**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF SOUTH CAROLINA**
**CHARLESTON DIVISION**

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| ELVIS MOODIE, RAYON FISHER, DESMOND ELLIS, and KEISHA COLLINS-ENNIS, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>KIAWAH ISLAND INN COMPANY, LLC, d/b/a KIAWAH ISLAND GOLF RESORT,<br><br>Defendant. | Case No. 2:15-cv-01097-RMG |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court on the parties' Joint Motion for Final Approval of Class Action Settlement and Entry of Final Judgment and the Plaintiffs' Motion for Approval of Costs and Attorneys' Fees. The Court makes the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. Plaintiffs Elvis Moodie, Rayon Fisher, Desmond Ellis, and Keisha Collins-Ennis filed this class action lawsuit on March 6, 2015. (ECF No. 1.)

2. Plaintiffs alleged that they, as well as a class of approximately 275 other H-2B workers from Jamaica, the Philippines, and Romania were not paid properly by the Defendant pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (FLSA), the South Carolina Payment of Wages Act, S.C. Code Ann. §§ 41-10-10, *et seq.* (SCPWA), and their employment contracts. *See* SAC ¶¶ 80-109 (ECF No. 143).

3. Plaintiffs alleged that the Defendant violated the FLSA, the SCPWA, and their contracts by: taking *de facto* wage deductions for Plaintiffs', the FLSA Opt-in Plaintiffs', and the other Rule 23 Class Members' pre-employment visa, transportation and related expenses, not providing proper notification to workers under the FLSA prior to taking a tip credit, improperly including tips received by workers as "wages" for purposes of paying the H-2B prevailing wage, failing to pay a supplemental prevailing wage rate issued by the U.S. Department of Labor during the 2013 season, improperly deducting money from workers' pay for daily transportation, and overcharging workers for housing.

4. Defendant denied, and continues to deny, Plaintiffs' allegations and denies that it violated any laws with respect to its employment of Plaintiffs and the other Class Members.

5. Defendant moved to dismiss Plaintiffs' claims, which the Court denied in substantial part, permitting Plaintiffs to pursue all of their claims with the exception of their third-party beneficiary contract claim. (ECF No. 49.)

6. The Court granted Plaintiffs' motions for collective action status under the FLSA, and for class certification under Rule 23 for their state law claims. (ECF Nos. 47, 58).

7. Eighty (80) individuals, plus the four named Plaintiffs, opted-in to the FLSA collective action.

8. For purposes of the claims brought under the South Carolina Payment of Wage Act and for breach of contract, which were previously certified by this Court for class action treatment pursuant to Federal Rule of Civil Procedure 23 (ECF No. 58), the settlement covers the following classes of individuals:

> All those individuals admitted as H-2B temporary workers pursuant to 8 U.S.C. § 1101(a)(15)(H)(ii)(b) who were employed by Defendant in 2012, 2013, 2014, and 2015.

9. Thirty-five (35) individuals filed exclusion forms with the Court prior to the settlement. As such, the following thirty-five (35) individuals, and only these thirty-five (35) individuals, are excluded from the class covered by the settlement and the final judgment Order: Claud H. Wilson, Cleveland Anthony Rose, Dale Isaacs Scott, Easton P. Williams, Evon Daile Rowe, Farrah Tannaca Brown, Fenton Robert Rowe, Gail Rosemarie Smith, Garey Oliver Arthurs, Gillion Adoneiceseya Parchment, Jacqueline Camille Hinds, Jovanie Anthony Edwards, Julie Ann Marie Taylor, Kayan Eni Keisha Veira, Kayon Santina Barrett, Kingsley Ellis, Kristha Alzanzo McIntyre, Marcia Charmain Cunningham, Marisa Jodi-Ann Colleen Watson, Matthew Oneil Benjamin, Nadeen Nichile McInnis, Natoya Tonnesha Scott, Nicole Annakay Burrell, Obert Ottle Thompson, Owen Albert Wilson, Renford Green, Suzette Arthurs, Tanikka Betwaya Ukkyuellyue, Tonisha Elaine Brown, Tryone Bruce, Valeria Elaine Allen, Veronica Phillips, Veronica Marie Anna Palmer, Winsome Brown, and Yumi Jalo-mi Gayle.

