

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

LU ANNE ELLIOTT, on behalf of  
herself and others similarly situated, who  
consent to their inclusion

Plaintiff,

vs.

STONEBROOK GOLF & COUNTRY  
CLUB OF SARASOTA, INC.,

Defendant

Collective Action Representation

**VERIFIED COLLECTIVE ACTION COMPLAINT FOR VIOLATION OF THE FLSA  
AND DEMAND FOR JURY TRIAL**

Plaintiff, LU ANNE ELLIOTT, individually and on behalf of all others similarly situated who consent to their inclusion in this class action, hereby file this Complaint against Defendant, STONEYBROOK GOLF & COUNTRY CLUB OF SARASOTA, INC., referred to herein as (“Stoneybrook”) and allege as follows:

**Introduction**

1.) The Fair Labor Standards Act (“FLSA”) is designed to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers...” 29 U.S.C. §202(a). To achieve its goals, the FLSA sets minimum wage and overtime pay requirements for covered employers. 29 U.S.C. §§206(a) & 207(a).

2.) The FLSA allows employers to pay less than minimum wage to employees who receive tips. 29 U.S.C §203(m). In doing so, employers may take a “tip credit,” which allows employers to include in their calculation of tipped employees’ wages the amount that an employee receives in tips. *Id.* In order to apply a tip credit toward an employee’s

minimum wage, an employer must satisfy two conditions: (i) The employer must inform the employee that it will take a tip credit; and (ii) tipped employees must retain all the tips they receive, except those tips included in a valid tipping pool among employees who customarily and regularly receive tips. *Id.*

3.) Defendant, Stoneybrook Golf & Country Club of Sarasota, violates the FLSA by requiring its servers to participate in an invalid tip pool, whereby servers must contribute 100% of their tips to the Defendant, which then distributes tips according to “hours worked” to servers and other employees who do not customarily and regularly receive tips. Accordingly, Elliott brings this collective action on behalf of all similarly situated employees who may choose to opt into this action pursuant to §216(b) of the FLSA who have been paid less than the minimum wage and have been forced to participate in an invalid tip pool requiring them to share tips with employees who do not customarily and regularly receive tips. Plaintiff, Lu Anne Elliott, also consents to this collective action pursuant to 29 USC 216(b) evidenced by her consent and opt-in form filed here as Exhibit 1.

4.) This action further challenges the Defendant's misleading practice of asking for an 18% “Gratuity” on each dining bill. As described herein, the Defendant asks for an 18% Gratuity charge on each check, which customers reasonably expect and intend to be paid in full to wait staff employees. These expectations are based both on custom in the service industry, as well as the way the Defendant explicitly represents the “18% gratuity” charge to its customers.

5.) The Defendant takes the combined proceeds from the 18% Gratuity and distributes them in accordance with hours worked to servers, managers, and expeditors (in the service industry, expeditors are those people who work in the kitchen and deliver food to tables). The Defendant justifies this action by stating that the 18% gratuity is not a gratuity but rather a “service charge” and is thereby the property of the Defendant.

6.) The Defendant has attempted to cover up its tracks by removing a disclaimer from the bottom of its receipts. The disclaimer read, “An 18% gratuity has been added for your convenience. This gratuity is voluntary and may be adjusted.” On or around September 28, 2011, importantly after Plaintiff voiced concerns regarding the tip pool and tip credit, the Defendant removed the disclaimer in an attempt to make the gratuity more closely resemble a service charge.

7.) As such the Defendant has harmed the Plaintiff and each member of the class by unlawfully distributing gratuities that each wait staff employee has earned.

#### **Jurisdiction and Venue**

8.) This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 because it arises under the laws of the United States, specifically under the FLSA, 29 U.S.C. §201, *et seq.*

9.) Plaintiff’s claims arise under §§ 29 U.S.C. 203(m) and 216(b) of the FLSA.

10.) This Court has personal jurisdiction over this action because the Defendant is engaged in business within the state of Florida.

11.) Venue is proper in the Middle District of Florida pursuant to 28 U.S.C. 1391(b) because the acts complained of herein took place in this District and Plaintiff worked in the State of Florida for the Defendant within the territory of the Middle District of Florida.

### **The Parties**

12.) At all times relevant to this action Representative Plaintiff, Lu Anne Elliott, resided in Sarasota County, Florida

13.) At all times relevant to this action Elliott worked as a Server at the Defendant's restaurant.

14.) At all times relevant to this action, Elliott, and all other members of the class were employees of Stoneybrook within the meaning of 29 U.S.C. § 203(e)(1).

15.) Defendant, Stoneybrook Golf & Country Club of Sarasota, Inc., is a for profit corporation organized and existing under the laws of Florida, with its principle place of business located at 8801 Stoneybrook Boulevard, Sarasota, Florida, 34238.

16.) Defendant's Registered Agent for service is Frank D. Leahy whose address for service is 8801 Stoneybrook Boulevard, Sarasota, Florida, 34238.

17.) Stoneybrook Golf & Country Club is a member owned club that claims "it is the ideal venue, no matter what the occasion or time of year, from social gatherings to celebrations of life's most treasured occasions, every event takes on an extraordinary aura in a setting of serene elegance."<sup>1</sup>

18.) Defendant is subject to the FLSA and it and employees are covered by the FLSA because Defendant has sales over \$500,000 per year securing enterprise coverage.

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<sup>1</sup> Available at [http://www.stoneybrook.net/Dining-\(2\).aspx](http://www.stoneybrook.net/Dining-(2).aspx)

### General Allegations

- 19.) Plaintiff has been employed as a server by the Defendant since 2004.
- 20.) Plaintiff, as well as other servers employed by the Defendant, receives two biweekly checks. One check is for payroll and indicates an hourly rate less than the minimum wage and the other check is for gratuities.
- 21.) Defendant takes advantage of FLSA's tipped employees tip credit, paying Plaintiff and similarly situated class members a wage that is less than the Federal Minimum Wage of \$7.25 per hour.
- 22.) Approximately three years ago, the Defendant instituted a mandatory tip pool policy, requiring servers to turn over all tips/gratuities (including extra gratuity) to be totaled and distributed in accordance to hours worked. Of the total tip pool, 10% was immediately taken out to distribute to the bussers and the remaining 90% was distributed to servers, bartenders, and managers based on hours worked. Approximately one year ago the bussers were taken out of the tip pool.
- 23.) In *Sorensen v. CHT Corp.*, 9 Wage & Hour Cas. 2d (BNA) 824, 149 Lab. Cas. (CCH) ¶134823, 2004 WL 442638 (N.D. Ill. 2004) the court effectively held that the employer had violated 29 U.S.C. §203(m) if, as alleged, it claimed a tip credit, but required employees to turn over all tips into a tip pool and distributed only a fraction of the total back to them.
- 24.) Tip pooling is permitted by the FLSA as long as employees partake in the practice either voluntarily or are only required to pool with fellow "tipped employees" only an amount that is "customary and reasonable." For purposed of The Act, the

Department of Labor believes that disseminating **15%** (as opposed to 100%) of the tips pooled to each occupation is “customary and reasonable” by federal law. This means that an employee must retain at least 85% of the tips he or she receives from customers.

25.) Plaintiff, and class members, each individually receive an “End of Shift Report” which shows the amount of tips they earned for that day. However, Plaintiff and other servers are not allowed to access their End of Shift Reports for previous days worked, or for a single pay period.

26.) Aside from their “gratuities check”, Plaintiff and other similarly situated employees have never received documentation or a proper explanation regarding the tip pool and tip credit disbursement.

27.) A non-exhaustive list of managers that regularly receive(d) compensation from the tip pool include; Dale Gerber, former Shift Manager/Manager on Duty, responsible for scheduling, hiring and firing; Larry Allegretto, Bar Manager, responsible for scheduling, hiring, and firing the bartenders; Kevin Pearson, former Server promoted to “Dining Room Manager”, responsible for the weekly schedule, typically does the firing, and meets with potential customers to discuss pricing for events; Billy Hague, Dining Room Manager, has many responsibilities including handling complaints, event preparation, serving, kitchen expeditor, but primarily handles payroll and computes the gratuities to be disbursed; and Anthony Edwards, former server promoted to Manager in March 2011, helps with the hiring/firing, sets the floor plan for servers, and is the “Manager on duty” most nights.

28.) All of the above referenced managers are scheduled to work 40 hours or more per week, make their own schedules, have the capacity to hire, fire, and schedule other employees, can adjust/manipulate hours for payroll, and receive tips from the tip pool reflective of their 40 plus hours worked.

29.) According to the FLSA a valid tip pool may not include employees who do not customarily and regularly received tips.<sup>2</sup> Further, see *Chan v. Sung Yue Tung, Corp.*, 2007 WL 313483 at \*12-13 (finding that owners, officers, and managers of the restaurant improperly participated in the server tip pool). See also, *Morgan v. SpeakEasy*, 625 F. Supp. 2d 632 (N.D. Ill. Sept. 20, 2007); *Dominguez v. Don Pedro*, 2007 U.S. Dist. LEXIS 6659 (N.D. Ind. Jan. 25, 2007).

