No. 15-1583

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LAURA MCFEELEY, et al.,
Plaintiffs-Appellees,

v.

JACKSON STREET ENTERTAINMENT, LLC, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiffs-Appellees. For the reasons set forth below, the district court correctly concluded that Plaintiffs were employees under the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. 201 *et seq*., rather than independent contractors because the Plaintiffs were economically dependent on the Defendants rather than being in business for themselves. The district court also correctly awarded liquidated damages to Plaintiffs for such time period until Defendants consulted with legal

counsel regarding the workers' status under the FLSA because Defendants failed to demonstrate that they acted in good faith in committing the FLSA violations during that time period.

INTEREST OF THE SECRETARY

The Secretary has a substantial interest in the proper judicial interpretation of the FLSA because he has a statutory mandate to administer and enforce the Act. *See* 29 U.S.C. 204, 211(a), 216(c), 217. The Secretary is committed to opposing the misclassification of workers who are employees under the FLSA as independent contractors, thereby depriving them of the Act's protections. He has recently participated successfully as amicus in three appellate cases in support of misclassified workers.[1] Additionally, the Administrator of the U.S. Department of Labor's Wage and Hour Division ("Administrator") recently issued guidance which addresses the issue of the misclassification of workers. *See* Administrator's Interpretation No. 2015-1, "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors," 2015 WL 4449086 (July 15, 2015)

[1] *Safarian v. Am. DG Energy Inc.*, No. 14-2734, --- F. App'x ----, 2015 WL 4430837 (3d Cir. 2015) (remanding to district court for consideration of the economic realities rather than the structure of the relationship to determine employee status under the FLSA); *Chapman v. A.S.U.I. Healthcare & Dev. Ctr.*, 562 F. App'x 182 (5th Cir. 2014) (affirming judgment that caregivers were employees under FLSA and not independent contractors); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308 (11th Cir. 2013) (reversing judgment that cable installers were independent contractors).

("AI 2015-1"). Finally, the Secretary believes that the award of liquidated damages in cases involving FLSA violations is crucial to fulfill the statute's goal of fully compensating employees for the damages incurred by the non-payment of wages.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that Plaintiffs, exotic dancers, were employees under the FLSA rather than independent contractors because they were economically dependent on Defendants rather than being in business for themselves.

2. Whether the district court correctly awarded liquidated damages to the Plaintiffs as contemplated by the FLSA, where the Defendants failed to demonstrate that they acted in good faith.

STATEMENT

A. Factual Background

Plaintiffs are exotic dancers who danced at either one or both of two exotic dance clubs, Fuego's Exotic Dance Club and Extasy Exotic Dance Club (collectively "the clubs"), in Maryland, between April 1, 2009 and September 15, 2014. Joint Appendix ("JA") 984-86. The clubs are owned by Mr. Uwa Offiah, who operates the clubs through several different corporate entities (together with Mr. Offiah, the "Defendants"). JA 984-85, 418-19. At all times, Defendants

classified and treated Plaintiffs as independent contractors. JA 985, 424-25. During their employment, Plaintiffs were never compensated in the form of hourly wages. JA 986, 425.

Defendants required their dancers, including the Plaintiffs, to sign a "Space/Lease Rental Agreement of Business Space" regarding the terms of their working relationship with the Defendants; these agreements specified that the dancers were classified as independent contractors. JA 986, 1470-74. The "lease agreements" did not contain start or end dates but rather stated that the relationship continued on an "at-will" basis which could be terminated by either party. JA 1005, 860. The Plaintiffs' actual time working for Defendants varied, ranging from several months to multiple years. JA 1004-05, 517. Defendants had a policy that their dancers were not allowed to dance at other clubs; however, Plaintiffs conceded that certain dancers, ignoring this prohibition, did work at other clubs. JA 1005, 659, 748.

Defendants required dancers to audition and fill out an application before being hired, and required their dancers to be "fit" and "beautiful." JA 1010-11, 329. Defendants did not require their dancers to have any prior dancing experience; specifically, two of the Plaintiffs had not danced at any other exotic dance clubs before dancing for Defendants. JA 1003, 517, 631.

Defendants sometimes "coached" dancers on attitude and behavior that Defendants found inappropriate. JA 997, 332-34. Defendants also provided the dancers with a "rule book" that imposed written guidelines for dancer conduct. JA 996, 769-77. For example, the rule book provided that "professional behavior" while working was mandatory, that the dancers were not allowed to drink or smoke while dancing, that dancers must wear dance shoes at all times, and that the dancers were not allowed to have family or friends come to the clubs while the dancers were working. JA 769-77. It also provided that violation of the rules would result in being "kicked out . . . [i]ndefinitely" and established fines and fees for violation of certain rules. JA 996, 770-74.

