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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TETSUO AKAOSUGI, HIEU NGUYEN,
and RINKO DONAHUE, on behalf of
themselves and all others similarly situated,

No. C 11-01272 WHA

Plaintiffs,

**ORDER CERTIFYING SETTLEMENT
CLASS, AUTHORIZING NOTICE OF
CLASS ACTION AND PROPOSED
SETTLEMENT, AND SETTING FINAL
FAIRNESS HEARING**

v.

BENIHANA NATIONAL CORPORATION,

Defendant.

The Court has reviewed the proposed class settlement and addendum to the settlement and hereby directs notice be given to class members, so that a final fairness hearing can be held and a determination made as to whether to approve the proposed settlement and how much to award class counsel for fees and costs. A fairness hearing will be held at **3:00 P.M. ON JANUARY 24, 2013**, in Courtroom 8, on the 19th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102.

1. Certification of Settlement Class.

By order dated May 10, 2012, a vacation-pay terminated-employee class was certified under Rule 23(b)(3) to pursue claims for unlawful forfeiture of accrued vacation pay, failure to pay wages on termination, failure to provide accurate itemized wage statements, and unfair business practices against defendant BNC (Dkt. No. 154 at 9). Also certified was a vacation-pay current-employee class under Rule 23(b)(2) to pursue claims for unlawful forfeiture of accrued vacation pay, failure to provide accurate itemized wage statements, and unfair business practices

1 against defendant BNC. The class definitions as stated in the certification order were to apply
2 for settlement. Now the parties seek re-certification of the current-employee class for settlement
3 purposes only. The reason is that previously the class sought injunctive relief but the proposed
4 settlement does not. Instead, the proposed settlement will provide members of the current-
5 employee class with a monetary payment based on the number of vacation hours they forfeited
6 on April 1, 2012.

7 The parties request certification of the following settlement class:

8 All persons currently employed by Defendant at any
9 Benihana-branded, teppanyaki-style restaurant in California
10 whose rights to vacation benefits are determined according to the
11 terms of the Vacation Benefit Plan and Summary Plan
12 Description Prepared for Full-Time Restaurant Team Members of
13 the Benihana Companies (as amended and restated effective as of
14 September 12, 2011); excluding Benihana officers, directors,
15 Regional Managers, and any person hired after September 11,
16 2011, who has not been made a full-time employee and thus
17 eligible for vacation pay.

18 This definition differs from the previously certified current-employee class definition in
19 that it also excludes from the class persons hired after September 11, 2011, who have not been
20 made full-time employees and thus eligible for vacation pay. The parties seek to certify the same
21 claims as previously certified for the current-employee class. They seek to appoint current class
22 counsel as counsel for the new proposed settlement class and to appoint plaintiff Rinko Donahue
23 as class representative. Donahue currently serves as class representative for the current-
24 employee class certified in the May 10 order.

25 There are no changes to the proposed current-employee settlement class that require re-
26 examination of the Court's previous Rule 23(a) or 23(g) analyses and findings (Dkt. Nos. 142,
27 154).

28 Rule 23(b)(3) requires that plaintiffs show common questions of law and fact
"predominate over any questions affecting only individual members." This "inquiry tests
whether proposed classes are sufficiently cohesive to warrant adjudication by representation."
Hanlon v. Chrysler, 150 F.3d 1011, 1022 (9th Cir. 1998). Like the vacation-pay terminated-
employee class, which was certified under Rule 23(b)(3), there are significant questions of law
and fact common to the current-employee proposed settlement class — namely whether BNC's

1 vacation policy requires forfeiture of accrued vacation pay in violation of California Labor Code
2 § 227.3, and whether BNC's VEBA vacation account creates an employee benefit plan under
3 ERISA, such that plaintiffs' state law wage claims are preempted by federal statute. Common
4 issues will predominate and the class action method will be superior to adjudication of individual
5 claims for the proposed class.

6 The class period will remain the same, designated as four years prior to the filing of the
7 original complaint, filed on February 14, 2011 (Dkt. No. 154 at 8).

8 The following vacation-pay current-employee class is **CERTIFIED** under Rule 23(b)(3) to
9 pursue claims for unlawful forfeiture of accrued vacation pay, failure to provide accurate
10 itemized wage statements, and unfair business practices, for settlement purposes only:

11 All persons currently employed by Defendant at any
12 Benihana-branded, teppanyaki-style restaurant in California whose
13 rights to vacation benefits are determined according to the terms of
14 the Vacation Benefit Plan and Summary Plan Description Prepared
15 for Full-Time Restaurant Team Members of the Benihana
16 Companies (as amended and restated effective as of September 12,
17 2011); excluding Benihana officers, directors, Regional Managers,
18 and any person hired after September 11, 2011, who has not been
19 made a full-time employee and thus eligible for vacation pay.

20 Rinko Donahue is **APPOINTED** as class representative for the current-employee class.
21 Pursuant to Rule 23(g), Attorneys Jack W. Lee, Brad Yamauchi, and Kevin R. Allen of the
22 Minami Tamaki, LLP, firm and Daniel Feinberg and Lindsay Nako of the Lewis Feinberg, Lee,
23 Renaker & Jackson, P.C., firm are hereby **APPOINTED** as class counsel for all plaintiff
24 classes.

25 To be clear, this certification is for settlement purposes only. The previous current-
26 employee class will not be de-certified without a formal motion for de-certification.

27 **3. CLAIMS ADMINISTRATOR.**

28 The parties propose to use Simpluris, Inc., as the claims administrator. The parties
propose the claims administrator will print and distribute class notice, administer the settlement,
resolve class member disputes, challenges, and corrections to the settlement, distribute the
settlement sum, and perform tax withholding, reporting, and deposits related to the settlement.

1 The use of a claims administrator for these tasks is approved. Defendant BNC shall provide the
2 claims administrator with a class list by **SEPTEMBER 19, 2012**.

3 **4. NOTICE.**

4 The parties seek approval of a notice of proposed class action settlement. A revised
5 version of the proposed form of class notice is appended to this order. The notice has been
6 modified as follows:

- 7 • All references to preliminary approval have been eliminated.
- 8 • The settlement class definitions have been included.
- 9 • The Section titled “Do Nothing” has been revised to clarify that class members
10 will give up some claims in exchange for a possible settlement award.
- 11 • The Court address has been updated.
- 12 • The calculations regarding the potential full recovery for each class has been
added.

13 The parties have until **AUGUST 24, 2012**, to object or suggest revisions to the form of
14 notice. The administrator shall mail class notice by **11:59 P.M. ON OCTOBER 3, 2012**.

15 **5. DEADLINE TO OBJECT.**

16 Class members may object to any part of any settlement. All objections must be made in
17 writing and mailed to the address stated in the notice. The objections must be postmarked on or
18 before **11:59 P.M. ON NOVEMBER 20, 2012**. Class members who mail in written objections will
19 also have an opportunity to speak at the fairness hearing and raise their objection, though, this is
20 not required. If the parties seek to file responses to any objections received, they must do so by
21 **JANUARY 14, 2013**.

22 **6. DEADLINE TO OPT-OUT.**

23 Class members who wish to exclude themselves from the settlement must do so in
24 writing by submitting a signed and dated opt-out request to the address set forth in the notice.
25 The opt-out statement must be postmarked on or before **11:59 P.M. ON NOVEMBER 20, 2012**.

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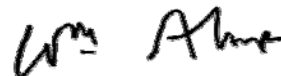
**7. MOTION FOR ATTORNEY'S
FEES AND COSTS AND MOTION FOR FINAL
APPROVAL OF SETTLEMENT.**

The motion for attorney's fees will be heard at **3:00 P.M. ON JANUARY 24, 2013**, the same day as the final fairness hearing. The motion for final approval of the settlement must be filed by **JANUARY 2, 2012**.

* * *

The parties must raise any objection to the deadlines set forth herein or to the notice appended hereto by **AUGUST 24, 2012**.

IT IS SO ORDERED.



Dated: August 20, 2012.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE