

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/02/18

DEPT. 308

HONORABLE ANN I. JONES

JUDGE

V. JAIME

DEPUTY CLERK

HONORABLE
#7

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

C. CONCEPCION, C.A.

Deputy Sheriff

TIMOTHY McCOY
CSR #4745 PRO TEMPORE

Reporter

10:00 am

BC652905

Plaintiff DAVID E. DWORSKY (X)

Counsel

JAY SOUTH

VS

Defendant TIMOTHY CAMPEN (X)

CABO CANTINA LLC ET AL

Counsel

NATURE OF PROCEEDINGS:

MOTION OF PLAINTIFFS JAY SOUTH, FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

The Court issues its tentative ruling.

Matter is called for a hearing.

The Order Appointing Court Approved Reporter as
Official Reporter Pro Tempore is signed and filed
this date. TIMOTHY J. McCOY CSR #4745

Counsel for both sides submit to the tentative
ruling.

The Court adopts the tentative ruling as the Final
Order of the Court as follows:

- (1) The settlement appears to be in the range of
reasonableness of a settlement that could
ultimately
be granted final approval by the Court;
- (2) Grant class certification;
- (3) Appoint Sean Slattery and Timothy Campen of
Slattery, Sobel & DeCamp, LLP as Class Counsel;
- (4) Appoint Plaintiff Jay South as Class
Representative;
- (5) Approve the notice;
- (6) Set the scheduled matters as indicated below; and
- (7) Plaintiffs' counsel shall file a proposed Order,

<p align="center">MINUTES ENTERED 02/02/18 COUNTY CLERK</p>

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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Plaintiff DAVID E. DWORSKY (X)

Counsel

JAY SOUTH

VS

Defendant TIMOTHY CAMPEN (X)

Counsel

CABO CANTINA LLC ET AL

NATURE OF PROCEEDINGS:

consistent with this ruling by, February 9, 2018.

SCHEDULE OF SETTLEMENT PROCEEDINGS

The following schedule is set by the Court:

- Preliminary Approval Hearing - February 2, 2018
- Deadline for Serving Notices to Class Members - February 28, 2018
- Deadline for Objecting or Opting Out - April 30, 2018
- Deadline for Submitting a Claim - May 21, 2018
- Deadline for Class Counsel to File Motion for Final Approval of Settlement and Motion for Attorney Fees (and respond to any objections) - June 18, 2018.

The Court set a Non-Appearance case review re Deadline to File Motion for Final Approval for JUNE 18, 2018.

Final Fairness Hearing and Motion for Final Approval of Class Action Settlement is set for AUGUST 3, 2018 at 11 a.m. in Department 308.

Further findings of the Court are more fully reflected in the Court's Ruling re Motion for Preliminary Approval of Class Action Settlement, filed this date and incorporated herein by reference

<p align="center">MINUTES ENTERED 02/02/18 COUNTY CLERK</p>
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/02/18

DEPT. 308

HONORABLE ANN I. JONES

JUDGE V. JAIME

DEPUTY CLERK

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JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

C. CONCEPCION, C.A.

Deputy Sheriff

TIMOTHY McCOY
CSR #4745 PRO TEMPORE

Reporter

10:00 am

BC652905

Plaintiff DAVID E. DWORSKY (X)
Counsel

JAY SOUTH
VS
CABO CANTINA LLC ET AL

Defendant TIMOTHY CAMPEN (X)
Counsel

NATURE OF PROCEEDINGS:

to the court file.

A copy of this Minute Order and the Court's Final Ruling is sent to counsel for each side.

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the MINUTE ORDER/FINAL ORDER RE MOTION FOR PRELIJMINARY APPROVAL upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in LOS ANGELES California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: FEBRUARY 2, 2018

Sherri R. Carter, Executive Officer/Clerk

By: _____

<p align="center">MINUTES ENTERED 02/02/18 COUNTY CLERK</p>

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/02/18

DEPT. 308

HONORABLE ANN I. JONES

JUDGE V. JAIME

DEPUTY CLERK

HONORABLE
#7

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

C. CONCEPCION, C.A.

Deputy Sheriff

TIMOTHY McCOY
CSR #4745 PRO TEMPORE

Reporter

10:00 am	BC652905	Plaintiff	DAVID E. DWORSKY	(X)
		Counsel		
	JAY SOUTH	Defendant	TIMOTHY CAMPEN	(X)
	VS	Counsel		
	CABO CANTINA LLC ET AL			

