. District Court for the Southern District of Florida in *Aguiar v. M.J. Peter & Associates, Inc., et al.*, Case No. 2:20-cv-60198-AMC and the U.S. District Court for the Western District of Wisconsin in *Weiss v. Youtos*, Case No. 3:20-cv-00990-slc. Plaintiffs' counsel litigated this case and was prepared to try this matter. The settlement amounts are significant amounts and take into account the amount of time litigated, the ability to reach resolution and collect, which is relevant in this current unknown economic environment. *See* Kristensen Decl. ¶ 5.

In exchange for the consideration described above, Plaintiffs have agreed to dismiss their causes of action for alleged violations of the FLSA claims stemming from Plaintiffs' employment with the Defendants. *See* Kristensen Decl. ¶ 2, Exs. 1-12.

IV. STANDARD FOR APPROVAL OF FLSA SETTLEMENTS

"When employees bring a private action for back wages under the [FLSA], and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness." *Lynn's Food Stores, Inc. v. United States*, 679 F.2d

[2] Plaintiffs' counsel worked with co-counsel Chip Muller of Muller Law, LLC in Rhode Island and Jarret L. Ellzey of Ellzey & Associates, PLLC in Texas.

1350, 1353 (11th Cir. 1982).

Most courts hold that an employee's overtime claim under FLSA is non-waivable and, therefore, cannot be settled without supervision of either the Secretary of Labor or a district court. *See Lynn's Food Stores*, 679 F.2d at 1352-55; *see also Otey v. CrowdFlower, Inc.*, No. 12-cv-05524, 2014 WL 1477630, at *3 & n.5 (N.D. Cal. Apr. 15, 2014) (collecting cases applying *Lynn's Food Stores*); *Singleton v. AT&T Mobility Servs., LLC*, 146 F. Supp. 3d 258, 260 (D. Mass. 2015).

The FLSA was enacted for the purpose of protecting workers from substandard wages and oppressive working hours. *Barrentine v. Arkansas–Best Freight System*, 450 U.S. 728, 739 (1981). Therefore, an employee's right to fair payment cannot be "abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." *Id.* Accordingly, FLSA settlements require the supervision of the Secretary of Labor or the district court. *See Lynn's Food Stores*, 679 F.2d at 1352-53. The FLSA also requires that a settlement agreement include an award of reasonable fees. *See* 29 U.S.C. § 216(b) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and the costs of the action").

"The Court may approve a proposed settlement upon a finding that all parties to the action have agreed to it and that it represents a 'fair and reasonable resolution of a bona fide dispute over FLSA provisions.'" *Drezler v. TEL NEXX, Inc.*, No. 13-cv-13009-ADB, 2019 WL 3947206, at *1 (D. Mass. Aug. 21, 2019) (quoting *Lynn's Food Stores*, 679 F.2d at 1355).

V. THE SETTLEMENTS ARE A REASONABLE COMPROMISE OF BONA FIDE DISPUTES REGARDING FLSA LIABILITY

The Court should approve the settlements because they reflect a reasonable compromise of a bona fide dispute regarding Defendants' alleged FLSA liability. There was no collusion in reaching the Agreement. The Parties were adequately represented by competent counsel

experienced in litigating cases under the FLSA, and the Agreement reached was the result of good-faith, arms' length negotiation between the Parties. Kristensen LLP has tried multiple employment cases and obtained substantial settlements against employers, including against exotic dance clubs in excess of three million dollars in 2020 alone. Kristensen LLP and Ellzey & Associates, PLLC (formerly Hughes Ellzey, LLP) have been appointed class and collective counsel many times during their decades of practice. Muller Law, LLC has tried multiple employment cases and vigorously represented clients in mediations and arbitrations in employment matters. *See* Kristensen Decl. ¶¶ 6-35.

