Fill in this information to identify the case:

Debtor 1 Gold`s Gym Franchising, LLC

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: Northern District of Texas, Dallas Division

Case number 20-31322-hdh11

E-Filed on 08/20/2020
Claim # 238

Official Form 410

Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**

Danae Skiba
Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?**

☑ No
☐ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
Gabrielle O. Ilochi, The Ilochi Law Firm Name	_____ Name
11601 Shadow Creek Pkwy., #111-325 Number Street	_____ Number Street
Pearland TX 77584 City State ZIP Code	_____ City State ZIP Code
Contact phone _____	Contact phone _____
Contact email gabrielle@ilochilaw.com	Contact email _____

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

__ __

4. **Does this claim amend one already filed?**

☑ No
☐ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

☑ No
☐ Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**

☑ No
☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ ____ ____ ____

7. **How much is the claim?** $ 8,896.00 . **Does this amount include interest or other charges?**

☐ No
☑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

Unpaid wages

9. **Is all or part of the claim secured?**

☑ No
☐ Yes. The claim is secured by a lien on property.

Nature of property:

☐ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim.*
☐ Motor vehicle
☐ Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: $_____

Amount of the claim that is secured: $_____

Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: $_____

Annual Interest Rate (when case was filed)_____%

☐ Fixed
☐ Variable

10. **Is this claim based on a lease?**

☑ No
☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $ 0.00

11. **Is this claim subject to a right of setoff?**

☑ No
☐ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ No

☑ Yes. *Check one:*

	Amount entitled to priority
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$ 0.00
☐ Up to $3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$ 0.00
☑ Wages, salaries, or commissions (up to $13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$ 0.00
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$ 0.00
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$ 0.00
☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$ 0.00

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☑ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 08/20/2020
MM / DD / YYYY

Gabrielle Ilochi
Signature

Print the name of the person who is completing and signing this claim:

Name: Gabrielle O. Ilochi
First name Middle name Last name

Title: Attorney-In-Charge

Company: The Ilochi Law Firm
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address
Number Street

City State ZIP Code

Contact phone Email

Attachment 1 - 410_Proof of Claim 8.18.20.pdf
Description - Proof of Claim

Fill in this information to identify the case:

Debtor 1 GGI Holdings, LLC et al.

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: · Northern District of Texas

Case number 20-31318-hdh 11

Official Form 410

Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**

Danae Skiba on behalf of herself and all others similarly situated
Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor Danae Skiba

2. **Has this claim been acquired from someone else?**

☑ No
☐ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**

Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
Gabrielle O. Ilochi Name	Name
11601 Shadow Creek Pkwy., #111-325 Number Street	Number Street
Pearland TX 77584 City State ZIP Code	City State ZIP Code
Contact phone (713) 487-9072	Contact phone
Contact email gabrielle@ilochilaw.com	Contact email

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

_ _

4. **Does this claim amend one already filed?**

☑ No
☐ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

☑ No
☐ Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**

☑ No
☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ ____ ____ ____

7. **How much is the claim?** $ 18,125.00 . **Does this amount include interest or other charges?**

☐ No
☑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

Unpaid wages

9. **Is all or part of the claim secured?**

☑ No
☐ Yes. The claim is secured by a lien on property.

Nature of property:

☐ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
☐ Motor vehicle
☐ Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: $_____

Amount of the claim that is secured: $_____

Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: $_____

Annual Interest Rate (when case was filed)_____%

☐ Fixed
☐ Variable

10. **Is this claim based on a lease?**

☑ No
☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**

☑ No
☐ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ No

☑ Yes. *Check one:*

	Amount entitled to priority
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$
☐ Up to $3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$
☑ Wages, salaries, or commissions (up to $13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$ 8,896.00
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$
☐ Other. Specify subsection of 11 U.S.C. § 507(a)( ) that applies.	$

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☑ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 08/18/2020
MM / DD / YYYY

/s/ Gabrielle O. Ilochi
Signature

Print the name of the person who is completing and signing this claim:

Name: Gabrielle (First name) | (Middle name) | Ilochi (Last name)

Title: Attorney-In-Charge

Company: The Ilochi Law Firm
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address: 11601 Shadow Creek Pkwy., #111-325
Number Street

Pearland (City) | TX (State) | 77584 (ZIP Code)

Contact phone (713) 487-9072 Email gabrielle@ilochilaw.com

Print | Save As... | Add Attachment | Reset

Attachment 2 - Attachment_1 8.18.20.pdf
Description - Attachment 1

ATTACHMENT 1

PROOF OF CLAIM

ATTACHMENT 1

Part 2, Item 7: Claim Amount

Creditor worked for Debtor as a Fitness Manager, as a full-time employee under an exempt status. During Creditor's employment, Debtor routinely misapplied Paid Time Off (PTO) to absences of less than a full workday and to workdays wherein Creditor merely arrived late for her shift, at times due to illness. Furthermore, on several occasions when Creditor's pay was adjusted to an hourly wage due to insufficient PTO misapplied by Debtor, Debtor failed to compensate Creditor at the hourly rate reflected in Debtor's own employee timekeeping system. As such, throughout her employment, Creditor was routinely paid at a variable rate of pay as an hourly employee only to receive less than her total hourly wages worked.

In the alternative, Debtor misclassified Creditor as an "exempt employee" pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq. Creditor, however, qualified as a non-exempt employee under the narrowly construed exemptions as interpreted by the Fifth Circuit. See *Blackmon v. Brookshire Grocery Co*., 835 F.2d 1135, 1137 (5th Cir. 1988). *Hewitt v. Helix Energy Sols. Grp., Inc*., 956 F.3d 341, 2020 U.S. App. LEXIS 12554, 170 Lab. Cas. (CCH) P36,785. Debtor failed to compensate Creditor for any overtime hours worked over forty in a workweek as required under the FLSA. 29 U.S.C. § 201 et. seq. Creditor initiated a collective action lawsuit, captioned *DANAE SKIBA on behalf of herself and all others similarly situated v. GHG-THE FITNESS GROUP, LLC d/b/a Gold's Gym Houston; GOLD'S GYM FRANCHISE LLC; and Timothy Bryan Murphy (a/k/a T. Bryan Murphy)*, 4:20-cv-02656, in the United States District Court for the Southern District of Texas, Houston Division, to recover unpaid overtime wages and for retaliation in violation of the FLSA. Included with this Proof of Claim is a copy of

the operative Amended Complaint. Creditor provides the following explanation of claim for damages:

I. UNPAID WAGES

Creditor seeks unpaid wages for all pay periods wherein Debtor misapplied PTO to absences of less than one full workday and delayed arrivals in violation of 29 C.F.R. §§ 541.602-603. 29 C.F.R. §541.603(b) provides that an employer who improperly deducts from an exempt employee's salary shall lose said exemption so long as facts indicate that the employer lacked the intention to pay the employees on a salary basis.