NATURE OF PROCEEDINGS:

V. JAIME, JUDICIAL ASSISTANT

JL. SEAN SLATTERY, ESQ.
CAMILLE JOY DECAMP, ESQ.
SLATTERY, SOBEL & DECAMP, LLP
12250 EL CAMINO REAL, SUITE 120
SAN DIEGO, CALIFORNIA 92130

MOE KESHAVARZI, ESQ.
SHEPPARD, MULLIN RICHTER & HAMPTON, LLP
333 S. HOPE STREET, 43RD FLOOR
LOS ANGELES, CALIFORNIA 90071

South v. RMG Sunset, Inc., et al.

MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date of Hearing: February 2, 2018
Department: 308
Case No.: BC652905

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles

FEB -2 2018

RULING:

- (1) The settlement appears to be in the range of reasonableness of a settlement that could ultimately be granted final approval by the Court;
- (2) Grant class certification;
- (3) Appoint Sean Slattery and Timothy Campen of Slattery, Sobel & DeCamp, LLP as Class Counsel;
- (4) Appoint Plaintiff Jay South as Class Representative;
- (5) Approve the notice;
- (6) Set the scheduled matters as indicated below; and
- (7) Plaintiffs' counsel shall file a proposed Order, consistent with this ruling by, February 9, 2018.

Sherri R. Carter, Executive Officer/Clerk
Court of Justice, Deputy

PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

As a "fiduciary" of the absent class members, the trial court's duty is to have before it sufficient information to determine if the settlement is fair, adequate, and reasonable. (*7-Eleven Owners for Fair Franchising v. The Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 [citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801, 1802 ("*Dunk*")].)

California Rules of Court, rule 3.769 governs settlements of class actions. Any party to a settlement agreement may submit a written notice for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion. (Cal. Rules of Court, rule 3.769(c).)

In determining whether to approve a class settlement, the court's responsibility is to "prevent fraud, collusion or unfairness to the class" through settlement and dismissal of the class action because the rights of the class members, and even named plaintiffs, "may not have been given due regard by the negotiating parties." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 60.)

FAIRNESS OF THE SETTLEMENT AGREEMENT

In an effort to aid the Court in the determination of the fairness of the settlement, *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244-245 ("*Wershba*"), discusses factors the Court should consider when testing the reasonableness of the settlement.

A presumption of fairness exists where: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the Court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of

objectors is small. (*Wershba, supra* at p. 245 [citing *Dunk, supra* at p. 1802].) The test is not the maximum amount plaintiff might have obtained at trial on the complaint but, rather, whether the settlement is reasonable under all of the circumstances. (*Wershba, supra* at p. 250.)

In making this determination, the Court considers all relevant factors including “the strength of [the] plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128 (“*Kullar*”) [citing *Dunk, supra* at p. 1801].)

“The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” (*City of Detroit v. Grinnell Corporation* (2d Cir. 1974) 495 F.2d 448, 455; see also *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 “[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.”.)

TERMS OF SETTLEMENT AGREEMENT

- Class Member(s) means all persons, who between January 1, 2012 and May 31, 2017, paid an undisclosed state living wage surcharge at one of Defendants’ restaurants. (¶2.5)
 - The Class Period is January 1, 2012 through May 31, 2017. (¶2.7)
- This is a claims-made settlement (¶2.3)
- No settlement fund or common fund is created or implied by this settlement agreement. Defendant will pay the following:
 - Up to **\$125,000** for attorneys’ fees and costs (¶4.7)
 - **\$2,500** for an incentive award to Plaintiff (¶4.8)
 - Up to **\$65,000** for the cost of administration (¶4.9)
- In consideration of the terms, conditions, and provisions of the Settlement Agreement, Defendant will provide the following benefits to the class:
 - **Injunction:** Defendants confirm that, as of May 31, 2017 they no longer apply a “living wage” surcharge — the surcharge that is the subject of the Action — to any customer’s bill at any of Defendants’ restaurants, and confirm that going forward for five years from the Effective Date of this Agreement they will not apply any surcharge to any customer’s bill at any restaurant within the Sunset Restaurant Management Group. (¶4.1, as amended)
 - **Payments to Class Members:** The Claims Administrator will set up a website for Releasing Settlement Class Members to submit claims. Releasing Settlement Class Members shall have the option of receiving either cash or a discount Voucher, as follows:
 - Full Refund with Receipt: Class Members who produce a valid receipt will receive a full refund for the surcharge amount. Releasing Settlement

Class Members who select this option shall have the choice of either mailing in physical copies of the completed submission form and receipt to the claims administrator, or uploading an image of their receipt onto the claims administration website according to instructions described thereon. (¶4.2.1, as amended)

- Flat \$3.00 Payment Without Receipt: A Releasing Settlement Class Member who does not have a receipt but wants a cash payment shall be entitled to a check, which shall be delivered by mail, in the amount of \$3 (three dollars) upon signing a declaration, under penalty of perjury, attesting that he or she visited one of Defendants' restaurants during the Class Period and paid the surcharge. (¶4.2.2)
- Voucher: Releasing Settlement Class Members will also have the option to receive a Voucher in lieu of a cash payment. (¶4.2.3)
 - Voucher is defined as a single Voucher for 10% off a customer's next purchase at any of Defendants' restaurants. Vouchers will have no expiration date. Only one Voucher may be used in a single transaction. Vouchers have no cash value, are not redeemable for cash in whole or in part. Vouchers are not gift cards or gift certificates under California law or otherwise. Vouchers are not valid for prior purchases. Vouchers may be used on sale and/or promotional items and can be used for tax. Otherwise, Class Members are responsible for any applicable sales tax. (¶2.20, as amended)
- In the event the Claims Administrator concludes that the cash/Voucher redemption process appears to involve fraud or other improper activity, after meeting and conferring Class Counsel and Defendants, the Claims Administrator may suspend the redemption process and consult with Class Counsel and Defendants about remedial measures. (¶4.3)
- There shall be no unpaid residual under CCP § 384 or any other statutory or case authority. Any amounts not provided to Class Members due to a failure to redeem cash or a Voucher will not be provided to any third party. Any such amounts will remain solely with Defendants. If, for any reason, a court determines otherwise, this Agreement shall be null and void. (¶4.4)
- The Claims Period has the following deadlines for Class Members:
 - 80 calendar days from the issuance of the notice to submit Claim Forms. (¶5.2, as amended.)
 - 60 calendar days from the date of the issuance of the class notice to submit opt-outs or objections. (¶2.14, as amended)
 - If more than 250 Class Members opt-out, Defendant may void the Settlement Agreement. (¶5.5)
- The Claims Administrator is Heffler Claims Group. (P Supp Brief at 8:9.)

- In the event the parties have a dispute about any issue related to this Agreement, they agree to submit to mediation before Hon. Richard Haden (Ret.) to attempt to resolve such dispute. (¶18)
- Class members who do not opt out will release certain claims, discussed in detail below.

ANALYSIS OF SETTLEMENT AGREEMENT

A. Does a Presumption of Fairness Exist?

1. Was the Settlement reached through arm's-length bargaining? Yes. Initial settlement talks with opposing counsel revealed the original Complaint Included incorrect names for some of the Defendant entities. (Campen Decl., ¶15.) Correcting the errors in party names was the primary basis for originally seeking to file an amended complaint. (*Ibid.*)

At the conclusion of mediation on June 2, 2017, the parties had reached a settlement in principle, subject to further proof. Specifically, Defendant RMG Sunset, Inc. demanded that all fourteen restaurant LLCs under the RMG Sunset management umbrella also be included in the settlement to promote finality of challenges to surcharge issue and for judicial economy. (Campen Decl., ¶6.) Class Counsel demanded an opportunity to review the discovery from the added locations before confirming the terms reached in the settlement in principle. (Campen Decl., ¶7.)

Defendants provided the requested data, and Class Counsel confirmed it was consistent with the previous data and in line with the proposed settlement. (Campen Decl., ¶8.) The initial settlement agreement was finally executed on June 16, 2017 with all the Sunset RMG restaurant entities included. (*Ibid.*) The First Amended Complaint was further modified to include all fourteen entities, as well as add several additional causes of action relevant to the matter. (*Ibid.*) In sum, there was no final settlement until ten days after mediation and not until after all relevant discovery was reviewed and vetted by Class Counsel. (*Ibid.*) (P Supp. Brief at 4:8-5:15.)

2. Were investigation and discovery sufficient to allow counsel and the Court to act intelligently? Subsequent to filing the original Complaint in this matter, the parties engaged in informal discovery. In May of 2017, Defendants' provided Plaintiff with 340 pages of discovery, which included all discovery Defendants had produced in the related *Stern* case in San Diego. This discovery included a monthly accounting of all surcharges collected from all of Defendants' restaurants from January 2016 through May 2017, as well as the total number of transactions per month for each individual restaurant during that same time period. (See Declaration of Timothy Campen, ¶4). Discovery provided to Plaintiff also included email correspondence between Defendants and customers regarding the surcharge, copies of notices of the surcharge provided in the restaurants, and internal communications between corporate personnel, restaurant managers, and restaurant staff regarding administration of the surcharge. (Campen Decl., ¶15).

Class Counsel demanded an opportunity to review the discovery from the added locations before confirming the terms reached in the settlement in principle. (Campen Decl., ¶7.)

3. Is counsel experienced in similar litigation? Yes. (Decamp Decl., ¶¶14 – 16.)

4. What percentage of class has objected? This cannot be determined until the fairness hearing. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group

2011) ¶ 14:139.18 ["Should the court receive objections to the proposed settlement, it will consider and either sustain or overrule them at the fairness hearing."].)

B. Is the settlement fair, adequate and reasonable?

1. Strength of Plaintiffs' case. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (*Kullar* at 130.)

• Economic Value:

Plaintiff's First Amended Complaint alleges five causes of action, all of which center around the same act of Defendants' particular means of including a "living wage surcharge" on every transaction. The total amount of money collected from surcharges by all Defendant restaurants was approximately \$2,102,754. (Campen Decl., ¶3.) The maximum limit of economic value of this settlement can be based on the total amount of surcharges collected. Alternatively, assuming each of the 2,064,598 transactions resulted in a claim for a \$3.00 refund, the upper limit of the value could theoretically be as high as \$6,193,794. (P Supp. Brief at 2:17-25.)

As a practical matter, it may be difficult or impossible to know the true number of patrons who were honestly unaware of the surcharge and accordingly seek reimbursement. Thus, the claims made rate among bona fide class members could very well result in a value less than that maximum. (*Id.* at 3:1-4.)

Defendants do not believe that Plaintiff's claims have any value, especially in light of the obstacles Plaintiff faces in attempting to certify a class. However, Defendants have agreed to enter into this settlement to achieve finality and avoid continuing costs of litigation. (Defendant's Further Supp. Brief at 2:16-21.)

• Value of Injunction:

The operative Settlement Agreement in this case now includes injunctive relief prohibiting Defendant restaurants from applying any surcharge to any transaction for 5 years. Considering the actual living wage surcharges invoked in the current case spanned less than 17 months and totaled over \$2 million, the value of this injunctive relief could be considered to have substantial economic value to future patrons of Defendant's restaurants. (P Supp. Brief at 3:15-23.)

Just as importantly, the broad language of prohibiting any surcharge would protect future patrons of Defendant restaurants from being subjected to similar attempts to collect additional revenue without raising the posted prices of menu items. (*Ibid.*)

2. Risk, expense, complexity and likely duration of further litigation. Further litigation carries the possibility of non-certification and unfavorable rulings on the merits of the above legal issues. If litigation were to proceed in this case and if Defendants were successful in defeating class certification, the public would necessarily be denied this injunctive relief. (*Id.* at 4:5-7.)

3. Risk of maintaining class action status through trial. It would have been Plaintiffs' burden to maintain the class action status through trial.

4. Amount offered in settlement. The Surcharge levied on consumers at Defendants' restaurants averaged approximately \$1.39 per transaction. (DeCamp Decl., ¶21.) As stated above, Defendants have offered to pay restitution to class members in one of the following three ways: (1) A full refund of the surcharge if the Class Member is able to produce a copy of

their receipt; (2) a check in the amount of \$3.00 upon signing a declaration, under penalty of perjury, attesting that he or she visited one of Defendants' restaurants during the Class Period and paid the surcharge; or (3) a voucher in lieu of cash payment. (Settlement Agreement, ¶¶4.21-4.23.)

No common fund will be created as a result of this settlement. Funds that go unclaimed by class members are, and will continue to be, the property of Defendants.

5. Extent of discovery completed and the stage of the proceedings. As stated above, it appears that Plaintiffs have completed sufficient discovery in order to make an informed decision.

6. Experience and views of counsel. As indicated above, Class Counsel is experienced in class actions. (DeCamp Decl., ¶¶14 – 16.) Class Counsel is of the opinion that the settlement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances. (*Id.* at ¶13.)

7. Presence of a governmental participant. This factor is not applicable here.

8. Reaction of the class members to the proposed settlement. The class members' reactions will not be known until they receive notice and are afforded an opportunity to object or opt-out. This factor becomes relevant during the fairness hearing.

SCOPE OF RELEASE

"Settlement Class Member Released Claims" as used herein means the claims, rights, penalties, demands, damages, debts, accounts, duties, costs and expenses (other than those costs and expenses required to be paid pursuant to this Settlement Agreement), liens, charges, complaints, causes of action, obligations, or liabilities that are released, acquitted and discharged pursuant to Section six of this Agreement. (¶2.18, as amended)

For good and valuable consideration set forth herein, the receipt and sufficiency of which is hereby acknowledged, all Releasing Settlement Class Members, do hereby irrevocably release, acquit, and forever discharge Defendants of and from any and all claims ... of any and every kind that were asserted in the Action, or that could have been asserted but were not asserted in the Action or in any other court or forum, arising out of or related to the living wage surcharge charged by Defendants as alleged in the Action, whether such allegations were or could have been based on common law or equity, or on any statute, rule, regulation, order, or law, whether federal, state, or local, including, without limitation, claims under federal or state unfair competition, false advertising laws, claims brought under California Business and Professions Code Sections 12024 *et seq.*, and California's Consumer Legal Remedies Act. (¶6.1)

Settlement Class Member Released Claims also include a release of all claims for Attorneys' fees and Costs incurred by Plaintiff, Releasing Settlement Class Members or by Class Counsel or any other attorney in connection with the Action and this Settlement. (¶6.2)

Releasing Settlement Class Members understand and agree that the release of the Settlement Class Member Released Claims is a full and final general release applying to both those Settlement Class Member Released Claims that are currently known, anticipated, or disclosed to Releasing Settlement Class Members and to all those Settlement Class Member Released Claims that are presently unknown, unanticipated, or undisclosed to any Releasing Settlement Class Members arising out of or related to the living wage surcharge charged by Defendants as alleged in the Action. Releasing Settlement Class Members acknowledge that the

facts could be different than they now know or suspect to be the case, but they are nonetheless releasing all such unknown claims. In furtherance of such intention, the release herein given shall be and remain in effect as a full and complete release of such matters notwithstanding the discovery or existence of any such additional different claims or facts relative to the matters released. This is an essential term of this Agreement without which there would have been no settlement. (¶6.3)

CONDITIONAL CLASS CERTIFICATION

A. Standards

A detailed analysis of the elements required for class certification is not required, but it is advisable to review each element when a class is being conditionally certified. (*Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 620, 622-627.) The trial court can appropriately utilize a different standard to determine the propriety of a settlement class as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases. (*Dunk* at 1807, fn. 19.) Because a settlement eliminates the need for a trial, when considering whether to certify a settlement class, the court is not faced with the case management issues present in certification of a litigation class. (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 859.) Finally, the Court is under no “ironclad requirement” to conduct an evidentiary hearing to consider whether the prerequisites for class certification have been satisfied. (*Wershba, supra* at p. 240.)

B. Analysis

1. Numerosity. The total number of transactions during the period in which the surcharge was in place among all restaurants in the Sunset Restaurant Management Group total 2,064,598, (Declaration of Timothy Campen, ¶3 [attached to Plaintiff’s Supplemental Brief (“P Supp. Brief”) as Exhibit 8].) Class Counsel asserts this number may be used as a reasonable estimate of the upper limit of the putative class members. (P Supp. Brief at 1:18-23.)

2. Ascertainability. This class definition “is precise, objective and presently ascertainable.” (*Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919.) Plaintiff contends that the class members in this case are readily ascertainable as being every patron who paid an undisclosed surcharge for food and/or beverages at any of Defendants’ restaurants between January 1, 2012 and May 31, 2017. Defendants do not concede that a class is ascertainable, but will not oppose the Court’s certification of the Settlement Class, as defined in the Amended Settlement Agreement, solely for the purposes of effectuating this settlement. (Supplemental Brief at 3:20-26.) Milton Zampelli, an owner of Defendant companies, states that Defendants do not store, record or maintain any customer information. (Declaration of Milton Zampelli, ¶4).

3. Community of interest. “The community of interest requirement involves three factors: ‘(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.’” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) Here, the class representative was a patron of one of Defendants’ restaurants and paid a Surcharge of \$2.70. He alleges he was not provided notice of this Surcharge. Like Plaintiff, other Class Members paid a surcharge and will seek restitution in the form of a cash payment or voucher. Thus, the community of interest requirement is met.

4. Adequacy of class counsel. As indicated above, Class Counsel is experienced in class actions.

5. Superiority. Given the relatively small size of the individual claims, a class action appears to be superior to separate actions by the class members.\

Since the elements of class certification have been met, the class may be conditionally certified at this time.

NOTICE TO CLASS

A. Standard

California Rules of Court, rule 3.769(e) provides: “If the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing.” Additionally, rule 3.769(f) states: “If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.”

B. Form of Notice

The revised proposed notice letter to class members (“long-form notice”) is attached to Plaintiff’s Additional Supplemental Brief as Exhibit 6. The information provided in the proposed long-form notice includes a summary of the litigation, the nature and terms of the settlement, the procedures for participating in, opting out of, or objecting to the settlement, and the time, date, and location of the final approval hearing.

A proposed flyer (“short-form notice”), which will be posted at Defendants’ restaurants, is attached to the Joint Supplemental Declaration as Exhibit 4. The flyer directs potential class members to a website where they can view a claim form and full details regarding the settlement.

A proposed claim form is attached to the Joint Supplemental Declaration as Exhibit 6.

The Court finds the notice acceptable.

C. Method of Notice

Within 25 calendar days of the Preliminary Approval Date, the Claims Administrator or Defendants shall arrange for the distribution of the Summary Notice to all Class Members by doing the following:

1. Publishing the notice in the following three weekly newspapers: LA Weekly, OC Weekly and San Diego Reader, once during the first week of the Claims Period, and once approximately three weeks before the end of the Claims Period;
2. Publishing the notice on each of Defendants' websites and providing a link to the settlement website on each of Defendants' websites— www.cabo.cantina.com; www.fiestacantina.net; www.pbcantina.com; www.bajabeachcafe.com; and www.jamesonsirishpub.com;
3. Sending an email notice to each recipient on Defendants' email list;

4. Displaying a sign (short-form notice) at the front entrance and at the hostess station and/or first point of contact of each of Defendants' restaurants throughout the 80 day claims period; and
5. Provide flyers (short-form notice) to customers at the location of the notice signs at the hostess station and/or first point of contact of each of Defendants' restaurants throughout the 80 day claims period. (§15.2, as amended.)

In addition, the Claims Administrator shall post the Notice, the operative complaint in the Action, this Agreement, the Order Granting Preliminary Approval of Class Action Settlement and Provisional Class Certification, on the claims website. (*Ibid.*)

D. Cost of Notice

The settlement administration costs are capped at **\$65,000**. (§14.9.) This amount appears reasonable. However, prior to the time of the final fairness hearing, the Claims Administrator must submit a declaration attesting to the total costs incurred and anticipated to be incurred to finalize the settlement for approval by the Court.

ATTORNEY FEES AND COSTS

California Rules of Court, rule 3.769(b) states: "Any agreement, express or implied, that has been entered into with respect to the payment of attorney fees or the submission of an application for the approval of attorney fees must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action."

Ultimately, the award of attorney fees is made by the Court at the fairness hearing, using the lodestar method with a multiplier, if appropriate. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 625-626; *Ketchum III v. Moses* (2000) 24 Cal.4th 1122, 1132-1136.) In common fund cases, the Court may utilize the percentage method, cross-checked by the lodestar. (*Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 503.) Despite any agreement by the parties to the contrary, "the court has an independent right and responsibility to review the attorney fee provision of the settlement agreement and award only so much as it determined reasonable." (*Garabedian v. Los Angeles Cellular Telephone Company* (2004) 118 Cal.App.4th 123, 128.)

The question of whether class counsel is entitled to **\$125,000** in fees and costs will be addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees.

Counsel should also be prepared to justify any costs sought by detailing how such costs were incurred.

SCHEDULE OF SETTLEMENT PROCEEDINGS

The following schedule is set by the Court:

Preliminary Approval Hearing – February 2, 2018

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Final Fairness Hearing and Final Approval – August 3, 2018 at 11 a.m.