

No. _____

**IN THE SUPREME COURT
OF THE UNITED STATES**

**CRAZY HORSE SALOON
AND RESTAURANT INC.,
d/b/a THEE NEW DOLLHOUSE,**

Petitioner,

v.

**ALEXIS DEGIDIO, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,**

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT**

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1145

ALEXIS DEGIDIO, individually and on behalf of all
others similarly situated,

Plaintiff-Appellee,

v.

CRAZY HORSE SALOON AND RESTAURANT INC,
d/b/a Thee New Dollhouse,

Defendant-Appellant,

and

JOSEPH B. HARGADON,

Third Party Defendant.

Appeal from the United States District Court for the
District of South Carolina, at Florence. Bruce H. Hen-
dricks, District Judge, (4:13-cv-02136-BHH).

Argued: December 5, 2017 Decided: January 18, 2018

Before WILKINSON, KING, and FLOYD, Circuit
Judges.

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Affirmed and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Judge King and Judge Floyd joined.

ARGUED: James Leon Holt, Jr., JACKSON, SHIELDS, YEISER & HOLT, Cordova, Tennessee, for Appellant. Jamisen A. Etzel, CARLSON LYNCH SWEET KILPELA & CARPENTER, LLP, Pittsburgh, Pennsylvania, for Appellee. **ON BRIEF:** Gary Lynch, CARLSON LYNCH SWEET KILPELA & CARPENTER, LLP, Pittsburgh, Pennsylvania, for Appellee.

WILKINSON, Circuit Judge.

Plaintiff-appellee Alexis Degidio filed a putative collective and class action against defendant-appellant Crazy Horse Saloon and Restaurant, Inc. (Crazy Horse). This appeal concerns the enforceability of arbitration agreements that were executed more than a year after this litigation began.¹

Arbitration is a valuable means of resolving disputes expeditiously, but this case shows that it can sometimes be abused to prolong litigation, exploit the judicial process, and give defendants two opportunities

¹ A collective action under the Fair Labor Standards Act (FLSA) differs from a class action under Federal Rule of Civil Procedure 23 because potential plaintiffs can join an FLSA collective action only by affirmatively giving consent in writing to become a party. 29 U.S.C. § 216(b). In a class action, by contrast, plaintiffs are presumed to be members of a class unless they affirmatively opt out of the class proceeding. Fed. R. Civ. P. 23(b)(3).

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to prevail on the merits. The district court denied Crazy Horse’s motion to compel arbitration. For the reasons that follow, we affirm its judgment and remand for further proceedings consistent with this opinion.

Degidio also argues on appeal that because the National Labor Relations Act (NLRA) protects employees’ right to “engage in . . . concerted activities for . . . mutual aid or protection,” 29 U.S.C. § 157, it invalidates arbitration agreements that prevent employees from bringing class or collective actions against employers. This question is currently before the Supreme Court. *See Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-285). Since we find the arbitration agreements infirm for reasons quite independent of the question raised in *Epic Systems*, we have no need to address that issue.

I.

Degidio performed as an exotic dancer at Crazy Horse’s gentlemen’s club in 2012 and 2013. Crazy Horse classified entertainers who performed at its club as “independent contractors.” The entertainers were not paid by Crazy Horse, but were instead compensated through customer tips.²

² Crazy Horse began to operate under the name “Thee New Dollhouse” on March 1, 2012.

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Degidio filed this class and collective action on August 8, 2013. Degidio alleged that Crazy Horse misclassified her and other putative class members as independent contractors and that it further violated the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* Degidio also claimed that Crazy Horse violated the South Carolina Payment of Wages Act (SCPWA), S.C. Code § 41-10-10 *et seq.*, by failing to pay entertainers the appropriate minimum wages, improperly denying them overtime wages, and inappropriately withholding the entertainers' tips.

Over the course of litigation, Crazy Horse adopted three distinct strategies to defeat Degidio's claim. First, Crazy Horse attempted to win the judicial action on the merits by filing multiple motions for summary judgment. Second, it repeatedly asked the district court to certify questions of state law to the South Carolina Supreme Court. And third, it sought to compel arbitration on agreements executed after the commencement of this suit. Only after the district court had resolved on the merits a number of legal issues did Crazy Horse ask the court to enforce the arbitration agreements.

As the ensuing chronology makes clear, Crazy Horse was disdainful of orderly judicial process and lacking in the respect that opposing parties in an adversary proceeding are due. Crazy Horse began its maneuvers when it answered Degidio's complaint on October 8, 2013, but did not move to compel

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arbitration. The parties then participated in discovery until November 2014.

In November and December 2014, at the very end of the discovery period, Crazy Horse began entering arbitration agreements with entertainers who had worked at the club. The arbitration provision was contained in a lease that Crazy Horse distributed to entertainers who used its facilities. Crazy Horse told entertainers that they were required to sign the lease as a condition of performing at the club. The agreement waived the signatory's right to participate in any class action against Crazy Horse, including any class that might be certified in this case. Prior to executing the agreements, Crazy Horse did not inform the district court that it was communicating with potential class members about pending litigation.

In December 2014, Crazy Horse moved for summary judgment on all claims. Crazy Horse's motion for summary judgment relied on evidence obtained in discovery, including deposition testimony, to argue that its entertainers were legally classified as independent contractors and thus not entitled to the protections of the FLSA. Crazy Horse did not mention arbitration in this motion for summary judgment. The next day, Degidio moved for Rule 23 class certification for the state law claims and conditional certification of a collective action under the FLSA.

On January 19, 2015, Crazy Horse opposed Degidio's motions for FLSA conditional certification and Rule 23 class certification and – for the first time

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in the litigation – argued that the district court should compel arbitration against any entertainers who had signed arbitration agreements.

In support of its motion to compel arbitration, Crazy Horse submitted signed declarations in which entertainers explained why they chose to sign the agreement. All of the entertainers stated that they preferred to be independent contractors because they enjoyed having the freedom to work at other clubs, set their own work schedules, and keep the money they received in tips. Crazy Horse also filed an affidavit from its CFO Laura Watson explaining that Crazy Horse had begun entering arbitration agreements with entertainers in November 2014.

On September 30, 2015, the district court granted in part and denied in part Crazy Horse’s motion for summary judgment. Specifically, the district court dismissed two of Degidio’s three SCPWA claims, those for minimum wages and overtime pay. The court found, however, that entertainers who performed at Crazy Horse were employees for purposes of the FLSA. Based on this finding, the district court granted Degidio’s motion for conditional certification of an FLSA collective action and authorized Degidio’s counsel to send notice to putative plaintiffs. The district court also “question[ed] the enforceability of the arbitration agreements as they pertain to this action.” J.A. 478-81 (citing *Billingsley v. Citi Trends, Inc.*, 560 Fed. Appx. 914, 919 (11th Cir. 2014)). The district court expressed concern “that potential class members have been misled about the nature of the plaintiff’s claims, the

implications of being classified as an employee, and what an employee would need to show to recover under the FLSA.” J.A. 480.

Shortly after notice had been sent to potential class members informing them of their right to opt into Degidio’s FLSA collective action, on October 26, 2015, Crazy Horse filed another motion for summary judgment. In the motion, Crazy Horse argued only that it was entitled to summary judgment on Degidio’s remaining SCPWA claim. It again did not mention arbitration.

After Crazy Horse filed that summary judgment motion, between November 2015 and January 2016, more than a dozen new plaintiffs joined this litigation. Nine of those plaintiffs had signed the arbitration agreements Crazy Horse is trying to enforce in this appeal.

Moreover, on November 30, 2015, only a month after it had filed a motion for summary judgment on Degidio’s SCPWA claims, Crazy Horse began serving written discovery on the opt-ins, including each opt-in who signed an arbitration agreement. Crazy Horse asked the opt-ins to produce documents relating to their sources of income, their work history, the number of hours they worked, and the remuneration they received from defendants. *See, e.g., Miller Interrogatories*, J.A. 874-76. All of these questions probe merits issues that are relevant to Degidio’s SCPWA and FLSA claims, but are unrelated to the question of arbitrability.

The district court denied Crazy Horse's motion for summary judgment on June 3, 2016. Seven days later, Crazy Horse moved to certify several questions of South Carolina law to the South Carolina Supreme Court. The district court properly denied the motion because it had earlier ruled on the exact same questions at Crazy Horse's request.³ Undeterred, Crazy Horse filed a second motion to certify the wages issue to the South Carolina Supreme Court on August 11, 2016.

Before the district court had ruled on Crazy Horse's second motion to certify state law questions to the South Carolina Supreme Court, on October 31, 2016, Crazy Horse filed another motion for summary judgment. The case had now been ongoing for more than three years, and more than nine months had passed since the latest opt-in had joined the FLSA collective action. This time, Crazy Horse sought to compel arbitration against the nine plaintiffs who had signed arbitration agreements in November and December 2014.

On January 26, 2017, the district court entered an omnibus order denying Crazy Horse's second motion to certify questions of state law, rejecting the motion to

³ Specifically, Crazy Horse argued that it was unclear whether "tips" qualified as "wages" for purposes of South Carolina law, and that the South Carolina Supreme Court should be given an opportunity to weigh in on this question. Crazy Horse had asked the district court to resolve this exact same question in an earlier motion for summary judgment. The district court did so seven days before Crazy Horse filed this motion.

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compel arbitration, and granting Degidio's motion for conditional class certification. As to arbitration, the court found that Crazy Horse had obtained the arbitration agreements through a unilateral, unsupervised, and misleading pattern of communication with absent class members initiated more than a year after the pendency of this case. J.A. 909. It thus declined to enforce the arbitration agreements. Crazy Horse now appeals this decision.

