IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

LAUREN HERINGTON, Individually, and on Behalf of All Others Similarly Situated,	)	
Plaintiffs,	)	
	)	**Case No. 15-cv-1152**
v.	)	
MILWAUKEE BUCKS, LLC	)	
Defendant.	)	

PLAINTIFFS' UNOPPOSED MOTION AND MEMORANDUM IN SUPPORT OF APPROVAL OF FLSA COLLECTIVE ACTION SETTLEMENT

Plaintiff Lauren Herington, individually and on behalf of all others similarly situated ("Plaintiff" or "Lauren"), by and through her undersigned counsel, respectfully submit this Unopposed Motion and Memorandum of Law in Support of Approval of FLSA Collective Action Settlement ("Motion") and further state as follows:

I. PROCEDURAL HISTORY

On September 24, 2015, Named Plaintiff Lauren Herington filed a collective action complaint against Defendant Milwaukee Bucks, LLC ("Defendant" or the "Bucks"), alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, and Wisconsin state wage laws. Specifically, Plaintiff alleged that Defendant failed to pay Plaintiff and other Milwaukee Bucks Dancers at minimum wage for all hours worked and overtime compensation for any hours worked in excess of forty (40) each week in violation of the FLSA. *See* 29 U.S.C. § 207. As a result, Plaintiff sought damages for all compensation owed.

The parties' extensive discovery included the following: (a) the exchange of Rule 26(a)

disclosures; (b) the exchange of written discovery including interrogatories and document production requests to Plaintiff and one Opt-in Plaintiff; (c) review of thousands of pages of documents and data; and (d) the depositions of three defense witnesses, including Defendant's Fed. R. Civ. P. 30(b)(6) witness.

In the summer of 2016, the Parties began exploring possible resolution. While Plaintiff believed her case was strong, including being able to maintain final FLSA certification, her likelihood of success was far from certain. Thus, to facilitate productive settlement discussions, Defendant provided Plaintiff's counsel with attendance sheets, handbooks, and other materials on an "attorneys eyes only" basis. These documents helped Plaintiff calculate estimated damages and craft a demand for settlement. The Parties subsequently engaged in mediation before a private mediator, Deborah Haude, on August 18, 2016, but were unable to come to a resolution at that time. Nevertheless, the Parties' counsel continued to engage in settlement discussions. On January 4, 2017, the Parties reached a mutual agreement for settlement.

II. STANDARD GOVERNING MOTIONS TO APPROVE FLSA SETTLEMENTS

In the Seventh Circuit, settlements of FLSA claims must be approved by a Court of competent jurisdiction. *See, e.g., Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986) (citing *Lynn's Food Stores, Inc. v. Dep't of Labor*, 679 F.2d 1350, 1352-53 (11th Cir. 1982)); *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, No. 00 C 5755, 2001 WL 1403007, at *6 (N.D. Ill. Nov. 7, 2001). An employee may compromise a claim under the FLSA pursuant to a court-authorized settlement of an action alleging a violation of the FLSA. *E.g. Lynn's Food Stores, Inc.*, 679 F.2d at 1355. When reviewing a proposed FLSA settlement, the district court must scrutinize the settlement for fairness and decide whether the proposed settlement is a "fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Id.* at 1353, 1355. If a

settlement in an employee FLSA suit reflects a reasonable compromise over issues, such as FLSA coverage or computation of back wages that are actually in dispute, the court may approve the settlement "in order to promote the policy of encouraging settlement of litigation." *Id.* at 1354.

III. ARGUMENT

The settlement reached by the Parties represents a fair, just and reasonable resolution of the claims alleged by Plaintiff under the FLSA and any remaining disputes between the Parties. The settlement reached is the result of extensive negotiations between the Parties to resolve this matter. The settlement figures agreed upon bear a reasonable and fair relationship to the amounts alleged by Plaintiff, and also take into account the specific risks and uncertainties associated with this litigation. The settlement was negotiated at arm's length by experienced counsel concerning bona fide disputes between their clients.

