

MAY 24 2017

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 FINAL APPROVAL  
OF CLASS ACTION SETTLEMENT

Dept.: 307  
Date: May 24, 2017  
Time: 9:00 a.m.

**I. BACKGROUND**

In this class action lawsuit, Plaintiffs Steven Vega and Javier Morrone sue their employer, Defendant Langham Hotels Pacific Corporation, for a variety of wage and hour claims. Plaintiffs, who are or were employed as bar tenders, allege that Defendant added a 22% "service charge" to banquet orders and distributes it to employees in the form of tips, but does not include this in their regular rate of pay for purposes of calculating overtime pay. (Complaint at ¶¶ 1-4, 8, 9, 12.)

1 The operative pleading contains claims for failure to pay overtime, failure to pay  
2 premium wages for missed meal and rest period, failure to furnish accurate itemized wage  
3 statements, unfair business practices, waiting time penalties, and PAGA.

4 Following mediation, the parties reached a settlement. On August 18, 2016, the Court  
5 granted preliminary approval of the settlement. Now before the Court is Plaintiffs' motion for  
6 final approval.

## 7 **II. DISCUSSION**

### 8 **A. SETTLEMENT CLASS DEFINITION**

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

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

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

### 15 **B. TERMS OF SETTLEMENT AGREEMENT**

16 The essential terms of the Settlement Agreement are as follows:

- 17 • The Gross Settlement Amount is \$650,000, non-reversionary. (§II¶H )
- 18 • The Net Settlement Amount (\$367,833.34) is the Gross minus the following:
  - 19 ○ Up to \$216,666.66 (1/3) for attorney fees (§III ¶C);
  - 20 ○ Up to \$25,000 for attorney costs (§III ¶C);
  - 21 ○ Up to \$13,000 for two \$6,500 service awards (§III ¶D);
  - 22 ○ Up to \$25,000 for claims administration costs (§III ¶F); and
  - 23 ○ \$2,500 [75% of \$3,333.33 PAGA penalty] to the LWDA (§III ¶E)

- 1 • Additionally, Defendant agrees to cease requiring class members to pool their tips or  
2 gratuities. (§III ¶H)
- 3 • There is no claims requirement; Settlement Class Members (class members who do not  
4 opt out) will automatically receive a pro rata share of the Net. (§IV ¶A.1)
- 5 • Class members have 60 days to opt out or object. (§II ¶M)
- 6 • Settlement payments will be calculated by dividing the Net by the total overtime hours  
7 that have accrued for all Settlement Class Members during the Class Period, and  
8 multiplying that amount by the number of overtime hours worked by each individual  
9 Settlement Class Member. (§IV ¶A.1) Overtime hours will be separately and distinctly  
10 calculated for each Settlement Class Member, with periods of leave of absence excluded.  
11 (Ibid.)
- 12 • Payment will be allocated 1/3 to wages, 1/3 to interest, and 1/3 to penalties. (§IV ¶A.2)
- 13 • The Gross Settlement Amount excludes Defendant's FICA/FUTA payments and any  
14 other payroll taxes owing by Defendant. (§II ¶H)
- 15 • Funds from checks not cashed within 120 days of mailing will be deposited in the  
16 appropriate State of California unclaimed property fund on the Settlement Class  
17 Member's behalf, provided that if the gross amount of the uncashed checks equals or  
18 exceeds \$3,000, the uncashed checks will be reallocated and distributed on a pro rata  
19 basis to those class members who cashed their checks. (§IV ¶A.3)
- 20 • Plaintiffs and Settlement Class Members release the Released Parties from "the causes of  
21 action pled in the Complaint or that could have been pled based on the facts alleged in the  
22 Complaint." (§II ¶W)
- 23
- 24
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## C. ANALYSIS OF SETTLEMENT AGREEMENT

### 1. Standards for Final Fairness Determination

“Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement.” CRC 3.769(g). “If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment. The court may not enter an order dismissing the action at the same time as, or after, entry of judgment.” CRC 3.769(h).

“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.” See Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America (2006) 141 Cal. App.4th 46, 60 (internal quotation marks omitted); see also Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 245 (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 to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of

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

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

## **2. Does a presumption of fairness exist?**

- a. Was the settlement reached through arm’s-length bargaining? Yes. The parties participated in a full day of mediation with the Hon. Peter D. Lichtman (Ret.) on February 19, 2016. (Declaration of Kye D. Pawlenko, ¶9.) While mediation did



1 not result in settlement, the parties later accepted the mediator's proposal. (Id. at  
2 ¶10.)

- 3 b. Were investigation and discovery sufficient to allow counsel and the court to act  
4 intelligently? Yes. The parties engaged in significant discovery, which included  
5 interrogatories, document requests, requests for admission, the deposition of  
6 Defendant's director of human resources, and other documentary evidence.  
7 Plaintiff also retained an expert to review class time and pay records and to  
8 prepare a damage model. (Id. at ¶8.)
- 9 c. Is counsel experienced in similar litigation? Yes. The attorneys representing  
10 Plaintiffs and the class are experienced in class action litigation, including wage  
11 and hour litigation. (Id. at ¶¶ 16-18.)
- 12 d. What percentage of the class has objected? There were no objectors to the  
13 settlement. (Declaration of Melissa Meade, ¶11.)