The parties dispute whether Defendants set the dancers' schedules or whether the dancers picked their own schedules and were able to come and go as they pleased. JA 995-97; Appellants' Br. at 10-11; Appellees' Br. at 21-22. However, it is undisputed that Defendants required the dancers to sign in upon entering the club and to pay a "tip in" to perform, which varied based on the day of the week and the time the dancer arrived. JA 997, 280-81, 289-91. Furthermore, the rule book provided that the dancers were not allowed to take extended breaks and that once a dancer left the club she could not come back in. JA 773-74.

Defendants were responsible for advertising and for the day-to-day operations of the clubs. JA 997. Defendants also established the prices for lap

dances and private dances in VIP rooms. JA 1001, 771, 845. They provided the equipment and furniture for the clubs, handled the lighting and music for the dancers, and maintained and cleaned the clubs in order to provide a healthy and safe environment for the dancers and for the clientele. JA 265, 336, 431-32, 475-76. Additionally, Defendants paid the rent and bills for the clubs, and the wages for the clubs' other workers. JA 1002, 438. Defendants did not serve alcohol, offered limited food and beverage options, and provided no other entertainment for patrons. JA 1006, 264, 288.

For their part, in addition to performing, Plaintiffs sometimes passed out flyers with their pictures to encourage business. JA 1000, 591-92. Plaintiffs provided their own performance wardrobes and occasionally brought their own food or decorations to the clubs for special events. JA 1002-03, 476, 828-29. They could also "show extra initiative" in the clubs to try to increase customer tips and performance fees. JA 1000-01.

B. Procedural Background and District Court Decisions

On April 3, 2012, Plaintiffs filed an FLSA collective action against Defendants, alleging violations of the FLSA's minimum wage and overtime provisions, as well as state law wage and hour violations. JA 985-6. On September 15, 2014, the district court granted in part Plaintiffs' motion for summary judgment, concluding that the dancers were Defendants' employees,

rather than independent contractors. JA 1007. The court explained that determining whether a worker is an employee or an independent contractor requires an examination of the economic realities of the relationship. JA 991. The court noted that the "focal point" of the economic realities test is whether the worker is economically dependent on the employer or truly in business for herself. JA 993. The court held, based on its analysis of this Court's criteria for examining the economic realities of the working relationship, that the dancers were employees rather than independent contractors because, "[m]ost importantly, Plaintiffs were economically dependent on the clubs rather than being in business for themselves." JA 1007.

The remaining issues regarding Defendants' liability under the FLSA and under Plaintiffs' state wage law claims proceeded to trial before a jury between February 3 and 5, 2015, and the jury returned verdicts in favor of Plaintiffs. JA 1510-12. On February 10, 2015, the district court entered judgment, including compensatory damages. JA 1512-18. The court also awarded liquidated damages under the FLSA for a portion of the relevant FLSA two-year "look back" period. *Id*. The district court based its award of liquidated damages on its conclusion that Defendants did not act in good faith prior to September 2011. JA 1512-13.

Defendants filed an appeal with this Court asserting, in relevant part, that the district court erred in concluding that Plaintiffs were employees under the FLSA

rather than independent contractors, and in awarding Plaintiffs liquidated damages. JA 1619; Appellants' Br. at 24-29, 40-42.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS WERE EMPLOYEES UNDER THE FLSA RATHER THAN INDEPENDENT CONTRACTORS BECAUSE THEY WERE, AS A MATTER OF ECONOMIC REALITY, ECONOMICALLY DEPENDENT ON THE DEFENDANTS RATHER THAN IN BUSINESS FOR THEMSELVES

A. The scope of employment relationships covered by the FLSA is extremely broad and only workers who, as a matter of economic reality, are in business for themselves are excluded from the Act's coverage as independent contractors.

The FLSA coverage of employment relationships is extremely broad. The Act defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. 203(d), and "employee" as "any individual employed by an employer." 29 U.S.C. 203(e)(1). The FLSA further defines "employ" to include "to suffer or permit to work." 29 U.S.C. 203(g). As repeatedly recognized by the Supreme Court, as well as by this Court, these definitions demonstrate Congress' intent for the FLSA to apply as broadly as possible. *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) ("employ" is defined with "striking breadth" (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947))); *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945) ("A broader or more comprehensive coverage of employees

. . . would be difficult to frame."); *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006) (the Act "was enacted to protect 'the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others'" and thus should be "'broadly interpreted and applied to effectuate its goals'" (quoting *Benshoff v. City of Virginia Beach*, 180 F.3d 136, 140 (4th Cir. 1999))). Indeed, the Act's definition of "employee" is the "'broadest definition that has ever been included in any one act.'" *Rosenwasser*, 323 U.S. at 363 n.3 (quoting 81 Cong. Rec. 7657 (statement of Senator Black)).

The determination of whether a worker is an employee under the FLSA, and thus entitled to the Act's protections, must be made in light of these sweeping definitions and the courts' liberal interpretation of the FLSA's scope. In making this determination, courts look to the "economic realities" of the relationship. *See, e.g.*, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (noting that the test of employment under the FLSA is economic reality); *Schultz*, 466 F.3d at 304; *Chao v. Mid-Atlantic Installation Svcs., Inc.*, 16 F. App'x 104, 105-06 (4th Cir. 2001). The economic realities of the relationship control, rather than any structure or labels given by the parties. *See Goldberg v. Whitaker House Coop, Inc.*, 366 U.S. 28, 33 (1961); *Safarian*, 2015 WL 4430837, at *3. The focus is on "whether the worker 'is economically dependent on the business to which [she] renders service or is, as a matter of economic [reality], in business for

[herself].'" *Schultz*, 466 F.3d at 304 (quoting *Henderson v. Inter–Chem Coal Co.*, 41 F.3d 567, 570 (10th Cir. 1994)); *see Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business . . . or are in business for themselves.").

The Administrator has consistently interpreted the scope of employment relationships covered by the FLSA broadly. Recently, the Administrator issued guidance that set forth these interpretations in the context of determining whether an employee has been misclassified as an independent contractor, stating that "[t]he ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business for [herself]." AI 2015-1, 2015 WL 4449086, at *5. The Administrator's consistent interpretation of the FLSA as set forth in AI 2015-1 is entitled to *Skidmore* deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (the Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 371 n.12 (4th Cir. 2011) (affording *Skidmore* deference to a Wage and Hour Division advisory memorandum setting forth the Secretary's positions regarding compensable time under the FLSA); *Schultz v. W. R. Hartin & Son, Inc.*, 428 F.2d 186, 191 (4th Cir. 1970) (affording *Skidmore* deference to a Wage and

Hour Division opinion letter regarding the distinction between construction and retail activities for purposes of the FSLA retail or service establishment exemption).

B. The district court correctly concluded that Plaintiffs were, as a matter of economic reality, economically dependent on Defendants and were not in business for themselves.

This Court analyzes the following six factors to guide its assessment of whether particular workers are, as a matter of economic reality, economically dependent on their putative employer and, thus, employees covered by the Act: (1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunity for profit or loss based on her managerial skill; (3) the worker's investment in equipment or material, or employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the worker's services are an integral part of the putative employer's business. *See Schultz*, 466 F.3d at 304-05 (citing *United States v. Silk*, 331 U.S. 704 (1947)); *Mid-Atlantic*, 16 F. App'x at 106. No single factor is dispositive and courts must consider the totality of the circumstances. *See Schultz*, 466 F.3d at 304-05 (citing *Silk*, 331 U.S. at 704); *Mid-Atlantic*, 16 Fed. App'x at 106.

As other courts have noted, consideration of these or similar factors must not subsume the overarching question of economic dependence. *See, e.g., Scantland*,

721 F.3d at 1312 ("We view the subsidiary facts relevant to each factor through the lens of 'economic dependence' and whether they are more analogous to the 'usual path' of an employee or an independent contractor."); *Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1311 (5th Cir. 1976) ("No one of these considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor—economic dependence." (citing *Mednick v. Albert Enters., Inc.*, 508 F.2d 297 (5th Cir. 1975))). Thus, these factors "should not be applied in a mechanical fashion" but rather should be applied with the "understanding that the factors are indicators of the broader concept of economic dependence." AI 2015-1, 2015 WL 4449086, at *2; *see Superior Care*, 840 F.2d at 1059 ("[T]he test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.").

While the determination of economic dependence is based on the facts and circumstances of the particular working relationship, courts both within and outside of the Fourth Circuit that have considered whether exotic dancers are employees under the FLSA have largely concluded that these workers are economically dependent on their employers rather than being in business for themselves. *See, e.g.*, *Reich v. Circle C Invs., Inc.*, 998 F.2d 324 (5th Cir. 1993) (exotic dancers were employees rather than independent contractors); *Foster v.*

Gold & Silver Private Club, Inc., No. 7:14CV00698, 2015 WL 8489998 (W.D. Va. Dec. 9, 2015) (same); *Degidio v. Crazy Horse Saloon and Rest. Inc.*, No. 4:13-cv-02136-BHH, 2015 WL 5834280 (D. S.C. Sept. 30, 2015) (same); *Butler v. PP & G, Inc.*, No. WMN-13-430, 2013 WL 5964476 (D. Md. Nov. 7, 2013) (same); *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901 (S.D.N.Y. Sept. 10, 2013) (same); *Martin v. Priba Corp.*, No. 3:91–CV–2786–G, 1992 WL 486911 (N.D. Tex. Nov. 6, 1992) (same). Applying this Court's criteria to the facts of this case clearly shows that the dancers at issue here were, as a matter of economic reality, economically dependent on the Defendants as opposed to being in business for themselves, and thus were employees under the FLSA entitled to the Act's protections.

