Martin v Restaurant Assoc. Events Corp.
2013 NY Slip Op 34244(U)
January 7, 2013
Supreme Court, Westchester County
Docket Number: 53700/11
Judge: Alan D. Scheinkman
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN, Justice.

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JENICA MARTIN, DANIEL YAHRAES, CHARLES NASSIF, and ARLETTY DIAZ,[1] on behalf of themselves and all others similarly situated,

Plaintiffs,

-against–

RESTAURANT ASSOCIATES EVENTS CORP. and COMPASS GROUP USA, INC.,

Defendants

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Index No. 53700/11
Motion Seq. # 2
Motion Date: 10/26/12

DECISION & ORDER

Scheinkman, J:

Plaintiffs Jenica Martin ("Martin"), Daniel Yahraes ("Yahraes"), Charles Nassif ("Nassif") and Arletty Diaz ("Diaz") (collectively "Plaintiffs") move for an order pursuant to CPLR 901 and 902 certifying this action as class action and granting such other and further

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[1]When this action was first initiated, there were two additional Plaintiffs – Nechesa Morgan and Charles Dudley. Thereafter, on June 6, 2012, these Plaintiffs made an unauthorized motion to withdraw as Plaintiffs. The Court held a conference on this unauthorized motion on June 8, 2012 at which time the Court suggested that counsel work it out by stipulation whereby these two Plaintiffs agree to submit to deposition as third parties and the depositions occur within three weeks. Thereafter, by stipulation efiled on July 10, 2012, Charles Dudley was voluntarily dismissed from the action without prejudice. While no stipulation has been efiled dismissing the action as to Plaintiff Nechesa Morgan, given the discussions with counsel, and given the notices of appearances filed by Plaintiffs' counsel in this action which limit their appearance to Plaintiffs Martin, Yahraes, Nassif and Diaz, the Court assumes that Ms. Morgan has been voluntarily dropped by stipulation as a plaintiff in this case.

relief as the Court deems just and proper. Defendants Restaurant Associates Events Corp. ("RA") and Compass Group USA, Inc. ("Compass") (collectively, "Defendants") oppose the motion.

RELEVANT BACKGROUND

This action was initiated with Plaintiffs' filing of their Summons and Complaint in this Court's efiling system ("NYSCEF") on August 2, 2011. Rather than answering, Defendants moved to dismiss the action and by Decision and Order dated January 12, 2012 (the substance of which is incorporated herein by reference) (*Martin v Restaurant Assoc. Events Corp.*, 35 Misc 3d 215 [Sup Ct Westchester County 2012]) (hereinafter "*Martin*"), this Court denied the motion.

On October 13, 2012, the Court held a Preliminary Conference and issued a Preliminary Conference Order, which provided for a discovery cut-off date for April 12, 2012 and a trial readiness conference for April 13, 2012. At the Preliminary Conference, the Court made clear that discovery was to proceed despite Defendants' motion to dismiss. Over the course of the litigation, the Court held several conferences concerning discovery disputes, which mainly involved Defendants' attempts to narrow the scope of disclosure. After a conference held on April 11, 2012 (at which the Court extended the discovery cut-off date by setting a compliance conference for June 1, 2012), the Court and parties discussed ways to limit the pre-class certification discovery so as to avoid the undue burden upon Defendants of having to produce documents relating to every event at which Defendants performed catering services over the past six years.

Based on the discussions at the April 11, 2012 conference, the parties executed a Stipulation Regarding Document Production on May 2, 2012 (hereinafter "Stipulation") which provided, *inter alia*, that Defendants would produce for the weeks of May 1-7 and December 8-14 for the years 2005-2011 "documents relating to all events within the State of New York at which butlers .. were utilized, whether such events were held on premises or off premises ...." (Stipulation at ¶ 2). It further required Defendants to produce documents for the following events for the years 2005-2011: "Baron Funds annual meeting at Lincoln Center, the Waxman fundraiser at the Lexington Armor, Television Upfront Week, parties for the Sopranos and Sex & the City, Lincoln Center Tent parties for Fox and NBC, New York Film Society parties, the American Ballet Theater's Opening gala, the Iris-American Society party at Lincoln Center, and Vogue Magazine's party at the Cooper Hewitt Museum on February 18, 2010" (Stipulation at ¶ 7).

Following the parties' entry into the Stipulation, the Court was requested to intervene with regard to Defendants' failure to provide documents in accordance with the Stipulation. Plaintiffs argued that production was inadequate since all that was produced were numerous blank contract documents (as though printed from a computer) rather than the signed contracts; Defendants failed to produce any correspondence they had with their clients, the invoices and the clients' payments. This was contrary to the Stipulation that required that Defendants produce during the stated time periods and for the stated events "proposals,

invoices, contracts, menus, payments, order forms, client communications, function sheets, staffing requests, assignment sheets, rental forms and other similar documents concerning the Events" (Stipulation at ¶ 3). During a conference call with counsel and Chambers on July 27, 2012, Defendants' counsel argued that Defendants should not have to pay for this fishing expedition because it is clear that no service charge was paid on these contracts and the form contracts should be sufficient. After a conference with the undersigned, counsel were advised that all outstanding documents had to be produced by Monday July 30, 2012, and the Court scheduled a follow up conference for Tuesday July 31, 2012. At the conference on July 31, 2012, the Court reiterated that everything outstanding had to be produced by August 3, 2012, and any documents not so produced could not be used in opposition to the class certification motion. The Court also stressed that Plaintiffs were free to make such arguments they viewed as appropriate based on Defendants' failure to produce documents in support of their class certification motion, which had to be filed by August 30, 2012. This motion ensued.

THE COMPLAINT'S ALLEGATIONS

RA is alleged to be a full service catering company that frequently serves some of New York City's most prominent social events, such as the re-opening of Alice Tully Hall and Fashion Week. It is said to be the exclusive caterer for many prominent venues, including such locales as the American Museum of Natural History, Carnegie Hall, Lincoln Center, and the Metropolitan Museum of Art (Complaint at ¶¶ 1, 25). According to the Complaint, RA is a subsidiary of Compass (Complaint at ¶ 10) and it was Compass who paid Plaintiffs (*id.* at ¶ 12).

The Complaint alleges that when Defendants contract with customers to cater events, Defendants charge their customers a service charge which is a percentage (ranging from 15% to 20%) of all charges billed to customers, including food, beverage and service labor (*id.* at ¶ 27). Plaintiffs aver that several sample catering menus for the New York Academy of Sciences stated that a 20% service charge would be charged on all food and drink and service labor:

> BASED ON A MINIMUM OF 25 GUESTS FOR THE BOARD ROOM AND CONFERENCE ROOM AND 75 GUESTS FOR THE AUDITORIUM, MENU AND LABOR INCLUSIVE. 20% SERVICE CHARGE AND 8.375% NYC TAX APPLY (Complaint at ¶ 28).

Plaintiffs also allege that "Hospitality Drop-off Order Forms," issued in September 2010 and February 2011 and relating to the provision of catering and waitstaff for hospitality suites and lounges at the Fashion Week Event, stated that a 15% service charge would be applied on all orders. According to the Complaint, the September 2010 form contained a checklist of various catered food as well as a miscellaneous category listing "Service Labor (1 Captain, 1 Bartender, 1 Butler)" to be provided by RA to serve the food (*id.* at ¶ 29; a copy of the September 2010 form is annexed to the Complaint as Ex. A).

Plaintiffs allege that the order forms used by RA did not disclose that the 15%

service charge was not a gratuity. More broadly, Plaintiffs allege that Defendant failed to disclose that the service charge was being retained by them and was not a gratuity or tip. From this failure to disclose, Plaintiffs infer that Defendants "lead their customers to reasonably believe" that the service charge will be paid over to the employees who worked the event (*id.* at ¶ 30). However, Plaintiffs allege that Defendants keep the service charge and share none of it with the employees (*id.*).

Plaintiffs allege that Defendants' employees were subject to termination of employment if they discussed gratuities with a customer. Further, Plaintiffs aver that RA's Employee Handbook prohibits employees from soliciting any gifts as well as from accepting any gifts. From this prohibition, Plaintiffs infer that a reasonable customer would believe that the service charge is a gratuity (*id.* at ¶ 31). Plaintiffs allege that "Defendants' policies have the effect of actively misleading customers to believe that the Service Charge is a gratuity" (*id.*).

Plaintiffs present a single cause of action, one which is predicated upon an alleged violation of Section 196-d of the New York Labor Law. Plaintiffs assert: (a) the service charge was a gratuity; (b) Defendants failed to tell their customers that the service charge was not a gratuity; (c) Defendants never provided clear written notice to their customers, on the bills presented to them for payment, that the service charge was not a gratuity; and (d) a reasonable customer would likely believe that the service charge was a gratuity intended for the employees (*id.* at ¶¶ 33-34).

Based on these allegations, Plaintiffs seek to recover the service charge (or at least the ones collected by Defendants in the six years prior to the commencement of the action), attorneys' fees, interest and costs (*id.* at ¶ 35).

PLAINTIFFS' CONTENTIONS IN SUPPORT OF THEIR MOTION

In this motion, Plaintiffs seek an order from this Court pursuant to CPLR §§ 901 and 902 that the action may proceed as a class action on behalf of

> All individuals employed as Butlers, Bartenders and Captains by Restaurant Associates Events Corp. ("Restaurant Associates") and Compass Group USA Inc. ("Compass") from August 2, 2005 to present at events where any charge purported to be a gratuity was assessed to customers (hereinafter "service charge"). The putative class does not include maintenance workers, corporate officers, salespersons, cooks, food preparers, chefs, dishwashers, directors, clerical, officer workers or any other person employed whose trade, classification or profession does not customarily receive gratuities (the "Class" or "Putative Class") (Affirmation of Lloyd Ambinder, Esq. dated September 21, 2012 ["Ambinder Aff."] at ¶ 2).

Plaintiffs explain that the "definition encompasses charges purporting to be gratuities as defined under 12 N.Y.C.R.R. § 146-2.18(b): 'any charge in addition to charges for food,

beverage, lodging, and other specified materials or services, including but not limited to any charge for "service" or "food service," is a charge purported to be a gratuity'" (Ambinder Aff. at 1, n.1, *quoting* 12 N.Y.C.R.R. § 146-2.18[b]).

