

AUG 31 2016

Sherri R. Carter, Executive Officer/Clerk

By: Nancy Navarro, Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

STEVEN VEGA and JAVIER MORRONE,
individuals on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

LANGHAM HOTELS PACIFIC
CORPORATION, a Delaware corporation; and
DOES 1 to 10 inclusive,

Defendants.

Case No.: BC572323

ORDER GRANTING
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT

Date: August 18, 2016

Time: 10:00 a.m.

Dept.: 307

I. BACKGROUND

This is a wage and hour class action filed by Plaintiffs Steven Vega and Javier Morrone, individually on behalf of similarly situated employees of Defendant Langham Hotels Pacific Corporation. Defendant is a hotel in Pasadena where Plaintiffs worked as bartenders. (Complaint, ¶¶ 1-4, 8.) The gist of the litigation is that Defendant adds a 22% “service charge” to banquet orders and distributes all or a portion of it to its employees in the form of tips but does not include this amount in their regular rate of pay for purposes of calculating overtime pay. (Id. at ¶¶ 9-12.)

1 The First Amended Complaint contains the following causes of action: (1) failure to pay
2 overtime; (2) failure to pay premium wages for missed meal and rest periods; (3) failure to
3 furnish accurate itemized wage statements; (4) unfair business practices; (5) waiting time
4 penalties; (6) civil penalties pursuant to PAGA.

5 Following mediation, the parties entered into a *Class Action Stipulation of Settlement*
6 (Settlement Agreement). Now before the Court is Plaintiff's request for preliminary approval of
7 the settlement.

8 **II. DISCUSSION**

9 **A. SETTLEMENT CLASS DEFINITION**

10 The proposed settlement class is defined as, "any and all persons who are or were non-
11 exempt hourly employees employed by Defendant in California any time during the Class
12 Period who were distributed any non-discretionary charge to customers by Defendant as part of
13 their pay." (Settlement Agreement, §II ¶B)

14 Class Period is February 13, 2011 through preliminary approval. (Ibid.)

15 For purposes of settlement, the parties stipulate to certification of this class. (§III ¶A)

16 **B. TERMS OF SETTLEMENT AGREEMENT**

17 A fully executed copy of the Settlement Agreement is attached to Declaration of Kyle
18 Pawlendo as Exhibit 1. Its essential terms are as follows:
19

- 20 • The Gross Settlement Amount is \$650,000, non-reversionary. (§II ¶H)
- 21 • The Net Settlement Amount (\$367,833.34) is the Gross minus the following:
 - 22 ○ Up to \$216,666.66 (1/3) for attorney fees (§III ¶C);
 - 23 ○ Up to \$25,000 for attorney costs (§III ¶C);
 - 24 ○ Up to \$13,000 for two \$6,500 service awards (§III ¶D);
 - 25

- Up to \$25,000 for claims administration costs (§III ¶F); and
- \$2,500 [75% of \$3,333.33 PAGA penalty] to the LWDA (§III ¶E)
- Additionally, Defendant agrees to cease requiring class members to pool their tips or gratuities. (§III ¶H)
- There is no claims requirement; Settlement Class Members (class members who do not opt out) will automatically receive a pro rata share of the Net. (§IV ¶A.1)
- Class members have 60 days to opt out or object. (§II ¶M)
- Settlement payments will be calculated by dividing the Net by the total overtime hours that have accrued for all Settlement Class Members during the Class Period, and multiplying that amount by the number of overtime hours worked by each individual Settlement Class Member. (§IV ¶A.1) Overtime hours will be separately and distinctly calculated for each Settlement Class Member, with periods of leave of absence excluded. (Ibid.)
- Payment will be allocated 1/3 to wages, 1/3 to interest, and 1/3 to penalties. (§IV ¶A.2)
- The Gross Settlement Amount excludes Defendant's FICA/FUTA payments and any other payroll taxes owing by Defendant. (§II ¶H)
- Funds from checks not cashed within 120 days of mailing will be deposited in the appropriate State of California unclaimed property fund on the Settlement Class Member's behalf, provided that if the gross amount of the uncashed checks equals or exceeds \$3,000, the uncashed checks will be reallocated and distributed on a pro rata basis to those class members who cashed their checks. (§IV ¶A.3)
- The parties will jointly select a claims administrator. (§II ¶U) [The parties have agreed to use Phoenix Settlement Administrator. (Pawlenko Declaration, ¶11.)]

