UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LIZABETH MALINSKI, LORRAINE SMITH, KATHLEEN YAZINKA, FILIS WARREN, SANDRA MOORES, and all others similarly situated, Plaintiffs,	)	
v.	)	Civil Action No. 08-11859-RWZ
STARWOOD HOTELS & RESORTS WORLDWIDE, INC. and PYRAMID ADVISORS LLC, Defendants.	)	

PLAINTIFFS' ASSENTED-TO MOTION FOR
FINAL APPROVAL OF CLASS ACTION SETTLEMENT

This motion is being submitted in advance of the Class Settlement Fairness Hearing scheduled to be held before this Court on Wednesday, October 13, 2010. The Plaintiffs hereby request final approval of their settlement with Starwood Hotels & Resorts Worldwide, Inc. ("Starwood") pursuant to Rule Fed. R. Civ. P. 23(e). This Court issued preliminary approval of this proposed class settlement with Defendant Starwood on July 22, 2010.

This action was brought on behalf of wait staff employees who have worked at banquet functions at hotels that were owned or operated by either of the two Defendants in this case, namely, Starwood and Pyramid Advisors LLC ("Pyramid"). Plaintiffs challenged Defendants' practices in distributing banquet service charges and asserted claims under the Massachusetts Tips Law, Mass. Gen. L. c. 149, § 152A, and the Massachusetts Minimum Wage Law, Mass. Gen. L. c. 151, §§ 1 and 7, as well as

the common law. Starwood denies the allegations in the Complaint and asserts that its practices fully complied with all legal requirements, including with Massachusetts Tips Law and the Massachusetts Minimum Wage Law.

Plaintiffs and Starwood have reached an agreement to settle this action on a class-wide basis as to fourteen hotels that Starwood owned or operated in Massachusetts during the applicable time period. The specific hotels involved and the applicable time are set forth in the attached Settlement Agreement. (A copy of the Settlement Agreement setting forth in detail the terms of the settlement is attached hereto as Exhibit 1.) This settlement only relates to Plaintiffs' claims against Starwood. Plaintiffs have already settled their claims against Pyramid in a separate agreement which was approved by order of this Court on May 24, 2010. See Docket No. 42. The total amount of proposed settlement with Starwood is $1,650,000. The proposed settlement is a fair result for the class and will, in these difficult economic times, allow the class to avoid the delay and uncertainty of further litigation.

For purposes of this proposed settlement, and as preliminarily approved by this Court, the settlement class is defined as:

> All function wait staff who were employed by Starwood as banquet wait staff at the following hotels and who received service charge or banquet gratuity distributions for work at banquet functions at such hotels during the period of time between October 5, 2002, and December 31, 2009: Boston Park Plaza, Four Points Hyannis, Four Points Lexington, Four Points Waltham, Sheraton Boston, Sheraton Braintree, Sheraton Colonial, Sheraton Framingham, Sheraton Lexington, Sheraton Needham, Sheraton Newton, Westin Boston Waterfront, Westin Copley Place, Westin Waltham.

Following the Court's preliminary approval of the settlement, notices were sent to the class as defined above (1,872 people total), and 817 class members have submitted

claim forms to receive their share of the settlement so far, accounting for over 75% of the settlement funds set aside for payment of claims. No class members have objected to the settlement, and no class members submitted requests to opt out of the settlement as of the opt-out deadline, September 16, 2010. See Declaration of Brendan McInerney, attached as Exhibit 2, ¶¶ , an employee of the claims Administrator who has prepared this declaration for the court to establish the administrator's compliance with the Preliminary Approval Order and the terms of the settlement.

Under the parties' agreement, assuming Court approval of the settlement, a final judgment will then be entered and the settlement proceeds would be distributed to putative class members according to the schedule agreed upon by the parties (as explained below). A proposed Order of Approval of Settlement and Dismissal with Prejudice is attached as Exhibit 3.