In support of the motion, Plaintiffs each provide an affidavit in which they, in sum and substance, state that they have been working for Defendants during the period in question[2], as catering service employees in the positions of Butler, Captain and Bartender (Daniel Yahraes and Arletty Diaz - Butler and Captain, Jenica Martin - Butler, Charles Nassif - Butler and Bartender). Their duties consisted of "serving food and drinks to patrons at the events and parties, taking orders, responding to guests needs, and helping set up and clean up as necessary during the events, including breaking down the event when its over" (Affidavits of Yahraes, Diaz, Nassif and Martin, sworn to September 18-20, 2012 at ¶ 3). They all aver to having worked at many venues, including but not limited to the eight venues listed in the Complaint as well as additional venues listed in attachments to each of their affidavits. All Plaintiffs other than Martin aver they have "worked with at least 1,500 other butlers, captains and bartenders, during the time [they] worked for Defendants. Some events that [they] worked would have as many as 150 service employees at that event" (*id.* at ¶ 5). Martin avers that she "worked with over 600 other butlers, captains and bartenders ... [and that] [s]ome events ... would include over 100 service employees at that event" (Martin Aff. at ¶ 5). During the busy seasons (September through December and March through June) they worked six events a week and during the other time frames, they worked two to four events a week (*id.* at ¶ 6).

All Plaintiffs contend that while "Restaurant Associates required its customers to pay a mandatory service charge" which they know occurred because they (1) were told by clients that they gave gratuities for the staff to the salesperson for that event, (2) saw "forms and contracts that listed a service charge," (3) saw that sometimes patrons "g[a]ve envelopes of money to the captain or salesperson" which were gratuities, and (4) were "told by colleagues that Restaurant Associates charged a service charge" (*id.* at ¶¶ 7-9) none of the Plaintiffs ever received the service charge and to the best of each of the Plaintiffs' knowledge, "no members of the staff, such as captains, butlers and bartenders, received any of the service charge" (*id.* at ¶ 8).

Plaintiffs submit an affirmation from their counsel. In it, counsel explains his firm's experience in handling numerous class action labor cases similar to this action and a listing of these cases is provided (Ambinder Aff. at ¶ 3).

Mr. Ambinder attaches as Exhibit E to his affirmation copies of documents produced by Defendants which he contends evidence that service charges were included in the following contracts: (1) Lincoln Center Fashion Week dated September 16, 2012; (2) New York Academy of Sciences dated July 21, 2008, (3) the New York Times Center dated September 19, 2008; (4) CUNY Graduate Center dated March 11, 2010; (5) Met Life dated December 15, 2011; and (6) a private unidentified party dated May 3, 2011 (Ambinder Aff. at ¶ 9, and Ex. E thereto). He also attaches contracts produced by Plaintiffs: Barclay Capital dated

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[2]Two Plaintiffs still work for RA (Yahraes and Diaz) and two stopped working for RA, Martin in June 2012 and Nassif in December 2010.

August 1, 2011; standard New York Times Catering Order Form undated; Lincoln Center Hospitality Drop-off Forms for four different events dated September 14, 2010, February 13, 2011, and February 14, 2011; and an advertisement for an event at the Morgan Library & Museum scheduled for June 11, 2010 (*id.*)[3]

Ambinder also submits (1) the deposition transcripts from the depositions of Plaintiffs (Exs. F-I) and the deposition of Defendant's representatives Jose Fong (Ex. N) and Andrew Ziobro (Ex. L); (2) an invoice from the Samuel Waxman Cancer Research Foundation explaining the service charge (Ex. J); (3) RA's 2009 Handbook (Ex. K); and (4) Defendants' unsigned form contracts (Ex. M). Ambinder also attaches the proposed Notice of Class Action Lawsuit (Ex. P).

In their memorandum of law, Plaintiffs' frame their cause of action by stating that they and their "co-workers hav[e] been subject to Defendant's unlawful policy of failing to remit gratuities to Plaintiffs as required under section 196-d of the New York Labor Law ... at those events where a service charge was assessed to the customer" (Pltfs' Mem. at 2). In support, Plaintiffs rely on the documents produced by Defendants evidencing same and their affidavits and deposition testimony which show that the service charge was "a percentage ranging from 10% to 20% of all charges billed to customers including, but not limited to, food, beverage and service labor ... [and that] the contracts contained no explanation of the nature of the service charge or who retained it" (*id.* at 3). Plaintiffs contend that "Defendants failure to explain the service charge caused the reasonable customer to believe that the service charge was a gratuity that would be paid to Plaintiffs who worked those events" (*id.*).

Plaintiffs argue that in 2011, "recognizing that customers would be mislead by the service charge," Defendants changed their contracts to include a paragraph stating

> THE ABOVE STAFFING CHARGES ARE AN ADMINISTRATIVE CHARGE FOR ADMINISTRATION FO THE FUNCTION, ARE NOT PURPORTED TO BE A TIP OR GRATUITY AND WILL NOT BE DISTRIBUTED AS A TIP OR GRATUITY TO THE EMPLOYEES WHO PROVIDED SERVICE TO THE GUESTS (*id.* at 4, *quoting*

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[3]Based on the deposition testimony and affidavits provided by Plaintiffs, it is Plaintiffs' position that based on their personal handling of various documents, there was clearly an imposition of a service charge in connection with the following additional events: Madame Tussaud's Wax Museum, American Museum of Natural History, Restaurant Associates Power House at American Museum of Natural History, Brooklyn Museum, Carnegie Hall, Cooper Hewitt Museum, Guggenheim Museum, Lincoln Center Fashion Week, The Tent at Lincoln Center, Metropolitan Museum of Art, Morgan Library, Rockefeller Center, Café Centro, Brassiere 8 ½, Barclay's, Bear Sterns, Deutsche Bank, JP Morgan Chase, Lehman Brothers, Met Life on 6th Avenue, Morgan Stanley, New York Academy of Science, New York Times, Time Warner Conference, Time Inc., Prospect House of N.J., Georgia Aquarium, Intrepid, CUNY, Alliance Bernstein, USTA Tennis Center and Clifford Chance (Pltfs' Mem. at 3, *citing* Yahraes Tr. at 33-34; Diaz Tr. at 32, 53-54; Nassif Tr. at 36).

Ambinder Aff., Ex. J).[4]

Plaintiffs argue that Defendants' policy prohibits Plaintiffs from accepting tips even if a customer offers them directly (*id.*, *citing* Ambinder Ex. K).

With regard to the deficiencies in Defendants' production, Plaintiffs make clear that following the conference on July 31, 2012, Defendants produced "a few hand-written agreements, and some email messages between company executives and customers" which did not rectify the deficiencies that had been brought to the Court's attention at the conference.

To show the extent of Defendants' discovery transgressions, Plaintiffs rely on the deposition testimony of Andrew Ziobro, RA's Vice President of Operations, in which he admitted that RA's practice is to generate a proposal and a contract for all catering events to external clients. He further testified that "a final written contract is generated for each event and signed by the client ... The signed contract is sent back to RA with the client's payment" (*id., citing* Ziobro Tr. at 55-56, 58 and 62). Plaintiffs assert that Defendants have not explained their failure to produce the final signed versions of these contracts and instead, Defendants' representative Jose Fong merely testified that "the requested documents were perhaps lost due to natural disasters, such as the flood at Lincoln Center, or were contained on a laptop computer, the location of which is uncertain" (*id.* at 6, *citing* Fong Tr. at 92-95, 110-112).

Plaintiffs contend that based on Defendants' document production, simply because a service charge was not assessed on every contract is not a bar to class certification "because it is absolutely clear that RA did impose a service charge for numerous other events without any explanation that the charge was not a gratuity" and that the "gratuities were not distributed to the service employees who performed work at those events, thus, Plaintiffs share the common claim that the Defendants should be liable for the unpaid gratuities" (*id.*).

Plaintiff further argue "Defendants have employed over one thousand service employees since 2005, and as many as 150 employees have performed work at a single event where a service charge was assessed and alleged to have been unlawfully retained" (*id.* at 6-7).

Relying on the requirements for class certification as delineated in CPLR 901(a) and 902, Plaintiffs argue that class actions are "routinely granted in Labor Law § 196-d cases such as this one seeking payment of unpaid gratuities" (*id.* at 9, *citing Krebs v Canyon Club*, 2009 NY Slip Op 50291[U], 22 Misc 3d 1125[A] [Sup Ct Westchester County 2009] [Scheinkman, J]; *Ramirex v Mansions Catering, Inc.*, 2009 NY Slip Op 31100[U] [Sup Ct NY County 2009], *affd* 74 AD3d 490 [1st Dept 2010]).

With regard to the requirement that the class be so numerous that joinder of all class members is impractical, Plaintiffs point out that courts generally find numerosity satisfied

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[4] This language appears in an invoice to Samuel Waxman Cancer Research Foundation dated October 28, 2011 regarding an event scheduled for November 17, 2011.

with a class size at around 40. Therefore, since Plaintiffs have provided evidence that Defendants employed no fewer than 1000 service employees during the relevant period and that as many as 150 service employees would work on a single event, this requirement has been satisfied.

Plaintiffs argue the second requirement – that common questions of law or fact predominate over any questions affecting the individual members – has been satisfied since the claims of Plaintiffs and "the putative class members arise from a common wrong: namely, that RA engaged in a policy of imposing a service charge at many of its' events and that by doing so it 'created the prospect that a reasonable customer could form a belief that the service charge was in lieu of a gratuity'" (*id.* at 12, *quoting Martin, supra*, 35 Misc 3d at 226).

Relying again on this Court's decision in *Krebs*, Plaintiffs contend that there are three essential questions of law and fact common to all members that will predominate over the questions affecting only individual members, which include "(1) whether the Club imposes charges that were, or were purported to be, gratuities, as understood by reasonable patrons, (2) whether the Club had an obligation to pay these funds over to members of its waitstaff, and, if a violation of Section 196-d is found, ... [and] (3) whether the class members should receive monetary compensation" (*Krebs, supra,* 2009 NY Slip Op 50291[U] at *21).

Plaintiffs argue that predominance is satisfied even though damages will differ since "New York courts universally hold that the need to compute damages individually does <u>not</u> defeat predominance or class certification" (*id.* at 14 [emphasis in original]). According to Plaintiffs, to calculate damages, the only documents required are the contracts containing the amount of the service charge assessed and the staffing sheets to figure out the class members who worked on the event and are entitled to share in the gratuity.

With regard to the typicality requirement, Plaintiffs argue that it too is satisfied since their claims "'derive from the same practice or conduct that gave rise to the remaining claims of the class members and is based upon the same legal theory'" (*id.* at 15, *quoting Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98 [2d Dept 1980]) – *i.e.*, the claims arise from the same conduct, Plaintiffs and the class members suffered the same wrong by Defendants, and Plaintiffs' and the class members' case is based on the same legal theory.

Plaintiffs contend that the fourth requirement – that Plaintiffs are able to fairly and adequately represent the interests of the class – is met because Plaintiffs and the putative class members seek the same relief of obtaining the gratuities duly owed, they are familiar with their claims and the claims of their class members, they have discussed Defendants' practice of imposing the service charges and not distributing the proceeds to Plaintiffs with other putative class members, and such practice was contrary to New York law. Finally, as set forth in their affidavits, they explain that want to represent the other employees to help them recover the unpaid gratuities.

With regard to the competency of Plaintiffs' counsel (another aspect to this requirement), Plaintiffs point out that the Appellate Division, First Department, has "noted the skill with which Plaintiffs' counsel [Virginia & Ambinder] prosecutes wage-and-hour class

actions" (*id., citing Dabrowski v Abax Inc.*, 84 AD3d 633, 634-635 [1st Dept 2011]).[5] Thus, it is argued that "class counsel has 'demonstrated a level of competence ensuring that they can fairly and adequately represent' Plaintiffs and the class" (*id.* at 19, *quoting Pesantez v Boyle Envtl. Serv., Inc.*, 251 AD2d 11, 12 [1st Dept 1998]).

Plaintiffs argue that the last requirement – a class action is a superior method for resolving plaintiffs' claims – by again relying on this Court's observations in *Krebs.* Namely, that the prosecution of separate actions would be impractical and inefficient since "the same patrons would be subject to repeated depositions and trials ... [and] [t]he same contracts would have to be examined and reviewed repetitively'" (*id.* at 19-20, *quoting Krebs*, at *20).

With regard to the CPLR 902 factors, Plaintiffs contend that to Plaintiffs' counsel's knowledge, no other individual has instituted an action against Defendants based on their failure to remit the gratuities they collected under Labor Law § 196-d. Further, the existence of hundreds of class members "is testament to both 'the impracticability and inefficiency of prosecuting or defending separate actions,' See CPLR § 902(2). Moreover, this forum is appropriate insofar as many of the class members live in Westchester County. See CPLR § 902(4). Plaintiffs argue there are few difficulties in managing a class action based upon the claims herein, particularly when compared to complications of managing multiple actions. See CPLR § 902(5)" (*id.* at 20-21).

DEFENDANTS' CONTENTIONS IN OPPOSITION

In opposition, Defendants submit an affirmation from their counsel, Andrew P. Marks, Esq., the sole purpose of which is to attach a copy of the Stipulation and selected pages from the deposition of Mary Dearborn. They also provide an affidavit from Andrew Ziobro, Senior Vice President Operations, RA, and a memorandum of law.

In his affidavit, Ziobro avers that he has worked for RA since 1987 and has worked in his present capacity since 2003. The purpose of his affidavit is to explain that RA is involved in three different business lines – Business & Industry (B&I), Cultural, and Off-Premises Catering (Affidavit of Andrew Ziobro, sworn to October 17, 2012 ["Ziobro Opp. Aff.] at ¶ 4). He explains that not only do the services differ between these business lines, they even differ within a business line based on a client's requirements (Ziobro Opp. Aff. at ¶5). The B&I line involves RA's corporate clients' daily employee related food services such as executive dining halls and cafeterias and these clients do not typically host outside non-employee events at their locations. These accounts are either on a set annual fee where RA retains the revenue or absorbs the loss of the food and beverage sales ("P&L accounts") or the client pays RA a fee and retains the revenue of food and beverage sales ("Fee accounts").

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[5]Plaintiffs' "co-counsel", Jeffrey K. Brown, Esq. from Leeds Brown Law P.C., also submits an affirmation, the purpose of which is to set forth the numerous matters in which Leeds Brown has successfully acted as lead trial counsel and its extensive experience litigating employment discrimination and wage and hour lawsuits (*see* Affirmation of Jeffrey K. Brown, Esq. dated September 20, 2012).

The Cultural events are held in public forums such as museums or concert halls. For these, RA provides the catering for the on-site food service facilities (*i.e.*, the restaurants and cafes) and also caters events held at these locations. He avers that often charitable events are held at these locations and the patron may either contract directly with the venue, make arrangements directly with RA, or work with both the venue and RA (*id.* at ¶ 9).

For the Off-Premises Catering, RA may provide catering at any allowable location the client desires (*i.e.,* a venue where RA does not have a B&I or Cultural account) and for these RA negotiates directly with the client for all aspects of the event.

Ziobro avers that the B&I and Cultural accounts have "dedicated on-premises staff to service day-to-day patron needs, such as staffing employee cafeterias or public restaurants, running orders to conference rooms, and attending small events like staff meetings or training sessions ... Some special events may require the account to supplement its dedicated staff. On such occasions, the account may request butlers (*i.e.,* servers, bartenders, captains, coat check) from RA's Central Staffing Office ('Central Staffing')" (*id.* at ¶ 12). According to Ziobro, the Off-Premises Catering uses Butlers from Central Staffing and when RA does not have enough Butlers to staff an event, it hires Butlers from independent vendors such as At Your Service ("AYS") (*id.* at ¶ 14).

Ziobro categorizes Plaintiffs as current or former Butlers. He avers that RA pays Butlers $19 an hour and Butlers working as Captains are paid $23 an hour. Ziobro admits that RA forbids Butlers from accepting gifts and advises them that they may not solicit tips from any tip jars at a bar, but does not prohibit them from accepting gratuities if offered by the event patron or a guest. If such tipping occurs, (which usually occurs only at smaller events at a patron's home), RA does not take a tip-credit against the Butlers' wages. He states that "[c]orporations and not-for-profit entities do not pay cash, pay pursuant to a contract and generally do not tip butlers at catered events" (*id.* at ¶ 17). Ziobro contends that the accounts/venues identified by Plaintiffs as including service charges are very different from each other. For example, because the New York Times is a Fee account and RA collects a set percentage of the food and beverage sales, the service charge of $0.75 per person is collected and retained by the New York Times. There are no Central Staffing Butlers involved in deliveries.

By contrast, Barclays is a P&L account and only Barclays employees can host events requiring catering. He avers that "all event confirmations are by email, and proposals are created and exchanged as Excel documents with RA's on-site contact at Barclay's. RA does not generate paper documents or signed contracts as part of its course of business with Barclays. On rare occasions, RA imposed a flat charge (*i.e.*, non-percentage service charge) to cover the cost of staffing an event" (*id.* at ¶ 20).

He explains that MetLife- Long Island City and MetLife New York City are P&L accounts and RA "imposed a flat charge for service on a few occasions to recover the cost of actual labor for that event" and "[a]s demonstrated in Ex. A, the 'service charge' was the sum of the hourly wages of the staff – including two cooks – who worked the event" (*id.* at ¶ 21). Exhibit A are two invoices, one from a Holiday Cocktail Reception on December 13, 2011 and one from a VSCS Planning Board Reception on December 14, 2011 wherein the service

charge equaled the hourly wages RA paid to the service people.

With regard to Alliance Bernstein, Ziobro states that it is an internal event-only Fee account whereby all food service, dining or pantry service provided for the employees was billed to Alliance Bernstein and food reservations were made using Alliance Bernstein's internal Event Management Software. According to Ziobro, "[t]his event was staffed by in house staff, not by Plaintiffs or other Central Staffing Butlers" and the event was "organized by Alliance Bernstein's Event Coordinator, who knew that the service charge was not a gratuity" (*id.* at ¶ 22).

Ziobro asserts that Fashion Week hosted by Mercedes-Benz at Lincoln Center involved two things. One, RA provided food to hospitality lounges where the food was simply delivered but Central Staffing Butlers did not serve the guests. Second, Mercedes-Benz hosted a hospitality lounge at which hors d'oeuvres were passed out. He contends that although a 15% service charge was imposed at the suggestion of the event planner, the event planner was aware that the service charge was not a gratuity.

Ziobro avers that the New York Academy of Science ("NYAS") is unique in that it is both a B&I account and Cultural account. The internal events do not have a service charge. For the external events, a 20% service charge is imposed but it is required by NYAS and it is remitted to NYSAS since the charge is imposed "to compensate NYAS for the use of its facilities" (*id.* at ¶ 24).

With regard to CUNY Graduate Center, although a 12% service charge is imposed on the deliveries, they are made by CUNY on-site personnel and not by Plaintiffs or other Central Staffer Butlers.

The June 11, 2010 wine tasting event for the Morgan Library and Museum included a 20% service charge, but that event was not staffed by Plaintiffs or other Central Staffers but instead was staffed by RA's on-site wait staff who "regularly receive tips and are paid a tipped rate (i.e., $5.00 per hour)" (*id.* at ¶ 26). He states that the entire service charge was paid over to the service employees as a gratuity (*id.* at ¶ 26).

Ziobro avers that "Mary Dearborn is RA's most prolific off-premises coordinator" (*id.* at ¶ 27). Based on Mary Dearborn's deposition, she only imposed a service charge on two events at the Guggenheim. One for a Skadden Arps dinner for 35 guests on September 14, 2010 and one for a White and Case reception and dinner for 30 guests on September 29, 2010. Ziobro attaches the invoices for each as Exhibits B and C respectively. He points out the for those events, there was a 20% service charge imposed, but there were only five Butlers that worked the Skadden event and none were a named Plaintiff. Further, the White and Case dinner was staffed by four RA employees and one AYS butler.

Ziobro explains RA's staffing for the events as "RA's standard procedure is to employ 1.5 Butlers per table of ten guests for plated events, along with one Captain per event and one co-captain per 150 guests. Thus, only plated events with more than 250 guests wold have a staff of more than 40 Butlers" (*id.* at ¶ 29). For non-plated passed hors d'oeuvres events, there would need to be at least 810 guests for a staff of 40 Butlers (*id.*).

In opposition to class certification in this case, Defendants argue that the reasonable patron standard under *Samiento v World Yacht, Inc.* (10 NY3d 70 [2008]) is necessarily situational and dependent upon particular circumstances. According to Defendants, "[t]he types of venues and events where a service charge was imposed are so varied and distinct that any common questions of law or fact are overwhelmed by required individualized inquiries rendering class-wide litigation unmanageable, unnecessary and unwarranted" (Defs' Opp. Mem. at 2). Defendants further argue that it would not be appropriate to divide the action into multiple subclasses because (1) the named Plaintiffs did not work at all venues/events at which a service charge was imposed and therefore their claims are not typical of every subclass; and (2) the size of each subclass is not so large that joinder would be impractical since "[o]nly events with more than 250 guests are likely to have involved forty Butlers and few of the events where a service charge was utilized were of such a magnitude" (*id.* at 2).

One of Defendants' main contentions is that the Stipulation "specifically provided that a venue would be excluded from further litigation if the documents did not show use of a service charge" (*id.* at 6).[6] Indeed, Defendants suggest that Plaintiffs retained new counsel based on their dissatisfaction with this Stipulation and their desire to get out from under it (*id.* at 7, n.4). They contend that they produced 20,000 additional pages based on this Stipulation and from these documents, there were only instances of service charges in connection with the New York Times, Barclays Capital, Met Life, Alliance Bernstein, New York Academy of Sciences, CUNY, Mercedes Benz Fashion Week at Lincoln Center, and two small events at the Guggenheim Museum. In response to Plaintiffs' contentions concerning Defendants' deficient document production, Defendants contend that

> Plaintiffs speculate that the hard copy of the contract contains some secret handwritten imposition of a service charge, contradicting such records as deposit invoices showing no service charge, final invoices showing no service charge, and electronic copies of contracts showing no service charge. Presumably this service charge must have been paid in cash, since it is not reflected on the wire transfer, credit card charge or check payments from the client, and whisked off to a secret bank account, since it is not reflected on corporate deposits. Plaintiffs offer nothing but self-serving and unsubstantiated anecdotal reference to other venues in support of their "belief," and

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[6]The language of the Stipulation upon which Defendants relies provides

> The absence of documents demonstrating the imposition of a service charge at Events held at a venue or business and industry account or arranged by a catering salesperson during the designated weeks (regardless of the number of covered Events, if any, included in such production) shall be deemed conclusive evidence that a service charge was not imposed at the venue or account or by the catering salesperson, and follow up discovery shall not be pursued with respect to that account, venue or catering salesperson (Stipulation at ¶ 7).

unsubstantiated allegations should not be considered on this motion for class certification (Defs' Opp. Mem. at 7, n.4).

Defendants reiterate the distinguishing characteristics of each of these events and venues as set forth in Ziobro's affidavit and argue that the action would thus have to be divided into "eight or more sub-classes, each involving different plaintiffs, facts, witnesses and expert testimony to establish the understanding of the reasonable patron under the circumstances. Not only would such a triable be inefficient and unwieldly, trying multiple claims before a single jury would undoubtedly cause confusion to the prejudice of the Defendants" (*id.* at 10).

It is Defendants' position that Plaintiffs have failed to satisfy the requirements for class certification under CPLR 901. With regard to numerosity, Defendants contend that the class as denominated by Plaintiffs (*i.e.*, a class of Butlers employed since 2005 at events where any charge purported to be a gratuity was assessed) ignores that based on the Stipulation, this litigation is limited "to the eight venues discussed above" (*id.* at 12). Thus, the total number of Butlers working for RA is not the relevant inquiry. Rather, it is only the "Butlers that served the handful of events where a service charge that purported to be a gratuity was imposed can be considered potential class members – and Plaintiffs offer no evidence of that number" (*id.* at 12). According to Defendants, the numerosity requirement must be satisfied for each subclass. In this regard, since no Butlers were used at The New York Times, the Morgan Library & Museum or Alliance Bernstein (and therefore Plaintiffs did not work there), these venues cannot meet the numerosity requirement and they must be eliminated from the action (*id.* at 13). It is Defendants' position that the Mary Dearborn events would also have to be excluded since they involved five or fewer Central Staffing Butlers and none of Plaintiffs worked these events (*id.*). Relying on Defendants' staffing numbers, Defendants contend that the only events for which the number Butlers used met the required 40 numerosity figure are the Butlers used for the Mercedes Benz September 2010 Fashion Week events and the NYAS events.

On the second requirement, it is Defendants' position that common questions of law or fact do not predominate over individualized questions because contrary to Plaintiffs' position, the only event for which Plaintiffs can show that RA had a policy of imposing a service charge is NYAS. Further, Defendants argue that the reasonable patron will vary materially across venues and, therefore, there would be "no single common question governing whether or whether the service charge was understood by the reasonable person to be a gratuity" (*id.* at 16).

Defendants contend that the legal issues also differ materially between venues. As an example, Defendants assert that there will be a legal issue with regard to NYAS whether the service charge that was provided to the client (which was required by the client to be imposed) was "retained" by RA within the meaning of New York Hospitality Regulations. Defendants also point out that with regard to Barclays, MetLife and Alliance Bernstein, "there is a specific legal issue of whether a flat service charge unrelated to the cost of food and beverage falls within 196-d or the 2011 Hospitality Wage Oder as a charge that purports to be a gratuity" (*id.*). Defendants further distinguish "The New York Times, where RA did not impose, collect or retain the service charge" and CUNY "where RA and Grey agreed to a 12%

service charge to cover the costs of transporting the catered food" (*id.* at 17).

In further support of the contention that the alleged individualized nature of this action renders it not susceptible to class action treatment, Defendants point out that this case is very different from the other cases involving Section 196-d since Defendants paid their employees handsomely ($19 hour rather than the typical $5 hour pay paid to employees eligible to receive tips) based on the understanding that they would not be receiving tips. Therefore, Defendants assert "Plaintiffs' attempt now to recover service charges as gratuities should be barred by estoppel, waiver, and ratification" and "[a]n individualized assessment will be required with respect to the understanding and intent of each of the Butlers" (*id.* at 18).

With regard to the typicality requirement, Defendants contend it is not met "because there is no evidence that they worked at the venues and events in question" and the claims for class members working at one venue would be substantively different from the class members that worked at another venue. Furthermore, Plaintiffs cannot show "typicality because they cannot establish that they and the putative class members are entitled to the same relief" (*id.* at 19). In this regard, Defendants argue that "[p]rior to the 2011 Hospitality Wage Order there was no statutory or regulatory requirement that an employer distribute gratuities to the service staff in equal shares. Employers were prohibited from retaining gratuities, but that is all. Indeed, courts have held that the distribution of gratuities to persons other than those within the plaintiffs' class is not unnecessarily unlawful ... Under the laws and regulations in effect until January 1, 2011, an employer could permissibly have given the entire sum purported to be a gratuity to a single person, such as a Captain, and not run afoul of 196-d" (*id.* at 19).

Defendants contend that Plaintiffs have not shown that they can fairly and adequately protect the interests of the class because conflicts of interest exist between class representatives and the class. This conflict stems from the Plaintiffs' testimony to the effect that "Captains received and improperly retained gratuities from customers" (*id.* at 20, *citing* Yahraes Aff. at ¶9; Nassif Aff. at ¶9) and that they were told by the Captains "'that they were not permitted to accept tips, and were even threatened with termination if they were caught accepting tips'" (*id., quoting* Pl. Mem. at 4, Nassif Tr. at 54; Yahraes Tr. at 85; Martin Tr. at 57). As such, Plaintiffs Yahraes and Diaz who were also Captains "are seeking to represent a class that includes people who are alleged to have enforced RA's supposed no-tip policy and improperly retained tips" and Plaintiffs have failed to address how they would reconcile such divergent interests. Further, the Captains' claims are not typical of those shared by the Butlers.

Defendants maintain that Plaintiffs' conclusory assertions concerning their having satisfied the requirements of CPLR 902(2) are likewise insufficient. In particular, Defendants argue that Plaintiffs have not established that this action satisfies CPLR 902(5) – *i.e.,* the prospective difficulty of managing this as a class action. According to Defendants, this case would be unmanageable as a class action because the individual issues predominate and "prosecuting this case will require an individual analysis of each of the eight locations, each with separate mini-trials regarding whether RA imposed the service charge, whether RA retained the service charge, whether the class members are entitled to the service charge, and issues of waiver, estoppel, and ratification on a Butler by Butler basis" (*id.* at 23).

C. Plaintiffs' Reply

In further support of their motion, Plaintiffs submit an attorney affirmation, an affidavit from Scott Woodhouse, Vice President and Team Leader for Lehman Brothers and later Barclays Capital, and a reply memorandum of law.

In his affidavit, Mr. Woodhouse explains his duties which were the "planning, coordinating, contracting and administrating corporate events for executives, employees and clients of Lehman and Barclays. These events took place at Lehman/Barclays' corporate office ('in-house') or at numerous venues throughout New York, the United States and overseas ('off-site'). Such events included golf outings, employee training sessions, client conferences, and social events, such as a holiday party or retirement dinner" (Affidavit of Scott Woodhouse, sworn to October 23, 2012 at ¶ 3). He contends that during the period 2005-2008 Lehman/Barclays booked dozens of events with RA and he personally handled up to a dozen of these events. He was responsible for negotiating the terms and conditions of the contracts with RA. He avers that contrary to any representation RA may make, he recalls specifically that "most, if not all" of the contracts contained a separate line identified as a service charge. And while he doesn't recall if he ever discussed this line charge with RA, he can definitively state that both he and the members of his staff "believed that the service charge was a gratuity to be distributed among the RA wait staff assigned to work at the Lehman/Barclays off-site events" (*id.* at ¶ 7).

In counsel's affirmation, Mr. Ambinder reiterates the parties' agreement concerning the production of documents as outlined in the Stipulation and contends that "[t]he vast majority of the documents produced by Defendants were nothing more than unsigned form documents that were simply printed out of a computer" (Reply Affirmation of Lloyd Ambinder, Esq. dated October 25, 2012 ["Ambinder Reply"] at ¶ 7). Ambinder further attaches the deficiency letter sent to Defendants on July 18, 2012 as Ex. B to his affirmation. Finally, Ambinder attaches the full transcript of Mary Dearborn's deposition as Ex. C to his affirmation.

In their Reply Memorandum, Plaintiffs lead by arguing that there is nothing in the Stipulation that supports Defendants' position that the Stipulation limits this litigation to the 8 venues. Instead, the Stipulation was entered into to "limit discovery in the pre-class certification stage of this action" to roughly 4% of the total time period at issue and "[n]o reasonable reading of the Stipulation, which was specifically delineated as a 'Stipulation Regarding Document Production,' could lead to the conclusion that Plaintiffs relinquished claims for venues and events where no documents were ever provided, during the fifty (50) calendar weeks each year for which Defendants provided no documents" (Pltfs' Reply Mem. at 2).

According to Plaintiffs, Defendants' opposition primarily consists of their arguments attacking the merits of this action which are "red herrings" for purposes of this class certification motion since the only thing that must be satisfied is that on the surface of the Complaint, there appears to be a cause of action that is not a sham. Plaintiffs contend they have more than satisfied this burden since from Defendants' limited document production, there is documentary evidence that Defendants imposed service charges at the following

events/venues: Lincoln Center's Fashion Week, the New York Academy of Sciences, the New York Times Center, the CUNY Graduate Center, Met Life and Barclays Capital, in addition to other private events (*id.* at 3). And Plaintiffs have provided testimony concerning other events that they witnessed such service charges being imposed including Madame Tussaud's Wax Museum, American Museum of Natural History, Restaurant Associates Power House at American Museum of Natural History, Brooklyn Museum, Carnegie Hall, Cooper Hewitt Museum, Guggenheim Museum, Lincoln Center Fashion Week, The Tent at Lincoln Center, Metropolitan Museum of Art, Morgan Library, Rockefeller Center, Café Centro, Brassiere 8 ½, Barclay's, Bear Sterns, Deutsche Bank, JP Morgan Chase, Lehman Brothers, Met Life on 6th Avenue, Morgan Stanley, New York Academy of Science, New York Times, Time Warner Conference, Time Inc., Prospect House of N.J., Georgia Aquarium, Intrepid, CUNY, Alliance Bernstein, USTA Tennis Center and Clifford Chance (*id.* at 3-4, *citing* Yahraes Tr. 32-34, 60; Diaz Tr. 32 and 53-54; Nassif Tr. 35-36 and Martin 25, 52). This evidence has been further supplemented by the Woodhouse Affidavit which evidences that such service charges were imposed with regard to events booked with Lehman/Barclays from 2005-2008 and that Woodhouse understood the service charge to be a gratuity.

With regard to the requirements for class certification under CPLR § 901, Plaintiffs first refute Defendants' contention that the subclasses must all meet the numerosity requirement. Instead, Plaintiffs proffer a number of decisions in which just the opposite was decided – the subclasses did not have to meet the numerosity requirements as long as the class as a whole met it. Further, Plaintiffs assert that the only case relied upon by Defendants for this proposition is readily distinguishable from this case since it involved a company that hired collectively only 40 employees (*id.* at 6, *citing Jara v Strong Steel Door, Inc.*, 2008 NY Slip Op 51733[U], 20 Misc3d 1135[A] [Sup Ct Kings County 2008]). Because Defendants admit that hundreds of RA's workers worked at events at which a service charge was assessed, the numerosity requirement is satisfied (*id., citing* Ziobro Tr. at 88).

On the issue of commonality, Plaintiffs dispute that individualized issues would overshadow the common questions of law and fact. Thus, Defendants' contention that RA would have a right to a set-off based on the employees' understanding that they were being paid higher hourly wages based on their inability to receive tips will never enter into the picture since the standard is the expectation of the reasonable customer (not the wait staff). As such, Plaintiffs contend that here, like in *Krebs*, the trial for one individual class member will proceed identically with the trial on a class-wide basis (*i.e.,*" the trial of claims of Waiter 'X' on one event would [not] be in any respect different from the trial of claims of Waiter 'Y' on that same event") (*id.* at 9).

Plaintiffs refute both prongs of Defendants' attack on the typicality requirements. First, with regard to Defendants' argument that Plaintiffs' claims are not typical because their "right to recover the service charges ... is unsettled ... [p]rior to the 2011 Hospitality Wage Order there was no statutory or regulatory requirement that an employer distribute gratuities to the service staff in equal shares" and, therefore, Defendants could have given the entire sum to a single employee and satisfied their obligations under the law (Pltfs' Reply at 9, *quoting* Defs' Opp. Mem. at 19), Plaintiffs argue that this misses the mark since it is undisputed that Defendants did not do this and, instead, retained the full service charge for themselves. In any event, after reciting the regulations so promulgated in 2011, Plaintiffs point out that these

regulations did not create a new standard. Instead, they were reported by the Department of Labor as simply "'clarify[ing[and fill[ing] in interstices in the statute by consolidating and incorporating previously issued case law, departmental guidelines and departmental opinion letters'" (Pltfs' Reply at 10, *quoting* New York Department of Labor 2011 Hospitality Industry Wage Order Regulatory Impact Statement at §3[d]).

On Defendants' second argument that Plaintiffs' claims are not typical because if Plaintiff "'Diaz worked at Barclays, her claim would be substantively different from a putative class member who worked at NYAS,'" (*id.* at 11, *quoting* Defs' Opp. Mem. at 18) Plaintiffs argue that it is Defendants themselves, based on their refusal to produce staffing sheets, that created the uncertainty over which individuals did or did not work at the events with Plaintiffs.[7] In any event, this argument is a non-starter since "[w]here an entity operates multiple locations, as the Defendants do here, and an identical policy of underpayment of wages at each location is alleged, courts routinely certify classes of employees at each location" and "[t]he standards set forth by the Court of Appeals and the Department of Labor can be just as easily applied to events that the named plaintiffs worked as those they did not" (*id.* at 12).

With regard to Defendants' contention that Plaintiffs cannot provide adequate representation since some of Plaintiffs were Captains in addition to being Butlers, Plaintiffs point out that under Labor Law § 196-d, Captains are specifically included within the food service workers entitled to share in tips and, therefore, these Plaintiffs are adequate representatives. Furthermore, Defendants' position that the Plaintiffs who were also Captains have a conflict of interest since they were required to enforce RA's no-tip policy is "absurd" since: (1) an employer's no-tip policy is not the issue since under *Samiento* – it is the understanding of the patron that is at issue and the no-tip policy may simply be a factor in determining the patron's understanding; and (2) there is nothing unlawful about a no-tip policy provided Defendants had not imposed the service charges.

Finally, with regard to the CPLR 902 factors, Plaintiffs point out that they all do not need to be met for certification. According to Plaintiffs, for the same reasons this Court found in *Krebs* that the prosecution of separate actions by each affected member of the class would be highly impractical and inefficient would likewise occur here. Further, Defendants' attempts at distinguishing *Krebs* because "'here the disputed charges were imposed at eight unrelated and unique locations'" is, according to Plaintiffs, "a distinction without a difference." First, it ignores the fact that this case is not limited to these eight locations. Second, the idea that there will need to be a separate analysis undertaken for each venue "would be true whether or not the matter is certified as a class action;" thus, Defendants' argument is really not one against class certification but that Defendants should not be sued at all. Plaintiffs also dispute that Defendants have a defense of "waiver, estoppel and ratification;" accordingly, there are no individualized issues over the defenses that will predominate over the common questions of law and fact.

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[7]Plaintiffs also point out that at her deposition, Diaz testified to seeing "a couple of hundred invoices for events at Morgan Stanley where food services were rendered, and 95 percent of them included service charges" (Pltfs' Reply at 11, *citing* Diaz Tr. at 35-36), yet Defendants failed to produce any documents relating to events at Morgan Stanley.

THE MAY 2, 2012 STIPULATION

As discussed *supra,* the Stipulation that was entered into in order to resolve the discovery dispute followed a conference before this Court at which the Court and counsel attempted to work out an amicable arrangement for discovery recognizing that requiring Defendants to produce every document concerning every catered event over a six year time frame would be overly burdensome. It was – and remains – absolutely clear that the parameters of the discovery at issue was not concerning the entire case – only this pre-class certification discovery phase. The Stipulation recites the background leading to the parties' entry into the Stipulation, including that while Plaintiffs offered to limit the sampling period to the entire months of May and December during the years 2005 to 2011, based on Defendants' protestations that such a production would be unduly burdensome, time consuming and expensive, at the status conference held on April 11, 2012, "Justice Scheinkman recommended that plaintiffs limit the sampling period to one week in May and one week in December during the year from 2005 to 2011" (Stipulation at 1). It was based on this conference and the Court's recommendation that "Counsel for plaintiffs have designated the weeks of May 1-7, and December 8-14, from the years 2005-2011, for which they seek to review documents" (Stipulation at ¶ 1) and that based on these two one-week periods for the months of May and December during the six year period, Defendants would produce

> documents relating to all events within the State of New York at which butlers referred by Restaurant Associates Central Staffing were utilized, whether such events are held on or off premises, and whether such events are held at cultural venues or a business and industry account where Restaurant Associates ... provides exclusive catering, or booked through RA off-premises division and held at a non-exclusive venues, such as an armory or private home (hereinafter 'Events') ... Production shall include proposals, invoices, contracts, menus, payments, order forms, client communications, function sheets, staffing requests, assignment sheets, rental forms and other similar documents concerning the Events (*id.* at ¶¶ 2-3).

Defendants further agreed to produce documents (as described in paragraph 3) from the following events for the years 2005-2011:

> Baron Funds annual meeting at Lincoln Center, the Waxman fund raiser at the Lexington Armory; Television Upfront Week; parties for the Sopranos and Sex & the City; Lincoln Center Tent parties for Fox and NBC; New York Film Society parties; the American Ballet Theater's opening gala, the Irish-American Society party at Lincoln Center; and Vogue Magazine's party at the Cooper Hewitt Museum on February 18, 2010 (Stipulation at ¶ 7).

The parties agreed that the effect of this production was, in essence, that if a service charge was uncovered with regard to "any Event, account, venue or catering salesperson," Plaintiffs could pursue reasonable follow up discovery (*id.* at ¶ 4). However,

> [t]he absence of documents demonstrating the imposition of a service charge at **Events held at a venue or business and industry account or arranged by a catering salesperson during the designated weeks (regardless of the number of covered Events, if any, included in such production) shall be deemed conclusive evidence that a service charge was not imposed at the venue or account or by the catering salesperson,** and follow up discovery shall not be pursued with respect to that account, venue or catering salesperson (*id.* at ¶ 5).

Based on the bolded language, the Court does not read the Stipulation in the manner propounded by Defendants. Contrary to Defendants' contention, this Stipulation does not limit Defendants' ultimate liability in this case to the 8 events/venues where service charges were uncovered in this phase of discovery. Instead, the only thing agreed to was that as to events that were produced for the designated weeks for which no service charge was imposed, that would be "conclusive evidence that a service charge was not imposed at the venue or account or by the catering salesperson" and Plaintiffs could not seek follow up discovery with regard to these events and venues. Accordingly, to the extent Defendants' motion is predicated on its position that there is no basis for this suit because there were only eight events/venues for which a service charge was uncovered and for each of these events/venues, there can be no liability for the reasons set forth in the Ziobro affidavit, the Court disagrees. The Court holds that Plaintiffs did not, by entering into the Stipulation, forever bar themselves from seeking discovery as to events/venues that were not a part of the stipulated time frame. However, Plaintiffs will be precluded, based on the Stipulation's terms, from seeking further discovery on events/venues that were disclosed for which no surcharge was imposed to the extent that Defendants, in fact, fulfilled their obligations to produce all "proposals, invoices, contracts, menus, payments, order forms, client communications, function sheets, staffing requests, assignment sheets, rental forms and other similar documents concerning the Events" as they were required to do (and which Plaintiffs contend they did not do).

The Court need not now resolve whether Defendants, in fact, produced all that they were supposed to. However, the Court stresses that the Stipulation did not afford Defendants the right to withhold documents (such as the proposals, invoices, menus, payments, client communications, function sheets, staffing requests, assignment sheets, etc.) relating to an event on the ground that Defendants had determined that the terms of the contract form found on Defendants' computer made such production unnecessary. Of course, if after a diligent search, responsive documents cannot be located within Defendants' possession, custody or control, Defendants may so indicate and, at this juncture, the appropriate way of so indicating would be through the provision of an affidavit from the person who conducted the search. Further, if Defendants believe that the production of the detailed documents should not be necessary in view of the contract terms, they are free to contact Plaintiffs' counsel and seek a modification of the Stipulation.

THE SUBSTANTIVE CLAIM

Although the gravamen of Defendants' opposition is that, based on the facts as Defendants know them to be, Plaintiffs' claim is devoid of merit, this motion is not a motion for summary judgment and the standard of review as to the merits of Plaintiffs' claim is simply whether on its surface it does not appear to be a sham. Because this Court has already determined that the Complaint states a viable claim for a violation of Labor Law Section 196-d, the Court has necessarily already determined that there appears to be a cause of action which is not a sham in *Martin, supra* (*see Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]; *Super Glue Corp. v Avis Rent A Car System, Inc.*, 132 AD2d 604, 607 [2d Dept 1987]; *Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]). Accordingly, Plaintiffs have met their burden that the action is not a sham and the Court shall proceed with whether Plaintiffs have satisfied their burden for class certification.

THE GOVERNING LEGAL STANDARDS

CPLR Article 9, which sets forth the criteria to be considered in granting class action certification, is to be liberally construed (*see Jacobs v Macy's East, Inc.*, 17 AD3d 318, 319 [2d Dept 2004]; *Kidd v Delta Funding Corp.*, 289 AD2d 203 [2d Dept 2001]; *Liechtung v Tower Air, Inc.*, 269 AD2d 363 [2d Dept 2000]; *Friar, supra*, 78 AD2d at 91). As a practical matter, a class action may be the only method available for determining a consumer dispute where the damages sustained by any particular consumer are insufficient to justify the expenses of litigation and the number of individuals involved is too large, and the possibility of effective communication between them too remote, to make practicable more traditional means of litigation (*see, e.g., Weinberg v Hertz Corp.*, 116 AD2d 1, 5 [1st Dept 1986], *affd* 69 NY2d 979 [1987]). Since the class action procedure serves a salutary purpose of permitting numerous consumers to band together to address a common wrong, and since a class can always be decertified or revised, the interests of justice require that, where the case is doubtful, the benefit of any doubt should be given to allowing the class action (*Brandon*, 106 AD2d at 168; *Friar v Vanguard Holding Corp., supra*).

In order to obtain class certification, Plaintiffs must satisfy each of the five statutory requirements of CPLR §901 - numerosity, predominance, typicality, adequacy, and superiority. Plaintiffs must also show that certification is appropriate under the five factors set forth in CPLR §902 – interest of class members in controlling the litigation, inefficiency of separate actions, extent of prior litigation of the controversy, desirability of concentrating the litigation in this forum, and difficulties in managing the class action (*see Canavan v Chase Manhattan Bank, N.A.*, 234 AD2d 493, 494 [2d Dept 1996]). Plaintiffs bear the burden of establishing that the class exists and that the prerequisites are met (*id.* at 494, *citing Brady v State of New York*, 172 AD2d 17, 24-25 [3d Dept 1991], *affd* 80 NY2d 596 [1992], *cert denied* 509 US 905 [1993]; 2 Weinstein-Korn-Miller, NY Civ Prac ¶ 901.08 [2d ed]; *see also Kudinov v Kel-Tech Constr., Inc.*, 65 AD3d 481, 481 [1st Dept 2009]; *Globe Surgical Supply v Geico Ins. Co.*, 59 AD3d 129 [2d Dept 2008]). "Whether a lawsuit qualifies as a class action matter is a determination made upon a review of the statutory criteria as applied to the facts presented" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52 [1999]). Certification cannot be predicated on general, conclusory allegations, but must be supported by a factual record (*see Rallis v City of*

New York, 3 AD3d 525, 526 [2d Dept 2004]; *Yonkers Contr. Co. v Romano Enter. of New York, Inc.*, 304 AD2d 657, 658 [2d Dept 2003]).

Moreover, *Samiento* indicates that the important criteria is not what the caterer believed the service charges were for but what a reasonable patron would believe the surcharges were for.

ANALYSIS OF THE CPLR 901 PREREQUISITES

CPLR 901(a) sets forth five prerequisites that must be met in all class actions (*see* Alexander, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR C:901:2). In exercising its discretion on whether or not to grant class certification, courts are advised that "[t]hese criteria are to be liberally construed because the Legislature intended Article 9 to be a liberal substitute for the narrow class action legislation that preceded it" (*Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]; *Godwin Realty Assoc. v CATV Enter., Inc.*, 275 AD2d 269, 269 [1st Dept 2000] ["CPLR article 9 is to be liberally construed to accommodate claims that would not be economically litigable except by means of a class action"]). Court will address each of the requirements in turn.

A. Numerosity

There is no mechanical test to determine whether the numerosity requirement has been met; the court is to consider the particular circumstances of each case and the reasonable inferences and common sense assumptions from the facts before it (*Friar, supra*, 78 AD2d at 96). However, both federal and state courts presume that numerosity is satisfied where the proposed class contains around 40 members (*see, e.g., Consolidated Rail Corp. v Town of Hyde Park*, 47 F3d 473, 483 [2d Cir 1995], *cert denied* 515 US 1122 [1995]; *Lee v ABC Carpet & Home*, 236 FRD 193, 203 [SD NY 2006] [class of 44 carpet installation mechanics]); *Dornberger v Metropolitan Life Ins. Co.*, 182 FRD 72, 77 [SD NY 1998]; *Gonzalez v Nicholas Zito Racing Stable, Inc.*, 2008 WL 941643 [ED NY 2008]; *Hoerger v Board of Educ. of Great Neck Union Free School Dist.*, 98 AD2d 274 [2d Dept 1983] [class of 44 members certified as to breach of contract cause of action against teacher's union]; *Galdamez v Biordi Constr. Co.*, 2006 NY Slip Op 51969[U], 13 Misc 3d 1224(A) [Sup Ct NY County 2006], *affd* 50 AD3d 357 [1st Dept 2008] [prevailing wage claim involving 30 to 70 workers]; *Jara v Strong Steel Door, Inc.*, 2008 NY Slip Op 51733[U], 20 Misc 3d 1135[A], 2008 WL 3823769 [Sup Ct Kings County 2008]). Although there are some nearly 30 year old First Department decisions in which classes as small as 45 and 71 were found not to be sufficiently numerous to warrant certification, those decisions appear to be have been overtaken by more recent authority (*see generally* Haig, Commercial Litigation in New York State Courts §18:5) and Second Department authority (*see, e.g., Globe Surgical Supply*) appears to support a finding of numerosity in classes of roughly similar size, as does more recent First Department authority. But, in any case, the numbers here are higher than that.

Plaintiffs have presented evidence that Defendants employ some 1000 wait staff employees consisting of Butlers, Captains and Bartenders. Further, Plaintiffs have averred in their affidavits and deposition testimony that as many as 150 Butlers would be involved with

any one event or venue at which the service charge was allegedly imposed. The only counter to Plaintiffs' evidence concerning the numerosity threshold is predicated on Defendants' misplaced reliance on their theory that their liability in this case is limited to the 8 events/venues uncovered from the documents produced pursuant to the Stipulation indicating that a service charge had been imposed. From those events, Defendants proceed to explain why none of these events/venues will support a finding of liability in this case for numerous reasons, all of which require this Court to make factual determinations – an entirely inappropriate exercise for a class certification determination. In essence, Defendants are arguing that only a couple of venues/events would support the numerosity quota of 40 Butlers, Captains and Bartenders but that even as to those, there is no basis for liability.

The Court does not agree with the predicate underlying Defendants' argument and, therefore, finds that Defendants have not countered the evidence presented by Plaintiffs as to the potential number of class members in this case. Thus, because the potential number of class members can be as large as 1000, it is apparent that joinder of some 1000 employees as individual plaintiffs would be impractical and management of the case would be complex and difficult if there were some 1000 individual plaintiffs, each entitled to representation by counsel of their own selection. Even if this action is broken down into subclasses based on different events and venues and the number of Butlers, Captains or Bartenders at each of these events do not reach the 40 number, this is no bar to class certification since each subclass need not meet the 40 member threshold. Indeed, in *Krebs*, this Court found class certification appropriate even though each event at the Club could have involved 15 or less wait staff.

Likewise, it would appear that the costs of maintaining separate actions would be prohibitive for the potential class members, obtaining counsel individually may prove difficult because of the relatively small damages, and any potential class members who still work for the Defendants might not bring individual suits for fear of retaliation (*Lee v ABC Carpet & Home*, 236 FRD 193, 203 [SD NY 2006]). Accordingly, the court finds numerosity has been satisfied because joinder is both impractical and undesirable.

B. Commonality

CPLR 901(a)(2) requires that there be questions of law or fact common to the class which predominate over any questions affecting only individual class members. This standard requires "predominance, not identity or unanimity, among class members" (*Friar v Vanguard Holding Corp.,* 78 AD2d 83, 98 [2d Dept 1980] [acknowledging that the differences in the manner in which the defendant obtained money from potential class members does not mean that individual questions predominate over common questions]; *see also Branch v Crabtree,* 197 AD2d 557 [2d Dept 1993] [predominance of questions of fact or law over questions affecting only individual members is the test, not a nice inspection of the claims of each individual member]; *Freeman v Great Lakes Energy Partners, LLC*, 12 AD3d 1170, 1170 [4th Dept 2004] [common questions of law and fact means similar, though not identical, claims]; *Cherry v Resource America, Inc.*, 15 AD3d 1013, 1013 [4th Dept 2005] [upholding class certification and finding common questions of law and fact predominated concerning defendants' common use of a methodology to manipulate calculation of royalties]). "The statute clearly envisions authorization of class actions even where there are subsidiary

questions of law or fact not common to the class" (*Weinberg, supra,* 116 AD2d at 6).

Here, Plaintiffs contend that the same three common issues of law and fact found to be present in *Krebs* are likewise present here, *to wit* "(1) whether the [Defendants] impose[] charges that were, or were purported to be, gratuities, as understood by reasonable patrons, (2) whether [Defendants] had an obligation to pay these funds over to members of its waitstaff, and, if a violation of Section 196-d is found, (3) whether the class members should receive monetary compensation."

As in *Krebs*, Defendants contend that the individual issues concerning the variables present at each event/venue would overshadow any such common questions since the differences present at these events/venues will cause there to be differences among the reasonable patron. Because Plaintiffs must show that the customers reasonably believed the surcharges were gratuities or purported gratuities, Plaintiffs' claims will require that the Court evaluate the circumstances that gave rise to each customer's belief, an inquiry that, in turn, must focus on the nature of the event and the individual contract made with Defendants.

Once again, the Court draws upon its prior decision in *Krebs* and finds that "these issues are not issues that are unique to Plaintiff[s] or to any of [Defendants' Butlers, Captains and Bartenders]. Rather, these issues are common to those members of the waitstaff, *i.e.,* these issues are a sub-set of the central issue common to the class of [Butlers, Captains and Bartenders] ... whether [Defendants] imposed and collected a gratuity or what was purported to be a gratuity from its patrons. The individual inquiry is not predicated upon factors unique to Plaintiff[s] or other [Butlers, Captains and Bartenders] but factors unique to each event which would then be applied to resolved the entitlement, if any, of the waitstaffers who worked that event. While it is reasonably assumed that the individual members of the waitstaff did not work every event, and that the composition of the workers at each event varied, it remains that, according to Plaintiffs ... [as many as 150]" have performed work at a single event where a service charge was assessed and unlawfully retained (*Krebs*, *supra,* 2009 NY Slip Op 50291[U] at *7). Therefore, even on an event-by-event basis, the questions are common to at least 150 people. "There are no individual questions presented that are unique to any particular special event waitstaff member. Even as to damages, it would seem that, if a gratuity or purported gratuity was collected and should have been paid over, the damages would be shared *pro rata* by all of the staff members who worked the event in question. Thus, damage trials focused on the individual claims of staff members would not be required. Indeed, it would appear that a separate damage inquiry would not be necessary at all, as, if liability were established, the amount of damage would be known. All that would be required is to ascertain the names of the persons who worked the particular event (something that would seem not to involve any great effort)" (*id.*).

As in *Krebs,* the complexities raised by Defendants concerning the variables associated with each distinct event/venue and how those variables impacted what a reasonable patron would have understood the service charge to be would require the same inquiries and the complexities are not unique to any individual class member. Accordingly, as this Court held it *Krebs*, "it seems to be more efficient to resolve these issues on an event-by-event basis (as to which the identities of those who worked each event is relevant only to the distribution of damages), rather than a worker-by-worker basis, which would necessitate

repeated inquiries into the very same events" (*id.*).

C. Typicality

CPLR 901(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. Indeed, "[t]he essence of the requirement of typicality *** is that not only must the representative party have an individual cause of action but the interest of the representative must be closely identified with the interests of all other members of the class (*see Gilman v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc 2d 941, 945 [Sup Ct NY County 1978], *quoting* 2 Weinstein-Korn-Miller, NY Civ Prac ¶ 901.09, Fed R Civ Pro rule 23[a][3]). Plaintiff's claims need not be identical to those of the class (*see Branch, supra,* 197 AD2d at 557). When a plaintiff's claims derive from the same practice or course of conduct that gives rise to the claims of other class members, and are based upon the same legal theory, the typicality requirement is satisfied (*see Friar, supra,* 78 AD2d at 99). Thus, "[t]ypicality does not require identity of issues and the typicality requirement is met even if the claims asserted by class members differ from those asserted by other members" (*Pludeman, supra*, 74 AD3d at 423). Here the contention is that Plaintiffs and the putative class members were injured as a result of Defendants tacking on a service charge to certain catering events/venues thereby duping the reasonable patron into believing that the service charge was a gratuity that would be paid over to Plaintiffs and the putative class members, but which was never so paid. If it is ultimately determined that Labor Law § 196-d was violated by this conduct, then each member was injured in the same manner. Thus, since the claims arise from the same conduct (*i.e.,* the same alleged wrong committed by Defendants) and Plaintiffs' claims are based on the same legal theory (*i.e.,* violation of Labor Law § 196-d) as the claims of the class members, the typicality requirement has been satisfied (*Friar, supra,* 78 AD2d at 99).

The fact that Plaintiffs may not have worked on the same events/venues as the other class members is of no moment since there is no necessity that the individual claims be identical as this Court previously noted in *Krebs*:

> [A]s to events for which surcharges were imposed and nothing explicit was said to the patrons, a finding as to what a "reasonable patron" may have perceived as to whether the surcharge was a purported gratuity may well have relevance as to all such events, whether Plaintiff worked on such events or not. Moreover, it is also true that, if the Club is found liable to Plaintiff for gratuities generated by events at which she worked, it necessarily follows that the Club is just as liable to other members of the waitstaff who worked the event.
>
> Clearly, to the extent that all members of the Club's special event waitstaff did not work on every single special event held at the Club, their individual claims are not identical. But identity is not required. Rather, the individual claims of putative class members are best considered as being overlapping, with some members being potentially entitled to receive their share of a gratuity or

> purported gratuity generated by an event at which they worked, with somewhat different groups of class members being entitled to shares in a gratuities or purported gratuities flowing from other events at which they worked. Plaintiff, based on her unrefuted allegation that she worked one or two events each week, has claims which are typical of the putative class of special event waitstaff workers and she is situated similarly to this group of special event waitstaff workers (*Krebs, supra,* 2009 NY Slip Op 50291[U] at * 9).

Defendants argue that the Plaintiffs' claims are not typical since the Plaintiffs and class members will all be subject to different inquiries concerning Defendants' defenses of waiver, estoppel and ratification based on the high hourly wages Plaintiffs provided to Butlers and Captains. Leaving aside the issue of whether or not Defendants' defenses of waiver, estoppel or ratification are even viable (which the Court seriously doubts given the framed issue of liability based on the Court of Appeals' holding in *Samiento, supra*) Defendants' arguments concerning the possible defenses are irrelevant to the issue of class certification since while it may affect the ultimate right to recovery, it does not impact the presentation of the liability issues (*Lessard v Metropolitan Life Ins. Co.,* 103 FRD 608, 611 [D Me 1984]). Furthermore, the defense of waiver, estoppel and ratification would be the same for all class members because Ziobro averred that Defendants paid all Butlers and Captains the same hourly wage of $19 and $23 respectively based on the understanding (as prominently displayed in the Employee Handbook) that they would not be receiving tips. Accordingly, even if the defenses are viable, the same facts supporting these defenses apply across the board to all Plaintiffs and putative class members (*i.e.,* the affirmative defenses do not depend on facts peculiar to each plaintiff's case). Therefore, the cases upon which Defendants rely are *inapposite* as they involved potential class representatives who were subject to defenses unique to him/her that did not exist for the rest of the class.[8]

The Court does not accept Defendants' arguments that the claims are not typical since Plaintiffs' right to recover is unsettled because prior to the issuance of the 2011 Hospitality Wage Order, there was no requirement that Defendants distribute the gratuities in equal shares. Thus, if Defendants had turned over the entire service charge to one Butler or one Captain, they would have satisfied their obligations under the prior law. Here, it is undisputed that Defendants did not turn over the service charge collected to the Butlers, Captains or Bartenders. Further, this defense would arise whether or not this action proceeded as a class action or as separate actions.

The Court also does not agree with Defendants' alternative argument that somehow the Captains' interests in this action are adverse to the Butlers' or Bartenders' interests because based on Plaintiffs' own testimony (1) the Captains sometimes received tips, and (2) the Captains were required to enforce Defendants' no tip policy. As to the first point, the tips the Captains received were not the tips from the service charge collected so the

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[8] *See, e.g., Romero v Flaum Appetizing Corp.*, 2011 WL 812157 (SD NY 2011); *Rife v Barnes Firm P.C.*, 48 AD3d 1228 (4th Dept 2008), *lv dismissed in part, denied in part* 10 NY3d 910 (2008).

Captains did not recover the fruits from the alleged Labor Law § 196-d violation so as to somehow either make their claims atypical or place their interests in a position adverse to the Butlers and Bartenders. Second, since the Defendants' liability hinges on the reasonable patron standard, the fact that Defendants may have required their Captains to advise the Butlers and Bartenders that they were not permitted to ask for or accept gratuities has nothing to do with what the reasonable patron understood the service charge set forth in the contracts Defendants entered into with their clients. Accordingly, Plaintiffs have established the typicality requirement for Class Certification.

D. Adequacy of Representation

CPLR 901(a)(4) provides that the Plaintiffs must be able to "fairly and adequately protect the interests of the class." A class representative acts as a fiduciary with respect to the interests of other class members (*see City of Rochester v Chiarella,* 65 NY2d 92, 100-101 [1985]). The responsibility of a class representative includes the duty to act affirmatively to secure the rights of class members and to oppose adverse interests asserted by others (*id.*). In determining whether a named plaintiff is a suitable class representative, the court may consider: (1) whether a conflict of interest exists between the representative and the class members; (2) the representative's background and personal character, as well as his or her familiarity with the lawsuit, to determine the ability to assist counsel in its prosecution; (3) the competence, experience and vigor of the representative's attorneys; and (4) the financial resources available to prosecute the action (*see Pruitt v Rockefeller Ctr. Prop., Inc.*, 167 AD2d 14, 24 [1st Dept 1991] [adequacy of representation requires that counsel for the named Plaintiffs be competent and that the interests of the named Plaintiffs and the members of the class not be adverse]). The Appellate Division, Second Department has framed the issue as "class counsel should have some experience in prosecuting a class action" (*Globe Surgical Supply, supra,* 59 AD3d at 144).

As noted above, the Court finds that the Butlers, Captains and Bartenders are not in positions adverse to each other such that Plaintiffs would not be able to adequately represent the interests of the other class members. Defendants have not raised any issues concerning Plaintiffs' background or personal character or financial resources to create any concern with the adequacy of their representation. Finally, Plaintiffs' counsel and co-counsel have provided information concerning their prior experience in representing classes in similar wage and hour actions and the Court finds that counsel and co-counsel, whether viewed separately or as a unit, have the competence, experience and vigor necessary to represent the interests of the class. Accordingly, Plaintiffs have established that they would be able to fairly and adequately protect the interests of the class.

E. Class Action as a Superior Method of Litigation

CPLR 901(a)(5) provides that one of the prerequisites for class action status is a finding that a class action is superior to other methods for the fair and efficient adjudication of the controversy. This requirement is usually satisfied from a weighing of the elements listed in CPLR 902. Here, Plaintiffs' motion papers and Defendants' opposition are somewhat sparse on CPLR 902 elements, but Plaintiffs have presented proof that no other actions have been filed and that this forum is an appropriate one given that Westchester County is the residence

for at least one Plaintiff. Also, given the relatively small amount likely to be recovered by each individual class member, the prospect of each member suing individually is unlikely and further, would be impractical and inefficient. Plaintiffs' counsel also argues that there would be few issues in managing this action as a class action as compared to the complications of managing numerous separate actions by the affected Butlers, Captains and Bartenders.

The Court concludes that given the similarities between this case and *Krebs,* and the even greater need to certify the class in this case given the larger size of the potential class than the potential class in *Krebs*, the Court finds that a class action is a superior method of litigation for the fair and efficient adjudication of the controversy for the same reasons the Court articulated in *Krebs*. Accordingly, the Court finds that this requirement and overall, the criteria of CPLR 902 satisfied as well. As such, the Court shall grant Plaintiffs' motion and shall certify the class.

However, the Court will modify the class designation as sought by Plaintiffs in order to avoid having class membership be determined upon matters which may be subject to legitimate factual dispute.

The way Plaintiffs frame the class is restated, with the terminology that the Court finds difficult placed in bold.

> All individuals employed as Butlers, Bartenders and Captains by Restaurant Associates Events Corp. ("Restaurant Associates") and Compass Group USA Inc. ("Compass") from August 2, 2005 **to present at events where any charge purported to be a gratuity was assessed to customers (hereinafter "service charge").** The putative class does not include maintenance workers, corporate officers, salespersons, cooks, food preparers, chefs, dishwashers, directors, clerical, officer workers **or any other person employed whose trade, classification or profession does not customarily receive gratuities** (the "Class" or "Putative Class") (Affirmation of Lloyd Ambinder, Esq. dated September 21, 2012 ["Ambinder Aff."] at ¶ 2).

The problem with the first sentence is that, in theory, if it is determined that were no instances where charges that purported to be a gratuity were assessed to customers, then there would be no one in the class. Moreover, Plaintiffs themselves have offered evidence that Defendants changed their policies in 2011 by indicating on invoices that staffing charges are not purported to be tips or gratuities. However, to deal with Defendants' contention as to different classes of events being organized differently, the Court will use the phrase "worked at events where a service charge was assessed to customers."

Likewise, workers would be excluded from the class if their occupation "does not customarily receive gratuities" – a formulation that itself is fraught with potential factual questions.

The Court also finds the phrase "to present" to be problematic in that it suggests that as events are held during the pendency of this litigation, the class is ever growing. In theory, then, there could be no end to discovery and no end to this litigation.

Since this action was filed in 2011, the Court perceives it reasonable to limit the class to Butlers, Bartenders and Captains who were employed by Defendants up to December 31, 2011.

Accordingly, the Court will strike these phrases from the proposed definition and define the certified class as follows:

> All individuals employed as Butlers, Bartenders and Captains by Restaurant Associates Events Corp. ("Restaurant Associates") and Compass Group USA Inc. ("Compass") from August 2, 2005 to December 31, 2011 and who worked at events where a service charge was assessed to customers (hereinafter "service charge"). The putative class does not include maintenance workers, corporate officers, salespersons, cooks, food preparers, chefs, dishwashers, directors, clerical, or officer workers (the "Class").

DESIGNATION OF CLASS COUNSEL

Plaintiffs' motion did not request the designation of class counsel. On this motion, the firm of Virginia & Ambinder LLP is first named as attorneys for Plaintiffs and the Leeds, Morelli & Brown, P.C., is named as "counsel".

The Court ought to have a single lawyer or law firm to deal with for each party in a case. While the Court has no difficulty with the attorney of record being assisted by others, whether inside or outside the law office of the attorney of record, the designation of a single attorney of record for a party provides certainty as to the responsibilities undertaken and lines of communication. The designation of an attorney of record makes it clear who is responsible for attending court proceedings, who may make binding commitments on behalf of the client, and who is authorized to served, and be served with, papers on behalf of the client.

As noted above, the submissions on this motion indicate that both Virginia & Ambinder LLP and Leeds, Morelli & Brown are capable of providing fair and adequate representation of the class. The Court can appreciate that, in a case of this potential magnitude, there may be a need for the firms to collaborate. In the event of a class recovery or settlement, any issues regarding duplication of effort will may be considered in connection with an award of attorneys' fees. The Court previously brought this issue up at the conference held on June 8, 2012 based on the numerous notices of appearance that had been efiled in NYSCEF. At that conference, it was represented that Virginia & Ambinder would be the attorneys of record. However, as noted above, contrary to this representation, the present motion was filed by both firms. The Court shall assume that Virginia & Ambinder's representation at the conference still holds and that it is the attorney of record for the class now certified. Leeds, Morelli & Brown may participate as "of counsel" to the attorney of record.

If this is incorrect, counsel may raise this issue again at the conference scheduled for January 22, 2012.

THE NOTICE TO THE CLASS

While Plaintiffs have annexed a proposed notice to the class as an exhibit to their motion, Plaintiffs have not specifically requested that this Court endorse the notice proposed or that it issue an order directing that notice of class certification be sent to the class in a particular manner. Further, Defendants' opposition is bereft of any discussion concerning the proposed notice and the method for such notice. Accordingly, the Court shall not decide what the substance of the notice shall be nor what the method for service of such notice on the class members should be and whether or not it should be accompanied by a posting of this notice at the Defendants' offices. In this regard, the Court shall schedule a conference for January 22, 2013 at 9:30 a.m. at which such issues shall be addressed by counsel. The Court invites counsel to exchange drafts in advance of the conference and to provide the Court, by January 21, 2013 at 3: 00 p.m. with their respective versions and a copy marked to show the differences between their respective positions.

CONCLUSION

The Court has considered the following papers:

1) Notice of Motion dated September 21, 2012; Affirmation of Lloyd Ambinder, Esq. dated September 21, 2012 together with the exhibits annexed thereto; Affidavit of Daniel Yahraes, sworn to September 18, 2012; Affidavit of Arletty Diaz, sworn to September 20, 2012; Affidavit of Jenica Martin, sworn to September 20, 2012; Affidavit of Charles Nassif, sworn to September 19, 2012; Affirmation of Jeffrey K. Brown, Esq. dated September 20, 2012;

2) Memorandum of Law In Support of Plaintiffs' Motion for Class Certification dated September 21, 2012;

3) Affirmation of Andrew P. Marks, Esq. in Opposition to Class Certification dated October 18, 2012, together with the exhibit annexed thereto;

4) Affidavit of Andrew Ziobro, sworn to October 17, 2012, together with the exhibits annexed thereto;

5) Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification dated October 18, 2012;

6) Affirmation of Lloyd Ambinder, Esq. in Support of Class Certification, dated October 25, 2012 together with the exhibits annexed thereto;

7) Affidavit of Scott Woodhouse, sworn to October 23, 2012;

8) Reply Memorandum of Law in Support of Plaintiffs' Motion for Class Certification dated October 25, 2012;[9]

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion by Plaintiffs Jenica Martin, Daniel Yahraes, Charles Nassif, and Arletty Diaz to certify this action as a class action is granted to the extent set forth below and is otherwise denied; and it is further

ORDERED that this action may be maintained as a class action on behalf of all individuals employed as Butlers, Bartenders and Captains by Restaurant Associates Events Corp. ("Restaurant Associates") and Compass Group USA Inc. ("Compass") from August 2, 2005 to December 31, 2011 and who worked at events where any service charge was assessed to customers (hereinafter "service charge"). The class does not include maintenance workers, corporate officers, salespersons, cooks, food preparers, chefs, dishwashers, directors, clerical, or officer workers (the "Class"); and it is further

ORDERED that Plaintiffs Jenica Martin, Daniel Yahraes, Charles Nassif, and Arletty Diaz are appointed representatives of the Class; and it is further

ORDERED that the Court will conduct a Conference on January 22, 2013 at 9:30 a.m. and will discuss with counsel at that time the issues relating to the designation of lead counsel/attorney of record, the form of notice and the method of providing notice to the class members, and issues of timing, including the date by which the notice shall be transmitted and the date by which class members may request exclusion, as well as any other issues relating to the management of the litigation; and it is further

ORDERED that counsel for Plaintiffs and Defendants shall exchange drafts of the proposed notice and submit to the Court by January 21, 2013 at 3:00 p.m. their respective versions and a copy marked to show the differences; and it is further

ORDERED that the schedule set forth herein, and the Conference herein ordered, may not be adjourned without the express written permission of the Court.

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[9]Though Defendants' counsel filed a sur-reply attorney affirmation, it has not been considered as it was unauthorized. Further, as Plaintiffs did not raise anything for the first time in their reply, there is nothing to which Defendants did not already have an opportunity to respond.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
January 7, 2013

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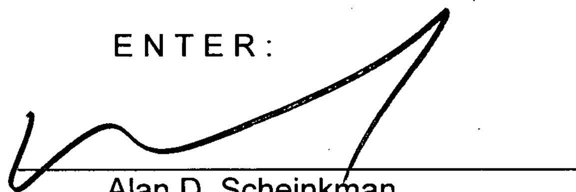

Alan D. Scheinkman
Justice of the Supreme Court

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