IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

BENJAMIN LOPEZ and SUSANA RINOZA, individually and on behalf of other members of the general public similarly situated,

Plaintiffs,

vs.

LUCKY CHANCES, INC., a California Corporation; RENE MEDINA; ROMMEL MEDINA; RUEL MEDINA; and DOES 1-50,

Defendants.

Case No. CIV 486493

ORDER GRANTING CLASS CERTIFICATION

Date: September 23, 2011
Time: 2:00 p.m.
Dept.: 23
Judge: Hon. V. Raymond Swope

Complaint Filed: August 13, 2009
Trial Date: None Set

Plaintiffs Benjamin Lopez and Susana Rinoza's Motion for Class Certification came on for hearing on September 23, 2011 at 2:00 p.m. in Department 23 of the Superior Court of California, County of San Mateo in Redwood City, California, Honorable V. Raymond Swope presiding. Andrew Kopel, of the Law Office of Andrew Kopel; and Laura L. Ho of Goldstein, Demchak, Baller, Borgen & Dadarian appeared for Plaintiffs Benjamin Lopez and Susana Rinoza. Charles J. Smith and Tyler M. Paetkau of Hartnett, Smith and Paetkau appeared for Defendants Lucky Chances, Inc., Rene Medina, Rommel Medina, and Ruell Medina.

The Court, having reviewed and considered the papers, and having considered the arguments of counsel, and GOOD CAUSE APPEARING, HEREBY ORDERS the Motion for Class Certification is GRANTED for the reasons that follow:

I. Operative Complaint and Class Certification Order Sought

On August 3, 2008 plaintiffs Benjamin Lopez and Susana Rinoza (together "Plaintiffs") initiated this action and on March 4, 2011 filed the presently operative Second Amended Complaint individually and on behalf of all others similarly situated (current and former Asian Game Referees employed at Lucky Chances Casino) against Lucky Chances, Inc. and the owners of the casino, Rene Medina, Rommel Median and Ruell Medina (altogether "Defendants") (the "SAC"). The SAC contains causes of action for: 1) conversion; 2) violation of Cal. Lab. Code ("LC") § 98.6; 3) wrongful termination in violation of public policy; 4) violation of LC § 2802; 5) civil penalties pursuant to LC § 2698 et seq.; 6) violation of Cal. Bus. & Prof. Code ("B&PC" § 17200 et seq.); and 7) breach of contract. The class period is defined as the four year period preceding this action to December 31, 2009.

Plaintiffs seek certification of a class defined as "all Asian Game Referees employed by Defendants at Lucky Chances Casino any time from August 3, 2005 to December 31, 2009" (hereinafter the "Referees" or the "Class") and an order determining that a class action is proper as to all causes of action asserted in the SAC, appointing Plaintiffs as representatives of the Class and appointing Plaintiffs' counsel as counsel for the Class. **The motion is GRANTED with the addition of a subclass of Referees employed as of December 31, 2009 for the purpose of adjudicating the wrongful discharge claims.**

II. Evidentiary Rulings

Plaintiffs seek judicial notice of a trial court order in *Grodensky v. Artichoke Joe's Casino*. Although it is proper to take judicial notice of court records pursuant to Cal. Evid. Code § 452(d), the decision has no precedential value and Plaintiffs are improperly requesting that the Court take judicial notice of prior findings of fact. *See* 1 Witkin Cal. Evid. Jud. Notice § 24. **The request is therefore DENIED.**

Defendants seek to exclude class member declarations on the basis that they had sought them through discovery but Plaintiffs did not produce them. Violation of a prior court order is necessary to preclude evidence except in the most egregious of circumstances, such as where there has been a pattern of misuse of the discovery process. *See, e.g. New Albertsons, Inc. v. Sup. Ct.* (2008) 168 Cal.App.4th 1403, 1426. Here, there is no evidence of a willfully false response; Plaintiffs filed timely objections to form interrogatory no. 12.3 and employment interrogatory no. 215.2 and Defendant never even moved to compel. **The request is therefore DENIED.**

III. Standard for Class Certification

Cal. Civ. Proc. Code § 382 provides in relevant part that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." The two basic requirements for a class action are the existence of an ascertainable class and a well-defined community of interest in the questions of law and fact involved. *See Vasquez v. Sup. Ct.* (1971) 4 Cal.3d 800, 809. Whether a class is "ascertainable" within the meaning of CCP § 382 is determined by examining the class definition, the size of the class, and the means available for identifying the class members. *See Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271. The "community of interest" requirement embodies three separate factors: [1] dominant common questions of law or fact; [2] class representatives whose claims or defenses are typical of the class; and [3] class representatives who can adequately represent the class. *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. "Predominant common questions" means that each member must not be required to individually litigate numerous and substantial questions to determine his or her right to recover following the class judgment and that the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial

process and to serve the litigants. *Washington Mutual v. Sup. Ct.* (2001) 24 Cal.4th 906, 913-14. As a general rule, if the defendant's liability can be determined by facts common to all members of a class, the class will be certified even if the members must individually prove their damages. *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916. However, a class action cannot be maintained where the existence of damages, the cause of damage, and the extent of damage have to be determined on a case-by-case basis (even if there are some common questions). *Basurco v. 21st Century Insurance Co.* (2003) 108 Cal. App.4th 110, 119. An additional consideration is the superiority of the class action method; a class should not be certified unless "substantial benefits accrue both to litigants and the courts." *Linder v. Thrifty Oil* (2000) 23 Cal.4th 429, 435. *See generally* Weil & Brown, Civil Procedure Before Trial §§ 14:11-14:11.20; 14:15.

IV. Ascertainability

Defendants do not dispute that the Class is sufficiently ascertainable and the Court finds that it is; the Class is comprised of 42 people, and their identities can be determined from Defendants' records.

V. Community of Interest: Adequacy of Class Representatives

Although Defendants argue that Plaintiffs will not accurately represent the Class, the Court finds those arguments lacks merit and Plaintiffs have adequately demonstrated that Plaintiffs and their counsel can adequately represent the Class.

As to Plaintiffs, nothing that Defendants have identified (Plaintiff Rinoza's disciplinary issues and taking a leave of absence, her deposition testimony about not having an objection to the tipping practices and Plaintiff Lopez's failure to reapply to Lucky Chances after the referee position was terminated) renders their claims atypical or demonstrates any conflict with the Class. *Mora v. Big Lot Stores, Inc.* (2011) 194 Cal.App.4th 496 did not hold that the named plaintiffs' "checkered" work

histories meant that they would be inadequate representatives; although that was one reason the *trial* court identified for denying class certification, the court of appeal affirmed solely on the basis that common questions of fact or law did not predominate over individual issues and explicitly declined not reach the issue of the adequacy of the class representatives. *Id.* at 512 n. 14.

With regard to the ethical issues as to Plaintiffs' counsel, Defendants have not demonstrated that Kopel engaged in any conduct which is necessarily improper or which violates Cal. R. Prof. Conduct 2-100. First, Defendants admit that during Kopel's initial contact in 2006, Kopel did not know that Nosrati was a manager at Lucky Chances and there was no pending lawsuit. Accordingly, his conduct did not violate Cal. R. Prof. Conduct 2-100, which requires that an attorney not communicate with a party that he "knows to be represented by another lawyer in the matter." Although he promised Nosrati and Dange a "bigger cut" of the payoff, it can reasonably be inferred that Kopel was referring to incentive awards which courts do routinely award named plaintiffs in class actions. Second, although Kopel "approached" Nosrati and "attempted to strike up a conversation" in 2008 and 2011 despite knowing that he was a manager at Lucky Chances, there is nothing in Nosrati's declaration (Savage Decl. Ex. 22) which suggests that the attempted communication was "about the subject of the representation" and therefore prohibited by Cal. R. Prof. Conduct 2-100. (Moreover, Defendants' argument relates only to *Kopel* and not Plaintiffs' other counsel.)

VI. Community of Interest: Commonality

The key issue is whether common questions predominate over individual ones. Because the tip pooling claims, the reimbursement claims and the wrongful discharge claims are subject to different law and facts, they must be considered separately to determine whether common questions predominate.

a. Tip Pooling Claim

Plaintiffs' tip pooling claim is that Defendants required the Referees to collect and share their bat

wing table tips with Shift Supervisors (who they allege are "agents" within the meaning of Labor Code § 350) and other employees to whom the tips were not paid, given or left (such as Lucky Chances itself through the Christmas bonus fund, Chip Runners, Card Control Agents, Bussers and Security Guards). They contend that this violates Labor Code § 351 which provides in relevant part that no employer or agent shall collect, take, or receive any gratuity left for an employee by a patron, and that every gratuity is the sole property of the employee or employees to whom it was paid, given, or left.

They allege that two main distribution schemes existed whereby the dollar amounts were paid out first and then the remaining balance was paid on the basis of points:

Recipient	**8/05 - Approx. 11/08**	**Approx. 11/08 - 12/09**
Referee	4 points	4 points
Christmas Bonus Fund	6 points	n/a
Shift Supervisor	6 points	4 points
Chip Runners (Asian Games and Poker)	2 points	$7
Card Control Agent	$25	$25
Bussers	$10	$10
Security Guards	2 points	$10

The Court finds that this claim properly is certified for class treatment because Plaintiffs' theory is that this practice was common to all members of the Class and that theory is supported by substantial (and even uncontroverted) evidence given that Defendants have not submitted evidence demonstrating that the Referees' tipping practices actually varied by shift or by person. Plaintiffs submitted Lucky Chances's response to form interrogatories which, although it disclaims any participation in the practice,

admits that during every shift Chip Runners received $7 each, Porters (Bussers) received $10 each, Security Guards received $10 each and the Card Control Staff received $25 each. The response further states that after those amounts were paid out, the Referees (which include the Shift Supervisors) divided the rest of the tips among themselves based upon hours worked. *See* Lucky Chances Interrogatory Response 216.1 (Webb Decl. Ex. 14 p. 16-19). (The interrogatory response does not admit that the practice involved contribution to the Christmas Bonus Fund during the class period.) Plaintiffs also submitted declarations by Referees from each shift describing the same practice and the same breakdown of allocations. Although Defendants make a reference in their opposition brief to the declarations of Referees it submitted to support the contention that the Referees' "voluntary tip-sharing practices varied from shift to shift" (see Opp. at 2:6-7), in fact the defense declarations evidence the same allocations described by Plaintiffs. (The evidence does show that at some point in late 2009, after this lawsuit was filed, members of the graveyard shift decided for the first time to vote on tip allocations, and decided to stop tipping Security Guards. *See* Wong Decl. ¶ 23 (Webb Decl. Ex. 10); Wong Depo at 118-120 (Savage Decl. Ex. 2). But this graveyard shift-specific fact which altered the common practice for a limited time is not sufficient to defeat the commonality otherwise present for the claim.) The undisputed evidence is that all Referees deposited all tips into a box (to which only management had a key) and received tips according to a common allocation throughout the class period. Plaintiffs have therefore submitted sufficient evidence with respect to tip allocation to demonstrate that common issues predominate over individual ones.

Defendants argue that this evidence notwithstanding, class treatment is not proper because the Referees' tipping practice was voluntary and because all employees who shared the tips were permitted to receive them. But these arguments and the evidence Defendants submit to support them speak to the merits of the claim. In the context of class certification, the Court does not consider whether the claim is "legally or factually meritorious." *Linder*, 23 Cal.4th at 339-40. Defendants raise the issue of

participation being "voluntary" in an attempt to show there was no "uniform corporate policy" (*Mora*, 194 Cal.App.4th at 508-09) regarding tip allocation. Rather than speaking to the *uniformity* of the challenged practice (which is the key issue for certification), the assertion is that there was in fact no Lucky Chances *policy* governing tip allocation (the argument being that this was something decided upon and implemented by the Referees themselves rather than management). The further assertion that this is a merits issue because the Defendants did not require the Referees to participate in any tip allocation, speaks to Defendants' potential liability for the claim, rather than whether the claim can be determined by reference to common evidence. So long as there is evidence of a casino-wide practice, which there is, certification is proper *even if* liability can only be premised upon Defendants having *imposed* that practice on the Referees. (In any event, Plaintiffs submitted sufficient evidence, although contested, to demonstrate that the tipping system was implemented by management, particularly with respect to the origin of the tip pool and insofar as Plaintiffs assert that the Shift Supervisors themselves are "agents.") With respect to the propriety of sharing tips with Chip Runners, Card Controllers, Security Guards, Bussers and Shift Supervisors, Defendants assert that this is not a merits issue because in *Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 734-35, the court stated that "the requisite predominance was missing where there was insufficient evidence misclassification was the rule rather than the exception." Defendants argue that "[w]hat a clear majority of the declarations describe is a perfectly lawful, voluntary tip sharing scheme between employees who directly served the tipping customers" (Opp. at 15:17-18). However, it is not as though the declarations reveal the predominance of a *lawful* tipping system over the *unlawful* one challenged by the complaint. The evidence is clear that one distribution system applied, and that the parties' *substantive* dispute is whether the non-Referees who were allocated tips were entitled to share in the tip pool (and also whether participation in the tip allocation system was created and maintained by Referees or imposed by management).

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b. Reimbursement Claim

Plaintiffs' reimbursement claim is that Lucky Chances maintained a policy throughout the class period that required all Referees to wear and maintain a Cardroom Work Permit Identification Card (the "Badge") issued by the Town of Colma Police Department, and Defendants did not reimburse them for the related fees. They contend that this violates Labor Code § 2802, which requires reimbursement for all necessary expenditures or losses incurred by an employee in direct consequence of the discharge of his or her duties.

The Court finds that this claim is properly certified for class treatment because the challenged policy of not reimbursing the Referees for their Badges is equally applicable to all Referees. Defendants argue only that they are not required by law to pay for the Badges. Whether Defendants are not required to pay for the Badges is a merits issue subject to common proof rather than an issue relating to the propriety of class treatment.

c. Wrongful Discharge Claim

Plaintiffs' wrongful discharge claim is that this lawsuit was filed in August 2009 and shortly thereafter, under the guise of a planned reorganization of the operations of the Asian Games section, in December 2009, Lucky Chances laid off all Referees by eliminating the referee job position. (They concede that Lucky Chances permitted the Referees to apply for different jobs within the casino and did rehire a number for different positions, but Plaintiffs also submitted evidence showing that Lucky Chances had advised the Referees in December 2009 that they should consider the layoff to be "permanent." *See* Webb Decl. Ex. 31.) They contend that the layoffs were in retaliation for the filing of this lawsuit in violation of Labor Code § 98.6 and public policy.

The Court finds that this claim is properly certified for class treatment for a subclass of Referees employed as of December 31, 2009 when the elimination of the Referee position went into effect,

because the challenged decision is a single decision equally applicable to all then-employed Referees. Defendants argue only that the elimination of the position was not a termination and that any termination was not retaliatory, but those are merits issues subject to common proof rather than issues relating to the propriety of class treatment.

VII. Superiority

For the foregoing reasons, Plaintiffs have demonstrated that a class action is a superior method for adjudicating the Referees' claims, despite the fact that not only individual actions but arbitration or Berman hearings are available to individuals wishing to adjudicate their wage claims.

VIII. Conclusion

The Court appoints Plaintiffs' counsel as class counsel and certifies a class of "all Asian Game Referees employed by Defendants at Lucky Chances Casino any time from August 3, 2005 to December 31, 2009," and a subclass of "all members of the Class employed as of December 31, 2009" for the purpose of adjudicating the wrongful termination claim, and it appoints Plaintiffs as class representatives.

IT IS SO ORDERED.

Dated: SEP 23 2011

By: _____

V. RAYMOND SWOPE
JUDGE OF THE SUPERIOR COURT