14  
15 CONCLUSION: The settlement is entitled to a presumption of fairness.

16 **3. Is the settlement fair, adequate, and reasonable?**

- 17 a. Strength of Plaintiffs' case. "The most important factor is the strength of the case for  
18 plaintiffs on the merits, balanced against the amount offered in settlement." See Kullar  
19 v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 130. Based on damage  
20 modeling by Plaintiff's expert, Defendant's exposure was calculated to be between  
21 \$1,000,000 and \$1,500,000. (Pawlenko Declaration, ¶9.) Plaintiffs also realized the  
22 significant risks of continued litigation, one such risk being that no court has ever held  
23 that service charges must be included in the regular rate. (Ibid.) Further, there is a split in  
24 authority as to whether service charges should be included in the regular rate for  
25

1 purposes of calculating missed meal and rest break premiums. For these and other  
2 reasons, the \$650,000 settlement, which provides recovery for approximately 43% - 65%  
3 of the maximum value of the claims, is within the ballpark of what is reasonable.

- 4 b. Risk, expense, complexity and likely duration of further litigation. Given the nature of  
5 the class claims, the case is likely to be expensive and lengthy to try. Procedural hurdles  
6 (e.g., motion practice and appeals) are also likely to prolong the litigation as well as any  
7 recovery by the class members.
- 8 c. Risk of maintaining class action status through trial. Even if a class is certified, there is  
9 always a risk of decertification. See Weinstat v. Dentsply Intern., Inc. (2010) 180  
10 Cal.App.4th 1213, 1226 (“Our Supreme Court has recognized that trial courts should  
11 retain some flexibility in conducting class actions, which means, under suitable  
12 circumstances, entertaining successive motions on certification if the court subsequently  
13 discovers that the propriety of a class action is not appropriate.”).
- 14 d. Amount offered in settlement. As indicated above, Defendant has agreed to settle for the  
15 non-reversionary amount of \$650,000. Based on the claims administrator’s calculations,  
16 the average payout to the 345 class members will be \$1,140.52. The highest estimated  
17 payment is \$12,230.99 and the lowest is \$1.71. (Meade Declaration, ¶14.)
- 18 e. Extent of discovery completed and stage of the proceedings. As discussed above, at the  
19 time of the settlement, the parties had conducted extensive discovery.
- 20 f. Experience and views of counsel. The settlement was negotiated and endorsed by Class  
21 Counsel who, as indicated above, is experienced in class action litigation, including  
22 wage and hour cases.
- 23 g. Presence of a governmental participant. This factor is not applicable here.
- 24  
25

1 h. Reaction of the class members to the proposed settlement.

2 Number of class members: 354

3 Number of notices mailed: 354

4 Number of undeliverable notices: 0

5 Number of opt-outs: 0

6 Number of objections: 0

7 Number of participating class members: **354**

8 (Meade Declaration, ¶¶3-12.)

9 CONCLUSION: The settlement can be deemed “fair, adequate, and reasonable.”

10  
11 **D. ATTORNEY FEES AND COSTS**

12 Class Counsel request \$216,666.66 for attorney fees and \$15,551.14 for costs.

13 Despite any agreement by the parties to the contrary, courts have an independent  
14 responsibility to review an attorney fee provision and award only what it determines is  
15 reasonable. (*Garabedian v. Los Angeles Cellular Telephone Company* (2004) 118 Cal.App.4<sup>th</sup>  
16 123, 128.)

17 In determining the appropriate amount of a fee award courts a percentage calculation is  
18 permitted in common fund cases such as this. (*Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5<sup>th</sup>  
19 480, 503.) While not required, the Court may, with appropriate data, also engage in a lode-star  
20 “cross-check.” *Id.*

21  
22 Here, fees are sought pursuant to the percentage method. (Fee Motion at pages 3-4.) The  
23 \$216,666.66 fee request is 1/3 of the \$650,000 settlement amount, which is average. (*In re*  
24 *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 558, FN13: “Empirical studies show that,  
25



1 regardless whether the percentage method or the lodestar method is used, fee awards in class  
2 actions average around one-third of the recovery.”)

3 Class Counsel has presented information sufficient for performing a lodestar cross-  
4 check.

Timekeeper	Hours	Hourly Rate	Total Lodestar
Matthew B. Hayes	113.3	\$650	\$ 73,645
Kye D. Pawlenko	420.1	\$600	\$252,060
<b>TOTAL</b>			<b>\$325,705</b>

8 (Pawlenko Declaration, ¶¶ 13, 16-20, Exhibit 1 to Motion.) The hours spent on this  
9 litigation appear reasonable, and the hourly rates charged also appear to be consistent with  
10 prevailing rates in the community. Accordingly, class counsel’s actual attorney fees of \$325,705  
11 acts as the lodestar; the lodestar exceeds the \$216,666.66 fee request.

12 Because the fee request represents a reasonable percentage of the common fund and is  
13 well supported by the lodestar cross-check, and because the notice expressly advised class  
14 members of the fee request and it was not objected to, the Court awards fees in the amount  
15 requested.  
16

17 As for costs, Class Counsel request \$15,551.14. (Pawlenko Declaration, ¶13 and Exhibit  
18 2 to Motion.) The class was provided with notice that litigation costs could be as high as  
19 \$25,000, and none objected. The costs include filing and court fees, Case Anywhere, mediation  
20 (\$3,525), experts (\$8,244.14), *Belair West* notice, service of process, postage, travel, and  
21 copying. The costs appear to be reasonable and necessary to the litigation, are reasonable in  
22 amount. For all these reasons, the Court awards costs of \$15,551.14.

23 **E. INCENTIVE AWARD TO CLASS REPRESENTATIVE**

24 An incentive fee award to a named class representative must be supported by evidence  
25 that quantifies time and effort expended by the individual and a reasoned explanation of

1 financial or other risks undertaken by the class representative. See Clark v. American  
2 Residential Services LLC (2009) 175 Cal.App.4th 785, 806-807; see also Cellphone  
3 Termination Cases (2010) 186 Cal.App.4<sup>th</sup> 1380, 1394-1395 (“[C]riteria courts may consider in  
4 determining whether to make an incentive award include: 1) the risk to the class representative  
5 in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties  
6 encountered by the class representative; 3) the amount of time and effort spent by the class  
7 representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof)  
8 enjoyed by the class representative as a result of the litigation. [Citations.]”)

9 Here, the named Plaintiffs request incentive awards of \$6,500 each.

10 Steven Vega works as a bartender for Defendant, where a substantial portion of his pay  
11 consists of tips and service charges. (Declaration of Steven Vega, ¶2.) He sought out legal  
12 counsel in 2015 because he did not believe he was being paid appropriately and, after meeting  
13 with counsel, agreed to act as a class representative and sue on behalf of a class. (Id. at ¶¶ 3-5.)  
14 Vega has devoted approximately 40 hours of work to this litigation over the past two years,  
15 speaking with his attorneys, gathering documents, and speaking with other class members,  
16 including determining that there was an issue relative to the adequacy of the notice and bringing  
17 that to counsel’s attention. (Id. at ¶¶ 6, 7.)

18 Javier Morrone provides a declaration with similar information, stating that he has spent  
19 approximately 35 hours on this litigation since its inception. (Declaration of Javier Morrone, ¶¶  
20 2-7.) Both Plaintiffs also signed general releases of their claims.

21 Each named plaintiff seeks a \$6,500 incentive award. In light of the above as well as the  
22 benefits obtained on behalf of the class, \$6,500 appears to be a reasonable inducement for  
23 Vega’s participation in this case. Morrone was less involved and the Court approves an  
24 incentive award to him of \$5,000.

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1 **F. CLAIMS ADMINISTRATION COSTS**

2 Claims administrator Phoenix Settlement Administrators requests \$8,800. (Meade  
3 Declaration, ¶15.) This is less than the \$25,000 settlement cap. Given the tasks performed (and  
4 still to be performed), this amount appears to be reasonable. This amount was also disclosed to  
5 class members and deemed unobjectionable.

6 **III. CONCLUSION AND ORDER**

7 **A. Ruling**

8 The Court hereby:

- 9
- 10 (1) Grants class certification for purposes of settlement;
- 11 (2) Grants final approval of the settlement as fair, adequate, and reasonable;
- 12 (3) Awards \$216,666.66 in attorney fees and \$15,551.14 in costs to Hawes Pawlenko LLP;
- 13 (4) Awards \$6,500 to Plaintiff Steven Vega and \$ 5,000 to Plaintiff Javier Morrone as  
14 incentive awards;
- 15 (5) Awards \$8,800 in claims administration costs to Phoenix Settlement Administrators;
- 16 (6) Approves \$2,500 PAGA penalty payment to the LWDA;
- 17 (7) Orders class counsel to lodge a proposed Judgment, consistent with this ruling and  
18 containing the class definition, release language, and the names of all class members who  
19 opted out, by 6/5, 2017;
- 20
- 21 (8) Orders class counsel to provide notice to the class members pursuant to California Rules  
22 of Court, rule 3.771(b); and
- 23 (9) Sets a Non-Appearence Case Review re: Final Report re: Distribution of Settlement  
24 Funds is for 12/15/17, at
- 25



1 \_\_\_\_\_ . Final Report is to be filed by

2 12/8/17

3  
4 Dated:

5 5/24/17

6 Maren E. Nelson  
7 MAREN E. NELSON  
8 Judge of the Superior Court  
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