10. The Parties engaged in extensive discovery, including depositions of all four (4) named Plaintiffs, three (3) FLSA Opt-In Plaintiffs/Rule 23 Class Members, seven (7) depositions of non-H-2B personnel of Defendant, a Rule 30(b)(6) deposition of Defendant, a Rule 30(b)(6) deposition of the agency Defendant uses for assistance in the H-2B process, and a deposition of Defendant's proposed expert. The parties also exchanged extensive written discovery in this case, including almost 200,000 pages of documents produced by the Defendant related to the Class Members' employment.

11. The parties participated in two days of mediation with the assistance of a third-party neutral. During the second day of mediation, the parties agreed to a settlement whereby the Rule 23 Class Members and FLSA collective action members would share in a $2,000,000

Settlement Fund, and class counsel would receive $300,000 in costs and attorneys' fees, pending Court approval.

12. The Court previously granted preliminary approval to the class action settlement on June 14, 2016, finding it within the range of fairness and reasonableness. Class counsel was ordered to send notice to the Class Members with respect to the settlement. (ECF No. 170.)

13. All of the Class Members were provided notice by mail (and email, where addresses were available) of the pendency of this class action and an opportunity to exclude themselves, and were again provided notice by mail of the class action settlement and an opportunity to exclude themselves and/or file objections to the settlement. (ECF Nos. 102, 172.)

14. The Defendant satisfied its obligations pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, by providing notice of the settlement to the United States Attorney General, the South Carolina Attorney General, and the South Carolina Secretary of State.

15. The settlement notice sent to Class Members contained information about the terms of the settlement, as well as a claim form that contained individualized information with respect to the minimum amounts the class member would receive under the terms of the agreement. The settlement notice also advised Class Members that class counsel would seek approval of $300,000 in costs and attorneys' fees, as agreed by the parties. The notice advised Class Members that the costs and attorneys' fees will be paid separately from the $2,000,000 that is being paid toward the Settlement Fund.

16. No Class Members filed objections to the settlement or sought to be excluded from the settlement.

17. Of the 237 Class Members, 231 individuals will be eligible to claim in the Settlement Fund, either because of their automatic qualification based on filing a FLSA consent

to sue form, or their having returned a valid Claim Form to class counsel prior to the deadline. In other words, 97.5% of the Class Members are eligible to receive their share of the settlement. (Knoepp Decl. (ECF No. 173-2) ¶¶ 4-5.)

18. The parties submitted a joint motion for final approval of the settlement, supported by a joint memorandum and the declaration of James Knoepp, one of the attorneys serving as class counsel. (ECF Nos. 173, 173-1, 173-2.)

19. The Settlement provides substantial monetary compensation to the Rule 23 Class. The 231 Rule 23 Class Members who are eligible to participate in the Settlement Fund will receive a settlement payment covering up to four different categories of damages depending on the seasons they worked and whether they were employed in tipped positions.

20. First, the Rule 23 Class Members will receive 50% of the potential unpaid wages under state law associated with their first workweek unreimbursed expense claims (up to the level of the H-2B prevailing wage rate) for the estimated expenses they incurred each season between 2012 and 2015 to obtain H-2B visas and travel to the United States to work for Defendant, a central legal issue in this litigation. The Rule 23 Class Members will also receive an additional payment of two times their unreimbursed expense recovery as treble damages under the South Carolina Payment of Wages Act, plus pre-judgment interest at the statutory rate. In other words, claiming Class Members will receive the equivalent of 150% of their (un-trebled) potential unreimbursed expense damages, plus pre-judgment interest.

21. Second, the Rule 23 Class Members who were employed during the 2013 season will receive 50% of the potential unpaid wages under state law associated with their claim that Defendant did not pay them the supplemental H-2B prevailing wage rate issued by the Department of Labor during the summer of 2013. Rule 23 Class Members will also receive an

additional payment of two times their supplemental prevailing wage recovery as treble damages under the South Carolina Payment of Wages Act, plus pre-judgment interest at the statutory rate. In other words, claiming Class Members will receive the equivalent of 150% of their (un-trebled) potential supplemental prevailing wage damages, plus pre-judgment interest.