30.) Where a tipped employee is required to contribute to a tip pool that includes employees who do not customarily and regularly receive tips, the employee is owed all tips he or she contributed to the pool and the full \$7.25 minimum wage.

31.) The Defendant notes “18% Gratuity” on the bottom of its dining checks.

32.) The Defendant informs the wait staff that the 18% “gratuity” is really a “service charge” and disburses it in accordance with hours worked to servers, managers, and expeditors.

33.) The Defendant does not disclose to customers that the “gratuity” is effectively a “service charge”.

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<sup>2</sup> Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA)

34.) Only after Plaintiff raised concerns about the including of managers in the tip pool and its implications on the tip credit did the Defendant remove the discretionary disclaimer that was formerly located on the bottom of each dining check.

35.) The Defendant removed the disclaimer in an attempt to make the gratuity more closely resemble a “service charge” effectively allowing the Defendant to disburse the gratuities to its managers at its own discretion.

36.) Wait staff employees traditionally receive tips/gratuities from customers.

37.) A tip is defined by the Department of Labor as “a sum presented by a customer as a gift or gratuity in recognition of some service performed for him” (29 C.F.R. § 331.52). Typically, a tip or gratuity is viewed as a gift from a guest without influence of the employer.

38.) The Department of Labor specifically addresses services charges, and their implication on the tip credit, “A compulsory charge for service, such as 10 percent of the amount of the bill, imposed on a customer by an employer’s establishment, is not a tip and, even if distributed by the employer to his employees, cannot be counted as a tip.” See 29 C.F.R. § 531.55(a). Furthermore, these charges “which become a part of the employer’s gross receipts are not tips for purposes of the Act.” Id. at § 531.55(b)... Therefore, we conclude that the “imposed gratuity” is not a tip under the FLSA. Thus, no tip credit is allowed for amounts received as an imposed gratuity and the employer must pay the entire minimum wage and overtime as required by the FLSA. See FOH § 30d03.”<sup>3</sup>

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<sup>3</sup> Wage and Hour Opinion Letter, FLSA 2005-31, 9/2/05 [released 10/17/05].

39.) Because the Plaintiff, and other similarly situated employees, have not been permitted to retain all of their tips and have been forced to participate in an invalid tip pool arrangement, the Defendant has not been eligible to claim the “tip credit” against the minimum wage and thus has been obligated to pay all employees the full minimum wage.

40.) In addition, the Defendant has not complied with its obligations to inform or properly notice employees of the tip credit.

41.) Plaintiff, after researching wage laws and contacting the Department of Labor, informed her employer in good faith that she believed it was engaging in an illegal tip pooling and tip crediting practice.

42.) Elliott brought concerns regarding the legality of the Defendant’s tip pool and tip credit arrangement to Food and Beverage Manager Kathleen Strand’s attention via electronic mail on July 22, 2011 and July 23, 2011.

43.) After failing to obtain responses to her questions regarding labor compliance, Plaintiff contacted Billy Hague, Dining Room Manager, and requested a private meeting. Plaintiff explained her findings and Mr. Hague informed her that he would bring the information to the Club Manager, Frank Leahy’s attention as well as request an investigation.

44.) On August 10, 2011, Plaintiff was called into Frank Leahy’s office to discuss her concerns. Plaintiff brought copies of her research findings, including FLSA fact sheet #15, to the meeting. Mr. Leahy asked if Plaintiff had filed a complaint with the Wage Hour Division and assured her that it was not necessary to do so while the club

investigated the claims. Mr. Leahy further stated that in the past few weeks, **combined**, the managers referenced in ¶22 attribute 35% to the tip pool.

45.) Plaintiff asserts that because she voiced concerns of the tip pool and tip credit FLSA compliance, the Defendant is now attempting to cover its tracks, hid evidence, and manipulate evidence to appear as if it was compliant with the FLSA.

46.) All contributions to the tip pool given by the Defendant's managers and servers would be historically evidenced and logged in the Defendant's "Jonas" system.

47.) However, the log of Defendant's managers tip contributions would not be an accurate indication of the manager's contributions as **all** events are rung up under a manager's account and not a server's account.

48.) The Defendant's requirement that all events be rung up under a manager's account is an attempt to document the manager's "contribution" to the tip pool.

### **COLLECTIVE ACTION ALLEGATIONS**

49.) Plaintiff brings this action as a collective action pursuant to the Fair Labor Standards Act § 216(b), on behalf of herself and a class of persons consisting of;

All persons who have worked as a Server at the Stoneybrook Golf & Country Club of Sarasota between October 10, 2008 and the date of final judgment who elect to opt into this matter.