I. THE PROPOSED PLAN OF DISTRIBUTION OF THE SETTLEMENT FUNDS.

An independent third-party claims administrator mailed the Notice and Claim Form & Release approved by this Court to class members on June 23, 2010. See Exhibit 2, ¶ 9, and notice and claim form Exhibit 2.A. The deadline to submit claims was September 16, 2010, and 817 class members have submitted claim forms. Exhibit 2, ¶¶ 9, 12.[1]

Plaintiffs propose that the settlement funds be distributed to banquet wait staff employees who worked at any of the 14 hotels identified above during the period of time

[1] As explained in Mr. McInerney's declaration, 26 claim forms submitted are "deficient" in that they were received late or have incomplete information. These claimants will be eligible to receive payment provided they cure any defect in their claim form by November 19, 2010. Under the terms of the Settlement Agreement, other late claims will be accepted and paid, to the extent funds remain. To be considered eligible for payment, late claims must have complete information and be received by Rust no later than November 19, 2010.

Starwood operated the hotel between October 5, 2002 and December 31, 2009. Under the terms of the proposed settlement, each hotel will be treated as a "subclass" for purpose of distributing the settlement funds. The portion of the settlement funds that is assigned to each hotel subclass shall be calculated based on the amount of banquet administrative fees charged by that hotel during the period from October 5, 2005 to December 30, 2009.[2]

Attached as Exhibit 2.B is a list of claimants (with names redacted) and their settlement shares. As explained in the declaration of Brendan McInerney (Exhibit 2), 817 class members submitted claim forms, of which 791 claim forms are timely and complete. Exhibit 2, ¶¶ 12-14. The 791 claim forms represent approximately 42% of the class, and the total amount due to be paid to these claimants is $770,610.17, approximately 75% of the total class settlement fund.

The individual awards to members of the Settlement Class who submit a valid Claim Form & Release have been calculated based on the service charges the class member was paid in comparison to the total service charges paid to all banquet wait staff at the hotel during the hotel subclass period, except that there is a minimum guaranteed payment of $20.00. The settlement amounts for class members range from the minimum $20 payment to more than $9,000. Of the claims submitted thus far, more than 160 class members are receiving amounts of $1,000 or more. Assuming the Court grants final approval of the proposed settlement, the administrator will issue checks to class members who submitted a completed claim form within 21 days after entry by the

[2] For the two hotels that Starwood did not operate during that period, the subclass share will be equal to the lowest of the amounts ascribed to the other twelve hotels.

Court of an order granting approval and dismissing this action.[3] A copy of a proposed Order is attached as Exhibit 3.

The proposed distribution also allocates one-third for attorneys' fees and costs, as well as $20,000 in incentive payments for the five lead plaintiffs who brought this case forward and assisted counsel with pursuing it on behalf of a class ($4,000 each).

II. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

It is well-established that courts favor settlements of lawsuits over continued litigation. See, e.g., Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910); Durett v. Housing Auth. of Providence, 896 F.2d 600, 604 (1st Cir. 1990); In re Viatron Computer Sys. Corp., 614 F.2d 11, 15 (1st Cir. 1980). Before granting approval of a proposed class action settlement, the Court must find that the settlement is fair, reasonable, and adequate. See Mass. R. Civ. P. 23(c); Sniffin v. Prudential Ins. Comp., 395 Mass. 415 (1985).

A presumption of fairness of a settlement is established where the parties can show that: (1) the settlement was the product of arms-length bargaining; (2) sufficient discovery and investigation has been taken to enable counsel and the court to act intelligently; (3) the proponents of the settlement are counsel experienced in similar litigation; and (4) the number of objectors or interests they represent is not large when compared to the class as a whole. 4 Herbert B. Newburg & Alba Conte, NEWBURG ON CLASS ACTIONS § 11:41 (3d ed. 1992-2002). In addition, courts consider the amount of the settlement compared to the amount at issue in the case and the plaintiffs' likelihood

[3] Any unclaimed funds remaining 160 days after the Court's final approval of the settlement will be transferred to a cy pres fund for the benefit of Greater Boston Legal Services.

of succeeding on the merits and recovering damages on their claims. See, e.g., M. Berenson Co. v. Faneuil Hall Marketplace, Inc., 671 F. Supp. 819, 822-823 (D. Mass. 1987).

In the case at bar, an examination of each of these factors demonstrates that the proposed settlement is fair, reasonable, and adequate to the members of the class, and should be approved by the Court. Notably, settlements in similar cases brought by Plaintiffs' counsel Shannon Liss-Riordan and Hillary Schwab under the Massachusetts Tips Law, Mass. Gen. L. c. 149, § 152A, have been approved by Massachusetts courts in more than twenty cases.[4] These settlements contained very similar terms to the proposed settlement in this case, including the same provision for attorneys' fees and the same basic method for notifying class members and distributing the settlement proceeds.

[4] These cases include Hayes et al. v. Aramark Sports Service LLC, U.S. Dist. Ct. (D. Mass.) C.A. No. 08-10700; Niles et al. v. Ruth's Chris Steak House, U.S. Dist. Ct. (S.D.N.Y.) C.A. No. 08-07700; Mitchell et al. v. PrimeFlight Aviation Services, U.S. Dist. Ct. (D.Mass.) C.A. No. 08-cv-10629; Barreda et al. v. Prospect Airport Services, U.S. Dist. Ct. (N.D. Ill.) C.A. No. 08-3239; Noons et al. v. Flemings/Boston, Limited Partnership, C.A. No. 09-0167 (Suffolk Superior Ct. 2009); Scatto v. Fine Hotels Corp., C.A. No. 07-1823 (Bristol Superior Ct. 2009); Mouiny v. Commonwealth Flats Dev. Corp. d/b/a Seaport Hotel & World Trade Center, C.A. No. 06-1115 (Suffolk Superior Ct. 2009); Shea, et al. v. Weston Golf Club, C.A. No.02-1826 (Middlesex Superior Ct. 2009); Verecchia et al. v. DT Management, Inc. d/b/a Hotel @ MIT et al., C.A. No. 08-0127 (Middlesex Superior Ct. 2008); Rose et al. v. Ruth's Chris Steak House Boston, C.A. No. 07-5081 (Suffolk Superior Ct. 2008); Perry et al. v. Woodman's, Inc. et al., C.A. No. 08-1218 (Essex Superior Ct. 2008); Roth et al. v. Vesper-Country Club, C.A. No. 07-1231 (Middlesex Superior Ct. 2008); Cooney et al. v. Compass Group Foodservice and Northeastern University, C.A. No. 02-3159 (Middlesex Superior Ct. 2008); Byrne et al. v. Elephant and Castle Group, LLC, C.A. No. 06-4732 (Suffolk Superior Ct. 2008); Ng et al. v. Jin Restaurant Group LLC, C.A. No. 07-333 (Essex Superior Ct. 2008); Fernandez et al. v. Four Seasons Hotel, C.A. No. 02-4689 (Suffolk Superior Ct. 2008) (banquets); Banks et al. v. SBH Corp. (Grill 23), C.A. No. 04-3515 (Suffolk Superior Ct. 2007); Frye et al. v. Columbia Sussex Corp., C.A. No. 06-4622 (Middlesex Superior Ct. 2007); Calcagno et al. v. High Country Investor, Inc. (Hilltop), C.A. No. 03-0707 (Essex Superior Ct. 2006); Ellison, et al. v. NPS, LLC, C.A. No. 05-01105 (Middlesex Sup. Ct. 2006); Meimaridis, et al. v. Brae Burn Country Club, C.A. No. 04-3769 (Middlesex Superior Ct. 2006); Hough et al. v. Select Restaurants, Inc. d/b/a Top of the Hub, C.A. No. 05-1258 (Suffolk Sup. Ct. 2006); Bullock et al. v. Ritz-Carlton Hotel Co., C.A. No. 04-04379 (Suffolk Sup. Ct. 2005); Michalak et al. v. Boston Palm Corporation, C.A. No. 03-1334 (Suffolk Sup. Ct. 2004); Williamson et al. v. DT Management Co. d/b/a Boston Harbor Hotel, Inc., C.A. No. 02-01827 (Middlesex Sup. Ct. 2004); Fernandez et al. v. Four Seasons Hotel, LTD, C.A. No. 02-4689 (Suffolk Sup. Ct. 2004); Keyo et al. v. Seaport Hotel and World Trade Center Boston, et al., C.A. No. 02-3339 (Suffolk Sup. Ct. 2004); Licari et al. v. Meridien Hotels, Inc., C.A. No. 02-3340 (Suffolk Sup. Ct. 2003); Latta et al. v. The Nashawtuc Country Club, Inc., C.A. No. 01-4185 (Middlesex Sup. Ct. 2003).

In this case, the proposed settlement was rigorously negotiated, and agreement was only reached after day-long mediation with an experienced wage and hour mediator from JAMS Endispute, Michael Loeb, Esq. The mediation occurred after the parties engaged in written discovery and Starwood produced almost 16,000 pages of documents relating to the various hotels from which Plaintiffs' Counsel was able to analyze the scope of potential liability and damages. The settlement was clearly reached as a result of arm's-length negotiations.

When sufficient discovery has been provided and the parties have bargained at arm's-length, there is a presumption in favor of the settlement. See City Partnership Co. v. Atlantic Acquisition, 100 F.3d 1041, 1043 (1st Cir. 1996); United States v. Cannons Engineering Corp., 720 F. Supp. 1027, 1036 (D. Mass. 1989); Berenson, 671 F. Supp. at 822 (where a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair).

As described in the preliminary approval motion, Plaintiffs also seek $4,000 enhancement payments for each of the five lead Plaintiffs. As noted in the preliminary approval motion, courts have recognized that such payments can serve an important function in promoting class action settlements.[5] Indeed, this Court has approved

[5] Enhancement payments are generally approved so long as they are not "greatly disproportionate to the recovery set aside for absent class members" in order to ensure "that the named plaintiffs, as fiduciaries to the class, have not been tempted to receive high incentive awards in exchange for accepting suboptimal settlements for absent class members." Sheppard v. Consolidated Edison Company of New York, Inc., 2002 WL 2003206, *5-6 (E.D.N.Y. 2002) (collecting cases approving enhancement payments). See also Ingram v. The Coca-Cola Co., 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding $300,000 to each of four representative plaintiffs); In re Dun & Bradstreet Credit Servs. Customer Litig., 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (citing cases in support of enhancement payments and awarding payments ranging from $35,000 to $50,000 for named plaintiffs); Yap v. Sumintomo Corp. of Am., 1991 WL 29112, *9 (S.D.N.Y. 1991) (awarding $30,000 additional compensation to representative plaintiffs).

substantially larger enhancement payments in another Massachusetts Tips Law class action. See Hayes et al. v. Aramark Sports LLC, D. Mass. Civil Action No. 08-10700-RWZ (Docket Nos. 41, 43) (approving incentive payments of $25,000 each for two lead plaintiffs in $1.5 million settlement).

Indeed, enhancement payments serve a particularly important role in employment class actions, where the lead plaintiffs are risking their livelihood to bring the case forward on behalf of their fellow co-workers. This is true both in cases such as this one, in which all five lead plaintiffs are still employed by one of the Defendants and in cases in which the lead plaintiffs no longer work for the defendant but remain employed in the industry. In the Internet age, all a prospective employer needs to do to learn that these individuals have been lead plaintiffs in a wage and hour class action is to type their name in to an Internet search engine.[6] Thus, lead plaintiffs in a case such as this have taken a significant risk in order to bring these claims on behalf of their co-workers.

Courts have recognized the important role of class actions in the employment context precisely because of this very real element of potential retaliation. See, e.g., Overka et al. v. American Airlines, Inc., D. Mass. Civil Action No. 08-10686-WGY (Docket No. 50, at 22) (in certifying national class of skycaps challenging $2 per bag curbside check-in charges, Judge Young noted with approval skycaps' argument that "class adjudication is superior in the employment context because fear of employer retaliation may have a chilling effect on employees bringing claims on an individual

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[6] The first entry that comes up from a "Google" search for the lead plaintiffs here is to a website listing labor cases filed in Massachusetts, *see* http://dockets.justia.com/browse/state-massachusetts/court-madce/noscat-8/nos-790/.

basis" and held that class action "is a superior method for adjudication of the controversy"); see also Perez v. Safety-Kleen Systems, Inc., 253 F.R.D. 508, 520 (N.D. Cal. 2008) (concluding class action was superior because, *inter alia*, "some class members may fear reprisal"); Guzman v. VLM, Inc., 2008 WL 597186, at *8 (E.D.N.Y. 2008) (noting "valid concern" that "many employees will be reluctant to participate in the action due to fears of retaliation"). This same consideration makes enhancement payments even more crucial in employment class action settlements as well.

III. THE REQUESTED ATTORNEYS' FEE IS FAIR AND REASONABLE AND SUPPORTED BY THE APPLICABLE PRECEDENT.

The proposed distribution of the settlement proceeds provides for a one-third share for attorneys' fees and expenses. The lead plaintiffs support this payment, and in addition, the Notice of Settlement will inform class members that one-third of the settlement proceeds would be used to pay for attorneys' fees. Plaintiffs' Counsel accepted this case on a contingent fee arrangement, with payments for filing and other expenses paid by Plaintiffs.

The proposed attorneys' fee is the same standard one-third share that has been approved routinely by judges presiding over class action settlements (see cases cited infra at 11-12), including the judges who have ruled on the fairness of the other settlements achieved by Plaintiffs' counsel in tips law cases listed above at note 4 (and including the 1/3 share awarded by this Court in the $1.5 million settlement cited above, Hayes et al. v. Aramark Sports LLC, D. Mass. Civil Action No. 08-10700-RWZ (Docket Nos. 41, 43)).

Plaintiffs' counsel have been the pioneers in the development of the law protecting tipped employees in Massachusetts and beyond. Over the last eight years, Plaintiffs' lead counsel, Attorney Shannon Liss-Riordan, has represented wait staff in more than fifty cases brought under state and federal tips laws very similar to this one, in which the wait staff claim they have not been permitted to retain the total proceeds of charges added to food and beverage bills or tips given to them by patrons. Many of these cases have settled, and others remain in various stages of litigation. Along with her co-counsel Attorney Hillary Schwab, she has taken three tips cases to trial and has won all three before juries: Calcagno et al. v. High Country Investor, Inc., d/b/a Hilltop Steak House, C.A. No. 03-0707, Mass. Sup. Ct. (Essex 2006) (banquet coordinators not entitled to share in gratuities); Benoit et al. v. The Federalist, Inc., C.A. No. 04-3516, Mass. Sup. Ct. (Suffolk 2007) (coordinators not entitled to portion of banquet service charges); and DiFiore et al. v. American Airlines, Inc., C.A. No. 07-10070, U.S. Dist. Ct. (D. Mass. 2008) (airline's policy of collecting $2 per bag charge for curbside check-in that was not distributed to skycaps violated Mass. Tips Law and rendered airline liable for tortious interference with advantageous relations). She and Attorney Schwab have also handled two tips cases on appeal, both of which they also won: DiFiore et al. v. American Airlines, Inc., 454 Mass. 486 (2009) (Massachusetts Supreme Judicial Court decided on certified question that non-employers are covered by Mass. Tips Law, affirming jury verdict for plaintiff skycaps); Cooney et al. v. Compass Group Foodservice, 69 Mass. App. Ct. 632 (2007) (reversing trial court's denial of summary judgment for plaintiff servers, holding that Massachusetts Tips Law should be strictly construed against establishment that did not distribute proceeds of charges labeled

"service charges" to wait staff employees). Plaintiffs' counsel have prevailed on summary judgment on behalf of plaintiff wait staff in at least seven tips cases. She has been appointed class counsel for a national class of wait staff employees in a case against a national steakhouse chain, Johnson et al., and Morton's Restaurant Group, Inc., AAA Case No. 11 160 01513 05 (confirmed by the federal district court, Judge Mark L. Wolf, C.A. No. 07-11808 (D. Mass. 2008)).

Plaintiffs' counsel's expertise has allowed them to litigate this case much more efficiently and effectively than would attorneys with less experience in this area of law.

Courts generally favor awarding fees from a common fund based upon the percentage of the fund method. As the Supreme Court has explained:

> [T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole. . . . Jurisdiction over the fund involved in the litigation allows a Court to prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (citations omitted); see also Blum v. Stenson, 465 U.S 886, 900 n.16 (1984); In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Lit., 56 F.3d 295 (1st Cir. 1995) (awarding attorneys' fees of $68 million out of a $220 million settlement fund).[7]

[7] Among the advantages recognized by the First Circuit in Thirteen Appeals, was the fact that the percentage method is less burdensome to administer than the lodestar method. *See id*. at 307. The court also endorsed the percentage of recovery approach because it is result-oriented, and hence it promotes the more efficient use of attorney time, and because the percentage method also better reflects the market value of counsel's services. In Thirteen Appeals, the First Circuit noted that other Courts of Appeals have *required* the use of percentage awards in common fund cases. See, e.g., Camden Condominium Ass'n v. Dunkle, 946 F.2d 768, 771 (11th Cir. 1991); Swedish Hospital Corp. v. Shalala, 1 F.3d 1261, 1271-72 (D.C. Cir. 1993); see also Report of Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237, 255 (1985) and Federal Judicial Center, Awarding Attorneys' Fees and Managing Fee Litigation, 63-64 (1994).

A one-third attorney's fee in a common fund case has been consistently approved as reasonable. Examples of cases in which a one-third fee was approved include Chalverus v. Pegasystems, Inc., C.A. No. 97-12570-WGY (December 19, 2000) (awarding as an attorneys' fee one-third of a more than $5 million recovery); In re: Peritus Software Services, Inc. Sec. Litig., C.A. No. 98-10578-WGY (February 28, 2000); In re: Copley Pharmaceutical, Inc. Sec. Litig., C.A. No. 94-11897-WGY (D. Mass. Feb. 8, 1996) (awarding one-third of a $6.3 million settlement fund); Morton v. Kurzweil Applied Intelligence, Inc., C.A. No. 10829-REK (D. Mass. Feb. 4, 1998); In re Gillette Securities Litigation, C. A. No. 88-1858-REK (D. Mass. Mar. 30, 1994); Wilensky v. Digital Equipment Corporation, C.A. No. 94-10752-JLT (D. Mass. July 11, 2001); In re Picturetel Corporation Sec. Litig., C.A. No. 97-12135-DPW (D. Mass. Nov. 4, 1999) (approving award of one-third of a $12 million settlement fund); Zeid v. Open Environment Corp., C.A. No. 96-12466-EFH (D. Mass. June 24, 1999) (awarding a fee of one-third of a $6 million settlement).

Given this precedent approving one-third recovery for attorneys' fees in class action cases, as well as these additional factors described here, and the fact that no class member has raised any objection, the Court should recognize that a one-third fee recovery in this case is reasonable.

VI. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant final approval of the Settlement as set forth in the Settlement Agreement.

Specifically, Plaintiffs request that the Court issue an Order of Approval of Settlement and Dismissal with Prejudice in the form attached to this motion as Exhibit 3.

Respectfully submitted,

LIZABETH MALINSKI, LORRAINE SMITH, KATHLEEN YAZINKA, FILIS WARREN, SANDRA MOORES, and all others similarly situated,

By their attorneys,

/s/ Hillary Schwab
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Dated: October 12, 2010

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2010, a copy of this document was served by electronic filing on all counsel of record.

/s/ Hillary Schwab
Hillary Schwab, Esq.