22. Third, Rule 23 Class Members who worked in tipped positions will receive 20% of the potential unpaid wages associated with their claim that Defendant was not permitted under state law to include the tips they received from customers toward the obligation to pay the H-2B prevailing hourly wage rate. Rule 23 Class Members who worked in tipped positions will also receive an additional payment of two times their tipped wage damages recovery as treble damages under the South Carolina Payment of Wages Act, plus pre-judgment interest at the statutory rate. In other words, claiming Class Members will receive the equivalent of 60% of their (un-trebled) potential tipped wage damages, plus pre-judgment interest.

23. Fourth, Rule 23 Class Members will receive a 100% reimbursement of any alleged overpayment of money that was deducted by Defendant from their net pay based on the allegation that Defendant should not have charged workers for the cost of daily transportation and that Defendant overcharged workers for the costs of housing, plus pre-judgment interest at the statutory rate.

24. With respect to all four categories of damages for the Rule 23 Class, the amount allocated to each Rule 23 Class Member will take into account (and be reduced by) any money received through the Settlement by those Class Members who opted-in to the FLSA collective action.

25. First, under the FLSA, FLSA Opt-In Plaintiffs will receive a 100% recovery of any potential first workweek unpaid wages under the FLSA (up to the level of the federal

minimum wage only) related to the estimated unreimbursed expenses incurred to obtain H-2B visas and travel to the United States to work for Defendant. The FLSA Opt-In Plaintiffs will also receive an equal amount in liquidated damages under the FLSA with respect to this claim.

26. Second, under the FLSA, FLSA Opt-In Plaintiffs who were employed during the 2013 season will receive 100% of the potential unpaid wages associated with their claim that Defendant did not pay them overtime using the supplemental H-2B prevailing wage rate issued by the Department of Labor during the summer of 2013 as the regular rate. The FLSA Opt-In Plaintiffs will also receive an equal amount in liquidated damages under the FLSA with respect to this claim.

27. Third, FLSA Opt-In Plaintiffs who worked in tipped positions will receive 50% of the potential unpaid wages associated with their claim that Defendant was not permitted to take a tip credit under the FLSA. The FLSA Opt-In Plaintiffs will also receive an equal amount in liquidated damages under the FLSA with respect to this claim.

28. Fourth, FLSA Opt-In Plaintiffs will receive 50% of the potential unpaid wages associated with their claim that charges for daily transportation and alleged overcharges for housing resulted in FLSA minimum wage violations. The FLSA Opt-In Plaintiffs will also receive an equal amount in liquidated damages under the FLSA with respect to this claim.

29. The Settlement provides that the four named Plaintiffs will each receive $7,500 in addition to their other payments, and three other individuals who provided deposition testimony will receive additional payments of $1,500 each. These payments total $34,500 of the $2,000,000 Settlement Fund, or 1.725% of total overall payment to Class Members.

30. Class counsel submitted a motion for approval of costs and attorneys' fees, supported by a memorandum and declarations of attorneys James Knoepp, Michelle Lapointe,

Sarah Rich, Susan Dunn, and Nancy Bloodgood. (ECF Nos. 174, 174-1, 174-2, 174-3, 174-4, 174-5, 174-6.)

31. Class counsel incurred out-of-pocket expenses in this case in the amount of $33,013.11, and anticipate spending an additional $15,000 in costs associated with settlement administration. (Knoepp Decl. (ECF No. 174-2) ¶¶ 8-9.)

32. After taking into account these expenses, class counsel seeks approval for an award of $250,000 in attorneys' fees for their work on this case. This amounts to 11% of the total $2.3 million being paid by Defendant as part of the settlement.

33. Class counsel's declarations indicate that, after the exercise of billing judgment, their total lodestar figure for work on this case is $410,477.00. (ECF No. 174-1 at 4 (Mem. in Supp. showing chart); Knoepp Decl. (ECF No. 174-2) ¶¶ 5-7 & Exhibits A, B to Knoepp Decl.; Ex. A to Declaration of Michelle Lapointe (ECF No. 174-3); Ex. A to Declaration of Sarah Rich (ECF No. 174-4); Declaration of Nancy Bloodgood ¶¶ 4-5 (ECF No. 174-6) & Ex. A to Bloodgood Decl. As such, class counsel seeks approval of attorneys' fees amounting to 60% of their lodestar figure.

34. The court finds the rates proposed by class counsel to compute their lodestar figure to be reasonable for the Charleston market for attorneys with similar education and experience. Those rates are $425 per hour for James Knoepp and Nancy Bloodgood, $375 per hour for Michelle Lapointe, $275 per hour for Sarah Rich, and $100 per hour for the two paralegals who worked on the case.

The Court held a hearing with respect to motion for approval of the class action settlement and the motion for approval of costs and attorney's fees on December 16, 2016, and makes the following conclusions of law.

**CONCLUSIONS OF LAW**

35. The "claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e).

36. FLSA claims that are settled or compromised also require court approval. *See DeWitt v. Darlington County, S.C.*, No. 4:11-cv-00740-RBH, 2013 WL 6408371, at *3 (D.S.C. Dec. 6, 2013).

37. In any class action settlement, the Court must first "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1); *see also DeWitt*, 2013 WL 6408371, at *4. The Court finds that the settlement notice given to the class satisfied the requirements of due process and Rule 23(e) of the Federal Rules of Civil Procedure. The Court directed Class Counsel to mail a detailed Notice of the Settlement and a Claim Form to each of the 237 Rule 23 Class Members to their last known addresses, which were obtained from Defendant's files. Class Counsel completed that mailing on July 13, 2016. (ECF No. 172.) The Notice contained all of the information necessary for an individual to determine whether to remain in the class, whether to opt-out, whether to file an objection to the terms of the Settlement, how to file a claim to obtain a share of the Settlement Fund, and the deadlines related to each option.

38. A class action settlement may be approved "only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

39. The court considers several factors when deciding to grant final approval to a class action settlement: "(1) the amount offered in settlement; (2) the risks inherent in continued litigation; (3) the extent of discovery completed and the stage of the proceeding when the settlement was reached; (4) the risk, complexity, expense, and likely duration of the litigation absent settlement; (5) the experience and views of class counsel and (6) the response of Class Members to the Settlement." *Brunson v. Louisiana-Pacific Corp.*, 818 F. Supp. 2d 922, 926 (D.S.C. 2011); *see also Flinn v. FMC Corp.*, 528 F.2d 1169, 1173-74 (4th Cir. 1975); *Lomasolo v. Parsons Brinckerhoff, Inc.*, No. 1:08cv1310 (AJT/JFA), 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009).

40. Although the Fourth Circuit has not articulated a standard for approving a settlement under the FLSA, "district courts within the Fourth Circuit have incorporated the same standard that is generally applied in evaluating settlements of Rule 23 classes." *DeWitt*, 2013 WL 6408371, at *3 (citations omitted).

41. The Court approves the settlement and its terms as fair, reasonable, and adequate.

42. First, the amount offered in settlement provides substantial monetary compensation to the Class Members, as detailed above.

43. Second, the settlement is a recognition by each side of the risks inherent in continued litigation, with each side compromising in order to reach a fair resolution.

44. Third, discovery in the case had concluded prior to the settlement. The parties engaged in extensive discovery, which included multiple depositions and analysis of hundreds of thousands of documents, providing each side with a thorough view of their respective strengths and weaknesses with respect to continued litigation.

45. Fourth, the settlement represents a fair compromise between the parties that avoided the risk, complexity, and expense of filing cross-motions for summary judgment and subsequent appeals regarding various legal claims and defenses.

46. Fifth, class counsel has extensive experience litigating cases of this nature, including settlement of cases involving similar claims. Class counsel's view that the settlement in this case is very favorable to the Class Members and that the allocations with respect to the various claims is fair is entitled to significant weight.

47. Finally, no Class Members filed objections to the settlement and no Class Members sought exclusion from the settlement. In fact, 231 out of 237 Class Members (97.5%) are eligible to receive their share of the Settlement Fund.

48. The Court also approves the individual amounts to be paid to the named Plaintiffs and three other Class Members. Those payments, which amount to a total of $34,500, or 1.725% of the Settlement Fund, reasonably and fairly compensate the named Plaintiffs and the other Class Members who were deposed for the actions they took that benefitted the class. *See, e.g.*, *Irvine v. Destination Wild Dunes Mgmt., Inc.*, No. 2:15-cv-980-RMG, 2016 WL 4532563, at *3-*4 (D.S.C. Aug. 30, 2016) (approving individual payments in FLSA case in amounts ranging from $1,000 to $5,000); *DeWitt v. Darlington County*, No. 4:11-cv-00740-RBH, 2013 WL 6408371, at *14-15 (D.S.C. Dec. 6, 2013) (collecting cases); *Temporary Services, Inc. v. American Intern. Group, Inc.*, No. 3:08-cv-00271-JFA, 2012 WL 4061537, at *6 (D.S.C Sept. 14, 2012) (approving individual awards of $20,000).

49. The Court also approves as fair and reasonable the portion of the settlement agreement that pays class counsel $300,000 in costs and attorneys' fees.

50. The Court analyzes motions for attorney's fees under the requirements set forth in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978). *See* Local Civ. Rule 54.02(A) (D.S.C.).

51. The *Barber* decision focuses on twelve factors, which are: "(1) the time and labor expended; (2) the novelty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases." *Barber*, 577 F.2d 216 at 226 & n.28.

52. Here, class counsel has incurred $33,000 in out-of-pocket expenses, and anticipates incurring an additional $15,000 in expenses related to settlement administration, which will be paid out of the $300,000 they seek in costs and attorney's fees as opposed to from the Settlement Fund. Class counsel's request for $250,000 in attorney's fees is fair and reasonable under the *Barber* factors.

53. Class counsel's time records, which they reduced in the exercise of billing judgment, indicate a reasonable amount of time and labor expended on a class action of this nature. Their lodestar figure of $410,477.00 is significantly more than the $250,000 they seek in fees.

54. This case raised several novel issues of law involving the H-2B guest worker visa program, including whether the law and regulations applicable to the H-2B program were part of a contract entered into between the Defendant and the Class Members, and whether claims

seeking unpaid wages up to the level of the H-2B prevailing wage were preempted by the FLSA. *See Moodie v. Kiawah Island Inn Co., LLC*, 124 F. Supp. 3d 711 (D.S.C. 2015) (order on motion to dismiss). This required specialized knowledge of the FLSA and the H-2B guest worker program, which class counsel possessed.

55. Class counsel, most of whom are employed by a non-profit civil rights firm, worked on a *pro bono* basis. As part of the settlement, class counsel significantly reduced what it might otherwise have expected to obtain by filing a full fee petition upon the conclusion of the case if they had been successful. *See* 29 U.S.C. § 216(b) (authorizing fees under the FLSA); S.C. Code Ann. § 41-10-80(C) (same with respect to SCPWA).

56. In many class actions such as this case, class counsel seeks a percentage of the total recovery, or amounts paid by the defendant, pursuant to a common fund theory. *See DeWitt* 2013 WL 6408371, at *6-7. That percentage is typically anywhere from 20% to 45% of the total recovery obtained. *See id.* at *7, *9 (citing several examples). In this case, class counsel's proposed fees and costs of $300,000 would amount to a only 13% of the total amount of $2,300,000 being paid by Defendant, and only 11% of the total amount if you exclude the approximate $50,000 in out-of-pocket expenses incurred by class counsel. An award of costs and fees of more than $750,000 would not be an uncommon request in this case were it handled by private counsel. Here, counsel is seeking approval of a figure that is only one-third of a typical award, which the Court finds to be a reasonable request.

57. Based on the amounts being paid in relation to the maximum damages that Rule 23 and FLSA opt-in collective action members may have received, class counsel obtained excellent results in this case. With respect to almost each category of damages, Class Members are receiving more than 150% of their alleged unpaid wages.

58. The attorneys serving as class counsel were experienced in labor and employment litigation, and those who are employed at SPLC have extensive experience representing migrant guest workers in similar class action cases. There are few, if any, attorneys in the local market who would take this type of case on behalf of migrant guest workers who maintain their permanent residences in foreign countries, and whose claims involve specialized knowledge of the H-2B guest worker visa program.

59. Thus, the Court finds that, based on its analysis of the *Barber* factors, class counsel's request for approval of the $300,000 in costs and attorney's fees agreed to by the parties as part of the settlement is fair and reasonable.

Richard Mark Gergel
United States District Judge

December 16, 2016
Charleston, South Carolina