**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| JESSICA BERGER, ET AL,<br><br>Plaintiffs,<br>v.<br><br>PERRY'S STEAKHOUSE OF ILLINOIS, LLC., D/B/A PERRY'S STEAKHOUSE AND GRILLE, ET AL,<br><br>Defendants. | Case No: 1:14-cv-08543<br><br>Judge: Thomas M. Durkin |

# JOINT MOTION FOR APPROVAL OF SETTLEMENT

PLAINTIFFS JESSICA BERGER, et al ("Plaintiffs"), and DEFENDANTS PERRY'S STEAKHOUSE OF ILLINOIS, L.L.C. ("PSI"), et al, collectively referred to as "the Parties," by and through their respective attorneys, respectfully move this Court to approve their settlement, attached to this Motion as Exhibit "A." In support of this Motion, the Parties state as follows:

## I. INTRODUCTION

The Parties move this Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure to give preliminary approval to the terms of settlement agreed to by the Parties which resolves all wage-related claims of Plaintiffs and the class members who do not opt-out of the Settlement. The Parties and their counsel believe the Settlement to be fair, reasonable, and equitable, resolving *bona fide* disputes between them as to all claims made by the Settlement Recipients against PSI from November 2013 through March 15, 2018 for all allegedly due unpaid wages, and all related alleged damages, including but not limited to all alleged liquidated damages, interest, and penalties.

## II. THE HISTORY OF THE CASE

On October 29, 2014, Plaintiffs filed on behalf of themselves and other servers similarly situated, *see* ***Dkt.* No. 1**, a 5-count Complaint against PSI alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"); Illinois Minimum Wage Law, 820 ILCS § 105/1 *et seq.* ("IMWL"); and other Illinois laws. The Parties engaged in a prolonged contest over personal jurisdiction and the proper entities to be sued and the Complaint was amended several times. Ultimately the claims in question were as set forth in Plaintiffs' Fourth Amended Complaint ("Complaint"), filed with the Court on March 7, 2016, ***Dkt. No*. 121**. As ultimately amended, Plaintiffs sought collective action relief as to their FLSA claims and FED.R.CIV.P. 23 class action certification and relief for all state law claims.

The Complaint contained the following causes of action:

(a) A Credit Card Offset Fee ("CCOF") claim regarding PSI's alleged improper assessment of offsets to Plaintiffs' credit card tips;

(b) A Tip Pool claim regarding PSI's alleged improper handling of tip pool distributions withheld from Plaintiffs' tips;

(c) A Notice claim regarding PSI's alleged failure to provide proper notice of the tip pool to the servers as required by the FLSA;

(d) A Side Work claim regarding PSI's alleged failure to compensate Plaintiffs properly for work performed that was outside of what is generally considered "side work" and requiring them to perform this "side work" in excess of 20% of each work week;

(e) A Breach of Contract claim; and

(f) An Unjust Enrichment claim.

On March 12, 2018, the Court granted Plaintiff's Motion for Partial Class/Collective Certification under FRCP 23 and Section 216(b) of the FLSA on Plaintiffs' CCOF, Notice, Side Work and Unjust Enrichment claims. *See* ***Dkt. No*. 239**. Plaintiffs issued notice to 107 individuals initially identified by PSI as present or former servers for PSI from the time it opened the Oak Brook,

Illinois, location in November 2013 until March 15, 2018. A total of 29 individuals timely submitted consents to opt into the Lawsuit. Four individuals opted out. During discovery the claims of 4 additional plaintiffs were dismissed by the Court. In addition, it was determined that certain individuals were mis-identified as servers and certain other additional individual were identified as properly belonging to the Class. In total, the Settlement Class now includes 105 members.

At the close of discovery, the Parties each filed motions for partial summary judgment. Plaintiffs filed for judgment on only their CCOF and Side Work claims. Defendants' sought summary judgment on all claims. On December 23, 2019, the Court ruled in its Memorandum Opinion and Order, ***Dkt. No*. 348**, that:

a) Plaintiffs were entitled to summary judgment on their Credit Card Offset Fee claims;

b) Plaintiffs were also entitled to partial summary judgment on their request for FLSA liquidated damages on their CCOF claim; specifically, the Court found that Plaintiffs were entitled to recover Liquidated Damages, but were not entitled to summary judgment for a willfulness violation;

c) Plaintiffs were not entitled to partial summary judgment on their Side Work claims;

d) PSI was not entitled to summary judgment on Plaintiffs' Notice or Side Work claims;

e) PSI was entitled to partial summary judgment on Plaintiffs' Tip Pool claim; and

f) PSI was entitled to partial summary judgment on Plaintiffs' Breach of Contract and Unjust Enrichment claims.

In short, the Court left it to a jury to decide Plaintiffs' (1) FLSA Notice claim, (2) FLSA and IMWL Side Work claims, (3) certain aspects of the common law claims, (4) the CCOF claim as to Defendant Cortes, and (5) whether PSI's actions as to the FLSA CCOF claim were willful. The case was set for trial in January 2021. PSI indicated that it would appeal the Court's ruling on the CCOF Liquidated Damages ruling and any of the other remaining issues if PSI lost them at trial. Because both Parties recognize the risk accompanying the questions of whether Plaintiffs or

PSI would ultimately prevail at trial on the issues listed above, the parties have determined that a compromise of the Settlement Class Members' claims is warranted.

## III. THE PARTIES' INVESTIGATION OF THE CLAIMS

At each step of the Lawsuit, the Parties vigorously and exhaustively investigated and litigated the case. Before and after filing their Complaint, Plaintiffs interviewed and obtained declarations from multiple putative Class Members. The parties engaged in hotly contested motion practice and PSI ultimately produced tens of thousands of documents, including time reporting and payroll records. Along with their consulting and computer expert, Plaintiffs' counsel reviewed and analyzed thousands of pages of documents and time reporting and payroll records produced by PSI. Plaintiffs conducted a Rule 30(b)(6) deposition and five fact witness depositions. PSI deposed twelve Class Members. Both Parties have fully analyzed the claims of the class members and engaged in numerous exchanges of potential damage calculations.

Against the backdrop of the Court's summary judgment rulings and the discovery conducted, the Parties possess sufficient information to agree to a settlement. On September 18, 2020, after 6 years of exhaustive litigation, PSI and Plaintiffs, through their Counsel and on behalf of the Settlement Class, reached an agreement in principle to settle the Lawsuit subject to the Court's preliminary and final approval. After many rounds of negotiations to come to agreement on all the intricate details of the Agreement, the parties have prepared a written Settlement Agreement and Release of Claims, attached as Exhibit A.

## IV. THE SETTLEMENT AGREEMENT

For purposes of preliminary approval, the following briefly summarizes the Agreement's terms:

1. The Settlement Proceeds. PSI has agreed to pay a total amount of FOUR HUNDRED FORTY-FIVE THOUSAND DOLLARS ($445,000.00) ("Settlement Proceeds") and an

additional amount payable to Class Counsel for attorneys' fees. Such attorneys' fees shall either be negotiated by the Parties or determined by the Court as set forth in the Agreement. The Settlement Proceeds will be administered by Plaintiffs' counsel.

2. The Allocations to Settlement Sub-Classes.

A. The Credit Card Offset Fee Sub-Class. This sub-class is actually divided into two sub-classes; a Rule 23 sub-class under the IMWL and a collective sub-class under 216 of the FLSA. Members of the IMWL CCOF Sub-Class include all individuals who worked as servers at PSI at any time from November 12, 2013, to October 14, 2014 ("CCOF Time Period"), and who were subject to PSI's practice of deducting a credit card offset fee to convert server's credit card tips into cash on a nightly basis , other than the eight (8) individuals identified above who opted out or were dismissed from the case. Each member of this sub-class will be compensated for each hour they worked at PSI as a server during the CCOF Time Period, at the rate of $3.30 per hour, reflecting the difference between the Illinois minimum wage of $8.25 (the rate at which Plaintiffs claim they should have been paid) and the Illinois Tip Credit Rate of $4.95. The sum total of base wages to be paid on this claim is ONE HUNDRED TWENTY-ONE THOUSAND, FOUR HUNDRED TWENTY-FIVE DOLLARS AND FIFTY-EIGHT CENTS ($121,425.58).

1. IMWL Interest. In addition, each IMWL sub-class member will be paid 2% per month of their outstanding base wage total for each month these wages remained owing through April 30, 2020, the approximate date agreement between the Parties was reached on this claim. The calculations are set forth in Attachment "D" to the Settlement Agreement. The total of IMWL interest

payments is ONE HUNDRED SEVENTY-FIVE THOUSAND, FOUR HUNDRED ELEVEN DOLLARS AND NINETY-EIGHT CENTS ($175,411.98). The total recovery on the IMWL CCOF claim is thus **$296,837.56**.

2. The FLSA CCOF Sub-Class. This sub-class consists of those 16 individuals who are members of the IMWL sub-class who also timely "opted-in" to the FLSA claims. Members of this sub-class will receive their full base wage recovery of $3.30 for each hour worked under the IMWL claim described above. Because these Recipients are barred from double recovery of base damages for the same damage time period, the only additional recovery for the FLSA sub-class is for Liquidated Damages (double base wages) as provided for by the FLSA. For settlement purposes, this FLSA sub-class will receive as a group a total of TWENTY-TWO THOUSAND, SIX HUNDRED FORTY-SIX DOLLARS AND NINETY-THREE CENTS (**$22,646.93**) as non-willful liquidated damages. This total sum represents 50% of the total number of hours each of the FLSA CCOF sub-class members worked as a server during the eligible time period of November 12, 2013, to October 14, 2014, multiplied by $3.30. As set forth in Attachment "E" to the Settlement Agreement, each eligible FLSA CCOF Sub-Class member will receive a *pro rata* share of the above total, based upon the ratio of each individual's server hours worked compared to the total hours of server work by this Sub-Class during the CCOF Time Period.

B. The Notice Sub-Class. The Notice sub-class consists only of those persons

employed by PSI as servers from November 13, 2013, to December 31, 2016, who were paid by Defendants at the sub-minimum wage tip credit rate *and* timely opted into the collective action. Since each of these individuals has received full compensation of $3.30 for all hours worked during the CCOF Time Period, and are therefore barred from double recovery of base wages, the eligible time period for the Notice sub-class starts on October 14, 2014 (the end of the CCOF Time Period), and ends on December 31, 2016 ("Notice Time Period"), the date after which the Parties agree that PSI was in full compliance with the FLSA Notice requirements. For settlement purposes, this Sub-Class will receive as a group a total of TWENTY-THREE THOUSAND, SEVEN HUNDRED TWENTY-SEVEN DOLLARS AND THIRTY CENTS ($23,727.30), representing 44.29% of the total number of hours each sub-class member worked as a server during the applicable time period. Each member of the Notice Sub-Class will receive a *pro rata* share of this total based upon the ratio of each individual's server hours worked compared to the total hours of server work by this Sub-Class during the Notice Time Period.

C. The Side Work Sub-Class. This sub-class is defined as all persons employed by PSI as servers from October 14, 2014, through March 15, 2018, who were paid at the sub-minimum wage, tip credit rate, and performed what PSI assigned as "side-work."[1] For settlement purposes this sub-class will actually be divided into 2 sub-classes based on the time period each server worked.

1. 10/14/14- 12/31/17. Each of these Sub-Class Three Settlement Recipients

[1] Again, to avoid double recovery, Sub-Class Three Settlement Recipients will only recover for time during which they are not also receiving a recovery as a member of Sub-Classes One or Two.

shall be eligible to receive a *pro rata* share of FIFTY-THREE THOUSAND, THREE HUNDRED FIFTY-SIX DOLLARS AND EIGHTY-TWO CENTS ($53,356.82). This total sum was negotiated as a compromise of the total number of hours each Sub-Class Three Settlement Recipient was available to do "side work" when the restaurant opened, multiplied by $3.30. The *pro rata* amount each Sub-Class Three Settlement Recipient for this time period is to receive for this portion of their Side Work claim is set forth in Attachment "F" to the Settlement Agreement.

2. 1/1/18- 3/15/18. Each of these Sub-Class Three Settlement Recipients shall be eligible to receive a *pro rata* share of THREE THOUSAND, SEVEN HUNDRED FORTY-FIVE DOLLARS AND TWENTY-TWO CENTS ($3,745.22). This total sum was negotiated as a compromise of 20% of all hours worked by each server during this time period, multiplied by $3.30. The amount each Sub-Class Three Settlement Recipient for this time period is to receive for this portion of their Side Work claim is set forth in Attachment "G" to the Settlement Agreement.

3. Additional Allocations of the Settlement Proceeds. In addition to the allocations to the Settlement Class, Class Representatives Jessica Berger and Timothy Rendack will each receive $5,000 for their services in connection with the prosecution and settlement of the Lawsuit. The parties have agreed that Class Counsel will receive reimbursement of their costs and expenses in the total amount of $34,686.17.

4. Summary of Additional Terms of the Agreement.

A. Payment of Attorneys' Fees, Costs and Expenses. The Parties have agreed

to follow the procedures set forth in FRCP 54 and NDIL Local Rule 54.3 to determine Class Counsel's fee. If the Parties do not reach an agreement on the amount to be paid to Class Counsel for attorneys' fees by the time the Court is prepared to enter its Final Approval of Settlement Agreement, the Court will enter an order as to all other matters and reserve the issue of attorneys' fees for the Court to decide. The Parties have expressly agreed that if they do not reach an agreement on their own, that the Court will decide the matter and each Party has waived their right to appeal that decision by the Court. Dismissal of the Lawsuit will not be entered until such time as the Court enters its order on the payment of fees.

B. Release of Claims and Other Consideration Provided by Plaintiffs. The Settlement Agreement provides that Defendants will be provided general releases from the Named Plaintiffs and all Opt-In Settlement Recipients , together with an agreement from these Recipients not to disparage any of the Releasees.

C. Notice. The Agreement sets forth the terms for sending out Notice of Settlement to all Class members, providing for the opportunity to opt-out and to object prior to a scheduled fairness hearing. A copy of the proposed Notice to class members is set forth in Attachment "H" to the Settlement Agreement.

D. Distribution of Awards. The Agreement also provides terms and conditions for the distribution of the Settlement awards, locating missing plaintiffs, distributing awards initially granted to class members who cannot be located or otherwise have lost entitlement to the award, and dealing with newly discovered class members,

## V. APPLICABLE LEGAL STANDARD

Under Rule 23(e), settlement of a class action may be accomplished only with approval of the court. In this regard, courts utilize a two-step process which includes notice to class members, the opportunity for them to opt out of and/or object to the settlement, and a fairness hearing to ensure that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P 23(e); *see also Reynolds v. Beneficial Nat. Bank,* 288 F.3d 277, 279 (7th Cir.2002) and *Armstrong v. Bd. of Sch. Dirs. of Milwaukee,* 616 F.2d 305, 314 (7th Cir.1980), *overruled on other grounds by Felzen v. Andreas,* 134 F.3d 873 (7th Cir.1998)).

At the preliminary approval stage, "the court's task is merely to 'determine whether the proposed settlement is within the range of possible approval,' not to conduct a full-fledged inquiry into whether the settlement meets Rule 23(e)'s standards." *American Intern. Group, Inc. v. ACE INA Holdings, Inc.,* 07 CV 2898, 09 CV 2026, 2011 WL 3290302, *6 (N.D. Ill. Jul 26, 2011) (quoting *Armstrong,* 616 F.2d at 314). The court should consider: (1) the strength of plaintiffs' case compared to the terms of the proposed settlement; (2) the likely complexity, length, and expense of continued litigation; (3) the amount of opposition to settlement among affected parties; (4) the opinion of competent counsel; and (5) the stage of the proceedings and the amount of discovery completed. *In re AT & T Mobility Wireless Data Servs. Sales Litig.,* 270 F.R.D. 330, 346 (N.D.Ill.2010).

As for collective actions brought under the FLSA, district courts in this Circuit routinely require court approval of FLSA settlements. *See, e.g., Paredes v. Monsanto Co.*, No. 4:15-CV-088 JD, 2016 WL 1555649, at *1 (N.D. Ind. Apr. 18, 2016); *Adams v. Walgreen Co.*, No. 14-CV-1208-JPS, 2015 WL 4067752, at *1 (E.D. Wis. July 2, 2015); *Hernandez v. PeopleScout, Inc.*, No. 12 C 1228, 2012 WL 3069495, at *3 (N.D. Ill. July 24, 2012); *O'Brien v. Encotech Const. Servs.,*

*Inc.*, 183 F.Supp.2d 1047, 1050 (N.D. Ill. 2002). A plaintiff may compromise a claim under the FLSA pursuant to a court-authorized settlement of an action alleging a violation of the FLSA. *See e.g. Lynn's Food Stores, Inc. v. Dep't of Labor*, 679 F.2d 1350, 1355 (11th Cir. 1982). Courts routinely approve FLSA settlements, including those brought on a class or collective basis, when they are reached as a result of contested litigation to resolve bona fide disputes. *Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, No. 16 Civ. 3571, 2016 WL 5109196, at *1 (N.D. Ill. Sept. 16, 2016); *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982).

## VI. THE PROPRIETY OF THE SETTLEMENT AGREEMENT

A presumption of fairness should attach to the proposed settlement. *See Lynn's Food Stores, Inc.*, 679 F.2d at 1354 (recognizing that courts rely on the adversarial nature of a litigated FLSA case resulting in settlement as an indication of fairness). The settlement set forth herein was achieved after extensive negotiations between the Parties. Should this matter have continued, the Parties would have proceeded with trial and would have incurred additional litigation and appellate costs.

Moreover, the Parties' settlement amounts are based upon either a calculation of each eligible individual class member's damages based upon actual hours worked, or a reasonable compromise taking into account the facts and circumstances relating to all pending claims.

Specifically, in light of the Court's summary judgment opinion, all individuals who performed work as servers from the opening of PSI's restaurant in November 2013 until the discontinuation of the credit card offset fee in mid-October 2014 are being compensated in full for all hours worked at the statutory rate of $3.30 per hour. Because of the operation of the IMWL 2% penalty provision, and the passage of time, such individuals are also being compensated for the

accrual of statutory penalties through April 30, 2020, in amounts that more than double the "base wage" recovery of those Recipients. In addition, a portion of the overall payment being made by PSI to eligible CCOF claimants includes an amount for liquidated damages to be distributed to such eligible Recipients, as recited above. In light of PSI's position concerning the propriety of an award of liquidated damages, the immediate payment of 50% of the statutory liquidated damages to these Opt-In plaintiffs in consideration of PSI's foregoing any appeal of that ruling is a very reasonable compromise.

The Notice claim is only available under the FLSA and its merits were also vigorously contested by Defendants. The Parties stipulated that Defendants provided their employees written notice compliant with FLSA Notice requirements commencing in January 2017. But what notice PSI was actually required to provide its employees under 7th Circuit precedent and what notice was actually given to each of the eligible Opt-In plaintiffs remained a factually and legally contested matter, subject to defeat at trial or on appeal. The parties therefore submit that settling this claim on behalf of these 12 plaintiffs for almost 50% of the potential base amount allegedly owed to them, is eminently reasonable given the above uncertainties.

The Side Work claim was the most contested claim of all. The Parties continue to disagree on the merits of the claim, as well as the appropriate means of calculating side work wages. Nevertheless, in the interest of compromise, the parties agreed to conciliate this issue by agreeing, solely for the purpose of this settlement process, to an average time spent for opening side work at slightly over 20% of total time. Further, as part of this collaborative process, Class Counsel suggested and PSI has agreed that a *pro rata* distribution based upon overall hours worked (similar to the proportional formula utilized for the Notice Sub-Class and the CCOF FLSA Sub-Class) repre-

sented the most appropriate means of allocating settlement wages, compared with merely allocating the same fixed amount to every Recipient, irrespective of the overall amount of time he or she worked as a server.

For summary judgment purposes, Class Counsel did not conduct an analysis of the remaining 2 ½ months in 2018 included in the class period. Therefore, for the 25 servers who worked from January 1 to March 15, 2018, Class Counsel analyzed the hours and shifts each of these servers worked. It was determined that 20% of all hours each server worked at $3.30 per hour gave each of these 25 plaintiffs more than 1 hour per shift in back pay differential and this pro rata methodology of distribution based on actual hours worked was the fairest means to compensate each of them for their time spent on dual jobs/excessive side work for this short time period.

The only other major component of the settlement that should be brought to the Court's attention is the issue of the deferred payment of attorneys' fees. The Parties made a good faith decision to defer their focus on attorneys' fees until after the Court's preliminary approval of the settlement in order to avoid additional delay for the class members. It has been agreed by counsel for both parties that they will attempt to resolve the attorneys' fees issue during the Notice to Class period. To demonstrate their good faith desire to finalize and dismiss this Lawsuit, both parties have agreed to waive appeal rights and to allow the Court to make a binding decision on fees if they cannot reach an agreement.

Based upon the foregoing, the Parties request that this Court review their Settlement Agreement, grant preliminary approval of the Agreement and Notice of Settlement to Class and set a date for the Final Approval Hearing at the appropriate time.

The Parties hereby submit a Joint Proposed Order for the Court's consideration. See Exhibit B.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFFS JESSICA BERGER and TIMOTHY RENDAK, ET AL, and DEFENDANTS PERRY'S STEAKHOUSE OF ILLINOIS, L.L.C., HOWARD CORTES and JEFFREY PAGNOTTA submit this Joint Request for Approval of Settlement Agreement, and respectfully request that the Court:

(g) grant the Motion;

(h) enter the Proposed Order or an Order substantially similar to it in which the Court approves of the Settlement Agreement; and

(i) at the point where the attorney's fee issue has been resolved either by agreement or by Court determination, dismiss the remainder of Plaintiffs' Complaint and all other claims with prejudice (with each party otherwise bearing their own fees and costs, except as provided in the Settlement Agreement); and

(j) afford any other relief the Court deems appropriate.

Dated: February 8, 2021.

Submitted for both parties (with permission) by:

/s/Colleen M. McLaughlin
Counsel for Plaintiffs

Colleen McLaughlin
Law Offices of Colleen M. McLaughlin
1751 S. Naperville Rd., Ste. 209
Wheaton, Illinois 60187
Telephone: (630) 221-0305
colleen@cmmc-employmentlaw.com

PERRY'S STEAKHOUSE OF ILLINOIS, L.L.C., HOWARD CORTES and JEFFREY PAGNOTTA
By: */s/ Lionel M. Schooler*
One of its Attorneys

Lionel Schooler (Pro Hac Vice) (lschooler@jw.com)
**Jackson Walker L.L.P.**
1401 McKinney Suite 1900
Houston, TX 77010
713/752-4516

Jeffrey S. Fowler (6205659) (jfowler@lanermuchin.com)
**Laner Muchin, Ltd**.
515 North State Street, Suite 2800
Chicago, Illinois 60654
312/467-9800