Creditor calculates wages owed using her own good-faith reasonable estimate of days and hours worked, and compensation received. Creditor need not submit her own documentary proof to make a valid claim. Under the FLSA, employees are permitted to prove wages owed using this method when an employer fails to keep accurate records of time worked. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (citing *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 687–88 (1946)). While Debtor may have time sheets and invoices that could be used to calculate a more precise estimate of damages, it has not yet produced that information to Creditor. If Creditor receives these records, she will recalculate and amend her Proof of Claim. To calculate an estimate of unpaid wages, Creditor performed the following steps:

1. Reviewed all dates within each pay period wherein PTO was misapplied or alleged applicable by Debtor;
2. Reviewed Creditor's paystubs for the relevant time period to determine gross income for said pay period;
3. Compared Creditor's timesheets for the corresponding pay period to determine the total hours worked, total hours missed, and all absences;

4. Calculated the total number of full day absences and compared them to the days wherein Debtor alleged that Creditor was absent thus requiring PTO;
5. Identified the difference between the total number of full day or longer absences for the pay period and the amount of PTO claimed or applied by Debtor for said pay period for any corresponding pay period for which Debtor's PTO was applied and she was paid as on an hourly basis;
6. Identified the sum of Creditor's hours worked according to employee's timesheet entries; and
7. Identified the difference between the total number of hours for which Creditor was compensated as provided in the corresponding paystub and the amount of hours Creditor worked as stated in her timesheet entries.

II. UNPAID OVERTIME

In the alternative, Creditor seeks unpaid overtime wages for all hours worked over forty in a workweek during a three-year statutory period. *See* 29 U.S.C. § 207. Creditor did not receive any overtime pay for hours worked over forty in a workweek. The FLSA provides that employees paid a day rate must receive half-time (0.5) pay of their regular hourly rate for all hours worked over forty in a workweek. 29 C.F.R. § 778.112; *Solis v. Hooglands Nursery, L.L.C.*, 372 F. App'x 528 (5th Cir. 2010). Under the FLSA, employees may recover wages earned within two years of the employee's filing of her consent to join form ("the two-year period"). 29 U.S.C. § 255(a). Employees may recover for an additional year ("the third year") if the employer's violation was "willful" or in reckless disregard for the law. 29 U.S.C. § 255(a). Creditor submits her claim for damages attributable to each time period.

Creditor calculates wages owed using her own good-faith reasonable estimate of days and

hours worked, and compensation received. Creditor need not submit her own documentary proof to make a valid claim. Under the FLSA, employees are permitted to prove wages owed using this method when an employer fails to keep accurate records of time worked. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (citing *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 687–88 (1946)). While Debtor may have time sheets and invoices that could be used to calculate a more precise estimate of damages, it has not yet produced that information to Creditor. If Creditor receives these records, she will recalculate and amend her Proof of Claim.

To calculate an estimate of unpaid weekly overtime wages, Creditor performed the following steps:

1. Multiplied the days worked each workweek by the hours worked per day to calculate an hour estimate;
2. Multiplied the number of days worked each workweek by her day rate compensation to calculate weekly compensation;
3. Divided weekly compensation by hours estimate to calculate the regular rate;
4. Multiplied the regular rate by one-half (0.5) to calculate the overtime rate;
5. Multiplied the overtime rate by the number of hours in hours estimate that exceeded forty to calculate the weekly damages; and
6. Multiplied the weekly damages by the number of weeks Creditor worked during the two-year period (adjusted to reflect gaps in work, if any). (See Attachment 2 for unpaid overtime amount.)

III. LIQUIDATED (DOUBLE) DAMAGES

The FLSA provides an award of "liquidated" damages in an amount equal to compensatory damages. 29 U.S.C. § 260. (See Attachment 2 for liquidated damages.)

IV. ATTORNEY'S FEES & LITIGATION COSTS

The FLSA allows employees who obtain judgment to also recover "a reasonable attorney's fee and costs of the action" from the employer. 29 U.S.C. §216(b). (See Attachment 2 for attorney's fees and costs.)

V. PREJUDGMENT AND POST-JUDGMENT INTEREST

Creditor also seeks pre and post judgment interest to the extent permitted by law.

Attachment 3 - Attachment_2 8.18.20.pdf
Description - Attachment 2

ATTACHMENT 2

PROOF OF CLAIM
ATTACHMENT 2
Part 2, Item 7: Claim Amount
Damages Estimates for Creditor(s) Danae Skiba on behalf of herself and all others similarly situated

Approximate employment start date:	November 12, 2019
Approximate employment end date:	July 31, 2020
Date Creditor filed her Consent with the Court:	July 29, 2020
Good faith estimate of days worked per week:	Six (6) days per week
Good faith estimate of day rate compensation:	$161.52
Damages accrued during two-year time period:	$8,896.00 (including liquidated damages)
Damages accrued during the third year:	To be determined pending certification of the requested collective action
Reasonable Attorney's Fees:	$17,375.00
Litigation Costs:	$18,125.00
Claim for Total Damages Sought in Litigation:	$18,125.00

Creditor reserves the right to amend her Proof of Claim to assert additional damages to the extent that additional facts are established in discovery and to assert additional attorney's fees and litigation costs incurred in connection with litigation of Creditor(s)' claims and accompanying claims of potential collective action members.

Attachment 4 - Attachment_4 8.18.20.pdf
Description - Attachment 4

ATTACHMENT 4

UNITED STATES BANKRUPTCY COURT **NORTHERN DISTRICT OF TEXAS**

In re:	§	
	§	
GGI Holdings, LLC et al.[1]	§	
	§	
Debtor(s)	§	
	§	
	§	**BANKRUPTCY CASE NO.**
	§	
	§	
	§	**20-31318-hdh 11**
	§	

DECLARATION OF DANAE SKIBA

1. My name is Danae Skiba. I am a Creditor in this bankruptcy proceeding initiated on behalf of GGI Holdings, LLC et al. I am over the age of eighteen and competent to testify about the matters set forth in this declaration. The statements made in this declaration are made based on my personal knowledge, experiences, and observations.