II.

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, adopted “a liberal federal policy favoring arbitration agreements.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA recognizes that arbitration is an expeditious way to resolve disputes and conserve judicial resources. *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001). It accordingly requires that courts stay “any suit or proceeding” pending arbitration of “any issue referable to arbitration under an agreement in writing for such arbitration.” 9 U.S.C. § 3. Pursuant to this directive, courts generally respect contractual agreements to settle disputes via arbitration. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (“[C]ourts must place arbitration agreements on an equal footing with other contracts.”).

However, the policy undergirding the FAA is not without limits. “A litigant may waive its right to invoke the Federal Arbitration Act by so substantially

utilizing the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.” *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987) (quoting *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985)). This is because “[a]rbitration laws are passed to expedite and facilitate the settlement of disputes and avoid the delay caused by litigation,” not to provide “a means of furthering and extending delays.” *Radiator Specialty Co. v. Cannon Mills*, 97 F.2d 318, 319 (4th Cir. 1938). “Two factors specifically inform our inquiry into actual prejudice: (1) the amount of the delay; and (2) the extent of the moving party’s trial-oriented activity.” *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991).

Crazy Horse employed judicial proceedings to pursue a litigation strategy for over three years, and it did so to the detriment of plaintiffs in this case. Instead of filing a motion to compel arbitration at an early stage in the litigation process, Crazy Horse filed multiple motions for summary judgment, served discovery, and twice asked the district court to certify questions of state law to the South Carolina Supreme Court. This was litigation activity aimed at obtaining a favorable ruling on the merits of the case. In fact, Crazy Horse had already obtained favorable rulings from the district court to the effect that Degidio’s claims for minimum wages and overtime under the SCPWA were preempted.

In pursuing this merits-based strategy for three years, Crazy Horse actively sought to obtain a favorable

legal judgment. In doing so, it forced plaintiffs and the district court to spend unnecessary time and resources on issues that might have had to be reargued before an arbitrator. This conduct could not be more at odds with the FAA's goal of facilitating the expeditious settlement of disputes.

Of course, if the district court had granted any of Crazy Horse's motions for summary judgment, then arbitration would have been unnecessary: the district court would already have resolved the dispute and arbitration would serve no purpose. The only possible purpose of the arbitration agreements, then, was to give Crazy Horse an option to revisit the case in the event that the district court issued an unfavorable opinion. In other words, Crazy Horse did not seek to use arbitration as an efficient *alternative* to litigation; it instead used arbitration as an insurance policy in an attempt to give itself a second opportunity to evade liability.

Crazy Horse claims that it filed its motion to compel arbitration as quickly as possible. According to the club, it did not delay because it could not move to compel arbitration against parties who had yet to join Degidio's suit. And, because Degidio did not herself sign an arbitration agreement, Crazy Horse argues that there was no party against whom it could have moved to compel arbitration until after signatories had opted to join the action. This argument is doubly misguided.

The first difficulty with this argument is that it misrepresents the procedural history of the case. Crazy Horse began executing the arbitration agreements in November 2014. Crazy Horse did not need to wait to inform the district court about its arbitration strategy until entertainers who had signed arbitration agreements joined the case. It could instead have told the district court that it intended to compel arbitration with respect to any entertainers who elected to sign arbitration agreements and then proceeded to join Degidio's lawsuit. The fact that the arbitration agreements expressly mentioned this lawsuit suggests that Crazy Horse was well aware that the agreements were relevant to the ongoing litigation. Had Crazy Horse informed the district court of its intention to compel arbitration at this earlier stage of litigation, the trial judge would have been able to monitor communications between Crazy Horse and potential plaintiffs. As a practical matter, the district court could have waited to issue merits judgments until the prior arbitration question had been settled. In this way, the district court would not have had to decide legal questions that might ultimately be rehashed by the arbitrator.

As we have noted, however, rather than moving for arbitration, Crazy Horse proceeded to make a number of legal arguments before the district court over a period of three years. For example, in December 2014, a few weeks after it began executing arbitration agreements, Crazy Horse filed a summary judgment motion asking the court to decide the case on the merits. Then, after Crazy Horse informed the court in January 2015

that many potential plaintiffs had signed arbitration agreements, the club filed two more merits-based summary judgment motions and asked the trial judge to certify questions of law to the South Carolina Supreme Court. Even after the opt-ins had joined the class, Crazy Horse continued to pursue a merits-based litigation strategy before asking the court to compel arbitration. For instance, Crazy Horse asked the district court to reconsider its order on Degidio's SCPWA claim and to again certify questions of law to the South Carolina Supreme Court. In addition, Crazy Horse served discovery on all of the opt-ins who had signed arbitration agreements. But rather than limit discovery to questions of arbitrability, Crazy Horse included interrogatories and requests for production on numerous details of the opt-ins' employment history and income. In doing so, Crazy Horse continued to act as though all of the claims would be disposed of in litigation – not in an arbitral proceeding.

There is a second reason to reject Crazy Horse's contention that it could not file a motion to compel arbitration until after the district court had conditionally certified an FLSA class. Such a ruling would give defendants a perverse incentive to wait as long as possible to compel arbitration. Generally, arbitration agreements are signed before the commencement of any litigation. When such agreements are executed during the pendency of litigation, there is an increased risk that arbitration will operate not to expedite the resolution of disputes, but to prolong the entire process and

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to give defendants a second opportunity to contest unfavorable judgments.

This all turns the arbitral process on its head. Instead of giving the parties to an arbitration agreement one neutral arbiter, it grants defendant two bites at the apple. It is hard to escape the impression that defendants knew exactly what they were up to, and the district court was quite right to put a stop to it. By treating arbitration as a backstop and as a last resort rather than as a substitute for judicial proceedings, Crazy Horse pushed this case further and further from the FAA's mandate of helping parties resolve disputes expeditiously.

Moreover, the arbitration agreements that Crazy Horse presented to potential plaintiffs painted a false picture of the entertainers' legal posture. Specifically, the agreements suggested that the entertainers' ability to keep tips and set their own schedules was a result of their designation as independent contractors, and that this designation would be imperiled if the entertainers joined Degidio's suit.

The proposed arbitration agreements were quite clear that entertainers would be able to enjoy important remunerative and scheduling benefits only if they worked as independent contractors. For example, Paragraph 7.C of the agreement, which summarized the benefits of being an independent contractor, specified that an entertainer's ability to "choose the days or evenings to appear and perform at the club" was contingent on the entertainer retaining her status as an

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independent contractor and signing the arbitration agreement.⁴ J.A. 78. Paragraph 7.B further emphasized that if the entertainers were found to be employees, then Crazy Horse “would be required to collect, and would retain, all Performance Fees paid by guests to Performer.”⁵ *Id.*

In their declarations, the entertainers appear to have been operating under the misunderstanding that

⁴ Paragraph 7.C stated in full: “Performer is a skilled entertainer and the Club is not responsible for providing training or instruction on performances. Since Performer understands that for all purposes under this Agreement, Performer will operate as an independent contractor Performer, Performer retains full independence in exercising judgment as to the time and manner in performing at the Club. For example, Performer shall have the sole and exclusive right to choose the days or evenings to appear and perform at the Club, and individual choice over his/her costumes, props, or any other equipment used during performance. Performer is solely responsible for the development of any performances, number of hours spent performing, and the final control over any aspect of the presentation of any performances.” J.A. 79.

⁵ Paragraph 7.B stated in full: “The Club and Performer acknowledge and represent that if the relationship between them was that of employer and employee, the Club would be required to collect, and would retain, all Performance Fees paid by guests to Performer. Performer acknowledges and agrees that if the relationship were one of employer/employee, all Performance Fees would be the property of the Club. THE PARTIES ACKNOWLEDGE AND REPRESENT THAT PERFORMER’S RIGHT TO OBTAIN AND KEEP PERFORMANCE FEES PURSUANT TO THIS LICENSE IS SPECIFICALLY CONTINGENT UPON THE BUSINESS RELATIONSHIP OF THE PARTIES BEING THAT OF THE CLUB BEING A LICENSOR AND TEMPORARY SPACE LESSOR AND PERFORMER BEING AN INDEPENDENT PERFORMER LICENSEE AND TEMPORARY SPACE LESSEE.” J.A. 79.

they would be able to keep their tips and flexible work schedule only if they were independent contractors, and that they would be able to assure themselves of that status only by signing the arbitration agreements. *See* J.A. 85-98. But the benefits that seemingly led the entertainers to sign arbitration agreements are available to both employees and independent contractors alike. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301-02 (1985). The FLSA requires that employers pay a minimum wage and overtime rates to their employees. 29 U.S.C. §§ 206-07. It does not prevent parties – whether they be businesses, employees, or independent contractors – from getting together to settle most questions of wages and scheduling to their mutual satisfaction. *See Roland Elec. Co. v. Walling*, 326 U.S. 657, 668 (1946). In other words, while the parties cannot circumvent the FLSA with a simple contractual declaration, *see Tony & Susan Alamo Found.*, 471 U.S. at 302, they remain free to determine most features of their relationship. Insofar as the entertainers signed the arbitration agreements because they thought that employment status would deprive them of any say-so over the conditions of their employment, the agreements are misleading.

As a final matter, the agreements were all presented to plaintiffs in a furtive manner. When it comes to FLSA collective actions, the mechanism by which parties join an ongoing lawsuit reposes in district courts the responsibility to supervise and manage contacts with potential plaintiffs. To join an FLSA class, each potential plaintiff must consent in writing to

become a party in the case. 29 U.S.C. § 216(b). This mechanism has come to be known as the “opt-in” requirement.

The FLSA’s opt-in requirement was enacted in response “to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome.” *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989). The requirement seeks to balance employees’ interest in pooling resources to bring collective actions and employers’ interest in reducing baseless lawsuits. In order to strike this balance, district courts must be able to supervise contacts between the parties and their respective counsel to ensure that potential plaintiffs are not misled about the consequences of joining a class in an ongoing employment dispute. The district court’s supervisory role helps to ensure that “employees receive accurate and timely notice . . . so that they can make informed decisions about whether to participate.” *Hoffmann-La Roche*, 493 U.S. at 170; *see also Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1201-03 (11th Cir. 1985) (“Because trial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute, it lies within the discretion of a district court to begin its involvement early, at the point of the initial notice, rather than at some later time.”).

The agreements in this case were all obtained after potential plaintiffs met with Crazy Horse’s CFO or counsel. The setting here was ripe for duress: Not only were arbitration agreements executed without knowledge of the court and in the context of an employment

relationship in which the employer alone could profess the requisite legal expertise. They falsely suggested that participation in the lawsuit would deprive potential plaintiffs of important professional rights. The combination of these circumstances rendered defendant's conduct indefensible from the get-go. The district court was right to describe the "circumstances here" as "distinct and disturbing," J.A. 911, and it correctly denied enforcement of these sham agreements. We respect the admirable care and patience of that court in the face of obviously trying circumstances.

The judgment of the district court is affirmed and the case remanded for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED.

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FILED: January 18, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1145
(4:13-cv-02136-BHH)

ALEXIS DEGIDIO, individually and on behalf of all
others similarly situated

Plaintiff-Appellee

v.

CRAZY HORSE SALOON AND RESTAURANT INC,
d/b/a Thee New Dollhouse

Defendant-Appellant

and.

JOSEPH B. HARGADON

Third Party Defendant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed. This case is remanded to the district court for further proceedings consistent with the court's decision.

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This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

ALEXIS DEGIDIO,	)	Civil Action No.:
individually and on behalf of	)	4:13-cv-02136-BHH
all others similarly situated,	)	
	)	ORDER
Plaintiff,	)	(Filed Jan. 26, 2017)
	)	
vs.	)	
	)	
CRAZY HORSE SALOON	)	
AND RESTAURANT, INC.	)	
d/b/a THEE NEW	)	
DOLLHOUSE	)	
	)	
Defendant.	)	

This matter is before the Court on Plaintiff's Renewed Motion for Rule 23 Class Certification, (ECF No. 139), Defendant's Motion to Certify Uncertain Questions of State Law, (ECF No. 146), and Defendant's Motion to Dismiss Claims of Opt-Ins to Conditionally Certified FLSA Action and to Compel Arbitration, (ECF No. 153). For the reasons set forth below, Plaintiff's motion to certify class is GRANTED and Defendant's motion to certify and motion to compel arbitration are DENIED.

I. BACKGROUND

A. Factual

The Court is well acquainted with the facts of this case, and summarized them in extensive detail in its September 30, 2015 Opinion and Order on Plaintiff's Motion for Conditional Class Certification and Judicial Notice pursuant to 216(b) of the FLSA and Motion for Class Certification under Rule 23, and Defendant's Motion for Summary Judgment. (ECF No. 116.) Therefore, the Court's recitation of the facts here is limited to those most relevant to the current motions.

There is only one work facility at issue in this action. The claims Plaintiff asserts against Defendant are limited to the period of time beginning with the former Crazy Horse's rebranding under the Thee Dollhouse ("Dollhouse") name in March 2012. The record shows Plaintiff Alexis DeGidio worked as an entertainer at Dollhouse during the class period and that at least 725 other individuals have worked at Dollhouse since March 2012.

Plaintiff alleges on behalf of herself and a proposed class that Defendant violated the South Carolina Payment of Wages Act, ("SCPWA"), S.C. Code Ann. §§ 41-10-10 to 110. In connection with her renewed Motion for Class Certification, Plaintiff cited to evidence in the record which supports her assertions that the workplace policies and practices at issue applied to every entertainer who performed at Defendant's club.

Through these policies and procedures, Defendant maintained significant supervision and control over the entertainers, despite the fact that all entertainers who perform at Dollhouse have been characterized by Defendant as independent contractors throughout the class period. As a result of this misclassification, Dollhouse does not pay entertainers any wages or include them on payroll. Rather, to earn money for working at Dollhouse, entertainers rely on tips received from Defendant's customers.

Plaintiff identified several specific practices which she contends violated the SCPWA. Plaintiff has presented evidence that Defendant mandates that entertainers pay a "house fee" for each shift they work, and Defendant's "house mom" is responsible for collecting the house fees from entertainers and forwarding that money to management. Defendant's house fees vary depending upon the entertainers' arrival time, with house fees escalating for later shifts. If an entertainer fails to pay her house fee on a given night, the house mom logs the back fees due, and entertainers will be required to pay the outstanding house fee in the future.

Plaintiff presented evidence that dancers are required to tip several of Defendant's employees every shift. Defendant requires entertainers to tip its disc jockeys ten dollars (\$10) per shift or 10% of the entertainer's total earnings if she made more than \$100. Defendant requires entertainers to tip Defendant's house mom a minimum of ten dollars (\$10) per shift. In

addition, Defendant requires that entertainers tip each of Defendant's floormen at least two dollars (\$2) per shift.

Plaintiff presented evidence that Defendant does not allow its customers to use their credit cards to directly tip entertainers or directly buy private dances. Rather, Defendant sells to its customers an artificial currency referred to as "golden dollars," which can only be used for tipping or buying private dances. Customers pay a ten percent (10%) premium to purchase golden dollars from Defendant. In addition, entertainers are required to pay Defendant a ten percent (10%) fee in order to have the golden dollars they receive as payment from customers redeemed for U.S. currency. Defendant sells thousands of dollars' worth of golden dollars on an average night, and golden dollar sales make up 12-15% of Defendant's gross annual revenues.

Plaintiff presented evidence that, as a result of Defendant's mandatory house fees and expected tip-outs, entertainers could actually lose money working at Dollhouse. The record before the Court shows that Defendant maintains daily records of the entertainers who report for a shift, the time they report for a shift, the amount of golden dollars exchanged by individual entertainers as well as the fees retained by Defendant, and the number and length of private dances performed by individual entertainers as well as the Defendant's nightly take of private dance fees.

B. Procedural

Plaintiff filed this action on behalf of herself and all other putative class members on August 8, 2013. Defendant began obtaining its entertainers' signatures on arbitration agreements in November 2014. On September 30, 2015, this Court granted Plaintiff's motion for conditional certification of an FLSA collective action and authorized the sending of notice to putative plaintiffs. The arbitration agreements, however, theoretically prevent any entertainers subject to the agreement from opting into this lawsuit, or any other similar lawsuit. Plaintiff filed a renewed motion for Rule 23 class certification on July 15, 2016. (ECF No. 139.) She argues that the Court should not enforce the arbitration agreement and that the entertainers otherwise subject to its terms should be allowed to join the class without any limitations. (*Id.* at 10.)

On October 26, 2015, Defendant moved for dismissal of Plaintiff's SCPWA claim and/or for summary judgment of that claim. (ECF No. 117.) In its motion, Defendant argued that S.C. Code Ann. § 41-10-40 does not define tips as constituting wages, nor does it specifically prohibit any deductions from tips as opposed to wages. Accordingly, Defendant argued, Plaintiff cannot establish that Defendant violated the SCPWA through improper deductions from wages.

The Court rejected this argument in an Order on June 3, 2016. Before examining the merits of Defendant's argument, the Court noted that the issue presented was "purely a question of law," and, therefore,

consideration of summary judgment was inappropriate. (ECF No. 132 at 2.) After analyzing analogous case law and the established purpose of the SCPWA, the Court found that tips meet the definition of wages under the SCPWA and denied Defendant's motion. (*Id.* at 4-11.)

Defendant then moved to amend the June 3, 2016 Order and to certify SCPWA questions to the South Carolina Supreme Court. (ECF No. 133.) Defendant claimed that it remained an uncertain issue of state law as to whether tips are considered wages under the SCPWA. The Court, however, declined to reconsider its prior Order or certify any questions on this issue, finding no clear error of law. (ECF No. 140.)

On July 15, 2016, Plaintiff filed a renewed motion for Rule 23 class certification. (ECF No. 139.) On August 11, 2016, Defendant again moved to certify uncertain questions of state law regarding Plaintiff's SCPWA claim. (ECF No. 146.) Also, on October 31, 2016, Defendant filed a motion to dismiss claims of opt-ins to conditionally certified FLSA action and to compel arbitration. (ECF No. 153.) Specifically, Defendant asserts that nine of the fifteen opt-in plaintiffs who filed consent forms during the designated opt-in period for conditional certification of a collective action under the FLSA must individually arbitrate their claims pursuant to the arbitration agreement. (ECF No. 153-1 at 1.) Additionally, Defendant argues that 95% of the putative Rule 23 class members have signed the arbitration agreements, thereby preventing class certification. (ECF No. 147 at 11.)

These motions are fully briefed and ripe for review. Because the resolution of the motion to certify questions and the motion to compel arbitration affects the motion for Rule 23 class certification, the Court addresses these two motions first.

II. DISCUSSION

A. Motion to Certify Questions

Despite having already moved to certify questions on Plaintiff's SCPWA claim and been denied, Defendant again moves to certify questions on the SCPWA claim to the South Carolina Supreme Court. (See ECF Nos. 133, 140, 146.) Defendant contends that this motion is proper because "a dispositive motion remains before the Court." (ECF No. 146 at 1.) It contends the Court only ruled on Defendant's motion to dismiss in its June 3, 2016 Order, and failed to dispose of the motion for summary judgment. (*Id.*) Defendant asserts that the Court should certify "uncertain questions of law raised" in the motion for summary judgment before the Court rules thereon. (*Id.* at 2.)

Defendant's argument is without merit, as the Court clearly disposed of Defendant's "motion to dismiss and/or for summary judgment," (ECF No. 117), in the June 3, 2016 Order. As the Court carefully explained, there was no need to consider the merits of summary judgment on the SCPWA claim because the issue presented was "purely a question of law." (ECF No. 132 at 2.) Indeed, the arguments made for summary judgment in Defendant's original motion were

moot once the Court found tips could be considered wages under the SCPWA. In its motion, Defendant argued that “there are no disputed issues of material fact regarding Plaintiff’s entire compensation being received through tips of patrons instead of from wages paid by Defendants.” (ECF No. 117-1 at 10.) Once the Court found that tips could be considered wages under the SCPWA, this argument had no weight. Thus, there are no dispositive motions pending and Defendant’s basis for moving to certify questions is without merit.

Even if it were procedurally proper for Defendant to move to certify questions, the Court would still deny this motion. The Court is confident in the reasoning laid out in the June 3, 2016 Order, namely, that there is sufficient basis to find that tips are considered wages under the SCPWA. Notably, this finding has recently been adopted by another court in this district. In *Carbone v. China Fun LLC et al*, No. 2:16-cv-00108 (December 21, 2016), defendants moved to dismiss plaintiffs’ SCPWA claim for the same reasons proffered in this matter. After discussing the language of the statute at issue and the remedial purpose of the SCPWA, Judge Norton denied the motion to dismiss, finding that “tips are ‘wages’ under the SCPWA.” *Carbone*, No. 2:16-cv-00108, *9.

In sum, the Court finds no basis to certify the questions proposed by Defendant and denies the motion.

B. Motion to Compel Arbitration

1. Legal Standard

The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16, reflects “a liberal federal policy favoring arbitration agreements.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Underlying this policy is Congress’s view that arbitration constitutes a more efficient dispute resolution process than litigation. *Hightower v. GMRI, Inc.*, 272 F.3d 239, 241 (4th Cir. 2001). Accordingly, “due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration.” *Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76 (1989). The FAA requires a court to stay “any suit or proceeding” pending arbitration of “any issue referable to arbitration under an agreement in writing for such arbitration.” 9 U.S.C. § 3.

In the Fourth Circuit, a litigant can compel arbitration under the FAA if he can demonstrate “(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.” *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991).

When a motion to compel arbitration arises in the context of a collective action, a court may consider

additional avenues for resolution. Specifically, there are two general, and different, ways in which a court may declare invalid, or not enforce, arbitration agreements entered into by plaintiffs (and potential class members) after the collective action was initiated. First, a court may find the arbitration agreements unconscionable, procedurally or substantively. *See Abdul-Rasheed v. KableLink Commc'ns, LLC*, 2013 WL 6182321, at *3 (M.D. Fla. Nov. 25, 2013) (denying FLSA defendants' motion to compel arbitration because, in part, the court found the arbitration agreements procedurally and substantively unconscionable). Second, a court may exercise its collective action managerial responsibilities by refusing to enforce the arbitration agreements as a way to correct defendants' pre-certification misconduct. *See Billingsley v. Citi Trends, Inc.*, 560 F. App'x 914, 919, 922-24 (11th Cir. 2014) (affirming district court's decision not to enforce arbitration agreements on the ground that it was a proper exercise of district court's responsibility to manage collective actions).

2. Analysis

In resolving Defendant's motion, the Court considers the "broad remedial goal" of the FLSA. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989). Congress passed the FLSA to protect workers from overbearing practices of employers who had greatly unequal bargaining power over their workers. *See Roland Elec. Co. v. Walling*, 326 U.S. 657, 668 n. 5 (1946). Congress has expressed a policy that FLSA plaintiffs

should have the opportunity to proceed collectively. See 29 U.S.C. § 216(b).

To join the FLSA collective action, each party plaintiff must consent in writing to become a plaintiff in the case. 29 U.S.C. § 216(b). This is referred to as opting-in to the action, which differs procedurally from a Rule 23 class action.¹ The FLSA’s collective action mechanism (1) reduces the burden on low wage employees through the pooling of resources and (2) allows for the efficient resolution of common issues of law and fact that arise from the same illegal conduct. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1264-65 (11th Cir. 2008); *see also Hoffmann-La Roche*, 493 U.S. at 170 (noting a collective action affords plaintiffs the “advantage of lower individual costs to vindicate rights by the pooling of resources” and “[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact”).

Because plaintiffs must affirmatively opt into the action, the benefits of a collective action “depend on employees receiving accurate and timely notice . . . so that they can make informed decisions about whether to participate.” *Hoffmann-La Roche*, 493 U.S. at 170. Courts can play a crucial role in ensuring a potential plaintiffs’ ability to make an informed decision, both in authorizing the notice process and in monitoring communications with absent class members. *See, e.g., id.* at

¹ In a Rule 23 class action, putative class members must “opt out” if they do not wish to be bound by the outcome of the class action. *See* Fed. R. Civ. P. 23(c)(2)(B).

171 (“Because trial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute, it lies within the discretion of a district court to begin its involvement early, at the point of the initial notice, rather than at some later time.”); *Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1201-03 (11th Cir. 1985) (recognizing district court’s authority to police class member contacts and to prohibit defendant from engaging in unsupervised, unilateral communications with plaintiff class members to solicit exclusion requests from Rule 23 class).

Such monitoring is especially important in the period following the filing of an FLSA lawsuit and prior to a court’s conditional certification of a class. As explained by the Eleventh Circuit, “[b]ecause formal notice to putative FLSA collective members is provided *after* conditional certification has been approved by the district court, pre-certification, *ex parte* communication with putative FLSA collective members about the case has an inherent risk of prejudice and opportunities for impropriety.” *Billingsley v. Citi Trends, Inc.*, 560 F. App’x 914, 921 (11th Cir. 2014) (emphasis in original). As such, trial courts have considerable discretion to “facilitat[e] notice to potential plaintiffs” and “broad authority” to exercise control over the collective action and to govern the conduct of counsel and parties in the collective action, so as to avoid any “such prejudice and impropriety and to ensure the potential plaintiffs have a fair opportunity to opt-in to a FLSA collective action.” *Id.* (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100

(1981)); *see also Hoffmann-La Roche*, 493 U.S. at 169-71; *Kleiner v.* [sic] 751 F.2d at 1200; *Jones v. Casey's General Stores*, 517 F. Supp. 2d 1080, 1088 (S.D. Iowa 2007) (“[T]his Court has relatively broad discretion in limiting communications with putative collective members when such communications cross the boundaries of propriety, including when the communications are unbalanced, misleading, or factually inaccurate.”); *Maddox v. Knowledge Learning Corp.*, 499 F. Supp. 2d 1338, 1342-43 (N.D. Ga. 2007) (observing that district courts in § 216(b) actions rely on broad case management discretion to allow pre-notice communications “while actively limiting misleading statements in such communications”); *Belt v. Emcare, Inc.*, 299 F. Supp. 2d 664, 667 (E.D. Tex. 2003) (“As in Rule 23 class actions, courts have the authority to govern the conduct of counsel and parties in § 216(b) collective actions.”).

Courts have exercised this authority by refusing to enforce arbitration agreements that were entered into during the vulnerable time period highlighted by the Eleventh Circuit, when such agreements were obtained through misleading and improper communications. *See, e.g., Billingsley*, 560 F. App'x at 921 (affirming district court's decision to deny enforceability of arbitration agreements where they were obtained in a confusing, misleading, and coercive manner); *Espinoza v. Galardi S. Enterprises, Inc.*, 2015 WL 9592535, at *3 (S.D. Fla. Dec. 31, 2015) (refusing to enforce arbitration agreements against opt-in plaintiffs, finding “evidence of an abusive, manipulative arbitration rollout for the purpose of undermining this litigation”);

Balasanyan v. Nordstrom, Inc., 2012 WL 760566, at *1-2, 4 (S.D. Cal. Mar. 8, 2012) (refusing to enforce individual arbitration agreement in an FLSA action because the defendant's imposition of the agreement was an improper class communication); *Williams v. Securitas Sec. Servs. USA, Inc.*, 2011 WL 2713741, at *3 (E.D. Pa. July 13, 2011) (invalidating arbitration agreement imposed on the defendant's employees during pre-certification stage of FLSA litigation and ordering corrective measures because the arbitration agreement was a "confusing and unfair communication" with the potential opt-in plaintiffs).

With this background in mind, the Court considers the merits of Defendant's motion. In contesting the motion to compel arbitration, Plaintiff argues that the Court should exercise its managerial responsibility and refuse to enforce the arbitration agreements because "they were obtained by Defendant's improper, unilateral, and misleading communications with putative opt-in plaintiffs after this action was filed."² (ECF No. 157 at 1.) Plaintiff argues that the language Defendant chose for the arbitration agreement was misleading in that it presented the entertainers with a false picture of their legal status and options.

² Plaintiff also argues that the Court should deny the motion to compel arbitration because: 1) Defendant waived its right to compel arbitration by delaying the assertion of its supposed right to arbitrate, and actively participating in this pre-trial litigation for years; and 2) the arbitration agreements are illegal and unenforceable under the National Labor Relations Act. (ECF No. 157 at 1.) Because the Court resolves the motion under Plaintiffs first argument, it does not reach these issues.

Specifically, the introductory paragraph of the Licensing Lease and Dispute Resolution Agreement (hereinafter “Agreement”) purports “to clarify what this document is and explain what the nature of the relationship is between you, as a Performer, and us, ‘the Club.’” (ECF No. 147-2 at 4.) It states in bold and all caps, **“YOU ARE NOT AN EMPLOYEE, THE CLUB IS NOT YOUR EMPLOYER,”** and proceeds to analogize the relationship between entertainers and Defendant to that of a mall and retail tenants. (*Id.*) As Plaintiff notes, by framing the contract in such a way, the Agreement “creates an illusion that . . . parties can simply contract out of the obligations of the [FLSA] and other state and federal employment laws.” (ECF No. 157 at 9.)

The Agreement reinforces this blatant misrepresentation of the law in Paragraphs 5 and 7. Paragraphs 5 and 7.C present a summary of benefits available to entertainers in their position as independent contractors. Paragraph 5 states that under the Agreement, “Performer shall be entitled to retain all fees and gratuities received by guests of the Club for performances of Performer’s services . . . [except for certain fees]. . . . However, nothing shall prevent Performer from receiving Performance Fees in excess of the suggested minimum fees, tips, or other gratuities.” (ECF No. 147-2 ¶ 5.) Paragraph 7.C further states:

Since Performer understands that for all purposes under this agreement, Performer will operate as an independent contractor Performer, Performer retains full independence

in exercising judgment as to the time and manner in performing at the Club. For example, Performer shall have the sole and exclusive right to choose the days or evenings to appear and perform at the Club, and individual choice over his/her costumes, props, or any other equipment used during a performance.

(*Id.* ¶ 7.C)

Paragraph 7.B, presents a starkly different view of the entertainers' conditions should they be considered employees, stating:

The Club and Performer acknowledge and represent that if the relationship between them was that of employer and employee, the Club would be required to collect, and would retain, all Performance Fees paid by guests to Performer. Performer acknowledges and agrees that if the relationship were one of employer/employee, all Performance Fees would be the property of the Club. THE PARTIES ACKNOWLEDGE AND REPRESENT THAT PERFORMER'S RIGHT TO OBTAIN AND KEEP PERFORMANCE FEES PURSUANT TO THIS LICENSE IS SPECIFICALLY CONTINGENT UPON THE BUSINESS RELATIONSHIP OF THE PARTIES BEING THAT OF THE CLUB BEING A LICENSOR AND TEMPORARY SPACE LESSOR AND PERFORMER BEING AN INDEPENDENT PERFORMER LICENSEE AND TEMPORARY SPACE LESSEE.

(*Id.* ¶ 7.B.)

The Agreement contains an explanation of the arbitration process and provides entertainers the opportunity to opt out within 21 days. (*Id.* at 9-10.) A section titled, “How will the Agreement affect my rights?” explains that those agreeing to arbitration would “not be able to participate in [Plaintiff’s] lawsuit as a plaintiff or class member.” (*Id.*) It summarizes Plaintiff’s lawsuit, stating that she alleges that entertainers “who have worked at the Club during the statutory periods were improperly classified as independent contractors rather than employees and, as a result, were not paid the federal minimum wage or overtime.” (*Id.* at 10.)

In light of the Agreement’s express mandate that entertainers “**ARE NOT ... EMPLOYEE[S]**”, it would be a stretch for entertainers reading this Agreement to believe that Plaintiff’s allegations, as highlighted by Defendant, have any merit. Further, given the Agreement’s representations of the negative conditions attached to an employee/employer relationship, common sense would likely dissuade entertainers from participating in litigation that is pursuing the recognition of such a legal status. In this context, it is not surprising that every entertainer who has performed at the Club since mid-November 2014 has signed the Agreement, and *not a single one* has opted out of the arbitration provision. (ECF No. 147-1 ¶¶ 4, 6.)

The declarations of five entertainers who signed the Agreement indicate that these entertainers indeed misunderstood the nature of Plaintiff’s lawsuit and its potential effects. Amy Hensell, for example, stated

I very much prefer to be an independent contractor rather than an employee. I like the freedom that I have to work when I want and when I can, and to earn as much money as my entertaining skills and abilities allow. Having the flexibility to work my own schedule and keep what I earn has allowed me the opportunity to obtain three college degrees, save some money, and provide for my three children as well as spend valuable time with them. I believe most of the Entertainers at the Club share the same preference to keep the independent contractor relationship.

(ECF No. 80-2 ¶ 7.)

Amber Ross (“Ross”) similarly declared, “I prefer to be an independent contractor rather than an employee. I like the freedom that I have to work when I can.” (ECF No. 80-3 ¶ 6.) “As an independent contractor, I like the freedom to come and go as I please and that I do not have to wait for a paycheck. I do not want my independence interfered with, and I believe other entertainers feel the same way.” (*Id.* ¶ 9.)

Eliza Grisby and Lucina DeWeese echoed Ross’s exact words³ and Gabrielle Poisson, (“Poisson”), likewise stated “I very much prefer to be an independent contractor rather than an employee. I like the freedom that I have to work when I want and when I can.” (ECF No. 80-5 ¶ 7.) Poisson also states: “As an independent

³ See ECF No. 80-4 ¶¶ 6, 9; 80-6 ¶¶ 6, 9.

contractor, I like the opportunity to make good money and that I do not have to wait for a paycheck.” (*Id.* ¶ 9.)

Each declaration was obtained after an interview with Defendant’s Chief Financial Officer Laura Watson and/or legal counsel, in which Defendant’s representatives explained the purposes of the declaration.⁴ It is evident that Defendant’s representatives did not correct any misconceptions of the law these entertainers had after reading the Agreement.

The Agreement, entered into only after the lawsuit commenced, illustrates precisely why courts maintain “considerable discretion” in managing collective actions. *Billingsley*, 560 Fed. App’x at 923. In drafting the Agreement to present such a misleading impression of the entertainers’ legal status and options, Defendant demonstrates how “unilateral communications with . . . potential plaintiffs can sabotage the goal of the FLSA’s informed consent requirement by planting the slightest seed of doubt or worry through the one-sided, unrebutted presentation of ‘facts.’” *Id.* at 924. “Because the damage from misstatements could well be irreparable, the district court must be able to exercise its discretion to attempt to correct the effects of such

⁴ See, e.g., ECF No. 80-2 ¶ 3 (“I am providing this declaration after being interviewed by Laura Watson and legal counsel for Crazy Horse. Ms. Watson explained to me that this declaration could be used to help the Club defend against a lawsuit . . . which claims Entertainers at the Club should be paid as employees and not treated as independent contractors.”); ECF No. 80-3 ¶ 3 (“I am providing this declaration after being interviewed by Laura Watson. They [sic] explained to me that this declaration will be used to help the club defend against a lawsuit. . . .”).

actions.” *Id.* (citing *Hoffmann-La Roche*, 493 U.S. at 170 (noting that court intervention in the collective action notice process may be necessary)).

Here, the Court exercises its discretion to correct the effects of Defendant’s misleading unilateral communications with potential plaintiffs. While arbitration agreements are typically given deference, the circumstances here are distinct and disturbing. The Court cannot, in good conscience, enforce arbitration agreements that were drafted in such an incredibly misleading manner and obtained after the lawsuit commenced. Such a remedial action is in line with those taken by other courts to correct the effects of misleading, coercive, or improper communications. *See, e.g., Billingsley*, 560 F. App’x at 921; *Espinoza*, 2015 WL 9592535, at *3; *Balasanyan*, 2012 WL 760566, at *1-2, 4; *Williams*, 2011 WL 2713741, at *3.

To clarify, the Court is not basing this decision on the mere fact of a unilateral communication between Defendant and potential plaintiffs after the lawsuit commenced. Nor does the Court rest its decision on the inherently coercive nature of the employer/employee relationship. Rather, the Court is disturbed by the Agreement’s misleading language implying that the entertainers’ legal status has been decided and that it is necessarily more beneficial for them to be considered independent contractors. (*See* 147-2 at 4 (**YOU ARE NOT AN EMPLOYEE, THE CLUB IS NOT YOUR EMPLOYER**).) Such biased language paints Plaintiff’s lawsuit in an extremely negative light, obscures Defendant’s unlawful remuneration practices under

the SCPWA and FLSA, and jeopardizes a potential plaintiffs' ability to make an informed decision on whether to participate in the lawsuit. Potential plaintiffs have a legal right not to join in a FLSA lawsuit, but this Court will not countenance Defendant's unabashed attempts to contract around the Court's authority, interpretation of the law, and rulings in the instant case through a misguided attempt to beat class certification to the punch. Because the decision to not enforce the arbitration agreements rests on the text of the Agreement, an evidentiary hearing would not benefit the Court's analysis.

The Court's decision does not conflict with those cases cited by Defendant in support of enforcing the arbitration agreements. For example, in *Slavinski v. Columbia Ass'n, Inc.*, No. CIV. CCB-08-890, 2011 WL 1310256, at *3 (D. Md. Mar. 30, 2011), the plaintiff alleged that her employer's interviews with 14 employees after the FLSA lawsuit had been filed constituted improper communications with prospective plaintiffs. She asked the court to enjoin the defendant from further improper communications with prospective class members. *Id.* The court found an injunction was not warranted, however, because the plaintiff "provided no evidence that [Defendant's representative] misrepresented facts about the lawsuit or discouraged participation in the suit" *Id.* at *4. Here, the Agreement evidences Defendant's misleading, one-sided presentation of the entertainers' legal status and options, as detailed above.

