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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 NEAL PATAKY, JESSICA CLEEK, and
11 LAUREN MICHELSON, individually,
12 and on behalf of others similarly situated,,
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14 Plaintiffs,

15 v.

16 THE BRIGANTINE, INC., a California
17 corporation,

18 Defendant.

Case No.: 17-cv-00352-GPC-AGS

**ORDER GRANTING PRELIMINARY
APPROVAL OF CLASS
SETTLEMENT**

[DKT. NO. 78]

19 Pending before the Court is Plaintiffs' Motion for Preliminary Approval of
20 Settlement. Dkt. No. 78. On May 25, 2018, this Court held a hearing on this motion and
21 requested that plaintiff file supplemental briefing regarding its concerns on publication
22 notice and the overall reach percentage of the class. Dkt. No. 82. On June 15, 2018,
23 Plaintiffs filed the Declaration of Timothy G. Williams in response to the Court's
24 concerns. Dkt. No. 83. Williams asserted that the proposed class administrator informed
25 him that current mailing addresses could be obtained for all class members through the
26 use of the former employee's social security number, which Brigantine had been required
27 to obtain and retain under state and federal law. *Id.* Accordingly, the Court is satisfied
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1 that the settlement now provides adequate reach and notice to the class. Consequently,
2 having considered the briefing, the argument of counsel, and counsel’s supplemental
3 declaration the Court will **GRANT** Plaintiff’s Motion for Preliminary Approval of
4 Settlement. Dkt. No. 83.

5 This case is involves a wage-and-hour class action. On February 22, 2017,
6 Plaintiffs Neal Pataky, Jessica Cleek, and Lauren Michelson filed a Complaint alleging
7 that they and other servers were paid tips from Brigantine’s customers, but that
8 Brigantine imposed a mandatory “tip pooling” policy in all restaurants dating back a
9 decade, requiring servers to “tip out” to other employees, including those that did not
10 provide direct table service in violation of Federal and California law. Reynolds Decl. ¶
11 8.

12 The Brigantine Corporation, Inc. (“Defendant”) owns at least a dozen restaurants
13 throughout San Diego County, including Brigantine Seafood and Miguel’s Cocina, each
14 of which have multiple locations. Reynolds Decl. ¶ 6. Defendant currently has over
15 1,000 team members. *Id.* Between 2005-2016, Brigantine employed Neal Pataky in
16 various roles including dining room server, bartender, and as a member of the wait staff.
17 Brigantine employed Plaintiff Jessica Cleek and Lauren Michelson as a cocktail server
18 and wait staff member between 2013-2016. *Id.* ¶ 7. Plaintiffs allege that Defendant
19 violated the Fair Labor Standards Act (“FLSA”) prohibition against forcing employees to
20 share tips with employees who do not provide direct table service to customers in places
21 where the kitchen staff does not customarily and regularly receive tips. *Oregon*
22 *Restaurant and Lodging Ass’n v. Perez*, 816 F.3d 1080, 1090 (9th Cir. 2016). Plaintiffs
23 further allege that this violation is a predicate violation of the California Business &
24 Professions Code, section 17200, et seq. (“Unfair Competition Law” or “UCL”).

1 On March 24, 2017, Plaintiffs filed a motion seeking an order under 29 U.S.C.
2 section 216(b) to “conditionally certify” an FLSA Collective Class Action. Dkt. No. 12.
3 The Court granted Plaintiffs’ motion to certify the FLSA class as to:

4 All current or former employees of The Brigantine, Inc. who have worked
5 on and after February 22, 2014 as “servers” including but not limited to
6 under job titles of food servers, cocktail lounge servers, dining room servers,
7 and bartenders. Notices were sent to over 900 potential class members and
8 over 120 individuals joined the FLSA case.

9 Reynolds Decl. ¶ 10. Notices were sent to over 900 potential class members in 2017 and
10 to date over 120 individuals joined the FLSA case as FLSA class members. *Id.*
11 Following that Order, Plaintiffs were preparing to file a class certification motion for the
12 FRCP Rule 23 opt out class when this settlement was obtained. Reynolds Decl. ¶ 11.

13 **A. PROPOSED SETTLEMENT¹**

14 Plaintiffs and Defendants negotiated a proposed settlement that will benefit
15 approximately 800 Settlement Class members with monetary payments wherein
16 Defendant will pay \$550,000 without refund or reversion to the Settlement Class.

17 The Settlement Agreement contemplates that Defendant will pay certain
18 compensation to settle the claims of Plaintiffs and all other servers within the class period
19 and includes (1) all members of the FLSA Collective Action who have filed Consent to
20 Join forms and (2) all other servers within the scope of the potential Rule 23 Class Action
21 defined as:

22 All current or former employees of The Brigantine, Inc. who have worked
23 anytime between February 22, 2013 and April 30, 2017 as “servers,”
24 including but not limited to under job titles of food servers, cocktail lounge
25 servers, dining room servers, and bartenders.

26 The Monetary Compensation consists of \$550,000 without refund or reversion.
27 The Settlement Amount is inclusive and in satisfaction of all requests for relief and
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¹ A copy of the Proposed Settlement Agreement is attached as Exhibit 1 to the Declaration of Stephanie Reynolds. Dkt. No. 78-2 at 9.

1 payments to Plaintiffs and the Settlement Class arising from and related to this case
2 including all claims for damages, interest, attorneys' fees, etc. Ex. 1 at 14.

3 **B. LEGAL STANDARD FOR COURT APPROVAL**

4 The Ninth Circuit maintains a "strong" judicial policy favoring the settlement of
5 class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).
6 The policy of the federal courts is to encourage settlement before trial. *Franklin v.*
7 *Kaypro Corp.*, 884 F.2d 1222, 1225 (9th Cir. 1989). Federal Rule of Civil Procedure
8 23(e) first "require[s] the district court to determine whether a proposed settlement is
9 fundamentally fair, adequate, and reasonable." *In re Mego Fin. Corp. Sec. Litig.*, 213
10 F.3d 454, 458 (9th Cir. 2000) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th
11 Cir. 1998)). To grant preliminary approval of a class action settlement, a court need only
12 find that the settlement is within "the range of reasonableness" to justify publishing and
13 sending notice of the settlement to class members and the scheduling of a final approval
14 hearing. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d. 1078, 1079-80 (N.D. Cal.
15 2007). Because class members will subsequently receive notice and have an opportunity
16 to be heard on the settlement, this Court need not review the settlement in detail at this
17 juncture. *In re M.L. Stern Overtime Litig.*, No. 07-CV-0118-BTM JMA, 2009 WL
18 995864, at *3 (S.D. Cal. Apr. 13, 2009).

19 After review of the proposed settlement, the Court determines that there is
20 adequate reason to provide notice to class members of the proposed settlement and to
21 schedule a fairness hearing.

22 **1. Fairness Determination**

23 The Court must make a determination of whether the class-action settlement is
24 "fair, reasonable, and adequate" pursuant to Rule 23(e)(1)(C). "It is the settlement taken
25 as a whole, rather than the individual component parts, that must be examined for overall
26 fairness." *Hanlon*, 150 F.3d at 1026. The Court evaluates whether "(1) the proposed
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1 settlement appears to be the product of serious, informed, non-collusive negotiations; (2)
2 has no obvious deficiencies; (3) does not improperly grant preferential treatment to class
3 representatives or segments of the class; and (4) falls within the range of possible
4 approval. *Dilts v. Penske Logistics, LLC*, No. 08-cv-318-CAB-BLM, 2014 WL
5 12515159, at *2 (S.D. Cal. July 11, 2014).

6 **a) Result of Non-Collusive Negotiations**

7 A settlement is presumed to be fair if reached in arms-length negotiations after
8 relevant discovery has taken place. *Cohorst v. BRE Prop., Inc.*, 2011 WL 7061923, *12
9 (S.D. Cal. Nov. 14, 2011) (citing *In re Immune Response Sec. Litig.*, 497 F. Supp. 1166,
10 1171 (S.D. Cal. 2007)). Here, the settlement resulted after Defendant produced discovery
11 responses and class data relating to wage and hour issues. Reynolds Decl. ¶ 12. The
12 parties reached a settlement after extensive negotiations with the assistance of the
13 Honorable Magistrate Judge Schopler’s “mediator’s proposal.” *Id.* ¶ 12. In particular, the
14 Court takes note that the parties entered into the agreement only after a second Early
15 Neutral Evaluation. *See* Reynolds Decl. ¶ 12. Consequently, this factor weighs strongly
16 in favor of approval.

17 **b) No Obvious Deficiencies**

18 The Court concludes that there are no obvious deficiencies to the settlement
19 finding that the settlement appears to offer Settlement Class members a substantial
20 portion of the tip income they were deprived of during their employment. The settlement
21 appears to be a compromise between the strengths and weaknesses of plaintiff’s case.
22 Plaintiffs alleged that Brigantine faced possible liability between \$500,000 to \$520,000 in
23 the case, as well as Attorneys’ fees and costs that are recoverable under the FLSA.
24 Plaintiffs, however, faced significant risk including a pending petition for a writ of
25 certiorari before the Supreme Court to review the Ninth Circuit’s decision in *Oregon*
26 *Restaurant and Lodging Ass’n v. Perez*, 843 F.3d 355 (9th Cir. 2016). Furthermore, the
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1 Department of Labor has indicated that it may revisit the tip pool issue at the core of this
2 case. Furthermore, Plaintiffs’ also assert that the issue of whether plaintiffs’ claims must
3 be subject to arbitration remains unsettled. These uncertainties create risk for plaintiffs
4 which weighs in favor of preliminary approval of this settlement.

5 **c) Fairness to All Class Members**

6 The proposed settlement does not appear to provide preferential treatment to
7 Plaintiffs or any segment of the Settlement Class. Defendant has provided Plaintiffs’
8 counsel with a spreadsheet that it contends shows all tips its managers collected from
9 servers and re-distributed to kitchen staff from January 1, 2013 through April 30, 2017
10 totaling \$529,956.34.² Reynolds Decl. ¶ 13. Defendant has also provided Plaintiffs’
11 counsel with spreadsheet data that includes all tip money reported by each individual
12 server within the class period. Reynolds Decl. ¶ 14. With this information which
13 includes each individual server’s reported tip total and the fact that servers’ tips to
14 kitchen staff were similar in percentage across Brigantine restaurants, each server can be
15 assigned a pro rata “claim share” of the settlement fund. *Id.* Plaintiff asserts that this is
16 the fairest method to determine claim shares because it is based on actual tip income
17 reported and tip data available from Defendant. *Id.*

18 The Court concludes that the Settlement would be fair to all proposed class
19 members and would not provide preferential treatment to any particular class members.
20 Upon review and after hearing further about the calculation process at oral argument, it is
21 apparent that all settlement Class members will be afforded with payments of tips in
22 proportion to the amount of money reported and will receive payments representative of
23 the differing amount of tips earned during their respective employment.

24 As such, the Court concludes that the Settlement would be fair to all proposed class

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26 ² The parties agree that this amount is overinclusive as it includes tips from January 1, 2013 to February
27 21, 2013 which precedes the Class Period.
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1 members.

2 **2. Class Certification**

3 Before approving a class action settlement, the Court must determine whether the
4 proposed class can be certified. *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997).
5 The parties’ settlement agreement complies with these requirements. Federal Rule of
6 Civil Procedure Rule 23(a) establishes four prerequisites for class certification: (1)
7 numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R.
8 Civ. P. 23(a).

9 Numerosity is satisfied if the “class is so numerous that joinder of all members is
10 impracticable.” Fed. R. Civ. P. 23(a). Here, numerosity is established by the fact that
11 nearly 800 Settlement Class Members have been identified by Defendant.

12 Commonality is satisfied if “there are any questions of fact or law common to the
13 class.” Fed. R. Civ. P. 23(a)(2). Commonality involves whether plaintiffs can show a
14 common contention such that “determination of its truth or falsity will resolve an issue
15 that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores,*
16 *Inc. v. Dukes*, 564 U.S. 338, 351 (2011). Plaintiffs have adequately demonstrated
17 commonality by showing that Defendant applies common operations, policies, and
18 procedures in its restaurants. Defendant distributes identical forms to employees of all
19 restaurants to review and execute. Reynolds Decl. ¶ 15. Moreover, the nature of the
20 work is similar in that “servers” as defined in the class have the responsibility of serving
21 customers food and beverages. Further, Defendants’ tip pooling policy for servers was
22 similar or identical for each of its restaurants. Reynolds Decl. ¶ 16. Accordingly,
23 commonality is satisfied as the Settlement class members each suffered the same injuries
24 and share similar questions of law and fact regarding their FLSA and UCL claims.

25 Typicality is satisfied if the class representatives’ claims are typical of those of the
26 Class. Fed. R. Civ. P. 23(a)(3). “The test of typicality is whether other members have the
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1 same or similar injury, whether the action is based on conduct which is not unique to the
2 named plaintiffs, and whether other class members have been injured by the same course
3 of conduct.” *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1175 (9th
4 Cir. 2010). The named plaintiffs’ claims involve the same injury and same conduct that
5 other injured plaintiffs in this class would face. Accordingly, the typicality requirement
6 is satisfied.

7 Finally, the adequacy requirement is satisfied if the class representatives “will
8 fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The
9 Ninth Circuit requires an evaluation of two factors: “(1) do the named plaintiffs and their
10 counsel have any conflicts of interest with other class members and (2) will the named
11 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?”
12 *Hanlon*, 150 F.3d at 1020. The named plaintiffs are adequate class representatives as
13 they appear to share the goal to advance the interests of others in the class and have met
14 with counsel to discuss the claims, supported discovery efforts, and attended two sessions
15 of the Early Neutral Evaluations that directly led to this settlement. Adequacy is
16 satisfied.

17 Finally, the settlement also satisfies the requirements of Rule 23(b)(3). Common
18 questions of law and fact predominate over any questions affecting only individual
19 members because the primary issue regarding Defendant’s tip pooling policy is
20 influenced by common facts identical to all settlement members. Second, a class action
21 is a superior method for settlement of the action as each class members’ claim is common
22 to the class and the settlement ensures certainty.

23 **CONCLUSION**

24 Based on the papers and pleadings submitted regarding Plaintiffs’ motion, and the
25 remaining papers, pleadings and Orders in this action, and for good cause shown, the
26 Court **GRANTS** Plaintiffs’ Motion for Preliminary Approval of Class Settlement.
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1 IT IS ORDERED that the “Terms of Settlement for Resolution of Class/Collective
2 Action and as Basis for Request for Court Approval,” (“Agreement”), submitted as
3 Exhibit 1 to the Declaration of Stephanie Reynolds, is given Preliminary Approval as a
4 full and final resolution of all claims as described therein, conditioned upon the Court’s
5 Final Approval. The terms of the Agreement appear to be fair, fall within the range of
6 reasonableness, and appropriate, subject to any objections that may be raised by the time
7 of final approval.

8 IT IS FURTHER ORDERED that Plaintiffs Neal Pataky, Jessica Cleek, and
9 Lauren Michelson are designated as Settlement Class Representatives for purposes of
10 settlement and the Agreement.

11 IT IS FURTHER ORDERED that Plaintiffs’ counsel, Timothy G. Williams and
12 Stephanie Reynolds of *Pope, Berger & Williams, LLP*, are appointed as Class Counsel
13 for purposes of settlement and the Agreement.

14 IT IS FURTHER ORDERED that Rust Consulting, Inc. is appointed to act as
15 Settlement Administrator to fulfill the obligations as generally described in the
16 Agreement and its March 12, 2018 proposal, submitted as Exhibit 2 to the Declaration of
17 Timothy G. Williams.

18 IT IS FURTHER ORDERED that the Notice of Settlement of Class Action and
19 Collective Action (“Notice”), submitted as Exhibit 4 to the Declaration of Stephanie
20 Reynolds, is specifically approved for use in the process of providing notice to Settlement
21 Class Members by Rust Consulting, Inc.

22 IT IS FURTHER ORDERED that, subject to final approval and identification of all
23 Settlement Class members to whom Rust Consulting, Inc. confirms were sent Notice, the
24 Settlement Class members will be bound by the Agreement and any determinations and
25 judgments concerning the same, including the full and complete releases by Settlement
26 Class members of the Class Claims (as that term is defined in the Agreement) which will
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1 settle, resolve, and forever bar those claims.

2 IT IS FURTHER ORDERED that the proposal for allocation and distribution of
3 the Settlement Amount (as that term is defined in the Agreement) as detailed in Plaintiffs'
4 Memorandum of Points and Authorities in support of their motion is preliminarily
5 approved for Notice. Such distribution and allocation includes:

6 1. A service payment to each Plaintiff as may be approved by the Court at final
7 approval of Two Thousand Five Hundred Dollars for their representation of the
8 Settlement Class, in addition to their respective settlement shares available to them as
9 members of the Settlement Class.

10 2. Attorneys' fees to Class Counsel as may be approved by the Court at final
11 approval of One Hundred Thirty-Seven Thousand Five Hundred Dollars, which
12 represents 25% of the Settlement Amount.

13 3. Reimbursement of reasonable litigation costs actually incurred by Plaintiffs'
14 counsel as may be approved by the Court at final approval, estimated to be approximately
15 \$1,500.00.

16 4. Costs of administration actually incurred by Rust Consulting, Inc. as may be
17 approved by the Court at final approval, estimated to be approximately \$18,556.00.

18 5. Distribution of the balance of the Settlement Amount to Settlement Class
19 members to occur per Court Order all at once in a single distribution after final approval.
20 Payments to Settlement Class members will be Fifty Percent as W-2 wages and Fifty
21 Percent as non-taxed penalties. Taxes will be withheld on any wage portions paid to
22 Settlement Class members by Rust Consulting, Inc., and the employer's share of payroll
23 taxes will be paid from the Settlement Amount.

24 IT IS FURTHER ORDERED that the following Scheduling Order shall apply for
25 continued case management and administration:

26 1. Defendant, THE BRIGANTINE, INC. ("Defendant"), shall comply with its
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1 obligations under the Agreement, including its obligations to provide Settlement Class
2 member data to Rust Consulting, Inc., and to pay the Settlement Amount to a qualified
3 settlement fund established and maintained by Rust Consulting, Inc. pending final
4 approval.

5 2. Notice to the Settlement Class shall be formatted as necessary by Rust
6 Consulting, Inc. as four printed pages in no smaller than 12-point font, including
7 completing all blank spaces in the Notice in accordance with this Order, and mailed to all
8 Settlement Class members identified by Defendant by first class mail within **fourteen**
9 **days** of receipt of the complete Settlement Class member data from Defendant. The
10 Notice period for exclusion requests and comments/objections shall be **sixty days** from
11 the original date of mailing, for a Settlement Class member to have returned or
12 postmarked for return a comment, objection, or request for exclusion. Rust Consulting,
13 Inc. shall continue to re-mail Notices on a rolling basis from returned mail up to ten days
14 before the end of the Notice period. Notice to Class Members will not be undertaken by
15 any other means.

16 A. Any Settlement Class member who wishes to object or comment must either
17 file a written objection with a statement of reasons with the Court, or file with the Court a
18 notice of intent to appear at the Final Approval hearing. All comments/objections/notices
19 must be signed and set forth the name, address, last four digits of SSN, telephone
20 number, and the name and number of the case. Any person who fails to either provide a
21 timely written objection or notice of intent to appear and speak at the Final Approval
22 hearing will be precluded from making such objection or opposition. Persons may not opt
23 out and object; any person who opts out has no right to comment on the settlement. If a
24 person objects and the objection is overruled, he/she will be bound by the settlement and
25 will not be allowed to opt out.

26 B. Any Settlement Class member who wishes to be excluded from the
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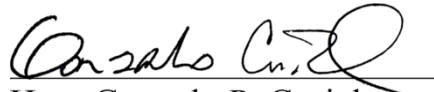
1 settlement must return a written request for exclusion/opt out. To be valid, an opt out
2 request must the full name (printed), address, last four digits of SSN, telephone number,
3 the name and number of the case and address, a statement requesting to be excluded from
4 the class, and a signature.

5 3. The hearing on fairness and final approval will be **November 2, 2018, at**
6 **1:30 p.m.** Plaintiffs shall file a motion for final approval of settlement, and a companion
7 motion for attorneys' fees and service award fees on or before **September 14, 2018.**

8 IT IS FURTHER ORDERED that, pending a hearing on fairness and final approval
9 of the settlement, all other pending dates and deadlines are **VACATED**, and the case is
10 otherwise **STAYED**, except as it relates to settlement and this Order.

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12 **IT IS SO ORDERED.**

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14 Dated: June 18, 2018


15 Hon. Gonzalo P. Curiel
16 United States District Judge
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