2. I am a Plaintiff against GHG-THE FITNESS GROUP, LLC d/b/a Gold's Gym Houston and GOLD'S GYM FRANCHISE LLC (collectively "Debtors") in the collective action lawsuit captioned, *DANAE SKIBA on behalf of herself and all others similarly situated v. GHG-THE FITNESS GROUP, LLC d/b/a Gold's Gym Houston; GOLD'S GYM FRANCHISE LLC; and*

[1] The Debtors in bankruptcy, along with the last four digits of each Debtor's federal tax identification number, are: GGI Holdings, LLC (1222); Gold's Gym International, Inc. (3614); Gold's Gym Holding Corp. (3610); Gold's Alabama, LLC (0520); Gold's Gym Franchising, LLC (5009); Gold's Gym Merchandising, LLC (4892); Gold's Gym Rockies, LLC (7129); Gold's Louisiana, LLC (9825); Gold's North Carolina, LLC (3221); Gold's Ohio, LLC (4396); Gold's Oklahoma, LLC (7577); Gold's St. Louis, LLC (4827); Gold's Southeast, LLC (9382); and Gold's Texas Holdings Group, Inc. (8156). The Debtors' mailing address is 4001 Maple Avenue, Suite 200, Dallas, Texas 75219.

Timothy Bryan Murphy (a/k/a T. Bryan Murphy), 4:20-cv-02656, in the United States Southern District Court of Texas, Houston Division.

3. I am an adult resident of the state of Texas.

4. I worked for Debtors as a Fitness Manager from approximately November 12, 2019 to July 31, 2020 and was classified as an exempt employee. My primary duties as a Fitness Manager included but were not limited to presenting and closing personal training options to new and existing members, meeting daily and monthly production goals, leading meetings and workshops to ensure development, and participating in recruitment, hiring, and training of Personal Trainers and support staff.

5. Based on my recollection, my good faith estimate is that I typically worked an average of six days per week for an average of nine hours per day. As a result, I regularly worked more than 40 hours per work week.

6. While working for Debtors, I was supposed to be paid a salaried wage of approximately $42,000.00, plus bonuses and commission, which broke down to a minimum daily pay rate of approximately $161.52.

7. I did not receive guaranteed compensation for the weeks I worked.

8. While classified as an exempt employee, I regularly worked more than 40 hours per week, and I did not receive overtime pay.

9. Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: 8/18/2020

DANAE SKIBA

Attachment 5 - Attachment_3 8.18.20.pdf
Description - Attachment 3

ATTACHMENT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DANAE SKIBA	§	
ON BEHALF OF HERSELF AND	§	**JURY DEMANDED**
ALL OTHERS SIMILARLY SITUATED,	§	
Plaintiff	§	
	§	
V.	§	**CIVIL ACTION NO.**
	§	
GHG – THE FITNESS GROUP, LLC d/b/a GOLD'S GYM HOUSTON;	§	
GOLD'S GYM FRANCHISING LLC; and	§	
TIMOTHY BRYAN MURPHY (a/k/a T. BRYAN MURPHY)	§	
Defendants	§	

PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff DANAE SKIBA ("Plaintiff Skiba"), on behalf of herself and all others similarly situated (collectively "Plaintiffs"), files this First Amended Complaint against Defendants GHG-THE FITNESS GROUP, LLC, d/b/a GOLD'S GYM HOUSTON; GOLD'S GYM FRANCHISING LLC; and TIMOTHY BRYAN MURPHY (a/k/a T. BRYAN MURPHY), Individually (collectively "Defendants") and would show the Court as follows:

I. PRELIMINARY STATEMENT

1. This lawsuit seeks damages against Defendants for violations of the Fair Labor Standards Act ("FLSA"), as amended. Plaintiff Skiba, on behalf of herself and all similarly situated employees, seeks to recover unpaid salaried wages, statutory liquidated damages, reasonable attorneys' fees and costs, or in the alternative unpaid overtime wages, statutory liquidated damages, reasonable attorneys' fees and costs. See Exhibit 1 (Plaintiff Skiba's Consent to Join). Moreover, Plaintiff Skiba seeks to certify this matter as a collective action under the FLSA.

II. PARTIES

2. Plaintiff Skiba is an individual residing in Harris County, Texas.

3. Defendant GHG-THE FITNESS GROUP, LLC, d/b/a GOLD'S GYM HOUSTON ("Defendant GHG") is a limited liability company authorized to do business under Texas laws. At all times during Plaintiff Skiba's and the similarly situated employees' employment, Defendant GHG was the employer and/or joint employer of Plaintiff Skiba and the similarly situated employees as defined by 29 C.F.R. § 791.2. Defendant GHG can be served by serving its registered agent, Bryan Murphy, at 6511 FM 1488 Magnolia, TX 77354.

4. Defendant GOLD's GYM FRANCHISING LLC ("Defendant GGF") is a limited liability company authorized to do business under Texas laws. Defendant GGF's Dallas, TX address is 4001 Maple Ave., Ste. 200 Dallas, TX 75219. At all times during Plaintiff Skiba's and similarly situated employees' employment, Defendant GGF was the employer and/or joint employer of Plaintiff Skiba and the similarly situated employees as defined by 29 C.F.R. § 791.2. Defendant GGF can be served by serving its registered agent, Corporation Service Company d/b/a CSC Lawyers Incorporated, at 211 E. 7th Street, Suite 620, Austin, TX 78701.

5. Defendant TIMOTHY BRYAN MURPHY a/k/a T. BRYAN MURPHY ("Defendant Murphy") is an individual. Defendant Murphy can be served at 10434 Clubhouse Circle, Kingwood, TX 77345. At all times during Plaintiff Skiba's and the similarly situated employees' employment, Defendant Murphy was the employer and/or joint employer of Plaintiff Skiba and the similarly situated employees as defined by 29 C.F.R. § 791.2.

III. JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to § 16(b) of the FLSA, 29 U.S.C. § 216(b), which provides, "An action to recover liability prescribed in either of the preceding sentences may be maintained against any employer . . . in any federal or state court of competent jurisdiction by any one or more employees for and on behalf of herself and themselves and other employees similarly situated." In addition, this Court has jurisdiction over the subject matter under 28 U.S.C. § 1331 because the claims arise under laws of the United States.

7. Venue is proper pursuant to 28 U.S.C. § 1391 (b) because a substantial part of the events or omissions giving rise to the claim occurred in this District.

IV. FLSA COVERAGE

8. At all times pertinent to this Complaint, Defendants have acted, directly or indirectly, in the interest of an employer and/or joint employer with respect to Plaintiff Skiba and the similarly situated employees.

9. At all times hereinafter mentioned, Defendants have been an employer within the meaning of Section 3(d) of the FLSA, 29 U.S.C. §203(d).

10. At all times hereinafter mentioned, Defendant GHG and Defendant GGF have been an enterprise within the meaning of Section 3(r) of the FLSA, 29 U.S.C. §203(r).

11. At all times hereinafter mentioned, Defendant GHG and Defendant GGF have been an enterprise engaged in commerce or in the production of goods for commerce within the meaning of 29 U.S.C. §203(s)(1), in that said enterprise has had employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person and in that said enterprise has had and has an annual gross volume of sales made or business done of not less than $500,000 (exclusive of excise taxes at the retail level which

are separately stated).

12. At all times hereinafter mentioned, Plaintiff Skiba and the similarly situated employees are individual employees who were engaged in commerce or in the production of goods for commerce as required by 29 U.S.C. §206-207.

V. FACTUAL ALLEGATIONS

13. Defendants provide fitness facilities and personal training services to individuals at Defendants' various locations.

14. Defendant TIMOTHY BRYAN MURPHY (a/k/a T. BRYAN MURPHY) is the CEO/President of Defendant GHG-The Fitness Group, LLC and possesses the following abilities: (1) the power to hire and fire employees; (2) the power to supervise and control employee work schedules or conditions of employment; (3) power to determine the rate and method of pay; and/or (4) power to maintain employment records.

15. Defendants have employees in the following Texas cities: Houston, Humble, Kingwood, Magnolia, Austin, Conroe, and The Woodlands. According to Defendant GGF's website, Defendants have twelve (12) locations in Austin, and approximately twenty-one (21) locations in San Antonio.

16. From approximately November 12, 2019 to the date this First Amended Complaint was filed, Defendants employed Plaintiff Skiba as a purported salaried employee under the "Fitness Manager" title at the Humble, TX—"Parks Lake" location.

17. Defendants employ a number of similarly situated employees as purported salaried and exempt employees, assigned to work at Defendants' various locations within Texas.

18. Plaintiff Skiba was initially informed that her job duties would qualify her for full time, non-exempt status. Furthermore, Plaintiff Skiba was informed that she would be paid

as a salaried employee with the potential to earn additional sales commissions and monthly bonuses should she meet predetermined production goals.

19. On or about Plaintiff Skiba's November 2019 hiring date, Defendants informed Plaintiff Skiba that they were interested in improving production, and that they were open to new ideas and flexible options for Fitness Managers. With the intention of heading in a new direction for the team, Defendants informed Plaintiff Skiba that they were interested in providing a flexible environment for Plaintiff Skiba's in the Fitness Manager position allowing her to take full advantage of the facility's busiest hours.

20. To this end, and in support of restructuring efforts, on December 10, 2019, VP of Fitness and wife of Defendant Murphy, Kristi Murphy, emailed then General Manager, Donald Lewis, and copied CEO/President, Defendant Murphy, informing him that Plaintiff Skiba would be permitted a flexible schedule allowing her to take advantage of peak customer hours. For several months following Kristi Murphy's approval, Plaintiff Skiba exercised this flexible schedule, working early hours and late evenings on occasion all while making accommodations for orientations.

21. In Plaintiff Skiba's position as Fitness Manager, she was tasked with several duties including hiring and firing employees, training Physical Trainers, and assuring production goals were reached; however, this role came with uncertainty regarding who Plaintiff Skiba was actually managing.

22. While Plaintiff Skiba was originally assigned to manage one Assistant Fitness Manager, and several Physical Trainers, Defendants' policy made managing Physical Trainers difficult. As part of a Fitness Manager's duties, Plaintiff Skiba was tasked with explaining the pay structure to her subordinates when asked; however, given the uncertainty of Physical

Trainers' status with the company, Plaintiff Skiba found herself with her own questions.

23. Despite recent attempts at switching exclusively to full-time Physical Trainers, Defendants failed to do so, leaving Plaintiff Skiba responsible for explaining the discrepancy to staff. More specifically, while Defendants wished to hire exclusively full-time Physical Trainers, this proved impossible given the standards required for these employees to qualify as full-time employees.

24. As explained by Account Manager, Ashley Sudwischer, Physical Trainers' hours were tracked in two separate time keeping systems. One system was specifically designated for Physical Trainers' "Floor Hours," or time used to try to obtain new clients, while the other system was exclusively limited to hours worked during paid training sessions with clients.

25. To qualify as a full-time employee under Defendants' pay structure, a Physical Trainer was tasked with completing one month containing the following metrics: a total of seventy (70) thirty-minute paid sessions per week; a total of one hundred and forty (140) paid sessions per pay period; and a total of two hundred and sixty (260) paid sessions per month. Only after reaching this threshold would a Physical Trainer then qualify as full-time. In total, the hours required to achieve full-time status for a Physical Trainer were 35 hours per week, 70 hours per pay period, and 130 hours per month. Only after achieving these metrics could a Physical Trainer qualify for benefits and PTO as a full-time employee.

26. Furthermore, after achieving full time status, a Physical Trainer stood to lose this status, benefits, and PTO should he or she fall below a total of 35 hours' worth of paid training sessions per week.

27. Understanding that these metrics were nearly unachievable, even for the most

successful Physical Trainer, Plaintiff Skiba found it irresponsible to hire Physical Trainers under the false pretense that they would be full-time employees. As such, Plaintiff Skiba continued to hire part time Physical Trainers, and only managed one Physical Trainer whom she believed may qualify as a full-time employee, so long as he maintained paid customer sessions totaling at least 35 hours per week.