Likewise, in *Ross v. Wolf Fire Prot., Inc.*, 799 F. Supp. 2d 518, 521, 526 (D. Md. 2011), the court declined to strike the affidavits of thirty-three employees that were drafted by their employer and obtained after the plaintiffs filed their FLSA lawsuit. Notably, there was no allegation that the affidavits themselves contained misleading information. *Ross*, 799 F. Supp. 2d at 526-27. Additionally, in *Stevenson v. Great Am. Dream, Inc.*, 2014 WL 3519184, at *2 (N.D. Ga. July 15, 2014), the court found no merit in the FLSA plaintiff's argument "that an arbitration agreement executed during a collective action suit is presumptively an impermissible intrusion upon a court's managerial duty." The court refused to find the arbitration agreements improper solely on the basis of timing. Here, Plaintiff has offered sufficient reason, beyond timing, to find that the arbitration agreements constitute improper communications.

Accordingly, because the arbitration agreements constituted improper communications between Defendant and putative class members during litigation, the Court exercises its managerial powers and refuses to enforce these agreements. Such action is necessary to "avoid . . . prejudice and impropriety and to ensure [that] the potential plaintiffs have a fair opportunity to opt-in to [this] FLSA collective action." *Billingsley*, 560 F. App'x at 921. The Court therefore DENIES Defendant's motion to compel arbitration (ECF No. 153).

C. Motion for Rule 23 Class Certification

1. Legal Standard

Rule 23(a) of the Federal Rules of Civil Procedure identifies the prerequisites for a class action as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *see generally Amgen Inc. v. Connecticut Ref. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013); *Gray v. Hearst Commc'ns, Inc.*, 444 Fed. App'x 698, 700 (4th Cir. 2011); *Brown v. Nucor Corp.*, 576 F.3d 149, 152 (4th Cir. 2009); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 339 (4th Cir. 2006). These four prerequisites for class certification under Rule 23(a) are commonly referred to as “numerosity, commonality, typicality, and adequacy of representation.” *See id.* Each of these requirements is satisfied in this case.

In addition to the requirements of Rule 23(a), Plaintiff must also meet the requirements for maintenance of a class action imposed by Rule 23(b)(3) –

namely that common, not individual, issues predominate and that class treatment is superior to other forms of adjudication. Fed. R. Civ. P. 23(b)(3). Certification under Rule 23(b)(3) is proper where “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members,” and, to resolve the case, “a class action is superior to other methods available.” Fed. R. Civ. P. 23(b)(3).

2. Summary Judgment Issue

Defendant first argues that the Court should not address Plaintiff’s motion to certify class until after the Court resolves Defendant’s motion for summary judgment on Plaintiff’s SCPWA claim, which is the basis of the class action. Here, Defendant is referring to its “motion to dismiss and/or for summary judgment,” filed on October 26, 2015. (ECF No. 117.) Defendant contends the Court only ruled on Defendant’s motion to dismiss in its June 3, 2016 Order, and failed to consider the motion for summary judgment. (*Id.*) The Court explained in detail why this argument is without merit in its discussion of Defendant’s motion to certify questions. (*See* Section 1.A.)

For the reasons previously stated, there is no pending motion for summary judgment for the Court to resolve. Thus, there is no reason to postpone disposing of Plaintiff’s motion for Rule 23 class certification.

3. Rule 23 Analysis

i. Numerosity

The first requirement of Rule 23(a) is that a plaintiff must show that “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1); *see also Mitchell v. Conseco Life Ins. Co.*, No. 12-548, 2013 WL 5372776 (D.S.C. Sept. 24, 2013); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 550 (D.S.C. 2000). Satisfaction of the numerosity requirement does not require that joinder is impossible, but only that the plaintiff will suffer a litigational hardship or inconvenience if joinder is required. *See Olvera-Morales v. Int’l Labor Mgmt. Corp.*, 246 F.R.D. 250, 255 (M.D.N.C. 2007); *Rodger v. Elec. Data Sys. Corp.*, 160 F.R.D. 532, 535 (E.D.N.C. 1995); 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *FEDERAL PRACTICE AND PROCEDURE* § 1762 (3d ed.2005).

The record shows that numerosity is satisfied here. In addition to other evidence, Defendant itself identified at least 725 entertainers who have performed at Dollhouse since March 1, 2012. This number is sufficient to satisfy the numerosity requirement. *See, e.g., Delebreau v. Bayview Loan Servicing, LLC*, No. 09-00245, 2009 WL 4884354 (S.D. W. Va. Dec. 10, 2009) (“There is no magic number to meet the numerosity requirement”) (citing *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984)); *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 337 (D. Md. 2012) (“The Fourth Circuit has held that no specified

number is needed to maintain a class action. This Court has previously noted that, generally speaking, courts find classes of at least 40 members sufficiently large to satisfy the impracticability requirement”) (quoting *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass’n*, 375 F.2d 648, 653 (4th Cir. 1967) and *Peoples v. Wendover Funding, Inc.*, 179 F.R.D. 492, 497 (D. Md. 1998)).

While Defendant argues that numerosity is precluded because 686 members of putative class signed arbitration agreements, the Court has found the arbitration agreements unenforceable in this action.⁵ See *supra* I.B. Accordingly, the arbitration agreements are not impediments to finding numerosity in this case.⁶

Defendant also argues here that Plaintiff has failed to address the practicability of joining these claims. (ECF No. 147 at 15.) Specifically, it argues that because the entertainers’ contact information is not kept up-to-date, there is no reasonably reliable means of ensuring that all class members will receive the required notice. (*Id.* at 16.) Consequently, Defendant argues, this class cannot be certified.

⁵ Defendant also argues here that Plaintiff cannot prove damages on a class wide basis. (ECF No. 147 at 14.) This argument goes to the typicality requirement, and is better analyzed under that prong.

⁶ As with FLSA collective actions, a court can exercise the same managerial responsibility in Rule 23 class actions and refuse to enforce arbitration agreements. See, e.g., *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d at 252-54 (imposing similar corrective action in Rule 23 class action).

This argument is unavailing. As an initial matter, “the United States Supreme Court has often upheld the use of first class mail as a method of notice reasonably calculated to apprise interested parties of proceedings affecting their rights despite the fact that ‘[t]he Supreme Court is obviously aware[] that not every first-class letter is received by the addressee.’” *Robinson v. Fountainhead Title Grp. Corp.*, No. CIV. WMN-03-3106, 2009 WL 2842733, at *1 (D. Md. Sept. 4, 2009) (quoting *Peters v. Nat’l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992)) (modifications in original). Indeed, courts have routinely held “that notice by first class mail ordinarily satisfies rule 23(c)(2)’s requirement that class members receive ‘the best notice practicable under the circumstances.’” *Id.*

Further, when notice by direct mail has been disputed, courts have found a second notice could cure any concerns under Rule 23(c)(2). *See Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 479 (D. Md. 2014) (ordering notice by direct mail to all class members at their last known address and then, if returned as undeliverable, directing defendant to conduct a search “using a competent information broker on the Internet and/or recognized credit bureau” to determine the individual’s correct address and to mail a second notice); *Minter v. Wells Fargo Bank, N.A.*, 283 F.R.D. 268, 276 (D. Md. 2012) (“By providing individual notice to class members for whom Wells Fargo has current address information and also providing notice to individuals that Class Counsel is able to locate through additional tracing, the Court is confident that individual mailing will be

sufficient to provide notice to the vast majority of potential class members, and thus satisfy the requirements of Rule 23(c)(2). . . .”).

Here, the Court recognizes that follow up notice may be necessary for those entertainers who no longer perform at the Club. In the event direct mail is returned as undeliverable, Plaintiff should search for a current address using a competent information broker on the Internet and/or recognized credit bureau and send an additional notice by direct mail, when possible. In short, the potential lack of current addresses for some entertainers does not bar certification of the class.

ii. Commonality

Rule 23(a)(2) requires that there be questions of law or fact common to the members of the class. Generally, courts give this commonality requirement a permissive application since the threshold for commonality is “not high” and “only requires that some questions of law or fact be shared by the putative class members, and not all questions raised be common.” *Paulino v. Dollar Gen. Corp.*, No. 12-75, 2014 WL 1875266 (N.D. W.Va. Feb. 24, 2014) (“This commonality requirement has been liberally construed and those courts that have focused on Rule 23(a)(2) have given it permissive application so that common questions have been found to exist in a wide range of contexts”) (quoting *Haywood v. Barnes*, 109 F.R.D. 568, 577 (E.D.N.C. 1986)); *Ruffin v. Entm’t of the E. Panhandle*, No. 11-19,

2012 WL 5472165 (N.D. W.Va. Nov. 9, 2012) (same); *Rodger v. Elec. Data Sys. Corp.*, 160 F.R.D. 532, 537 (E.D.N.C. 1995) (same); *Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009) (stating “[t]he threshold requirements of commonality and typicality are not high”); *Kohl v. Ass’n of Trial Lawyers of Am.*, 183 F.R.D. 475, 484 (D. Md. 1998) (not all questions raised need be common). Indeed, the commonality requirement is “not onerous. The inquiry is not whether common questions of law or fact predominate, but only whether such questions exist.” *Matthews v. Buel, Inc.*, No. 11-162, 2012 WL 1825273 (D.S.C. May 18, 2012). Thus, minor differences in the facts do not preclude a finding of commonality and a single common question of law or fact is sufficient to satisfy the requirement. *See Stanley v. Cent. Garden & Pet Corp.*, 891 F.Supp.2d 757, 770 (D. Md. 2012) (“To show commonality, there must be a single common question of law or fact among class members, although members do not need to share all issues. Factual differences among class members will not necessarily preclude certification if the class members share the same legal theory.”).