A. Bona Fide Disputes Exist

The settlement of the instant action involves a bona fide dispute. Plaintiff alleged that she did not receive proper minimum wage for all hours worked each week and/or proper overtime compensation for all hours worked over forty (40) per week. Defendant denied Plaintiff's allegations. It maintained that it provided sufficient payment to all Milwaukee Bucks Dancers, including Plaintiff. Had Plaintiff prevailed on her motions for conditional certification, class certification, and summary judgment or at trial, Defendant would ultimately be faced with a monetary verdict in favor of Plaintiff, as well as an obligation to pay her legal fees and costs incurred. If Defendant prevailed, Plaintiff would not recover any damages or attorneys' fees or costs, and Defendant would seek the recovery of certain statutory costs. In sum, the Court could have ruled for or against either side, or find that disputed fact questions were present necessitating a trial.

B. The Settlement is Fair and Reasonable

In determining whether a settlement is fair and reasonable, courts have considered non-exclusive factors such as: "(1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the Plaintiffs to the settlement; (3) the stage of the proceeding and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the action through the trial; (7) the ability of the defendants to withstand a larger judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of all the risks of litigation." *Butler v. American Cable & Telephone, LLC*, No. 09 CV 5336, 2011 WL 4729789, at *9, n.9 (N.D. Ill. Oct. 6, 2011).

The Parties' settlement is fair and reasonable and meets all applicable factors considered by courts. The settlement appropriately factored in the complexity, risk, expense, likely duration of the litigation, and range of reasonableness of the settlement fund in light of the best possible recovery. *See* Exhibit 1 (Settlement Agreement and Release) § 2. All Parties recognized the risks inherent in proceeding with the litigation in light of the issues in this case. Defendant recognized its potential exposure if Plaintiff prevailed on conditional certification, class certification, and summary judgment or at trial. Plaintiff recognized the risk that she could lose conditional certification, class certification, on summary judgment or at trial, and not recover any of her alleged damages.

Moreover, the settlement is appropriate at this stage of the proceedings and given the amount of discovery completed. As set forth above, the Parties have engaged in litigation dating back to 2015. Aside from Plaintiff's independent investigation, the Parties exchanged Rule 26(a) disclosures; exchanged written interrogatories; conducted depositions of three (3) individuals; and

exchanged and reviewed hundreds of pages of written discovery, including voluminous production of Defendants' written policies and procedures, payroll and time keeping data, and other electronically stored information (ESI). The Parties thus had sufficient information to assess the risks of assessing liability and damages.

Additionally, the settlement is well within the range of possible recovery. As in all wage and hour claims, particularly in the collective action context, the nature and amount of recoverable damages was uncertain. Even if a trier of fact ultimately found liability, a range of possible damages existed depending on factors including but not limited to the Parties and their witnesses' credibility, any alleged set-offs for overpayments, the applicable statute of limitations, and Defendant's knowledge, willfulness, and good faith.

While Plaintiff was confident in her claims, Defendant would have argued that Plaintiff received proper compensation for all hours worked, that no putative class member worked more than forty (40) hours in a given week, and that Plaintiff's claims were unique and individualized. In other words, Plaintiff faced multiple challenging defenses. Taking these considerations into mind, the amount of the settlement is appropriate in relation to the potential recovery.

The settlement is based on the number of weeks worked by each Plaintiff during the liability period, which takes into account the applicable three-year statute of limitations period. Plaintiff created computer formulas and prepared Excel spreadsheets to calculate damages for each Plaintiff based upon several different assumptions. The individual amounts that each Plaintiff will receive are set forth in the Settlement Agreement attached hereto as Exhibit 1. In addition to back pay, the amounts include an additional $10,000.00 service payment to the

Named Plaintiff, who devoted considerable time and expense (including answering written discovery), took risks, and whose efforts have helped achieve a significant result.

Based on the aforementioned factors, the Parties conclude that a settlement on the terms set forth in the Settlement Agreement is fair, reasonable, adequate, in the best interests of the Parties, and not worth the costs and risks associated with a trial. Additionally, the Parties have agreed that Defendant will pay Plaintiff's counsel $115,000.00 in attorneys' fees and recoverable costs, a sum representing a small fraction of the several hundred hours expended by Plaintiff's counsel in the prosecution of this action. The Parties agree this is a more than reasonable and fully-warranted fee under the circumstances in light of the risks taken, significant time expended, and benefits to the Milwaukee Bucks Dancers.

IV. SETTLEMENT APPROVAL PROCEDURE

The Agreement requires the occurrence of all the following events: (a) execution of the Agreement by the parties; (b) submission of the Agreement by the parties to the Court for preliminary approval of an FLSA settlement; (c) entry by the Court granting preliminary approval of the Agreement under FLSA Section 216(b); (d) Court approval of the method of distribution and the form and content of the Notice of the settlement; and, (e) filing of a joint motion for final approval along with the Court-approved settlement administrator's declaration that the Notice to the settlement class has been disseminated in accordance with the Court's Order. Upon final approval by the Court, the lawsuit will be dismissed without prejudice. Defendants agree that within twenty-one (21) days after the Court's final approval, Defendants shall issue payments in accordance with the Agreement.

V. PLAN OF SETTLEMENT ADMINISTRATOR

The parties agree to cooperate in the settlement administration process and to make all

reasonable efforts to control and minimize the costs and expenses incurred in the administration of the settlement. Within seven (7) calendar days after the Court grants preliminary approval of the Agreement described herein, Defendants shall provide the settlement administrator and Plaintiff's Counsel with a list of Class Members and their last know home addresses, email addresses and telephone numbers according to Defendants' business records.

Within seven (7) calendar days after receiving the above-mentioned list of Class Members, the settlement administrator shall send the Notice and Opt-in Form attached as Exhibits B and C to the Settlement Agreement to the Class Members via email and first class U.S. mail, postage prepaid. If any mailing is returned as undeliverable with an indication of a more current address, the settlement administrator will mail the Notice to the new address. If any such mailing is returned as undeliverable without any indication of a more current address, the settlement administrator will undertake reasonable efforts to identify a current address and, if one is identified, will mail the Notice to the new address. Additionally, within three (3) days of a request from the settlement administrator, Defendants will provide the settlement administrator with requested social security numbers to assist in locating Class Member addresses.

Class Members who want to participate in the settlement must opt-in by following the instructions on the Notice. To be valid, the opt-in forms must be filled out, signed, and mailed to the settlement administrator whose address is listed on the Notice, post-marked by the date specified in the Notice sixty (60) calendar days after the initial mailing of the Notice. Within three (3) business days after receiving an opt-in form, the settlement administrator shall provide counsel for the parties via electronic mail the executed opt-in form for purposes of filing the forms with the Court. The settlement administrator shall retain the opt-in forms and the envelopes showing the postmark of the form and permit inspection and copying of the same by counsel for

the parties at their request. Opt-in forms shall be disregarded if they are not post-marked on or before the applicable deadline. Class Members who do not submit a timely and valid opt-in form in the manner described herein shall not be deemed bound by this Agreement and shall not be affected by it. No later than ten (10) calendar days after the opt-in deadline, the settlement administrator shall provide the parties with a declaration that includes a complete list of all individuals who have timely opted into the settlement.

VI. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED

Under the FLSA, an employee may pursue a collective action on behalf of herself and "other employees similarly situated." 29 U.S.C. § 216(b); *e.g.*, *Girolamo v. Cmty. Physical Therapy & Assocs.*, No. 15 C 2361, 2016 WL 3693426, at *2 (N.D. Ill. July 12, 2016); *Terry v. TMX Furniture*, No. 13 C 6156, 2014 WL 2066713, at *2 (N.D. Ill. May 19, 2014). To pursue claims as part of a collective action, employees must give consent to join the action filed on their behalf. 29 U.S.C. § 216(b); *Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 441 (N.D. Ill. 1982). Courts apply a "less stringent" standard for conditional certification pursuant to 29 U.S.C. § 216(b) than the much higher threshold plaintiffs are held to in demonstrating commonality and predominance in certification of a class action under Rule 23. *E.g.*, *Vaughan v. Mortgage Source*, No. CV 08-4737(LDW)(AKT), 2010 WL 1528521, at *4 (E.D.N.Y. Apr. 14, 2010) (citation omitted); *Jirak v. Abbott Labs., Inc.*, 566 F. Supp. 2d 845, 847 (N.D. Ill. 2008). Plaintiffs need only make "a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." *Flores v. Lifeway Foods, Inc.*, 289 F. Supp. 2d 1042, 1045 (N.D. Ill. 2003) (citation omitted). "Courts interpret the 'similarly situated' requirement 'leniently.'" *Sylvester v. Wintrust Financial Corp.*, No. 12 C 01899, 2013 WL 5433593, at *3 (N.D. Ill. Sept. 30, 2013) (citations omitted); *Howard v. Securitas Sec. Servs.*

USA, Inc., No. 08 C 2746, 2009 WL 140126, at *5 (N.D. Ill. Jan. 20, 2009) ("[T]he court looks for no more than a 'minimal showing' of similarity.").

Plaintiffs meet their low burden of proof by making some showing that there are other employees who are similarly situated with respect to their job requirements and with regard to their pay provisions. *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010). Certification of an FLSA collective is warranted where, as here, the Parties have stipulated and agreed that final certification under FLSA Section 216(b) is appropriate. *See* Ex. A at 6. Accordingly, the Parties propose the following class for settlement purposes only:

> All individuals who were employed by Milwaukee Bucks, LLC, or any of its former or present parent entities, subsidiaries, or joint ventures as Milwaukee Bucks Dancers from September 12, 2012, through July 31, 2015.

VII. PROPOSED NOTICE IS FAIR AND ADEQUATE

Collective "opt-in" actions depend on "employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 172 (1989). Supervised notice also prevents "misleading communication." *Id*. at 172.

The proposal for notice to potential opt-in Plaintiffs meets the requirements of "timeliness, accuracy and information." *Id.* The proposed Notice informs similarly-situated employees of this action and gives them the opportunity to join. It also accurately describes their legal claims, their rights and their options. Finally, the Notice provides clear instructions on how to "opt-in" to the lawsuit and sets forth the prohibition against any retaliation for participating in the settlement.

The parties stipulate and propose that the Notice Regarding Proposed Settlement of Collective Action form be sent via email and first class U.S. mail to all putative class members.

The parties request that potential opt-in Plaintiffs interested in participating in this lawsuit be provided sixty (60) days from the date of mailing to "opt-in" to this case. The parties' proposed Notice is fair and accurate and should be approved for immediate distribution.

VIII. MOTION FOR FINAL APPROVAL

At least seven (7) calendar days prior to the Final Approval Hearing, the parties shall file with the Court: (a) a joint motion for final approval of settlement; and (b) a copy of the administrator's declaration. At the Final Approval Hearing, the parties will ask the Court to finally approve the Agreement, approve the amounts allocated for Class Counsel's fees and costs and the enhanced award for the Named Plaintiff, and dismiss the case. Counsel for the parties shall jointly present the Court with a proposed Final Judgement and Final Approval Order to accomplish that purpose.

IX. CONCLUSION

For all the above reasons, the Parties respectfully request an order: (1) approving the Settlement Agreement, the payment to Plaintiff, and the payment of attorneys' fees and costs set forth therein; (2) finding that the Named Plaintiff is an adequate representative; and (3) setting this matter for final approval approximately 75-90 days from this order.

Dated: April 26, 2017

Respectfully submitted,

/s/ Ryan F. Stephan

Ryan F. Stephan
Stephan Zouras, LLP
205 N. Michigan Avenue, Suite 2560
Chicago, Illinois 60601
Tel. 312-233-1550
rstephan@stephanzouras.com
One of Plaintiff's Attorneys

CERTIFICATE OF SERVICE

I, the attorney, hereby certify that on April 26, 2017, I electronically filed the attached with the Clerk of the Court using the ECF system which will send such filing to all attorneys of record.

/s/ Ryan F. Stephan