- The named Plaintiff and Settlement Class Members will release certain claims against Defendant. (See further discussion below)

C. **SETTLEMENT STANDARDS AND PROCEDURE**

California Rules of Court, rule 3.769(a) provides: “A settlement or compromise of an entire class action, or of a cause of action in a class action, or as to a party, requires the approval of the court after hearing.” “Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion.” See CRC rule 3.769(c).

“In a class action lawsuit, the court undertakes the responsibility to assess fairness in order to prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class action. The purpose of the requirement [of court review] is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties.” (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal. App.4th 46, 60 (internal quotation marks omitted); *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245 (“*Wershba*”): Court needs to “scrutinize the proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned,” internal quotation marks omitted.)

“The burden is on the proponent of the settlement to show that it is fair and reasonable. However ‘a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court

1 to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
2 objectors is small.” (*Wershba* at 245, citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
3 1794, 1802 (“*Dunk*”).) Notwithstanding an initial presumption of fairness, “the court should not
4 give rubber-stamp approval.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116,
5 130 (“*Kullar*”). “Rather, to protect the interests of absent class members, the court must
6 independently and objectively analyze the evidence and circumstances before it in order to
7 determine whether the settlement is in the best interests of those whose claims will be
8 extinguished.” *Id.* In that determination, the court should consider factors such as “the strength
9 of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk
10 of maintaining class action status through trial, the amount offered in settlement, the extent of
11 discovery completed and stage of the proceedings, the experience and views of counsel, the
12 presence of a governmental participant, and the reaction of the class members to the proposed
13 settlement.” *Id.* at 128. “Th[is] list of factors is not exclusive and the court is free to engage in
14 a balancing and weighing of factors depending on the circumstances of each case.” (*Wershba* at
15 245.)
16

17 “A settlement need not obtain 100 percent of the damages sought in order to be fair and
18 reasonable. Compromise is inherent and necessary in the settlement process. Thus, even if ‘the
19 relief afforded by the proposed settlement is substantially narrower than it would be if the suits
20 were to be successfully litigated,’ this is no bar to a class settlement because ‘the public interest
21 may indeed be served by a voluntary settlement in which each side gives ground in the interest
22 of avoiding litigation.’” (*Id.* at 250.)

23 **D. ANALYSIS OF SETTLEMENT AGREEMENT**

24 **1. Does a presumption of fairness exist?**

25

- 1 a. Was the settlement reached through arm's-length bargaining? Yes. On February
2 19, 2016, the parties had a full day of mediation before Peter D. Lichtman (Ret.)
3 (Pawlenko Declaration, ¶9.) While mediation was not immediately successful,
4 the parties later accepted the mediator's proposal. (Id. at ¶10.)
- 5 b. Were investigation and discovery sufficient to allow counsel and the court to act
6 intelligently? Yes. The parties engaged in formal and informal discovery. (Id. at
7 ¶8.) Plaintiff propounded form and special interrogatories and document requests,
8 and took the deposition of Defendant's director of human resources. (Ibid.) Class
9 Counsel reviewed two confidential declarations produced pursuant to the
10 mediation privilege, and retained an expert who reviewed class members' time
11 and pay records and prepared a damage model. (Ibid.)
- 12 c. Is counsel experienced in similar litigation? Yes. Class counsel is experienced in
13 class action litigation, including wage and hour class actions. (Id. at ¶¶ 14, 15.)
- 14 d. What percentage of the class has objected? This cannot be determined until the
15 fairness hearing. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before
16 Trial (The Rutter Group 2014) ¶ 14:139.18: "Should the court receive objections
17 to the proposed settlement, it will consider and either sustain or overrule them at
18 the fairness hearing.")

19
20 CONCLUSION: The settlement is entitled to a presumption of fairness.