50.) The claims of the Representative Plaintiff are typical of the claims of the class members. As it is the Defendant's pay practice to collect 100% of the tips earned by servers and redistribute the tips to servers, **managers**, and expeditors in accordance with hours worked, all wait staff personnel have been required to participate in an invalid tip pool. Further, the Defendant's dining bill lists an "18% gratuity" which the Defendant

attempts to claim as a “service charge” in order to disburse a portion of the total gratuities to its managers at its sole discretion.

51.) The number of proposed Class is so numerous that a joinder of all members is impractical though the precise number of class individuals is presently in the sole possession of the Defendant.

52.) Plaintiff will fairly and adequately represent and protect the interests of the proposed Collective Class members. Plaintiff has retained counsel competent and experienced in complex class and collective actions along with employment litigation. There is no conflict between the Plaintiff and the Class members.

53.) Common questions of law and fact exist as to the proposed Collective Class that predominate over any questions only affecting them individually and include, but are not limited to, the following:

- a. whether Defendant has demanded, handled, pooled, counted, distributed, accepted and/or retained service charges or portions of service charges paid by customers to whom Defendant represented that such service charges were intended for Plaintiffs and the Rule 23 Class and which customers reasonably believed to be gratuities for Plaintiffs and the Rule 23 Class;
- b. whether Defendant allowed managers to collect tips that were earned by and intended for Plaintiffs and the Class;
- c. whether Defendant's policy of failing to pay workers has been instituted willfully or with reckless disregard of the law; and
- d. the nature and extent of class-wide injury and the measure of damages for those injuries.

54.) Collective representation is superior to other available methods for the fair and efficient adjudication of the controversy for a number of reasons including but not limited to the following: the case challenges the policy of a large employer, and

many employees may be reluctant to bring claims individually for fear of retaliation; some class members may have only worked for the Defendant for a short period of time (and/or at only a few private dining events) and their individual damages would not be substantial enough to be worth the cost and effort of bringing individual claims; many class members will not have the resources to bring their claims individually; and it would be highly inefficient to require each employee affected by the practices challenged herein to bring his or her own individual claim.

**COUNT I**  
**Failure to Pay Minimum Wage in Violation of the FLSA**

55.) Plaintiff re-alleges and incorporates paragraphs one (1) through fifty-four (54), *supra*, as if fully set out herein.

56.) The Defendant's conduct in failing to pay all of its employees the minimum wage and inappropriate claiming of the "tip credit," as set forth above, violates the FLSA, 29 U.S.C. § 201, *et seq.* and particularly § 206 and § 216.

57.) The Defendant has wrongfully retained tips which should not be property of the employer.

58.) The Defendant asks a patron to pay a gratuity charge which the customers are willing to pay because it appears to be a gratuity for the wait staff, however the Defendant turns around and tells the wait staff it the gratuity is effectively a service charge and can be disbursed at the Defendant's discretion. Thus, the Defendant is enriched through this misrepresentation of this charge as a gratuity.

59.) The Defendant also violates the law by allowing managers and other non-tipped employees to keep tips from the tip pool.

60.) Further, Defendant has not complied with its obligation to inform its employees that it was taking a tip credit against them and give them proper notice regarding the same.

61.) Because of the Defendant's failure to comply with the law on tip credits it has lost its ability to claim a tip credit and the Class is entitled to the full cash minimum wage plus those unlawfully retained and/or distributed tips.

62.) This claim is brought on behalf of a class of similarly situated individuals, pursuant to 29 U.S.C. § 216(b).

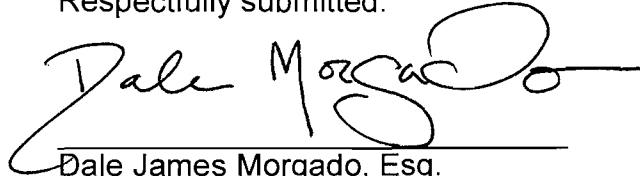
#### **PRAYER FOR RELIEF FOR COUNT I**

63.) **WHEREFORE** Representative Plaintiff respectfully requests that judgment be entered in her favor, awarding her and all similarly situated employees:

- a. An order designating this action as a collective action and issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated individuals with instructions to permit them to assert timely FLSA claims in this action by filing individual Consents to Sue pursuant to §216(b) and that notice be sent to all past and present employees of the Defendant at any time during the three year period immediately preceding the filing of this suit, through and including the date of this Court's issuance of the Court Supervised Notice.
- b. Full minimum wage (\$7.25-\$7.31 per hour) for each hour worked during which the tip pool was out of compliance;

Dated this 12th day of October, 2011.

Respectfully submitted.

A handwritten signature in black ink, reading "Dale Morgado". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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