Various courts have found commonality where the record evidence established that entertainers were subject to a uniform set of pay policies and practices. *See, e.g., Hart v. Rick’s Cabaret International, Inc. et al.*, No. 09-3043, 2014 WL 6238175 at *18-23 (S.D.N.Y. Nov. 14, 2014) (denying Defendants’ motion to decertify previously certified Rule 23(b)(3) class action under New York labor law, holding that commonality was established because “Rick’s NY systematically implemented

a series of across-the-board policies with regard to dancer pay: to classify all dancers as independent contractors; to not pay dancers a minimum (or any) wage; to leave the dancers' compensation instead to customers . . . "); *In re Penthouse Executive Club Comp. Litig.*, No. 10 CIV. 1145 KMW, 2014 WL 185628, at *3 (S.D.N.Y. Jan. 14, 2014) ("Plaintiffs' common factual allegations and a common legal theory – that Defendants violated federal and state law by misclassifying them as independent contractors, failing to pay them wages, improperly requiring them to pay fees and improperly withholding their tips – predominate over any factual or legal variations among class members."); *Ruffin v. Entm't of the E. Panhandle*, No. 11-19, 2012 WL 5472165 (N.D. W. Va. Nov. 9, 2012) ("at least two common questions of fact and law exist: (1) whether the entertainers were employees within the meaning of the WPCA; and (2) whether Defendants' practice of requiring the dancers to pay various fees and fines violates the assignment provisions of the WPCA. Accordingly, this Court finds the commonality factor satisfied"); *Chaves v. King Arthur's Lounge, Inc.*, No. 07-2505, at 3 (Mass. Superior Ct. July 31, 2009) (stating, as to exotic entertainers' wage claims, "This type of case is uniquely suited to class treatment. All of the putative class would stand in the same position relative to [the club], i.e., misclassified."); *Davis v. Déjà Vu Entertainment Enterp. of Minn., Inc.*, No. CT 92010727 (Minn. Dist. Ct. Dec. 16, 1992) (certifying class of exotic entertainers challenging independent contractor classification and resultant wage violations under Minnesota law); *Doe v. Gold Club-S.F., LLC*, No. 04-431683

(Calif. Superior Ct. June 8, 2005) (certifying class of exotic entertainers challenging independent contractor classification resultant wage and deduction violations under California law).

Here, the record shows that Defendant employs a common set of pay policies and practices that Plaintiff alleges violate the South Carolina Payment of Wages Act. Whether this single set of policies in fact violates South Carolina law is common to Plaintiff and to each putative class member and can be answered on a class-wide basis – the policies and practices at issue are either illegal as to all class members or as to none of them.

Defendant argues that class certification is nevertheless improper because individualized damages will overwhelm the common questions. (ECF No. 147 at 20, 24.) First, Defendant contends that Plaintiff has not presented any evidence of her alleged deductions from wages, thereby precluding finding that her damages are common to the class. Defendant further argues that determining each entertainer's damages, if a record of the alleged deductions exists, will require a fact-specific inquiry. Plaintiff responds that sufficient records exist, citing the daily sign-in-sheets and other records which were used by Defendant in support of its motions for summary judgment. (ECF No. 148 at 8 (citing ECF No. 69-4).) As Plaintiff notes, these records “provide numerous relevant data points, including the 1) dates and times that entertainers appeared for work, which entertainers can use to prove how much they paid in House Fees; 2) the golden dollar amounts

exchanged by an entertainer during each shift, including the amount retained by Defendant; and 3) the number and length of private dances given by entertainers, including the share of those fees retained by Defendant.” (*Id.*) While the records do not reveal the amount of tips the entertainers paid to other workers at the Club, Plaintiff asserts that it “can use the daily sign-in sheets, in conjunction with representative testimony regarding Defendant’s practices, or, alternatively, a statistical model created by an expert, to attempt to prove the average or minimum amounts that entertainers were required to tip per shift.” (*Id.*) She further contends that other courts have found class certification proper despite the possibility of individualized damages. (*Id.* at 9.)

In *Gunnells v. Healthplan Services, Inc.*, the Fourth Circuit held that “Rule 23 contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certification. In fact, Rule 23 explicitly envisions class actions with such individualized damage determinations.” 348 F.3d 417, 427-28 (4th Cir. 2003) (citing Fed. R. Civ. P. 23 advisory committee’s note). Citing *Gunnells*, courts in this district have routinely certified classes under Rule 23 despite the potential need for some individualized damages determinations. *See, e.g., In re: Mi Windows & Doors Inc. Prod. Liab. Litig.*, No. 2:12-MN-00001-DCN, 2015 WL 12850547, at *7 (D.S.C. July 22, 2015) (“Individual proof of some of the claimed damages by individual class members does not, by itself,

defeat certification.”); *Brunson v. La.-Pac. Corp.*, 266 F.R.D. 112, 119 (D.S.C. 2010) (“[W]hile, the different versions of the warranty may provide different forms of relief to each end-user of Defendants’ product, individual damage determinations do not necessarily destroy the commonality, typicality, or predominance of putative class members’ claims.”); *Thomas v. Louisiana-Pac. Corp.*, 246 F.R.D. 505, 516-17 (D.S.C. 2007) (“While the court may have to make individualized determinations regarding damages, the court finds this alone does not preclude certification.”).⁷

Here, the records submitted by Defendant indicate there is sufficient evidence to calculate damages for Plaintiff and the class members. (ECF No. 69-4.) Further, as *Gunnells* makes clear, the need for some individual calculations of damages does not preclude finding the commonality requirement met. This case centers on common factual and legal issues; namely, Defendant’s uniform pay policies and practices, and whether these pay policies and practices are lawful. To require these claims to be litigated individually for the

⁷ While many of these cases discuss the need for individualized damages determinations in the context of the predominance requirement of Rule 23(b)(3), “Rule 23(a)(2)’s commonality considerations overlap with the predominance considerations of Rule 23(b)(3).” *Sustainable Forest, L.L.C. v. Qwest Commc’ns Int’l, Inc.*, No. CV 0:01-2935-CMC, 2005 WL 8146267, at *5 (D.S.C. Nov. 28, 2005). Further, the predominance requirement is “more stringent” than the commonality requirement. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 147 (4th Cir. 2001). Thus, if the circumstances satisfy the predominance requirement, they would necessarily also satisfy the commonality requirement.

sake of individual damages determinations would be inefficient and burdensome.

The cases cited by Defendant do not convince the Court otherwise. For example, *Broussard v. Meineke Disc. Muffler Shops, Inc.* involved a class that the Fourth Circuit described as nothing more than “a hodgepodge of factually as well as legally different plaintiffs, . . . that should not have been cobbled together for trial.” 155 F.3d 331, 343 (4th Cir. 1998). The court noted that both the elements of the claims and affirmative defenses involved factual and legal variations between the various class members, thereby precluding satisfaction of the commonality and typicality requirements. *Id.* Here, there is no material factual or legal variation in the claims among the putative class members. In *Doe v. Chao*, the Fourth Circuit affirmed the district court’s denial of class certification, finding that “the putative class representatives have not suffered injuries similar to the injuries suffered by the other class members.” 306 F.3d 170, 184 (4th Cir. 2002), *aff’d*, 540 U.S. 614 (2004) (quoting *McClain v. South Carolina Nat’l Bank*, 105 F.3d 898, 903 (4th Cir. 1997) (internal quotation marks omitted)). Here, while the amount of damages may differ among class members, they all suffered the same type of injury; namely, the allegedly improper deduction of wages.

iii. Typicality

Rule 23(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims

or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The typicality requirement ensures that the claims of the representative plaintiff are aligned and consistent with those of other class members. A class representative’s claims are typical if they arise from the same course of conduct leading to the class claims, and if the same legal theory underlies the claims or defenses. *Rowles v. Chase Home Fin., LLC*, No. 10-01756, 2012 WL 80570 (D.S.C. Jan. 10, 2012). The analysis under this requirement overlaps and tends to merge with Rule 23(a)(2)’s requirement of commonality. *Soutter v. Equifax Info. Servs., LLC*, 498 Fed. App’x 260, 264-65 (4th Cir. 2012); *see also Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006); *Broussard*, 155 F.3d at 340.

Again, the record in this case demonstrates that Defendant subjects each class member to the same pay policies and practices. Given that Plaintiff’s claims and each of the class members’ claims arise out of the same pay policies and practices, Plaintiff’s claims are typical of the claims of the class members. Because Plaintiff and each class member is asserting the same legal claim against Defendant’s uniform course of conduct, the Court finds that the incentives of Plaintiff and the class are aligned such that typicality is satisfied.

iv. Adequacy of Representation

Rule 23(a)(4) provides that a class action may be maintained only if “the representative parties will

fairly and adequately protect the interests of the class.” Adequate representation may be presumed in the absence of any evidence that named plaintiffs have a conflict of interest with other class members, or that counsel are unqualified. *See Matthews v. Buel, Inc.*, No. 11-162, 2012 WL 1825273 (D.S.C. May 18, 2012) (“Absent contrary proof, class counsel are presumed competent and sufficiently experienced to prosecute the action on behalf of the class”) (citing *Hewlett v. Premier Salons Int’l, Inc.*, 185 F.R.D. 211, 218 (D. Md. 1997)); *see also* 3 Conte & Newberg, NEWBERG ON CLASS ACTIONS § 7:24. Indeed, a court may take judicial notice of the competency of counsel. *See, e.g., Frankford Hosp. v. Blue Cross*, 67 F.R.D. 643 (E.D. Pa. 1975) (no questions of counsel’s competence). In this case, Plaintiff and her Counsel satisfy these adequacy requirements.

Defendant makes several arguments as to Plaintiff’s alleged inability to adequately represent the class. It first argues that Plaintiff’s “limited appearances” at the Club over a period of ten months are not representative of those entertainers who performed at the Club for longer periods of time. (ECF No. 147 at 25.) However, even assuming Plaintiff performed for a shorter amount of time than other class members, she was subject to the same policies and practices as each class member and she has the same claims for lost wages as each member of the class. While Defendant asserts that Plaintiff is financially unable to pursue this class action, it cites case law that is actually unhelpful to its position. Defendant cites a Fifth Circuit case stating that a named plaintiff need not “present

proof of financial resources in order to meet his burden of proof on the issue of adequacy.” *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 485 n.26 (5th Cir. 1982) (finding plaintiffs established adequacy of representation where there was no “reason to believe that the named plaintiffs have inadequate resources” and the plaintiffs had demonstrated an ability to pursue the litigation up to that point). Here, there is no evidence that Plaintiff is financially unable to participate in this litigation as the named representative. While Defendant contends that Plaintiff has not paid her own court costs and litigation and travel expenses, there is no indication that she is unable to do so. Defendant’s allegations here amount to no more than speculation. *See Gunnells*, 348 F.3d at 430 (“To defeat the adequacy requirement of Rule 23, a conflict must be more than merely speculative or hypothetical.” (internal quotation marks omitted)).

Defendant also cites the arbitration agreements and submitted declarations as evidence that Plaintiff’s interests are “antagonistic” to the interests of those entertainers who wish to be considered independent contractors. (ECF No. 147 at 26.) As previously explained, however, the Court does not believe the arbitration agreements accurately present the law regarding the entertainers’ legal status and refuses to enforce the agreements in this action. Given the misleading nature of the arbitration agreements, the Court does not place any value in them in gauging the interests of the putative class. Further, if any entertainers do not want

to be considered employees at the Club, they can opt out of the class.

In addition, the Court finds that Plaintiff does not have conflicts of interest with other members of the class. As previously stated, Plaintiff suffered the same alleged injury as the other class members. Her recovery will not interfere with or take away from that of any other class member. Plaintiff and all class members stand to gain from a positive resolution of their legal claims. While Defendant makes various allegations as to Plaintiff's "volatile" character and drug use, it has not cited any authority indicating that these factors are appropriate considerations under the adequacy prong or specifically directed the Court to any case where a proposed class representative has been excluded for such reasons.

Finally, Defendant contends that Plaintiff "has not shown a willingness to actively prosecute class claims in that her Motion for Class Certification was filed nearly sixteen months after her original Complaint." (ECF No. 147 at 28.) While some time admittedly passed before Plaintiff filed a motion to certify a class, the Court does not question her willingness to bring this class action. Plaintiff is clearly involved in the litigation, as evidenced by her appearance to testify at deposition and her attendance at several depositions of Defendant's employees. *Cf. Monroe v. City of Charlottesville, Va.*, 579 F.3d 380, 385 (4th Cir. 2009) (finding named plaintiff was not adequate representative where evidence showed he: "(1) was unaware of the suit and only learned the suit was filed in his name after

reading about the lawsuit in the newspaper; (2) said the class attorneys would not return his calls; and (3) believed the lawsuit made him look bad”). In sum, the Court finds that Plaintiff will fairly and adequately protect the interests of the class.

The second prong of the “adequacy of representation” analysis, which is now governed by Rule 23(g), concerns the ability of class counsel to vigorously prosecute this case on behalf of the proposed class. Within the Fourth Circuit, the competency of class counsel is presumed and the burden of proving inadequacy of counsel is on the defendant. *See Baehr v. Creig Northrop Team, P.C.*, No. 13-0933, 2014 WL 346635 (D. Md. Jan. 29, 2014). The Court finds that Plaintiff’s counsel is more than adequate. Plaintiff’s proposed class counsel has submitted a resume demonstrating a long record of experience in wage and hour law and litigating class actions.

v. Predominance

Under Rule 23(b)(3) “the questions of law or fact common to class members” must “predominate over any questions affecting only individual members.” This “predominance requirement is similar to but ‘more stringent’ than the commonality requirement of Rule 23(a).” *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006). The issue of liability is a focal point for consideration of predominance. Where the question of basic liability can be established readily by common issues, then it is apparent that the case is

appropriate for class action. *See Gunnells*, 348 F.3d at 428 ([I]f common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied.” (internal quotation marks omitted)).

Courts have found predominance where liability can be established on a class-wide basis. *See, e.g., Leap v. Yoshida*, No. 14-3650, 2015 WL 619908, at *8 (E.D. Pa. Feb. 12, 2015) (finding predominance requirement fulfilled where employer subjected all servers to an unlawful system regarding tip deductions). Therefore, common issues of liability predominate over individual issues in this case. *See, e.g., Bonton v. Centerfold Entertainment Club, Inc.*, 2015 WL 2380300, *4 (W.D. Ark. May 19, 2015) (certifying class of exotic dancers alleging violations of Arkansas Minimum Wage Act); *Ruffin*, 2012 WL 5472165, *11 (certifying class of exotic dancers alleging violations of West Virginia Payment and Collection Act); *Hart*, 2010 WL 5297221, *6 (certifying class of exotic dancers alleging violations of New York Labor Laws); *Flynn v. N.Y. Dolls Gentlemen’s Club*, 2015 WL 3916161, *1 (S.D.N.Y. Apr. 28, 2015) (certifying class of exotic dancers for settlement purposes, alleging violations of New York Labor Laws); *In re Penthouse Exec. Club Comp. Litig.*, 2014 WL 185628, *3 (S.D.N.Y. Jan. 14, 2014) (certifying class of exotic dancers for settlement purposes).

Predominance is satisfied here because liability can be established on a class-wide basis. Specifically, Defendant’s liability depends on whether its policies and practices regarding its entertainers violated the

SCPWA. As stated at length above, the record shows Defendant applies the same pay policies and practices to Plaintiff and each of the class members. Thus, Defendant's liability, and whether its house fees, tips, and golden dollar practices are legal, are issues that are common to the class, and predominate over any individual issues.

Furthermore, as to damages, the record contains examples of several types of daily lists maintained in the regular course of business by Defendant which show the arrival times of entertainers, and the golden dollar fees and private dance fees collected by Defendant from entertainers, including both daily total numbers and entries at the individual entertainer level. These documents show that, should Plaintiff and the class prevail in proving Defendant violated the SCPWA, Plaintiff likely could calculate damages on both a classwide and per-plaintiff basis using simple processes of arithmetic and tabulation. The Court finds that common questions of law and fact predominate.

vi. Superiority

Under Rule 23(b)(3), the moving party must show that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Factors relevant to this question are "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against

members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action.” Fed. R. Civ. P. 23(b)(3).

The Court finds that a class action is the superior means for litigating this lawsuit for numerous reasons. First, class members’ damages may be relatively small such that their ability and incentive to individually litigate their claims may not exist. Second, aggregating myriad similar, if not identical, claims against Defendant’s uniform policies and practices in a single action serves to promote economies of time, effort and expense. Lastly, there is no difficulty in certifying this case as a class action, as evidenced by other courts that have certified similar classes of exotic dancers bringing substantially similar wage claims against defendant strip clubs. *See, e.g., Bonton*, 2015 WL 2380300, *4; *Ruffin*, 2012 WL 5472165, *11; *Hart*, 2010 WL 5297221, *6; *Flynn*, 2015 WL 3916161, *1; *In re Penthouse Exec. Club Comp. Litig.*, 2014 WL 185628, *3. For these reasons, the Court finds superiority satisfied.

CONCLUSION

For the reasons set forth above, Defendant’s Motion to Certify Uncertain Questions of State Law, (ECF No. 146), is **DENIED** and Defendant’s Motion to Dismiss Claims of Opt-Ins to Conditionally Certified FLSA Action and to Compel Arbitration, (ECF No. 153) is also **DENIED**. Further, upon consideration of

Plaintiff's Renewed Motion for Rule 23 Certification, and Defendant's opposition thereto, the Court finds Plaintiff has submitted sufficient evidence to carry her burden to establish that class certification is proper under Fed. R. Civ. P. 23. Plaintiff's Renewed Motion for Rule 23 Class Certification (ECF No. 139.) is therefore **GRANTED**. The Court hereby certifies a class under Fed. R. Civ. P. 23, consisting of:

All persons who, during the period of March 1, 2012 and continuing through the entry of judgment in this case, performed as a dancer/entertainer at Defendant's Thee New Dollhouse/Thee Dollhouse adult entertainment club located at 3001 Highway 17 South, North Myrtle Beach, South Carolina.

The Court designates Alexis DeGidio as lead plaintiff for the class and Carlson Lynch Sweet Kilpela & Carpenter, LLP as class counsel.

The proposed class notice submitted by Plaintiff is approved, and Defendant is to promptly comply with the Court's instructions regarding posting the notice and providing Plaintiff with contact information for potential class members. To facilitate the sending of notice, Defendant is ordered to produce to class counsel all class member names and most recent contact information in Defendant's possession. The information must be produced in a computer-readable format within fourteen (14) days of this Order and must also include the names and contact information of all entertainers who first performed at Defendant's club on or after October 1, 2015.

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IT IS SO ORDERED.

/s/ Bruce Howe Hendricks
United States District Judge

January 26, 2017
Greenville, South Carolina

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FILED: February 13, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1145
(4:13-cv-02136-BHH)

ALEXIS DEGIDIO, individually and on behalf of
all others similarly situated

Plaintiff-Appellee

v.

CRAZY HORSE SALOON AND RESTAURANT INC,
d/b/a Thee New Dollhouse

Defendant-Appellant

and.

JOSEPH B. HARGADON

Third Party Defendant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk
