IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

BRIAN FLYNN and NICHOLAS BONAR, individually and on behalf of all others similarly situated, Plaintiffs, vs. FAIRMONT HOTELS & RESORTS, INC. dba THE FAIRMONT ORCHID, HAWAII, FHR (ML) OPERATING COMPANY, LLC; and DOE DEFENDANTS 1-50, Defendants.	CV. NO. 10-00285 DAE-LEK

ORDER DENYING WITHOUT PREJUDICE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND FOR APPROVAL OF CLASS NOTICE AND DISSEMINATION PLAN

On December 14, 2010, the Court heard Plaintiffs' Motion for Class Certification and for Approval of Class Notice and Dissemination Plan. James J. Bickerton, Esq., appeared at the hearing on behalf of Plaintiffs; Kenneth M. Nakason, Esq. and Doris Tam, Esq., appeared at the hearing on behalf of Defendants. After reviewing the motion and the supporting and opposing memoranda, the Court DENIES Plaintiffs' Motion for Class Certification and for Approval of Class Notice and Dissemination Plan (Doc. # 20).

BACKGROUND

Plaintiffs Bryan Flynn and Nicholas Bonar ("Plaintiffs"), brought suit individually and on behalf of all others similarly situated, against Defendants Fairmont Hotels & Resorts (U.S.), Inc. dba The Fairmont Orchid, Hawaii ("Fairmont"), and FHR (ML) Operating Company, LLC (collectively, "Defendants"). Plaintiff Flynn was an employee at the Fairmont from December 2006 until May 2009 as a food server or waiter in the banquet department of the hotel. (First Amended Complaint, "FAC," Doc. # 5 ¶ 15.) Plaintiff Bonar was an employee at the Fairmont from September 2006 until March 21, 2010 and also worked as a food server or waiter in the banquet department of the Fairmont. (Id. ¶ 16.) Plaintiffs bring this case as a class action pursuant to Federal Rule of Civil Procedure ("Rule") 23.[1] (Id. ¶ 7.)

In their First Amended Complaint ("FAC"), Plaintiffs allege that Defendants regularly charged customers of banquets and other functions at the Fairmont, a "service charge" or "gratuity" that was calculated as a percentage of the total cost of food and beverage, typically between 21% and 22%. (Id. at ¶ 17.)

[1]Plaintiff's First Amended Complaint states that they bring the case as a class action pursuant to Rule 23 of the Hawaii Rules of Civil Procedure. (Id. ¶ 7.) Given that the case has been removed from state court to federal court, however, the Court construes Plaintiffs' First Amended Complaint as instituted per Rule 23 of the Federal Rules of Civil Procedure.

Plaintiffs contend, however, that Defendants did not distribute all of the service charge or gratuity to the non-managerial employees, like Plaintiffs and all other members of the proposed class, who provided customers with food and beverage service. (Id.) Instead, Plaintiffs allege, Defendants retained a portion of the service charge and did not disclose this retention to its customers. (Id.) Plaintiffs claim this conduct violated Hawai'i Revised Statutes ("HRS"), Section 481B-14.[2] (Id. at ¶ 18.) In violating § 481B-14, Plaintiffs further claim that Defendants violated HRS § 388-6 and engaged in unfair methods of competition in violation of HRS 480-2. (Id. at ¶ 19.)

In the FAC, Plaintiffs seek damages, treble damages, prejudgment interest, and attorneys fees. (Id. at 12.) Plaintiffs also seek declaratory judgment as well as "a permanent injunction concerning Defendants' actions." (Id.)

In the instant motion, Plaintiffs seek certification of the following class:

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[2] Section 481B-14 states:

> Any hotel or restaurant that applies a service charge for the sale of food or beverage services shall distribute the service charge directly to its employees as tip income or clearly disclose to the purchaser of the services that the service charge is being used to pay for costs or expenses other than wages and tips of employees.

Haw. Rev. Stat. § 481B-14.

> All past and present non-management employees of the Fairmont Orchid Hotel ("Hotel") who provided services in connection with the sales of food and/or beverage at the Hotel for which a service charge or gratuity charge was (a) imposed by the Hotel and (b) not distributed 100% to said non-management employees.

("Mot.," Doc. # 20. at 4.)

On April 8, 2010, Plaintiffs filed a Class Action Complaint in the Third Circuit Court of the State of Hawaii. (Doc. # 1-3.)

On May 13, 2010, Defendants filed a Notice of Removal and removed Plaintiffs' complaint to this Court. (Doc. # 1.) On May 18, 2010, Plaintiffs filed the FAC. (FAC, Doc. # 5.)

On August 30, 2010, Plaintiffs filed the instant Motion to Certify Class and For Approval of Class Notice and Dissemination Plan ("Motion"). (Mot., Doc. # 20.) Plaintiffs also filed a series of exhibits in support of their Motion. (Doc. # 21.) On October 12, 2010, Defendants filed a Memorandum in Opposition to Plaintiffs Motion ("Opposition"). ("Opp'n," Doc. # 24.) On October 19, 2010, Plaintiffs filed a Reply in support of their Motion. (Reply, Doc. # 31.)

STANDARD OF REVIEW

The decision to grant or deny class certification rests within the sound discretion of the trial court. Yamamoto v. Omiya, 564 F.2d 1319, 1325 (9th Cir. 1977). In order for a class action to be certified, plaintiffs must establish all of the requirements of Rule 23(a) and at least one of the alternative requirements of Rule 23(b). Blake v. Arnett, 663 F.2d 906, 912 (9th Cir. 1981). The burden of establishing these prerequisites falls on the party seeking certification. See Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir.2001).

The United States Supreme Court has held that a class will be certified only after a "searching inquiry" and "rigorous analysis" of the evidence, as "actual, not presumed, conformance with Fed. R. Civ. P. 23(a) remains indispensable." General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982). When considering a motion for class certification, the court accepts the allegations as pled in Plaintiffs' Complaint as true, see Blackie v. Barrack, 524 F.2d 891, 901 n. 17 (9th Cir.1975), but does not consider whether Plaintiffs have stated a cause of action or whether they are likely to prevail on the merits. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974). The Court must analyze the allegations of the complaint and other material (material sufficient to form a reasonable judgment on each requirement), consider the nature and range of proof necessary to establish

those allegations, determine as best able the future course of the litigation and then determine if the requirements are met at the time. See Blackie, 524 F.2d at 900-01.

DISCUSSION

As noted, Plaintiffs in the instant motion seek certification of a class. (Mot. at 4.) The proposed class period runs from the enactment of HRS § 481B-14 in 2000 to the present. (Id.) Although not briefed by either party, counsel for Defendants raised standing as an issue at the hearing. Specifically, Defendants argued that Plaintiffs do not have standing to seek the injunctive relief requested in their complaint and cannot, therefore, represent a class seeking such relief. The Court agrees.

" 'It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy.' " Fortyune v. American Multi-Cinema, Inc., 364 F.3d 1075, 1081 (9th Cir. 2004) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983)). "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Abstract injury is insufficient to demonstrate standing. Lyons, 461 U.S. at 101. Instead, a Plaintiff must demonstrate that:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Sys. (TOC), Inc., 528 U.S. 167, 180-181 (2000) (citing Lujan, 504 U.S. at 560-61 (1992)); see also Skaff v. Meridien N. Am. Beverly Hills, LLC, 506 F.3d 832, 837 (9th Cir. 2007); Bird v. Lewis & Clark College, 303 F.3d 1015, 1019 (9th Cir. 2002), *cert. denied*, 538 U.S. 923 (2003). If a plaintiff fails to demonstrate a case or controversy, then a federal court lacks subject matter jurisdiction over the suit. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998).

Standing "must be shown with respect to each form of relief sought, whether it be injunctive relief, damages or civil penalties." Bates v. United Parcel Service, Inc., 511 F.3d 974, 985 (9th Cir. 2007) (citing Friends of Earth, 528 U.S. at 185). For injunctive relief, a "plaintiff must demonstrate that he has suffered or is threatened with a 'concrete and particularized legal harm' []coupled with 'a sufficient likelihood that [the plaintiff] will again be wronged in a similar way.' " Id. (citation omitted) (quoting Lujan, 504 U.S. at 560; Lyons, 461 U.S. at 103); see also Fortyune, 364 F.3d at 1081 ("In the context of injunctive relief, [a plaintiff] must additionally demonstrate a sufficient likelihood that he will again be wronged

in a similar way." (quotations omitted)). In other words, a plaintiff "must establish a real and immediate threat of repeated injury." D'Lil v. Best Western Encina Lodge & Suites, 538 F.3d 1031, 1036-37 (9th Cir. 2008). While past wrongs "do not in themselves amount to a real and immediate threat of injury necessary to make out a case or controversy," Fortyune, 364 F.3d 1075 (quotations omitted) (citing Lyons, 461 U.S. at 103); see also Bates, 511 F.3d at 985, past wrongs are "evidence bearing on whether there is a real and immediate threat of repeated injury." Fortyune, 364 F.3d 1075 (quoting O'Shea v. Littleton, 414 U.S. 488, 469 (1974)); Bates, 511 F.3d at 985 (same).

In the context of a class action law suit, "standing is satisfied if at least one named plaintiff meets the [standing] requirements." Bates, 511 F.3d at 985 (citing Armstrong v. Davis, 275 F.3d 849, 860 (9th Cir. 2001). Indeed,

> [t]hat a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.

Lewis v. Casey, 518 U.S. 343, 357 (1996) (quotations omitted) (citing Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 (1976). Therefore, in a class action suit, "[i]njunctive relief is not available based on alleged injuries to unnamed members of a proposed class." Hodgers-Durgin v. de la Vina, 199 F.3d

1037, 1045 (9th Cir. 1999).

> Unless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief. Any injury unnamed members of this proposed class may have suffered is simply irrelevant to the question whether the named plaintiffs are entitled to the injunctive relief they seek.

Hodgers-Durgin, 199 F.3d at 1045.

Finally, "[w]hen evaluating whether [standing] elements are present, [a court] must look to the facts '*as they exist[ed] at the time the complaint was filed*.' " ACLU of Nev. v. Lomax, 471 F.3d 1010, 1015 (9th Cir. 2006) (quoting Lujan, 504 U.S. at 569 n.4); see also Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 623 (9th Cir. 2010) (same).

In light of these principles, the Plaintiffs cannot represent the proposed class. Specifically, Plaintiffs have not sufficiently alleged standing for the injunctive relief their complaint seeks. (FAC, at 12.)

According to the FAC, Plaintiff Flynn worked for Defendants from December 2006 until May 2009. (Id. ¶ 15.) Plaintiff Bonar worked for Defendants from September 2006 until March 21, 2010 (Id. ¶ 16.) Plaintiffs filed suit in state court on April 8, 2010. (See Doc. # 1-3.) Plaintiffs' theory of the case is that Defendants did not remit the entirety of an applied service charge to its serving employees as required by HRS § 481B-14. (Id. at ¶ 17-19.)

The Court does not believe, nor do the Plaintiffs explain how, the two named Plaintiffs—neither of whom worked for the Defendants when they filed suit[3]—can demonstrate there is a "real and immediate threat" of again having the Defendants retain a part of their service charge. See D'Lil, 538 F.3d at 1036-37. Indeed, the law in the Ninth Circuit is clear: employees do not have standing to seek injunctive relief against a former place of employment with respect to adverse employment conduct. See, e.g., Dukes, 603 F.3d at 623 (finding that "class members who were no longer . . . employees at the time the complaint was filed do not have standing to pursue injunctive or declaratory relief"); Walsh v. Nev. Dep't of Human Res., 471 F.3d 1033, 1037 (9th Cir. 2006) (recognizing former employees lack standing to seek injunctive relief because they "would not stand to benefit from an injunction . . . at [their] former place of work"). Simply put, the named Plaintiffs no longer worked for the Defendants when suit was filed; there is no reason to believe they will further be subject to the Defendants' alleged adverse employment conduct.

Having determined the named Plaintiffs do not have standing to

[3]As noted, the critical time frame for conducting a standing analysis is when a plaintiff files suit. Lomax, 471 F.3d at 1015. Here the Plaintiffs did not bring their claim in state court until April 8, 2010, after both Plaintiffs had ceased working for the Defendants.

pursue injunctive relief, it is clear they cannot represent a certified class seeking such relief. It is of no consequence that some unnamed class members might be entitled to such relief; the Ninth Circuit has been clear:

> *Unless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief.* Any injury unnamed members of this proposed class may have suffered is simply irrelevant to the question whether the named plaintiffs are entitled to the injunctive relief they seek.

Hodgers-Durgin, 199 F.3d at 1045 (emphasis added). The named Plaintiffs therefore cannot represent a class seeking injunctive relief.[4] The Court recognizes, however, that it may be possible for Plaintiffs to represent the same or a similar class if provided the opportunity to amend their Complaint. The Court therefore **DENIES** Plaintiff's Motion to Certify Class **WITHOUT PREJUDICE** and grants Plaintiffs leave to amend their complaint no later than 30 days from the filing of this Order.

[4]Because the Court concludes that the Plaintiffs cannot represent a class seeking injunctive relief, the Court will not address whether they have satisfied the requirements of Rule 23(a) and Rule 23(b).

CONCLUSION

For the reasons stated above, the court **DENIES WITHOUT PREJUDICE** Plaintiffs' Motion for Class Certification and for Approval of Class Notice and Dissemination Plan.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, December 29, 2010.

David Alan Ezra
United States District Judge

Flynn et al v. Fairmont Hotels and Resorts et al., Cv. No. 10-00285 DAE-LEK;ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION WITHOUT PREJUDICEAND FOR APPROVAL OF CLASS NOTICE AND DISSEMINATION PLAN