The Parties have strenuously different opinions about the classification of the dancers as employees or independent contractors. The Parties engaged in discovery, including written discovery and depositions to obtain evidence from each other. In addition, Plaintiffs filed a summary judgment motion that was pending at the time the Parties reached this settlement. The Parties were cognizant and aware of each other's arguments and positions pertaining to employee classification. The risk for Defendants was that in fee-bearing cases, with a real likelihood of liability, the attorneys' fees would dwarf the damages.[3]

The FLSA structure was intentionally designed by Congress as a remedial measure to incentivize and encourage private attorneys to pursue lower damage wage and hour claims with clear liability. "[T]he FLSA is a uniquely protective statute," *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 207 (2d Cir. 2015), cert. denied, 136 S. Ct. 824 (2016), and its purposes

[3] Multiple district courts have found an employment relationship and required clubs to pay dancers a minimum wage. *See Harrell v. Diamond A Entm't, Inc.*, 992 F.Supp. 1343, 1348 (M.D. Fla. 1997); *Clincy v. Galardi South Enter., Inc.*, 808 F.Supp.2d 1326, 1346 (N.D. Ga. 2011) (summary judgment); *Stevenson v. Great American Dream, Inc.*, No. 1:12-CV-3359-TWT, 2013 WL 6880921 (N.D. Ga. Dec. 31, 2013) (same); *Berry v. Great American Dream, Inc.*, No. 1:13-CV-3297-TWT, 2014 WL 5822691 (N.D. Ga. Nov. 10, 2014) (Gentlemen's Club collaterally estopped from re-litigating issue that entertainers are independent contractors rather than employees); *Mason v. Fantasy, LLC*, No. 13-CV-02020-RM-KLM, 2015 WL 4512327, at *13 (D. Colo. July 27, 2015); *Verma v. 3001 Castor, Inc.*, No. 13-3034, 2014 WL 2957453, at *5 (E.D. Pa. June 30, 2014): *Levi v. Gulliver's Tavern, Incorporated*, No. 15-cv-216-WES, 2018 WL 10149710 (D.R.I. Apr. 23, 2018) (granting dancer plaintiff's partial summary judgment that they are employees under the FLSA).

"require that it be applied even to those who would decline its protections," *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985). By awarding reasonable fees and costs to prevailing FLSA litigants, "Congress intended to encourage private citizen enforcement of the [FLSA]." *Soler v. G & U, Inc.*, 658 F.Supp. 1093, 1097 (S.D.N.Y. 1987). Indeed, "Plaintiffs' counsel's role as private attorneys general is key to the effective enforcement of these statutes." *Trinidad v. Pret a Manger (USA) Ltd.*, No. 12-cv-6094 (PAE), 2014 WL 4670870, at *12 (S.D.N.Y. Sept. 19, 2014).

The Agreements compensate Plaintiffs for their estimated damages and provide Plaintiffs with the certainty and peace of mind of obtaining a recovery during a time when many people have been unemployed for over a year during the COVID-19 pandemic. King's Inn, for example, has had to temporarily close as a result of the pandemic. Obtaining this relief now would provide Plaintiffs with the ability to obtain a recovery in this matter that would mean much more than obtaining a pyrrhic victory in name alone. *See* Kristensen Decl. ¶ 2, Exs. 1-12.

Counsel for the Parties engaged in mediation with Dennis J. Calcagno and arm's-length settlement discussion, each wary of the other's position as they advocated for their respective clients. In the end, the fruit of their labor was this settlement that provides Defendants with a finality to this matter and Plaintiffs with income they need. There was no fraud or collusion in this matter. The Parties were willing and able to defend their positions through trial. For these reasons, Plaintiffs respectfully request that the Court grant this Motion.

VI. ATTORNEYS' FEES AND COSTS

In an FLSA action, "[t]he court . . . shall, in addition to any judgment awarded to the plaintiff or the plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). "Where a proposed settlement of FLSA claims includes the payment of attorney's fees, the court must also assess the reasonableness of the fee award." *Selk v. Pioneers Mem'l Healthcare Dist.*, 159 F.Supp.3d 1164, 1180 (2016) (quoting *Wolinsky v. Scholastic, Inc.*, 900 F.Supp.2d 332, 335 (S.D.N.Y. 2012)). Ít is well settled that a reasonable

amount of fees is determined pursuant to the 'lodestar' approach,' which involves calculating 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" *Marrotta v. Suffolk County*, 726 F.Supp.2d 1, 4 (2010) (citing *Gay Officers Action League v. Puerto Rico*¸247 F.3d 288, 295 (1st Cir. 2001); *Mogilvesky v. Bally Total Fitness Corp.*, 311 F.Supp.2d 212, 216 (D.Mass. 2004). It is well established that "[t]he starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. The product of these two figures is the lodestar and there is a strong presumption that the lodestar is the reasonable sum the attorneys deserve." *Bivins v. Wrap It Up, Inc*., 548 F.3d 1348, 1350 (11th Cir. 2008) (internal citations and quotation marks omitted). "It is within the Court's discretion to adjust the lodestar figure." *Marrotta,* 726 F.Supp. 2d at 23. "The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward." *Cullens v. Georgia Dep't of Transp*., 29 F.3d 1489, 1492 (11th Cir.1994) (citation omitted); *see also Association of Disabled Americans v. Neptune Designs, Inc*., 469 F.3d 1357, 1359 (11th Cir.2006) ("In calculating a reasonable attorney's fee award, the court must multiply the number of hours reasonably expended on the litigation by the customary fee charged in the community for similar legal services to reach a sum commonly referred to as the 'lodestar.' . . . The court may then adjust the lodestar to reach a more appropriate attorney's fee, based on a variety of factors, including the degree of the plaintiff's success in the suit."); *Reynolds v. Alabama Dep't of Transp*., 926 F.Supp. 1448, 1453 (M.D. Ala. 1995) ("After calculating the lodestar fee, the court should then proceed with an analysis of whether any portion of this fee should be adjusted upward or downward.").

Here, Plaintiffs are requesting approval of an allocation of 45% of the settlement amount plus costs in accordance with the Plaintiffs' retainer agreements, which is less than the lodestar amount. Concurrently with this Motion, Plaintiffs' counsel will submit detailed billing entries demonstrating that a substantial amount of time and resources was needed to achieve this

settlement revealing a lodestar amount of $156,799.50 in attorneys' fees. Further, this was a hard-fought case with experienced opposing counsel who were ready to try this case on the merits in trial. *See* Kristensen Decl. ¶¶ 5-35, Exs. 13-17.

While we recognize that such a percentage in a class action would be of concern in a common fund settlement or even a hybrid class or collective action, such is not the case here where the action is a standalone FLSA collective action. Additionally, Plaintiffs' counsel took this matter on a contingency fee basis facing uncertainty as to whether any recovery would be achieved at Plaintiffs' counsel's cost. Plaintiffs' counsel spent considerable time and effort litigating this matter in good faith with the possibility of no recovery, which is oftentimes common in contingency fee cases. It is widely known that in some cases there is no recovery while in others there is a recovery and a multiplier on counsel's lodestar. Plaintiffs' counsel incurred costs of $11,037.54. Thus, the proposed allocation of attorney's fees does not undermine the fairness or reasonableness of the amounts received by Plaintiffs for purposes of this FLSA settlement.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court approve the Agreements and enter the proposed Order filed concurrently herewith.

Dated: August 11, 2021

/s/ John P. Kristensen

John P. Kristensen
California Bar No. 224132
(*Pro Hac Vice*)
KRISTENSEN LLP
12540 Beatrice Street, Suite 200
Los Angeles, California 90066
Telephone: (310) 507-7924
Fax: (310) 507-7906
john@kristensenlaw.com

Chip Muller
(BBO#672100)
MULLER LAW LLP
47 Wood Avenue
Barrington, RI 02806

Telephone: (401) 256-5171
Fax: (401) 256-5025
chip@mullerlaw.com

Jarrett L. Ellzey
Texas Bar No. 24040864
(*Pro Hac Vice*)
ELLZEY & ASSOCIATES, PLLC
1105 Milford Street
Houston, TX 77066
Telephone: (713) 554-2377
Fax: (888) 995-3335
jarrett@hughesellzey.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on Wednesday, August 11, 2021, a true and correct copy of the attached **PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR APPROVAL OF FLSA SETTLEMENT** was served via CM/ECF on all participants of record upon the following parties pursuant to Fed. R. Civ. P. 5:

Patrick T. Matthews, Esq.
B.B.O.# 629498
Brian M. Tavares
B.B.O.# 685949
Coastal Legal Affiliates, P.C.
P.O. Box 1870
Fall River, MA 02722
Tel: (508) 676-6900
Fax: (508) 676-9908
Email:
ptmatthews@fallriverattorneys.com
btavares@fallriverattorneys.com

Counsel for Defendants

/s/ John P. Kristensen
John P. Kristensen