21 **2. Is the settlement fair, adequate, and reasonable?**

- 22 a. Strength of Plaintiffs' case. "The most important factor is the strength of the case
23 for plaintiffs on the merits, balanced against the amount offered in settlement."
24 (Kullar at 130.) Here, Class Counsel, after consulting with an expert, believed
25 that if Plaintiffs were completely successful on all claims, Defendant's exposure

1 would range from \$1 million to \$1.5 million. (Pawlenko Declaration, ¶9). The
2 \$650,000 Gross Settlement Amount represents between 43% and 65% of that
3 exposure, well within the ballpark of reasonableness. (*City of Detroit v. Grinnell*
4 *Corporation* (2d Cir. 1974) 495 F.2d 448, 455; settlement amounted to 12% of
5 the plaintiffs' potential recovery.) Class Counsel acknowledges the significant
6 risk regarding liability. For one thing, although the overtime claim has the
7 greatest liability exposure, there is precedent for the rule that a service charge
8 must be included in the regular rate of pay. (*Ibid.*) And with respect to tip-
9 pooling, Defendant disputes that the banquet captains and banquet beverage
10 captains are its agents and asserts that such pooling is not unlawful, citing *Chau*
11 *v. Starbucks Corp.* (2009) 174 Cal.App.4th 688.

- 12 b. Risk, expense, complexity and likely duration of further litigation. Given the
13 nature of the class claims, the case is likely to be expensive and lengthy to try.
14 Procedural hurdles (e.g., motion practice and appeals) are also likely to prolong
15 the litigation as well as any recovery by the class members.
- 16 c. Risk of maintaining class action status through trial. Even if a class is certified,
17 there is always a risk of decertification. (*Weinstat v. Dentsply Intern., Inc.*
18 (2010) 180 Cal.App.4th 1213, 1226: "Our Supreme Court has recognized that
19 trial courts should retain some flexibility in conducting class actions, which
20 means, under suitable circumstances, entertaining successive motions on
21 certification if the court subsequently discovers that the propriety of a class action
22 is not appropriate.")
23
24
25

- 1 d. Amount offered in settlement. As indicated above, the Gross Settlement Amount
2 is \$650,000. Assuming that the Court approves all of the maximum requested
3 deductions, approximately \$367,833.34 will be available for automatic
4 distribution to participating class members. Assuming full participation, the
5 average settlement share will be approximately **\$994.14**. [$\$367,833.34 \text{ Net} \div 370$
6 $\text{class member} = 994.14$].
- 7 e. Extent of discovery completed and stage of the proceedings. As discussed above,
8 at the time of the settlement, Plaintiffs had conducted extensive discovery.
- 9 f. Experience and views of counsel. The settlement was negotiated and endorsed
10 by Class Counsel who, as indicated above, is experienced in class action
11 litigation, including wage and hour cases.
- 12 g. Presence of a governmental participant. This factor is not applicable here.
- 13 h. Reaction of the class members to the proposed settlement. The class members'
14 reactions will not be known until they receive notice and are afforded an
15 opportunity to opt out or object. This factor becomes relevant during the fairness
16 hearing.
17

18 CONCLUSION: The settlement can be preliminarily deemed “fair, adequate, and
19 reasonable.”

20 **3. Scope of release**

21 Plaintiffs and Settlement Class Members will, as of the Preliminary Approval Date,
22 release the Released Parties from the Settlement Class Released Claims. (Settlement
23 Agreement, §III ¶(G)) In addition, Plaintiffs, solely on their own behalves and not on behalf of
24
25

1 the class, release the Released Parties from any claims known or unknown, and waive all rights
2 and provisions of CC §1542. (Ibid.)

3 Settlement Class Released Claims means, “the causes of action pled in the Complaint or
4 that could have been pled based on the facts alleged in the Complaint.” (§II ¶¶W)

5 The class release appears to be proper as it is closely tethered to the pleading. The
6 broader release by the Class Representatives is acceptable as they were represented by counsel
7 when they agreed to such terms.