28. In a short time period, Plaintiff Skiba successfully led the Humble, TX location in the direction which Defendants' had hoped, performing to budget at around 80% by January – a far leap from the prior 20-30% the location had been reporting before Plaintiff Skiba's arrival.

29. As was required of all staff, Plaintiff Skiba, tracked her hours daily through a computerized time keeping system. However, due to her alleged exempt status, these hours were not taken into account when Defendants calculated her pay. Instead, Plaintiff Skiba was set to receive a prorated amount of her annual salary to be paid bi-monthly. However, despite what should have been a predetermined amount of pay, Plaintiff Skiba continuously received unpredictable, variable pay each period despite being classified as exempt.

30. On or about January 2020, Plaintiff Skiba noticed that Defendants were applying inconsistent and unclear metrics to Physical Trainers under her supervision. More specifically, Plaintiff Skiba determined that she had never received a clear explanation for the manner in which Physical Trainers were to be paid. Based on the manner in which the company was compensating these trainers, Plaintiff Skiba determined that they may not actually be eligible for full time status.

31. In addition to the confusion surrounding Physical Trainers' compensation, Plaintiff Skiba also noticed an immense amount of variation in her bi-monthly paystubs. More

specifically, Plaintiff Skiba noticed that several PTO requests had been submitted, without her knowledge, on days when she was not absent for the entire workday.

32. As such, Plaintiff Skiba addressed these concerns with her superiors, Defendant Murphy and Kristi Murphy, asking for clarity regarding the continuously varying pay structure despite her salaried and exempt status. Despite having received notice of this issue, Defendants failed to investigate Plaintiff Skiba's concerns, instead insisting that the pay period process was being applied appropriately.

33. However, according to Defendants' own Employee Handbook, in the event that partial absences occurred, the employee's PTO hours would then be applied to cover the employee's absence. Should an employee have insufficient PTO hours to cover the absence, only then did Defendants state that the employee's pay would be calculated as hourly. However, this was not the case.

34. Notwithstanding the boundaries set out in its own Employee Handbook, and as evidenced in Plaintiff Skiba's paystubs, Defendants misapplied PTO hours to days when employees were absent for less than a full workday and for illness related absences. Furthermore, after misapplying PTO and resorting to an hourly pay rate, Defendants also failed to keep proper records, thus leading to Plaintiff Skiba being paid for less hours than those actually worked.

35. Unsatisfied with the lack of consistency between her pay and the explanation she received, Plaintiff Skiba soon followed up with Account Manager, Ashley Sudwischer, only to receive another contradictory explanation mimicking Defendant Murphy's and Kristi Murphy's.

36. Frustrated with the lack of a clear explanation for the discrepancy, on February

6, 2020, Plaintiff Skiba followed up in an email to, Sarah Dailey, in Defendants' corporate office, asking for a clear explanation regarding compensation for Physical Trainers, Assistant Fitness Managers, and Fitness Managers.

37. In response to Plaintiff Skiba's inquiries, Dailey parroted the previous explanations given to Plaintiff Skiba, informing her that compensation plans for Fitness Managers and Assistant Fitness Managers were issues better addressed by Defendant Murphy, Kristi Murphy, or Ashley Sudwischer.

38. Shortly following her inquiries, Plaintiff Skiba continued receiving paystubs which were not reflective of her timesheets nor her absences. On or about March 16, 2020, while the facility was closed due to COVID-19 related orders, Plaintiff Skiba and other similarly situated employees, were notified that they were to come back into work that day.

39. As expected, the closed facility meant a lack of work for staff. Due to the facility's lack of customers, and an overall lack of work, Plaintiff Skiba and similarly situated employees were then forced to remain in the facility between five to eight hours without being paid a full day's salary, yet again shifting between exempt and non-exempt requirements at a whim due to no fault of Plaintiff Skiba or her fellow employees.

40. The following day, Plaintiff Skiba and several other employees were given notice that they would need to clean and sanitize the facility in preparation for the facility's eventual reopening. Complying with these wishes, Plaintiff Skiba and several other employees arrived to sanitize the facility with limited protective gear to protect them from contamination, only to once again receive less than a full day's salary.

41. Shortly thereafter on or about March 24, 2020, Plaintiff Skiba was called in yet again along with several other employees. Despite the facility still being closed and all

employees having been officially furloughed that day, Plaintiff Skiba and the others were forced to remain at the facility for a full day with no work to perform, and receiving only hourly pay for their time.

42. On or about May 11, 2020, Plaintiff Skiba was notified via email to come in yet again while still "furloughed." With the false premise that employees would be preparing the Humble, TX location for eventual reopening, Defendants instructed Plaintiff Skiba to report to her standard location.

43. Despite these instructions, when Plaintiff Skiba and the remaining employees arrived at the Humble, TX location, they were then informed that they would be traveling to the Kingwood location. Once present at the Kingwood location, Plaintiff Skiba and the remaining employees were then instructed to assist with moving heavy machinery and help load it onto a truck to be swapped with the equipment from the recently closed Houston – Cypress Landing location. Without warning, the employees reported to work prepared to sanitize the facility only to be met with intense manual labor.

44. In addition to the surprise assignment, employees were not provided any type of protective equipment, masks, gloves, or sanitizer and were unable to adhere to any form of social distancing.

45. On or about May 18, 2020, Defendants ended the furlough period, and notified employees that they would now be required to return. In exchange for the hours worked throughout the "furlough" period while having been compensated at an hourly rate instead of the standard salary pay, Defendant Murphy assured employees that they would receive additional PTO.

46. Following the close of the furlough period, General Manager, Joseph Ageitos,

was transferred from the Houston – Cypress Landing location to replace former General Manager, Donald Lewis. Shortly after joining the Humble, TX location, and without warning, Ageitos began taking issue with Plaintiff Skiba's well established flexible schedule.

47. Disregarding Plaintiff Skiba's assurances that her flexible schedule had been approved by Kristi Murphy, Defendant Murphy, and former General Manager, Donald Lewis, Ageitos insisted that Plaintiff Skiba get further confirmation to continue using this schedule.

48. On or about June 17, 2020, Plaintiff Skiba informed Defendant Murphy and Kristi Murphy that Ageitos was giving her difficulty regarding her schedule, and that he sought further confirmation. However, rather than referring back to their December 2019 email communications, both Kristi and Defendant Murphy pushed back. Defendant Murphy deferred to Kristi stating that he recalled no such conversation, while Kristi insisted that she never intended for such a schedule to be permanent. Despite having never challenging this schedule since its inception in December 2019, Kristi and Defendant Murphy sided with Joseph, the new General Manager, criticizing Plaintiff Skiba's schedule and overall performance implying that a flexible schedule no longer suited the business.

49. In addition to newly formed issues with Plaintiff Skiba's schedule, Defendant Murphy began referencing workplace gossip regarding Plaintiff Skiba's alleged wavering loyalty to the Defendants as it was purported that she was seeking other employment in Dallas, TX. Refusing to address any of Plaintiff Skiba's past concerns regarding the instability of the pay policies, Defendant Murphy created issues where none existed.

50. Just one month following her conversations with her superiors about these reoccurring pay discrepancies and varied pay amounts for purported exempt employees, Plaintiff Skiba now faced new and unexpected pushback regarding her overall performance,

alleged intentions to leave the company, and her interactions with her superiors – all of which were unfounded.

51. In addition to the heightened tension with Defendant Murphy and Kristi Murphy, Plaintiff Skiba also received pushback from other higher-ranking employees with whom she had once had an amicable relationship. In a June 23, 2020 email to VP of Operations, Dionne Booker, Plaintiff Skiba asked for Booker's opinion on ongoing challenges and how to best work with participants who wished to complete the fitness programs remotely due to the pandemic. Rather than provide assistance as she had often done in the past, Booker prompted Plaintiff Skiba to get more creative, offering no alternative solutions. Considering the relationship Plaintiff Skiba once had with Booker, she found it not to be a coincidence that Booker had withdrawn some since Plaintiff Skiba's struggle with Defendant Murphy and Kristi Murphy.

52. Despite heightened tension with Defendant Murphy and Kristi Murphy, and pushback from newly transferred General Manager, Joseph Ageitos, Plaintiff Skiba continued working to meet her projected goals. In spite of voicing her concerns, her paystubs remained nonreflective of a salaried employee's pay, and were miscalculated under the hourly standard.

53. For several pay periods spanning from December 2019 to the present, including the pay period beginning on July 1, 2020 and ending on July 15, 2020, Defendants misapplied PTO to partial absences and illness-related absences. More specifically, on July 2, 2020, Plaintiff Skiba's arrival and departure from work were not accurately reflected in her total hours. Specifically, on that day, Plaintiff Skiba worked from 8:57 a.m. to 7:06 p.m. – a total of 10.15 hours. However, Plaintiff Skiba's total amount of hours reflected on the timesheet for July 2, 2020 are erroneously reported as 8.17 hours. A miscalculation calling into question all of Plaintiff Skiba's timesheet entries as far back as her hiring date.

54. During the same pay period, Defendants further misapplied PTO to several other days when Plaintiff Skiba missed only a few hours of work. As such, for the time period beginning on July 1, 2020 and ending on July 15, 2020, Plaintiff Skiba's pay was calculated using an hourly rate. Therefore, in addition to this hourly rate being misapplied, Plaintiff Skiba was also underpaid due to the improper calculation of her total hours worked.

55. These types of miscalculations can be seen throughout the duration of Plaintiff Skiba's employment with Defendants, resulting in several pay periods wherein Defendants failed to compensate Plaintiff Skiba her full salaried pay, all while paying her hourly for an inaccurate number of hours worked.

56. Despite several attempts at discussing these issues, Plaintiff Skiba's inquiries went ignored. Rather than investigate Plaintiff Skiba's concerns, Defendants accused her of insubordination and disrespect while willfully ignoring her complaints. On several occasions, Plaintiff Skiba suggested an in-person meeting to speak with her superiors about each party's concerns. However, Defendants refused to meet with Plaintiff Skiba instead choosing to further isolate her and hold her to heightened standards not applied to other employees.

57. Despite several attempts at moving forward and finding a resolution with her superiors, on July 2, 2020, Plaintiff Skiba requested her pay records from Defendants. Later that day, Plaintiff Skiba then received a formal Write-Up for alleged insubordination to a total of three superiors due to her emails in which she asked to meet to resolve their issues in person.

58. Upon receiving this Write-Up, Plaintiff Skiba responded to the insubordination allegations, assuring that she had no intention to disrespect her superiors with her inquiries. Instead, Plaintiff Skiba called attention to the fact that she had persisting questions which remainder unanswered, and that she felt that she was being targeted due to said complaints.

59. After receiving the July 2, 2020 Write-Up, Plaintiff Skiba knew that Defendant Murphy and Kristi Murphy were unwilling to take any action to correct the unpaid wage issues. As such, Plaintiff Skiba attempted to forego them, making another complaint to Accounting Manager, Ashley Sudwischer about unpaid wages.

60. In several email communications with Sudwischer and Plaintiff Skiba, she was routinely redirected to the Employee Handbook, which expressly stated that employees missing a full day of work for anything other than illness would be required to use PTO to cover the absence. In response to Sudwischer's explanation, Plaintiff Skiba called attention to the fact that on several occasions, PTO was erroneously applied to partial absences or illness-related absences.

61. When asked about how PTO could be applied to a day when Plaintiff Skiba did in fact work at least a partial day, Sudwischer informed Plaintiff Skiba that, "It wouldn't make sense for the company to pay an employee for a full day's work if they clocked in for 5 minutes then left, unless it was due to the company closing like with COVID-19." Notwithstanding the clear contradiction in policy and practice, in her July 8, 2020 email response to Plaintiff Skiba, Sudwischer assured Plaintiff Skiba that the policy and her paystubs were in fact correct, making no effort or offer to review these records.

62. Seeking further information regarding her pay inaccuracies and the lack of consistence with the Employee Handbook, Plaintiff Skiba followed up several more times with Sudwischer asking about the various discrepancies in the ways in which PTO was applied, when it was applied, and the overall lack of consistence. However, during these communications, Plaintiff Skiba received the same response.

63. Despite her efforts, the inconsistent payments persisted. The morning of July 13,

2020, while two employees had already called in sick while awaiting results of their COVID-19 tests, Plaintiff Skiba called in complaining of a sore throat. After taking allergy medication, Plaintiff Skiba reported to work, just one and one-half hours after her scheduled start time. Despite calling in ahead of time and completing the remainder of her workday, Plaintiff Skiba later discovered that Defendants applied PTO to her late arrival, once again violating their own policy.

64. With a total of three employees currently awaiting results of COVID-19 tests, Plaintiff Skiba's complaints regarding unpaid wages remains even less of a priority than before. As it stands, Plaintiff Skiba continues to receive less than the required amount she is entitled to as a purported full time, exempt employee.

VI. FIRST CAUSE OF ACTION: UNLAWFUL DEDUCTION OF WAGES UNDER FLSA, 29 C.F.R. §§ 541.602- 603

65. The preceding paragraphs are incorporated by reference herein for all purposes.

66. The improper deductions from salary provisions set forth in 29 C.F.R. §§ 541.602-603, and the supporting federal regulations, apply to Defendants and protect Plaintiff Skiba and the putative class members.

67. Furthermore, 29 C.F.R. §541.602 states that deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons not including illness or disability.

68. Furthermore, §541.603(b) provides that an employer who improperly deducts from an exempt employee's salary shall lose said exemption so long as facts indicate that that the employer lacked the intention to pay the employees on a salary basis.

69. On several occasion throughout Plaintiff Skiba's employment, Defendants

misapplied PTO to partial absences of less than a full day, including those stemming from illness. As a result, several dates upon which Defendants applied PTO and resorted to hourly pay were days in which Plaintiff Skiba received less than the full day's pay to which she was entitled.

70. In addition to wrongfully applied PTO, Defendants also erroneously calculated Plaintiff Skiba's hourly wages, with frequent discrepancies between Plaintiff Skiba's actual hours recorded and the total amount of hours for which she received compensation.

71. Considering Defendants' knowledge of Plaintiff Skiba's complaints regarding unpaid wages, Defendants' defense of the pay structure, and Defendants' failure to rectify these discrepancies, it remains evident that Defendants' failure to pay wages was intentional and indicated an overall lack of intention to pay Plaintiff Skiba and similarly situated employees salaried wages. As such, Defendants must lose their exempt status as it is applied to Plaintiff Skiba and similarly situated employees, thus entitling said employees to overtime compensation of one and one-half standard wages for overtime hours worked over the course of their employment.

VII. SECOND CAUSE OF ACTION: UNPAID OVERTIME WAGES UNDER FLSA, 29 U.S.C. § 201 et. seq.

72. In the alternative, Plaintiff Skiba asserts that Defendants misclassified her and similarly situated employees as exempt employees. As such, the overtime wage provisions set forth in the FLSA, 29 U.S.C. § 201 et. seq., and the supporting federal regulations, apply to Defendants and protect Plaintiff Skiba and the putative class members.

73. Whether an employee falls within an exemption is a question of law; the amount of time the employee devotes to particular duties, as well as the significance of those duties, are

questions of fact. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986).

74. The FLSA requires each covered employer to compensate all non-exempt employees at a rate of not less than one and one-half times their regular hourly rate for all hours worked in excess of forty (40) hours per week.

75. Throughout the relevant period, Defendants misclassified non-exempt employees as exempt employees in an effort to avoid compensating said employees for the excess hours worked over forty (40) hours per week. Furthermore, Defendants failed to pay Plaintiff Skiba and other similarly situated employees' wages at time-and-a-half for hours that they worked over forty (40) hours in a workweek.

76. Throughout the relevant period, Defendants expected and required Plaintiff Skiba and the putative class members to be available to work more than forty (40) hours in a workweek, on several occasions even calling these employees to work during a Governor ordered shut down of the facility due to COVID-19 while supposedly furloughed.

77. As a result of Defendants' unlawful acts, Plaintiff Skiba and the putative class members have been deprived of overtime compensation in amounts to be determined at trial, and are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation.

78. Defendants' unlawful conduct has been willful and intentional. Considering the various occasions during which these discrepancies were brought to their attention, Defendants were aware or should have been aware that the practices described herein are unlawful. Defendants have not made a good faith effort to comply with the FLSA with respect to the compensation of Plaintiff Skiba and the putative class members.

79. Because Defendants' violations of the FLSA have been willful, a three-year statute of limitations applies, pursuant to 29 U.S.C. § 255.

VIII. THIRD CAUSE OF ACTION: FAILURE TO MAINTAIN ACCURATE RECORDS

80. Plaintiff reasserts and incorporates by reference all of the above numbered paragraphs.

81. The FLSA requires employers to keep accurate records of hours worked by employees. 29 U.S.C. § 211(c); 29 C.F.R. § 516.

82. Defendants failed to keep proper time records by unlawfully deducing Plaintiff Skiba's and other similarly situated employees' pay and misapplying PTO to less than a full day's absence or a non-illness related absence. Furthermore, Defendants also failed to keep proper time records by then compensating Plaintiff Skiba and other similarly situated employees at an hourly rate which did not accurately reflect the total recorded hours worked by each employee.

83. In the alternative to the pay violations of the FLSA described above, Defendant failed to keep proper time records as required by the FLSA by maintaining records wherein Plaintiff and other similarly situated employees were misclassified as exempt.

VIII. FOURTH CAUSE OF ACTION: RETALIATION UNDER FLSA, 29 U.S.C. §215(a)(3)

84. Defendants have retaliated against Plaintiff Skiba following her complaints of unpaid wages and pay discrepancies in violation of 29, U.S.C. § 215(a)(3).

85. To establish a prima facie case of FLSA retaliation claim, a plaintiff must show the following: (1) she participated in protected activity under the FLSA; (2) she suffered an adverse employment action; and (3) a causal link exists between the activity and the adverse

action suffered. *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 624 (5th Cir. 2008) (emphasis and quotation omitted).

86. Furthermore, the plaintiff must also prove by a preponderance of the evidence that but for her participation in protected activity, the adverse employment action would not have occurred. *Kanida v. Gulf Coast Med. Pers*. LP, 363 F.3d 568, 580 (5th Cir. 2004).

87. As previously stated, Plaintiff Skiba engaged in protected activity under FLSA when she complained several times to Defendants regarding uncertainty regarding exempt statuses or lack thereof for Physical Trainers, as well as varying pay amounts for alleged exempt employees and unpaid wages. In addition to complaints regarding these matters, Plaintiff Skiba also called attention to the misuse of PTO to absences of less than a full day's work or for illness. After her complaints and requests for pay records, Defendants' behavior towards Plaintiff Skiba shifted resulting in more harsh treatment towards Plaintiff Skiba, heightened criticisms, and false accusations. Shortly after her complaints, Plaintiff Skiba was accused of searching for outside employment, being less than committed to her position with the company, and was targeted more harshly than other employees regarding strategic plans which other employees were not held to.

88. Furthermore, on the same day that Plaintiff Skiba requested her pay records from Defendants, Plaintiff Skiba received a formal Write-Up threatening suspension without pay, and even termination, for "insubordination" against the very superiors to whom she had once mentioned pay the pay discrepancy.

89. The adverse employment actions Plaintiff Skiba faced were undoubtedly linked to her complaints regarding unpaid wages and misclassifications of herself and other employees. Prior to Plaintiff Skiba's complaints, she was a top performer with the company,

improving production by more than 50% in under three months of employment. Additionally, Plaintiff Skiba was once permitted to employ a flexible schedule allowing her to take advantage of peak hours and avoid unnecessary overlapping with other staff. Following her complaints, Plaintiff Skiba was not only written up and threatened with termination, but she also was treated as though her performance was suffering despite its remaining steady. Furthermore, Plaintiff Skiba was prohibited from employing a flexible schedule, thus making attainment of her performance goals increasingly more difficult. But for Plaintiff Skiba's complaints, she would not have received the adverse employment actions leading to her near termination.

90. For these reasons, Plaintiff Skiba can clearly establish a prima facie case of retaliation under 29, U.S.C. § 215(a)(3).

IX. COLLECTIVE ACTION UNDER 29 U.S.C. § 216(b)

91. The preceding paragraphs are incorporated by reference herein for all purposes.

92. Pursuant to 29 U.S.C. §216(b), Plaintiff Skiba brings this Complaint as a collective action, on behalf of herself and all persons similarly situated who consent to join this litigation by filing a written consent with the Court and who also agree to be represented by Plaintiff Skiba's counsel, such persons making claims under the FLSA for the three years preceding the filing of this Complaint or the filing with the Court of each such person's written consent to join until entry of judgment after trial.

93. Defendants have a common policy of allowing exempt employees' compensation to be deduced for absences of less than a full day and for absences related to illness. Furthermore, Defendants maintain a policy wherein purported exempt employees stand to lose this status at any point if their hours fall below a certain amount of hours per week, thus providing said employees with a non-predetermined, variable pay amount reliant upon hours

worked per pay period, rather than a predetermined salary.

94. Given Defendants' misclassifications and improper application of PTO, Defendants are prohibited from benefiting from the exempt status they currently bestow on employees who do not fulfill the requirements to qualify as such. While these employees are underpaid under the exempt status, in the alternative, they have also been underpaid under the non-exempt status entitling them to time and one-half their regular pay rate for hours worked in excess of forty (40) hours per work week.

95. In addition to failing to pay requisite time and one-half regular pay rate for overtime hours, Defendants have failed to pay the standard regular rate of pay for hours worked according to its own employee time tracking system.

96. Therefore, the Court should certify a collective action of all exempt employees whose pay has been unlawfully reduced due to absences of less than one full day of work or for illness related reasons. Furthermore, the Court's certification of this collective action should also include non-exempt employees who were not compensated at time-and-a-half for hours that they worked over forty (40) hours in a workweek, or who received compensation during a pay period which was not reflective of the actual hours recorded by said employees, and that worked at any time during the three years preceding the filing of this First Amended Complaint.

97. Plaintiff Skiba is informed and believes, and based thereon, alleges that there are other FLSA class members who could "opt-in" to this class.

98. Additionally, the actual number of FLSA class members is readily ascertainable by a review of Defendants' records through appropriate discovery, and Plaintiff Skiba proposes to take proceedings in this action to have such persons notified of this litigation and given an opportunity to file written consents to join this litigation.

X. JURY TRIAL DEMAND

99. Plaintiff Skiba, on behalf of herself and members of the putative class, demand a jury trial on all issues so triable.

XI. PRAYER

100. Plaintiff Skiba, on behalf of herself and all similarly situated employees, respectfully requests that the Court certify this case as a collective action under the Fair Labor Standards Act and order court-supervised notice to the class and further demands judgment against Defendants for the following:

(a) actual damages for unpaid overtime wages under the FLSA;

(b) liquidated damages as provided by the FLSA;

(c) reasonable attorney's fees under the FLSA;

(d) pre-judgment and post-judgment interest as provided by law;

(e) all costs of court; and

(f) any other relief to which Plaintiff Skiba is and members of the putative class may be entitled, whether in law or in equity.

Respectfully submitted,

The Ilochi Law Firm
11601 Shadow Creek
Pkwy., #111-325
Pearland, Texas 77584
Phone: (713) 487-9072

BY: /s/ Gabrielle O. Ilochi
ATTORNEY-IN-CHARGE
State Bar No.: 24107815
SDTX Bar No.: 3256155
Email: gabrielle@ilochilaw.com

ATTORNEY FOR PLAINTIFF

EXHIBIT 1

CONSENT TO JOIN

1. My name is Danae Skiba, and I am a former employee of GHG-THE FITNESS GROUP, LLC, d/b/a GOLD'S GYM HOUSTON.

2. I consent to be a party plaintiff in a lawsuit against GHG-THE FITNESS GROUP, LLC, d/b/a GOLD'S GYM HOUSTON and/or related entities and individuals in order to seek redress for violations of the Fair Labor Standards Act, pursuant to 29 U.S.C. § 216(b).

3. By signing and returning this consent form, I designate Gabrielle O. Ilochi of The Ilochi Law Firm, to represent me and make decisions on my behalf concerning the litigation and any settlement. I agree to be bound by any adjudication of this action by a court, whether it is favorable or unfavorable.

4. I also consent to join any separate or subsequent action to assert my claims against GHG-THE FITNESS GROUP, LLC, d/b/a GOLD'S GYM HOUSTON and/or related entities and individuals potentially liable.

Signature

Danae Skiba
Full Legal Name (Print)

7/28/2020
Date