1. Defendants exercised a significant degree of control over the manner in which the work was performed.

This Court instructs that courts must consider the "degree of control that the putative employer has over the manner in which the work is performed" as compared to "the control exerted by the worker." *Schultz*, 466 F.3d at 305. As with the other five factors, this question must be viewed in light of the "ultimate question" of whether the workers are economically dependent on the employer or in business for themselves. *Id.* at 305 (citing *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)). Thus, a worker's control over the manner in which the work is performed is "'only significant when it shows an individual exerts such a control

over a meaningful part of the business that she stands as a separate economic entity.'" *Scantland*, 721 F.3d at 1313 (quoting *Usery*, 527 F.2d at 1312-13); *see* AI 2015-1, 2015 WL 4449086, at *11 ("The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business.").

Here, Defendants controlled all meaningful aspects of the business of the clubs. In analyzing this factor, the district court first noted the importance of considering not only the Defendants' degree of control over the dancers but also over the atmosphere and clientele. JA 994 (citing *Butler*, 2013 WL 5964476, at *3). With respect to the dancers, the court considered relevant facts, such as that the club coached dancers on behavior and attitude, required the dancers to sign in upon arrival and pay a "tip in," and imposed detailed written guidelines that addressed dancer conduct and behavior, threatening to "kick out" dancers indefinitely or impose fines for violations of the rules. JA 996-97. The court also noted that these guidelines included set prices for private dances. JA 996. The district court correctly explained that even if the fines were not imposed and the written rules were not otherwise implemented, as Defendants alleged, a club's "'written threat to impose such fines . . . is strong evidence of its control over [the dancers]'" and "[a]n employer's 'potential power' to enforce its rules and manage dancers' conduct is a form of control." JA 996-97 (quoting *Hart*, 967 F. Supp. 2d

at 917-18); *see Circle C*, 998 F.2d at 327 (concluding that the "control" factor weighed in favor of employee status where the club and its operators exercised significant control over exotic dancers, such as instructing dancers on what prices to charge and promulgating rules regarding the dancers' behavior). In addition to these written rules, the Defendants required its dancers to be "fit" and "beautiful," and to complete an application and audition before working at the clubs. JA 1010-11, 329. Defendants also prohibited the dancers from working at other clubs; however, some dancers admittedly ignored this prohibition. JA 1005, 659, 748.

In addition to this control over the dancers, Defendants were responsible for all advertising and for the clubs' day-to-day operations. For example, Defendants set the clubs' hours and prices for admission and for private dances. JA 997. They were responsible for maintaining the facilities and providing a clean environment for the dancers and for the patrons. JA 336, 431-32. Defendants also provided the equipment and furniture for the clubs, as well as the music and lighting. JA 265, 331, 475-76.

Thus, the district court correctly concluded that Defendants exercised significant control over the dancers, as well as over the clubs' atmosphere and clientele. JA 997. In contrast, Plaintiffs did not control any meaningful aspects of the business. Even if, as Defendants alleged, the dancers set their own schedules and came and went as they pleased, the circumstances as a whole show that

Plaintiffs did not exert the type of control over their work that would indicate that they "'stan[d] as a separate economic entity.'" *Scantland*, 721 F.3d at 1313 (quoting *Usery*, 527 F.2d at 1312-13). Instead, the facts demonstrate that the Plaintiffs were economically dependent on the Defendants.

2. Plaintiffs' opportunity for profit or loss was not dependent on managerial skill.

The second factor considers whether the worker has opportunities for profit or loss dependent on her managerial skill. *See Schultz*, 466 F.3d at 307-08 (concluding that security agents were employees where there was "no evidence the agents could exercise or hone their managerial skill to increase their pay"); AI 2015-1, 2015 WL 4449086, at *6-7. A worker's efficiency or her ability to work more hours does not indicate independent contractor status, as these characteristics are more akin to an efficient piece-rate employee or to an employee's ability to work overtime than to "an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor." *Rutherford*, 331 U.S. at 730; *see Scantland*, 721 F.3d at 1317 ("An individual's ability to earn more by being more technically proficient is unrelated to an individual's ability to earn or lose profit via his managerial skill, and it does not indicate that he operates his own business.").

In analyzing this factor, the district court correctly determined that Defendants, rather than the Plaintiffs' managerial skill, controlled the dancers'

opportunity for profits. JA 1001. As the court noted, Defendants "controlled the stream of clientele that appeared at the clubs" by determining the clubs' hours and price of admission, controlling all advertising, and "managing the atmosphere within the clubs." *Id.* Defendants also set the prices for lap dances and private VIP dances, thus controlling "a key determinant–pricing–affecting Plaintiffs' ability to make a profit." *Id*. Even if Plaintiffs could work additional days to earn more money, as Defendants alleged, this characteristic is not indicative of independent contractor status, as this is true of many FLSA covered employees. *See Scantland*, 721 F.3d at 1316-17 (technicians' opportunity for profit was limited to ability to complete more jobs which was "analogous to an employee's ability to take on overtime work or an efficient piece-rate worker's ability to produce more pieces").

Similarly, the Plaintiffs' ability to promote themselves by handing out flyers or to "hustle," i.e., to show initiative in the clubs to encourage increased tips, does not reflect an independent contractor's ability to earn more, or risk more, by exercising her managerial skill. As the district court noted, in the context of exotic dancing, courts have typically rejected the argument that the ability to "hustle" or to increase profits by appearance indicates independent contractor status. *See Circle C*, 998 F.2d at 328 (dancers ability to "hustle" did not outweigh the club's significant control over the ability for dancers to earn a profit and the dancers did

not "exhibit the . . . initiative indicative of persons in business for themselves"); *Reich v. Priba Corp.*, 890 F. Supp. 586, 593 (N.D. Tex. Mar. 27, 1995) (relevant "initiative" is "in the sense of engaging in those activities that tended to expand the [worker's] client base, goodwill, and contracting possibilities" rather than the ability to "hustle" to increase earnings (citing *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983))).

Further, Plaintiffs faced no possibility of experiencing any actual loss. *See Dole v. Snell*, 875 F.2d 802, 810 (10th Cir. 1989) (independent contractor status typically associated with possibility of risk of loss). Indeed, as the district court noted, Plaintiffs' only ostensible losses were "their 'tip in' fee and their time." JA 1001. In sum, because Plaintiffs' opportunities for profits were controlled by Defendants rather than by the Plaintiffs' own exercise of managerial skills, and because Plaintiffs did not face any risk of actual loss, the district court correctly concluded that this factor weighs in favor of employee status.

3. Defendants' level of investment in the clubs far exceeded that of Plaintiffs.

This Court considers the worker's investment in the business, such as the employment of other workers or any investment in tools or equipment. *See Schultz*, 466 F.3d at 305. To determine economic dependence, courts must consider the comparative investments of the worker and the putative employer. *See, e.g.*, *Snell*, 875 F.2d at 810-11 (comparing cake decorators' minor investments

in equipment with the employers' significant business investments, such as rent, advertising, operating expenses, and labor); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1052-53 (5th Cir. 1987) (district court erred in considering only worker's minor investments and failing to consider significant investments of putative employer); AI 2015-1, 2015 WL 4449086 , at *8-9 (workers' investments should not be considered in isolation).

The district court here correctly compared the relative investments in the clubs by Defendants and Plaintiffs, concluding that the Defendants' investments in the clubs "greatly exceeded" Plaintiffs'; therefore, this factor weighs in favor employee status. JA 1001-03. The court noted that Defendants paid rent for the clubs, paid all of the clubs' bills and insurance, paid for major advertising, and paid the wages of other workers at the clubs, such as bartenders and cashiers. JA 1002-03. In comparison, Plaintiffs' only investments were their costumes and, sometimes, providing food or decorations for special events. *Id.* The disparity between these comparative investments demonstrates that Plaintiffs were economically dependent on the Defendants. *See Circle C,* 998 F.2d at 327-28 (dancers were employees where the dancers' only investments, in costumes and a padlock, were minor in comparison to the significant investments of the defendants); *Degidio*, 2015 WL 5834280, at *12 (dancers' investment in "clothing,

costumes, etc." were "miniscule" in comparison to the club's significant investments).

4. Plaintiffs' work did not require any specialized skill.

This Court also considers the degree of skill required for the work. *See Schultz*, 466 F.3d at 305. A worker's business skills, judgment, and initiative, rather than her purely technical skills, are relevant to a determination of whether the worker is in business for herself. *See, e.g.*, *Superior Care*, 840 F.2d at 1060-61; *Mr. W Fireworks*, 814 F.2d at 1053; *Usery*, 527 F.2d at 1314; AI 2015-1, 2015 WL 4449086 , at *9-10. Thus, "the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way." *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1295 (3d Cir. 1991).

The district court here correctly concluded that the minimal degree of skill required for exotic dancing at Defendants' clubs weighed in favor of employee status. JA 1003-04. The court considered relevant facts, including that Defendants did not require any prior dancing experience, and that two of the Plaintiffs had no prior dancing experience. *Id*. Even if Plaintiffs were experienced and skilled dancers, such technical dancing skill is not indicative of an independent contractor. *See, e.g.*, *Circle C*, 998 F.2d at 328 ("The dancers do not exhibit the skill . . . indicative of persons in business for themselves."); *Degidio*, 2015 WL 5834280, at

*13 (declining to characterize requirements of appearance and willingness to dance as "skill"). Further, Defendants conceded that the district court was likely to find in favor of the Plaintiffs on this factor. JA 1003, 830. Thus, as the district court correctly concluded, this factor weighs in favor of employee status because exotic dancing for Defendants' clubs does not require the type of specialized business skill, judgment, or initiative indicative of an independent contractor.

5. The duration of the working relationships is typical of at-will employment relationships.

In considering the permanence of the employment relationship, this Court focuses on the duration of the relationship, instructing that "[t]he more permanent the relationship, the more likely the worker is to be an employee." *See Schultz*, 466 F.3d at 308-09. As with all of the economic realities factors, the duration of the working relationship is relevant to the extent it indicates whether the worker is an employee or in business for herself. Thus, a worker's lack of a permanent or indefinite working relationship with the putative employer is indicative of independent contractor status if it is due to the worker's own business initiative. *See, e.g.*, *Superior Care*, 840 F.2d at 1061 (nurses were employees rather than independent contractors where their transience reflected the nature of their industry rather than "their success in marketing their skills independently"); *Mr. W Fireworks*, 814 F.2d at 1054 ("[I]n applying the *Silk* factors courts must make allowances for those operational characteristics that are unique or intrinsic to the

particular business or industry, and to the workers they employ."); *Martin v. Priba Corp.*, 1992 WL 486911, at *5 ("Because [exotic] dancers tend to be itinerant, the court must focus on the nature of their dependence."); AI 2015-1, 2015 WL 4449086 , at *10 (the lack of permanence or indefiniteness in a working relationship is relevant only to the extent that the reason for such lack of permanence or indefiniteness is indicative of the worker's running an independent business).

Here, the Plaintiffs' lease agreements with the clubs did not include any specified end-date and the agreements explicitly stated they would continue on an "at-will" basis, terminable by either party. JA 1005. This arrangement is no different than that of numerous FLSA-covered employees engaged on an at-will, indefinite basis. *See* AI 2015-1, 2015 WL 4449086, at *10. Additionally, Plaintiffs worked for Defendants for various lengths of time, with some having worked for Defendants for less than a year, and some having worked for multiple years. JA 1004-05, 517. However, the short duration of some of these relationships does not indicate that the dancers were engaged in the project-based working relationship typical of independent contractors. *See Solis v. Cascom, Inc.*, No. 3:09–cv–257, 2011 WL 10501391, at *6 (S.D. Ohio Sept. 21, 2011); AI 2015-1, 2015 WL 4449086, at *10. Further, while some dancers at the clubs did work for other clubs at the same time, the district court properly noted that this

characteristic does not meaningfully distinguish them from many other FLSA covered employees who hold multiple jobs. JA 1005 (quoting *Hart*, 967 F.Supp.2d at 920-21). Therefore, any lack of permanence or exclusivity in these working relationships does not indicate that the Plaintiffs were running independent businesses; rather, it was more a function of the job they were performing. *See Mr. W Fireworks*, 814 F.2d at 1054; *Martin v. Priba Corp.*, 1992 WL 486911, at *5. Thus, while some of these relationships may have lacked permanence, the district court properly concluded that this lack of permanence was not "outcome determinative" to the overall question of economic dependence. JA 1005-06.

6. Plaintiffs were an integral part of the Defendants' business.

The final factor to be considered is "the extent to which the service rendered by the worker is an integral part of the putative employer's business." *Schultz*, 466 F.3d at 309. This factor is particularly indicative of whether the worker is an employee or an independent contractor; if the work performed by the worker is integral to the employer's business, it is more likely that the worker is an employee rather than an independent contractor. *See, e.g.*, *Rutherford*, 331 U.S. at 729 (workers were employees in part because their work was "part of the integrated unit of production"); *Scantland*, 721 F.3d at 1319 (technicians' integral role in

what the employer described as the "backbone" of its business indicated employee status); AI 2015-1, 2015 WL 4449086, at *5-6.

Here, the Plaintiffs' exotic dancing services were indisputably integral to the Defendants' exotic dance club business. It would be difficult to imagine how an exotic dance club could function, much less be profitable, without exotic dancers. This is particularly true where, as the district court noted here, the Defendants' clubs offered no additional entertainment and very little in the way of food or beverage service. JA 1006. In concluding that the Plaintiffs were integral to Defendants' business, the district court noted that other courts considering this factor in the exotic dance club industry have consistently found exotic dancers to be "'essential'" to the business of an exotic dance club. *Id*. (quoting *Butler*, 2013 WL 5964476, at *5). Plaintiffs' integral role in Defendants' business further demonstrates that Plaintiffs were employees under the FLSA rather than in business for themselves.

7. The totality of the circumstances indicates that Plaintiffs were employees rather than independent contractors.

As explained above, the relevant factors must be considered together in light of the determinative question of whether the worker is economically dependent on the putative employer or in business for herself, with no single factor being dispositive. *See, e.g.*, *Rutherford*, 331 U.S. at 730 ("We think, however, that the determination of the relationship does not depend on such isolated factors but

rather upon the circumstances of the whole activity."); *Schultz*, 466 F.3d at 305 ("No single factor is dispositive; again, the test is designed to capture the economic realities of the relationship between the worker and the putative employer."); *Circle C*, 998 F.2d at 327 ("These factors are merely aids in determining the underlying question of dependency, and no single factor is determinative." (citing *Mr. W Fireworks*, 814 F.2d at 1054)).

Taking the above factors in consideration together makes clear that Plaintiffs were employees rather than independent contractors. Plaintiffs were economically dependent on Defendants for their work as exotic dancers and were not in business for themselves. Specifically, Defendants controlled virtually every meaningful aspect of the business of the clubs; Plaintiffs were almost entirely dependent on Defendants for any opportunities for profit; Plaintiffs made insignificant investments in the business of the clubs as compared to the substantial business investments made by Defendants; Plaintiffs performed work that did not require specialized skill; and Plaintiffs performed work that was integral to the Defendants' business. Although some of the working relationships may have lacked permanence, such lack of permanence was not due to the dancers being in business for themselves. Further, the fact that the Plaintiffs signed the lease agreements wherein they were labeled as independent contractors is not controlling, because it is the economic realities, rather than the structure, of the

relationship that is determinative. *See Safarian*, 2015 WL 4430837, at *2-3. The totality of the circumstances clearly demonstrates that Plaintiffs were economically dependent on Defendants. Therefore, the district court correctly held that Plaintiffs were employees under the FLSA and thus entitled to the Act's protections.

II. THE DISTRICT COURT CORRECTLY AWARDED LIQUIDATED DAMAGES BECAUSE DEFENDANTS FAILED TO SHOW THAT THEY ACTED IN GOOD FAITH

An employer who violates the FLSA's minimum wage or overtime protections is liable to its employees not only for back wages but also for "an additional equal amount" as mandatory liquidated damages. 29 U.S.C. 216(b); *see Richard v. Marriott Corp.*, 549 F.2d 303, 305 (4th Cir. 1977) ("The language of the statute is mandatory."). Liquidated damages are compensatory rather that punitive in nature, and serve as "'compensation for the retention of a [worker's] pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.'" *Roy v. County of Lexington, S.C.*, 141 F.3d 533, 548 (4th Cir. 1998) (quoting *Reich v. S. New Eng. Tel. Corp.*, 121 F.3d 58, 70-71 (2d Cir. 1997)). However, under the Portal-to-Portal Act, a court may, in its discretion, award a lesser amount of or no liquidated damages, but only where an employer demonstrates, to the satisfaction of the court, both that the violation was committed "in good faith" and that the employer "had reasonable grounds for believing" that its actions did not violate the Act. 29 U.S.C. 260. And even where

an employer demonstrates that it acted both in good faith and based on a reasonable belief that its actions were not in violation of the FLSA, the court "still retains the discretion to award liquidated damages." *Heidtman v. County of El Paso*, 171 F.3d 1038, 1042 (5th Cir. 1999) (citing 29 U.S.C. 260).

The statute therefore makes the award of liquidated damages the norm. To deviate from this norm, the statute places upon the employer the "'plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict.'" *Burnley v. Short*, 730 F.2d 136, 140 (4th Cir. 1984) (quoting *Wright v. Carrigg*, 275 F.2d 448, 449 (4th Cir. 1960)). Specifically, acting in "good faith" requires that the employer demonstrate an "honest intention to ascertain and follow the dictates of the FLSA." *Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 942 (8th Cir. 2008) (internal quotation marks omitted). Thus, good faith requires some affirmative steps by the employer to investigate its compliance under the FLSA; employers may not rely on ignorance of the FLSA's requirements as a basis for good faith. *Id.*; *see Alvarez v. IBP, Inc.*, 339 F.3d 894, 910 (9th Cir. 2003) (good faith requires an employer to take those "steps necessary to ensure FLSA compliance"), *aff'd on other grounds*, 546 U.S. 21 (2005); *Roy*, 141 F.3d at 548-49 ("[A]n employer 'may not simply remain blissfully ignorant of FLSA requirements.'" (quoting *Burnley*,

730 F.2d at 140)); *Barcellona v. Tiffany Engl. Pub, Inc.*, 597 F.2d 464, 469 (5th Cir. 1979) ("[G]ood faith requires some duty to investigate potential liability under the FLSA.").[2] Ignorance of the requirements of the FSLA is also insufficient to demonstrate that the employer had reasonable grounds to believe that it was not in violation of the Act. *See, e.g.*, *Barcellona*, 597 F.2d at 468-69.

Additionally, conforming to industry pay practices and the lack of employee complaints are both insufficient to constitute good faith or an objectively reasonable basis for the violation. *See, e.g.*, *Barbeque Ventures*, 547 F.3d at 942 (lack of employee complaints does not show good faith); *S. New Eng. Tel. Corp*., 121 F.3d at 71 (neither absence of complaints nor conforming with industry-wide standard are sufficient to establish good faith); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910 (3d Cir. 1991) ("[T]he employer's adherence to customary and widespread industry practices that violate the [Act] is not evidence of an

[2] While the absence of affirmative steps to investigate an employer's obligations under the FLSA precludes a finding of good faith for the purposes of awarding liquidated damages, it does not follow that *any* steps taken by the employer regarding its compliance with the FLSA's requirements constitute good faith. *See, e.g.*, *Chapman*, 562 F. App'x at 186 (district court did not abuse its discretion in awarding full liquidated damages in a misclassification case where employer's only evidence of good faith was that it had spoken to an attorney and an unnamed consultant "when forming its opinion that [the workers] were not employees" and there was no evidence of any further investigation into the workers' employment status); *Spires v. Ben Hill County*, 980 F.2d 683, 689-91 (11th Cir. 1993). Rather, any such affirmative steps taken must be looked at on an individual basis to determine whether the employer acted in good faith.

objectively reasonable good faith violation.").

This Court should affirm the district court's award of liquidated damages based on its conclusion that Defendants did not act in good faith prior to September 2011, at which time Defendants consulted with an attorney regarding the dancers' FLSA employee status and thereafter acted upon that attorney's advice. JA 1512-13. In support of their argument that they acted in good faith prior to September 2011, Defendants state only that Mr. Offiah, the owner of both clubs, retained the prior owner's employment practices upon purchasing the clubs, and that prior to the lawsuit in 2011, Defendants had no knowledge that there was an issue regarding the dancers' classification as independent contractors. *See* Appellants Br. at 40-41. Defendants raised similar arguments before the district court. JA 1467-79. These arguments fail to meet Defendants' substantial burden to demonstrate that they acted in good faith, as Defendants' ignorance of the violations, their reliance on the predecessor owner's past practices, and the absence of any worker complaints prior to the 2011 lawsuit are insufficient to demonstrate good faith. *See S. New Eng. Tel. Corp.*, 121 F.3d at 71; *Burnley*, 730 F.2d at 140. Indeed, prior to September 2011, Defendants did not take any affirmative steps to ascertain and comply with their obligations under the FLSA. Thus, the district court correctly concluded that Defendants did not act in good faith. Accordingly, the district court properly awarded liquidated damages for this time period, as

liquidated damages are mandatory unless the employer demonstrates that it acted in good faith and with reasonable grounds to believe that its actions did not violate the FLSA.[3]

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully Submitted,

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[3] Because liquidated damages are mandatory unless the employer demonstrates *both* that it acted in good faith *and* that it had reasonable grounds to believe it was in compliance, the district court properly awarded liquidated damages based solely on its conclusion that Defendants did not act in good faith. *See* 29 U.S.C. 260; *Barbeque Ventures*, 547 F.3d at 943. In any event, Defendants' arguments are also insufficient to demonstrate that Defendants had reasonable grounds to believe they were in compliance with the FLSA. *See Cooper Elec.*, 940 F.2d at 910; *Barcellona*, 597 F.2d at 468-69.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, using Microsoft Word 2010 utilizing Times New Roman, in 14-point font in text and footnotes.

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2015, I electronically filed the foregoing Brief for the Secretary of Labor as Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. One (1) paper copy of this brief has also been express mailed to the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit, pursuant to Local Rule 31(d).

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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