8 **4. May conditional class certification be granted?**

9 a. Standards

10 A detailed analysis of the elements required for class certification is not required, but it
11 is advisable to review each element when a class is being conditionally certified. (*Amchem*
12 *Products, Inc. v. Winsor* (1997) 521 U.S. 591, 620, 622-627.) The trial court can appropriately
13 utilize a different standard to determine the propriety of a settlement class as opposed to a
14 litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement
15 cases. (*Dunk* at 1807, FN 19.) Finally, the Court is under no “ironclad requirement” to conduct
16 an evidentiary hearing to consider whether the prerequisites for class certification have been
17 satisfied. (*Wershba* at 240.)

18 b. Analysis

- 19
- 20 i. Numerosity. There are approximately 370 class members. (Pawlendo
21 Declaration, ¶17.) Thus, numerosity has been established. (*Rose v. City*
22 *of Hayward* (1981) 126 Cal.App.3d 926, 934, stating that “[n]o set
23 number is required as a matter of law for the maintenance of a class
24 action” and citing examples wherein classes of as little as 10 [*Bowles v.*
25

1 *Superior Court* (1955) 44 Cal.2d 574] and 28 [*Hebbard v. Colgrove*
2 (1972) 28 Cal.App.3d 1017] were upheld).

- 3 ii. Ascertainability. The class is defined above. The class definition is
4 “precise, objective and presently ascertainable.” (*Sevidal v. Target Corp.*
5 (2010) 189 Cal.App.4th 905, 919.) Class members are identifiable from
6 Defendant’s records. (Settlement Agreement, §IV ¶B.2)
- 7 iii. Community of interest. “The community of interest requirement involves
8 three factors: ‘(1) predominant common questions of law or fact; (2) class
9 representatives with claims or defenses typical of the class; and (3) class
10 representatives who can adequately represent the class.’” (*Linder v.*
11 *Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) Here, there are predominant
12 questions regarding Defendant’s common policy, which Plaintiffs
13 contend violates California wage and hour laws. The proposed Class
14 Representatives have claims typical of the class as they were subject to
15 the same policies challenged by this litigation. And there is no indication
16 of any conflict between Plaintiffs and the class.
- 17 iv. Adequacy of class counsel. As indicated above, Class Counsel has
18 shown experience in class action litigation.
- 19 v. Superiority. Given the relatively small size of the individual claims, a
20 class action appears to be superior to separate actions by the class
21 members.
22

23 CONCLUSION: The class may be conditionally certified since the prerequisites of class
24 certification have been satisfied.
25

1 **5. Is the notice proper?**

2 a. Method of class notice.

3 Notice will be by direct mail. Within 15 days of preliminary approval, Defendant will
4 provide a class list to the Claims Administrator. (Settlement Agreement, §IV ¶B.2.) Within 30
5 days of preliminary approval, the Claims Administrator will mail notice to all class members
6 using the information provided by Defendant, as updated using the NCOA. (§IV ¶B.3) For
7 notices returned as undeliverable, the Claims Administrator will conduct one or more skip-
8 traces and then re-send notice. The proposed method of class notice appears to provide the best
9 possible means for giving actual notice to the putative class members.

10 b. Content of class notice.

11 The proposed class notice is attached to the Settlement Agreement as Exhibit A, and
12 appears to be acceptable except that references to Hon. Amy D. Hogue should be deleted. It
13 includes information such as: a summary of the litigation; the nature of the settlement; the terms
14 of the settlement agreement, including an estimate of the class member's anticipated recovery;
15 the maximum deductions to be made from the gross settlement amount (i.e., attorney fees and
16 costs, the enhancement award, claims administration costs, and PAGA penalties); the
17 procedures and deadlines for participating in (do nothing), opting out of, or objecting to, the
18 settlement; the consequences of participating in, opting out of, or objecting to, the settlement;
19 and the date, time, and place of the final approval hearing.

20 Cost of class notice.

21 As indicated above, Claims Administration costs are capped at \$25,000 and are estimated
22 not to exceed \$8,800. (Settlement Agreement, §III ¶F; Pawlenko Declaration, ¶11.) Prior to the
23 time of the final fairness hearing, the claims administrator must submit a declaration attesting to
24
25

1 the total costs incurred and anticipated to be incurred to finalize the settlement for approval by
2 the Court.

3 **6. Attorney fees and costs**

4 CRC rule 3.769(b) states: “Any agreement, express or implied, that has been entered into
5 with respect to the payment of attorney fees or the submission of an application for the approval
6 of attorney fees must be set forth in full in any application for approval of the dismissal or
7 settlement of an action that has been certified as a class action.”

8 Ultimately, the award of attorney fees is made by the court at the fairness hearing, using
9 the lodestar method with a multiplier, if appropriate. (*PLCM Group, Inc. v. Drexler* (2000) 22
10 Cal.4th 1084, 1095-1096; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615,
11 625-626; *Ketchum III v. Moses* (2000) 24 Cal.4th 1122, 1132-1136.) Despite any agreement by
12 the parties to the contrary, “the court ha[s] an independent right and responsibility to review the
13 attorney fee provision of the settlement agreement and award only so much as it determined
14 reasonable.” (*Garabedian v. Los Angeles Cellular Telephone Company* (2004) 118 Cal.App.4th
15 123, 128.)

16
17 The question of class counsel’s entitlement to \$216,666.66 in attorney fees will be
18 addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees.
19 Class counsel must provide the court with billing information so that it can properly apply the
20 lodestar method, and must indicate what multiplier (if applicable) is being sought.

21
22 Class counsel should also be prepared to justify the costs sought by detailing how they
23 were incurred.

24 **7. Enhancement Award to Class Representatives**

1 The Settlement Agreement provides for an enhancement award of \$6,500 to the each of
2 the class representatives. In connection with the final fairness hearing, the named Plaintiffs
3 must submit declarations attesting to why they should be entitled to enhancement awards in the
4 proposed amount. The named Plaintiffs must explain why they “should be compensated for the
5 expense or risk he has incurred in conferring a benefit on other members of the class.” (*Clark v.*
6 *American Residential Services LLC* (2009) 175 Cal.App.4th 785, 806.) Trial courts should not
7 sanction enhancement awards of thousands of dollars with “nothing more than *pro forma* claims
8 as to ‘countless’ hours expended, ‘potential stigma’ and ‘potential risk.’ Significantly more
9 specificity, in the form of quantification of time and effort expended on the litigation, and in the
10 form of reasoned explanation of financial or other risks incurred by the named plaintiffs, is
11 required in order for the trial court to conclude that an enhancement was ‘necessary to induce
12 [the named plaintiff] to participate in the suit’” (Id. at 806-807, italics and ellipsis in
13 original.)

14
15 The Court will decide the issue of the enhancement award at the time of final approval.

16 **III. CONCLUSION AND ORDER**

17 **A. TENTATIVE RULING**

- 18 (1) Grant preliminary approval of the settlement as fair, adequate, and reasonable;
- 19 (2) Grant conditional class certification;
- 20 (3) Appoint Steven Vega and Javier Morrone as Class Representatives;
- 21 (4) Appoint Hayes Pawlenko as Class Counsel;
- 22 (5) Appoint Phoenix Settlement Administrators as Claims Administrator;
- 23 (6) Approve the proposed notice plan; and
- 24 (7) Approve the proposed schedule of settlement proceedings.
- 25

B. PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS

- 1 • Preliminary approval hearing: August ³¹ 18, 2016 *the*
- 2
- 3 • Deadline for Defendant to provide class list to claims administrator: September ¹⁵ 7, 2016 *pm*
- 4 (15 days after preliminary approval)
- 5 • Deadline for claims administrator to mail notices: September ³⁰ 19, 2016 (30 days after *pm*
- 6 preliminary approval)
- 7 • Deadline for class members to opt out or object: November ³⁰ 19, 2016 (60 days after
- 8 mailing of notices)
- 9 • Deadline for class counsel to file motion for final approval: Jan. 31, 2016.
- 10 2016 (16 court days prior to final fairness hearing)
- 11 • Final fairness hearing: Feb. 23, 2016, at 10:00 a.m.
- 12
- 13

Dated: Aug. 31, 2016

Lisa Hart Cole
LISA HART COLE
Judge of the Superior Court