IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAIʻI

BRIAN FLYNN AND NICHOLAS BONAR, individually and on behalf of a Class of Similarly Situated Persons, Plaintiffs, v. FAIRMONT HOTELS & RESORTS, INC. dba THE FAIRMONT ORCHID, HAWAII, FHR (ML) OPERATING COMPANY, LLC and DOE DEFENDANTS 1-50, Defendants.	)	CIVIL NO. 10-00285 DAE/LEK **MEMORANDUM IN SUPPORT OF MOTION PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND FOR APPROVAL OF CLASS NOTICE AND DISSEMINATION PLAN**

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On April 8, 2010, Plaintiffs BRIAN FLYNN AND NICHOLAS BONAR ("Plaintiffs") filed this action, individually, and on behalf of a class of similarly situated employees whom Defendants FAIRMONT HOTELS & RESORTS (U.S.), INC. dba THE FAIRMONT ORCHID, HAWAII, and FHR (ML) OPERATING COMPANY, LLC (collectively "Defendants") subjected to the same unfair methods of competition in violation of Hawaii Revised Statutes ("HRS") Chapter 480 and wrongful withholding of tip income under HRS Section 388-6, all by

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virtue of Defendants' violations of HRS §481B-14. Plaintiffs' claims are for damages, disgorgement, and injunctive relief.

HRS §481B-14 expressly requires:

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

Thus, HRS§481B-14 requires that any service charge paid by consumers ***must*** be either: (1) completely distributed to employees as tip income ***or*** (2) clearly disclosed to the purchasers of services that the service charge monies were being appropriated to costs or expenses other than employee wages and tip income. HRS §481B-4 provides that a violation of HRS §481B-14 is automatically deemed or a *per se* violation of HRS §480-2.

All four of the requirements of Federal Rules of Civil Procedure ("FRCP") Rule 23 are satisfied here. The Class involves in at least 100 employees [actually in excess of 187] and is therefore presumptively too *numerous* to make joinder practical. *Exhibit "2"*. Class counsel and Messrs. Flynn and Bonar will *adequately* represent the Class, as they have no conflict of interest and Messrs. Flynn and Bonar understand their duties and responsibilities as class representatives. *Declarations of Brian Flynn, Declaration of Nicholas Bonar;*

Declaration of Brandee J.K Faria. All of the claims of the Class arise from a *common* nucleus of operative facts: the putative Class consists of Defendants' employees who served customers of the Fairmont Orchid who were charged a standardized "service charge" (or "gratuity" as they sometimes call it), on top of the total cost of food and beverage, typically ranging between 17% and 23% of the food and beverage price. Defendants admit that rather than distribute all of the service charge or disclose to its customers that they were retaining part of this service charge as mandated by HRS §481B-14, Defendants retained part of the service charge without making the statutorily required disclosure to their customers. *Exhibit "2"*.

Messrs. Flynn's and Bonar's claims are not only *typical; they are **exactly the same*** as that of the entire class. The facts and law here are not only universally *common* as to every class member; *they are **identical*** and present no issues of material fact. The only issue anticipated to remain for the jury after motion practice is completed will be how much each employee should be compensated for the monies improperly withheld from them over time. This is a quintessential class action.

II. THE PROPOSED CLASS

The Class for which certification is sought consists of the following:

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

All of Plaintiffs' claims arise under HRS Sections 480-2 and 480-13 and or Section 388-6, because of Defendants' ongoing violation of Section 481B-14. The class period runs from enactment of HRS §481B-14 in 2000 to the present.

III. CLASS CERTIFICATION SHOULD BE ORDERED

A. The Legal Standard for Class Certification and Support for Each Requirement.

Class action lawsuits have long been a part of American jurisprudence and have been firmly incorporated into federal jurisprudence under Rule 23 of the FRCP. In cases such as this, where there is a predominance of common questions concerning the Defendants' liability to the Class and a commonality of questions of damage, the class action proposed a method of adjudication superior to filing hundreds of individual lawsuits. *Pruitt v. Allied Chem. Corp., 85 F.R.D. 100 (E.D. Va. 1980).* The criteria for

determining whether an action should be maintained as a class action are set forth in FRCP Rule 23(a) and 23(b).

There are four requirements for class certification under FRCP Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the representative party are typical of the claims of the class, and (4) the representative party will fairly and adequately protect the interests of the class. The Class, with Plaintiffs as its representatives, meets the four requirements of Rule 23(a). Plaintiffs also satisfy the requirements of FRCP Rule 23(b) (2).

Application of the above criteria to this case establishes that a class action is virtually the only practicable way for this action to be maintained. Moreover, this case satisfies every policy and technical requirement of FRCP 23, especially in light of the "traditional flexibility afforded by Rule 23." *Buchholtz v. Swift & Company*, 62 FRD 581, 600 (D. Minn. 1973).

When ruling on class certification, the allegations of the complaint are taken as true.[1] The only relevant consideration is whether the pleading meets the

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[1] *See Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177, 94 S. Ct. 2140, 2152, 40 L.Ed.2d 732 (1974); *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975) (explaining that "court is bound to take substantive allegations of the complaint as true" at class certification state); *Thomas v. Baca*, 231 F.R.D. 397, 399 (C.D. Cal. 2005) ("In evaluating a motion for class certification, [t]he court is bound to take the substantive allegations of the complaint as true.'") (quoting *In re Unioil Sec.*

requirements of FRCP Rule 23. *Eisen*, 417 U.S. at 177-78 (question is not whether the Plaintiffs has stated cause of action or will prevail on merits, but simply if requirements of Rule 23 have been met); *Koolauloa Welfare Rights Group v. Chang,* 65 Haw. 90, 92, 679 P.2d 129, 131 (1984); *Hum v. Dericks,* 162 F.R.D. 628, 633 (D. Haw. 1995) (not appropriate to consider merits of proposed class action during certification motion). However, the Court may look beyond the pleadings to satisfy itself that there is sufficient information to reach a "reasonable judgment" on the requirements of Rule 23. *In re Heritage Bond Litig.*, No. 01-ML-1475 DT, 2004 WL 1638201 *8 (C.D. Cal. July 12, 2004); *In re THQ, Inc. Secs. Litig.*, No. CV00-1783 AMH, 2002 U.S. Dist. LEXIS 7753, *7 (C.D. Cal. Mar. 22, 2002).

B. The Requirements of FRCP 23(a) Are Met.

1) The Numerosity Requirement Is Met.

Rule 23(a)(1) requires that the class be so numerous that the joinder of all members would be impracticable. The numerosity requirement has been satisfied with as few as thirteen potential class members. *Life of the Land v. Burns,* 59 Haw. 244, 254, 580 P.2d 405, 411 (1978); *see also Life of the Land v. Land Use*

Litig., 107 F.R.D. 615, 618 (C.D. Cal. 1985)); *Satchell v. FedEx Corp.*, No. C03-02659, 2005 WL 2397522, *4 (N.D. Cal. Sept. 28, 2005) ("The Court is obliged to accept as true the substantive allegations made in the complaint."); *Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978).

Commission, 63 Haw. 166, 182, 623 P.2d 431, 444 (1981) (as few as 150 individuals have satisfied the numerosity requirement). Classes with as few as 35 known members have been certified in the federal courts. *See Fidelis Corp. v. Litton Indus., Inc.*, 293 F. Supp. 164 (S.D.N.Y. 1968) (35 members); *Arkansas Ed. Ass'n v. Board of Ed. of Portland*, 446 F.2d 763, 765 (8th Cir. 1971) (fewer than two dozen); *Weiss v. York Hosp.*, 745 F.2d 786, 807-08 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) (92 members); *In Re Gap Stores Sec. Litigation,* 79 F.R.D. 283, 302 (N.D. Cal. 1978) (91 members).

On April 29, 2010, Plaintiffs served discovery requests upon Defendants' seeking, *inter alia,* information relating to class certification. Defendants have been producing the responsive discovery on a "rolling basis", with the most recent documents received as recently as August 19, 2010. *Faria Decl.* The documents most recently produced included previously unavailable (to Plaintiff) class member information for 2007-2009. In Answers to Admissions, Defendants admit that the putative Class consists of at least 100 individuals who were Hotel employees who should have received the entirety of the "service charge" paid by customers for food and/or beverage services. *Exhibit "2"*. Subsequent to the foregoing admission, Defendants have produced employee listings of those employees entitled to receive part of the service charge for 2007-2010 (subject to a protective order), with the total employees identified during this time frame as being at least

187 class members. *Faria Decl.* Plaintiffs are still awaiting additional class member information for the 2003-2006 time frame. *Faria. Decl.*

Plaintiffs' damages are typical of those of the remaining Class members. Defendants have admitted that:

- During some or all of the time period between January 1, 2000 until the present, Defendants charged customers a "service charge" which was added onto the sale of food or beverages for, inter alia, banquets, group functions, meetings, wedding receptions, conferences, room service, conventions and other events.

- During some or all of the time period between January 1, 2000, until the present, Defendants did not distribute the entirety of all of the service charges collected from food and beverage purchases directly to its as tip income.

- During some or all of the time period between January 1, 2000, until the present, Defendants paid part of the service charges collected from food and beverage purchases to employees who were not non-management employees who provided services in connection with the sale of food and/or beverages.

- During some or all of the time period between January 1, 2000, until the present, Defendants did not disclose to the customers paying the service charge that some of the service charge was being used to pay for costs or expenses other than wages and tips of Defendants employees. [Defendants' affirmatively assert that they are now making the statutorily required disclosures.]

Exhibit "2".

Defendants have also recently disclosed the actual amount of "Service Charge Retained by the Hotel" for both banquets and room service for the years 2004-2009. For banquets, the Hotel retained service charges totaling

$2,728,054.00 (TWO MILLION SEVEN HUNDRED TWENTY EIGHT THOUSAND AND FIFTY FOUR DOLLARS). *Exhibit "3"*. For room service, the Hotel retained service charges totals $494,515.00 (FOUR HUNDRED NINETY FOUR THOUSAND FIVE HUNDRED AND FIFTEEN DOLLARS). *Id.* The retained service charges admitted by Defendants for banquets and room service totals $3,222,569.00 (THREE MILLION TWO HUNDRED TWENTY TWO THOUSAND, FIVE HUNDRED AND SIXTY NINE DOLLARS).

Again, Defendants still have not produced the figures for the additional amounts retained in 2003-2006 time period. However, using the information produced for the six years of 2004-2009, Defendants retained on average a total of $537,095 per year. Using this as a benchmark for the omitted 4 years, it is estimated that Defendants retained an additional $2,046,040.00 (TWO MILLION, FORTY SIX THOUSAND AND FORTY DOLLARS) during the 2003-2006 time frame. This would bring the total amount of the service charge retained by the hotel up to almost $5,268,609.00 (FIVE MILLION TWO HUNDRED SIXTY EIGHT THOUSAND SIX HUNDRED AND NINE DOLLARS) for 2003-2009.

Thus, as a result of Defendants' admitted failure to pay millions of dollars in owed service charge to over 187 non-management employees (even without considering those only employed during the 2003-2006), Plaintiffs and other

members of the proposed Class have all been injured in their business or property within the meaning of HRS §480-13(a). *Faria Decl.*

Further, many members of the putative Class are still employed at the Hotel and would likely be fearful to seek vindication of their rights through individual actions, even if that were cost-effective, over concern of losing their employment and livelihood. Thus, this prong of FRCP Rule 23 is met because it is both difficult and inconvenient to join all members of the proposed class, given this widespread concern as to retaliation should they commence separate individual actions. *Jordan v. County of L.A.*, 669 F.2d 1311, 1319 (9th Cir.), *vacated on other grounds*, 459 U.S. 810, 103 S.Ct. 35, 74 L. Ed. 2d 48 (1982); *see generally* Herbert Newberg & Alan Conte, *Newberg on Class Actions,* § 3.5 at 233-234 (4th ed. 2002) ("*Newberg*") ("In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the Plaintiffs whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone.").

2) <u>The Commonality Requirement Is Met.</u>

"The test or standard for meeting the Rule 23(a)(2) prerequisite is qualitative rather than quantitative -- that there need only be only a single issue common to all members of the Class. Therefore, this requirement is easily met in most cases." *Newberg on Class Actions 4th,* § 3.10. pp. 3-49. 3-50; *see also Harris v. General*

Dev. Corp., 127 F.R.D. 655 (N.D.Ill. 1989) (single issue common to all members of Class adequate to meet commonality requirement); *Ashe v. Board of Elections,* 124 F.R.D. 45 (E.D.N.Y. 1989) (racial discrimination issue common to all Class members); *Joseph v. General Motors Corp.*, 109 F.R.D. 635 (D.Colo. 1986) (defective engine design common to entire Class).

Commonality is established "if there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement is construed "permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) ("All questions of fact and law need not be common to satisfy the rule."). The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class. *Id.*; *In re THQ Inc. Secs. Litig.*, 2002 WL 1832145 (C.D. Cal. Mar. 22, 2002).

A question is considered common when it arises from a common nucleus of operative facts, even though underlying facts of the case may fluctuate over the entire class period and vary among the individual class members. *In re Asbestos School Litigation,* 104 F.R.D. 422 (E.D.Pa. 1984), *affd in part, vacated in part,* 789 F.2d 996 (3rd Cir. 1986), *cert denied,* 479 U.S. 852 (1986); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992) (defendants' conduct arose out of singular

nucleus of fact and law); *Newberg on Class Actions*, § 3.10, at 273-274 (4th ed. 2002).

> The threshold of commonality is not high. Aimed in part at determining whether there is a need for combined treatment and a benefit to be derived there from, the rule requires only that resolution of the common question affect all or a substantial number of the class members.

Jenkins v. Raymark Industries, 782 F.2d 468 (5th Cir. 1986); *Specialty Cabinets & Fixtures v. American Equitable*, 140 F.R.D 474, 476 (S.D. Ga. 1991), *see also Moilina v. Mallah Organization, Inc.*, 144 F.R.D. 37, 41 (S.D.N.Y. 1992) ("not every question of fact or law need be common to every member of the class"); Newberg on Class Actions, § 3.10, at 275-277 (4th ed. 2002).

In this case, the common nucleus of operative facts for the Class is as follows: Messrs. Flynn and Bonar represent a class of non-managerial employees who have been damaged by Defendants due to Defendants charging service charges to its customers, and retaining a portion thereof without disclosing this retention to the customer in violation of HRS §481B-4. Defendants have admitted this systematic practice. *Exhibit "2"*. This constitutes a systematic and "common" unfair method of competition in violation of HRS §480-2. Each Class member has been injured in his or her business or property within the meaning of HRS §480-13(a) by Defendants' failure to pay the entire service charge to non-management employees.

Each class member's claim presents the same questions of law: (1) whether the conduct at issue violates HRS §481B-14 and (2) how much damages each Class member suffered, and ultimately the appropriate amount of compensation they should be awarded under HRS §480-13. Based on the foregoing, almost all questions of fact and law are common amongst class members and the putative Class satisfies this requirement of FRCP Rule 23.

3) <u>The Typicality Requirement is Met.</u>

The FRCP Rule 23(a)(3) requirement that the named Plaintiffs' claims be "typical" is satisfied where there is no conflict of interest between the claims of the named Plaintiffs and the claims of the class. *See Life of the Land v. Land Use Commission,* 63 Haw. at 183, 623 P.2d at 444-45 ("[r]eading the third and fourth preconditions together, we too equate 'typicality with the absence of conflict of interest.'") Typicality does not mean the representative's claims must be coextensive with, or factually identical to, those of the putative Class. *Hanlon*, 150 F.3d at 1020; *In re THQ*, 2002 U.S. Dist. LEXIS 7753 at 12; *Blackie v. Barrack,* 524 F.2d 891, 910 (9th Cir. Cal. 1975); *Guentherv. Pacific Telecom, Inc.*, 123 F.R.D. 333, 336 (D. Or. 1988). "Varying factual differences between the claims or defenses of the class and the class representative will not render the named representative's claim atypical." *Von Collin v. County of Ventura*, 189 F.R.D. 583,

591 (C.D. Cal. 1999). *See generally Westways World Travel v. AMR Corp.*, 218 F.R.D. 223, 235 (C.D.Cal. 2003).

Nor does typicality require that the entire putative class rely on the same misrepresentations or omissions. *Blackie,* 524 F.2d at 902. "The 'typicality' requirement focuses less on the relative strengths of the named and unnamed plaintiffs' cases than on the similarity of the legal and remedial theories behind their claims." *Jenkins*, 782 F.2d at 472. *See Buchholz v. Swift & Co.*, 62 F.R.D. 581 (D. Minn. 1973) (In discussing the typicality requirement, the Court noted that Rule 23(a)(3) was satisfied "whenever there are co-extensive interests on the part of the representatives that are not antagonistic to the interests of the absentees.")

Plaintiffs' claims arise from the same course of conduct as all the other putative Class members' claims. Pursuant to a standardized policy, without disclosure to customers, Defendants did not disburse the service charge in its entirety to Plaintiffs and the putative Class. Defendants have admitted to this practice. *Exhibit "2"*. There is no therefore conflict between Plaintiffs' claims and those of the putative Class. All claims are based on the same legal theories – unfair methods of competition in violation of HRS § 480-2, as well as HRS §388-6, and HRS §481B-14 and related causes of action.

4) **The Adequacy Requirement is Met.**

The fourth requirement of FCRP Rule 23(a) is satisfied where "the representative part[y] will adequately protect the interests of the class" and class counsel is able to prosecute the action vigorously on behalf of the Class. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *In re THQ*, 2002 U.S. Dist. LEXIS 7753 at 20. (2002).

Here, the representative parties will fairly and adequately protect the interests of the class. As noted, the interests of the representatives are coextensive and wholly compatible with those of the class members. *See Sosna v. Iowa*, 419 U.S. 393, 403 (1975) (finding that the requirement of adequacy of representation was met because the interests of the Plaintiffs did not conflict with those of the other class members.)

Messrs. Flynn and Bonar are actively pursuing their claims on behalf of themselves and the class as a whole, and are zealously seeking relief from and recompense for the damages wrongfully caused by Defendants. Messrs. Flynn and Bonar are able class representatives, fully aware of their duties to the class. *See Flynn and Bonar Decls.* There are no special circumstances which would prevent Plaintiffs from acting in this representative capacity. *Ibid.*

There are no conflicts between Plaintiffs' attorneys and the putative Class. *Faria Decl.* Plaintiffs' legal team will prosecute the action vigorously on behalf of

Plaintiffs and the putative Class. The legal team has the resources to pursue this class action, and they are also experienced class action litigators. *See Faria Decl.*

Plaintiffs' legal team combines the experience of two firms: Perkin & Faria and Bickerton Lee Dang & Sullivan ("BLDS"). John Francis Perkin, James J. Bickerton and Brandee J.K. Faria are experienced and capable civil litigators, with significant background and emphasis in consumer class action cases. In just the past five years, Perkin & Faria and BLDS have co-counseled plaintiffs in more than a dozen consumer class actions and each firm has handled more class actions either alone or with other firms. *See Faria Decl.* Thus, in combination the two firms have more than 20 class actions between them. *See Faria Decl.* Plaintiffs' counsel is therefore demonstrably competent and has a track record that shows that they will fairly and skillfully prosecute this action with vigor on behalf of all class members. *See Specialty Cabinets & Fixtures v. Am. Equitable Life Ins.*, 140 F.R.D. 474, 476 (S.D. Ga. 1991)). The adequacy element is satisfied.

D. <u>Plaintiffs Satisfy the Requirements of FRCP 23(b)(3).</u>

Plaintiffs also seek certification under FRCP Rule 23(b)(3) which allows for class certification where: 1) common questions of law and fact ***predominate*** over individual questions, and 2) a class action is ***superior*** to other methods for fair and efficient adjudication of the controversy. "The fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance."

Buchholtz, 62 F.R.D. at 598. That clearly is the situation here. "Courts generally focus on the liability issue in deciding whether the predominance issue is met." *Dura-Bilt Corp. v. Chase Manhattan, Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981). "Just as 23(a)(2) does not require that all questions of law of fact be common, 23(b)(3) only requires that such questions predominate over individual ones." *Molina v. Mallah Org., Inc.*, 144 F.R.D. 37, 41 (S.D.N.Y. 1992).

Plaintiffs' First Amended Complaint definitively sets forth the duties owed to the Plaintiffs, Defendants' systemic breach of those duties, and whether Defendants' policy and practice themselves -- and the way they were presented – were unfair methods of competition. Defendants' admissions confirm the majority of the breaches alleged by Plaintiffs. *Exhibit "2"* Any relief granted by a court to remedy the individual claims of Messrs. Flynn and Bonar would thereby affect all other employees who rendered food and beverage services to customers on behalf of the Hotel.

Classes under Rule 23(b)(2) are appropriate when injunctive relief is sought. *See* Wright, Miller & Kane, *Federal Practice and Procedure*, Civ. 2d, Section 1175. *See also Mamula v. Satralloy, Inc.*, 578 F. Supp. 563 (S.D. Ohio 1983) (Class action for injunction against employer by retired and laid-off employees to compel employer to provide benefits due under ERISA employee benefit plan).

Among the relief sought, Messrs. Flynn and Bonar are seeking injunctive relief mandating Defendants' compliance with HRS §481 B-14.

Defendants have admitted to having retained portions of the service charge for every service employee while simultaneously not providing the statutorily required disclosure under HRS §481B-14. *Exhibit "2"*. Defendants admitted to having committed these against the whole class make injunctive relief appropriate with respect to the class as a whole. Plaintiffs have already identified numerous common questions of law and fact and have noted that the only varying issue is the dollar amount withheld from each class member. In these circumstances, it is plain that common questions "predominate" over individual questions, to the extent any of the latter even exist.

1. Common Questions Of Law And Fact <u>Predominate Over Individual Questions.</u>

"The predominance test is not a numerical test and does not require the court to add up the common issues and the individual issues and determine which is greater." *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 375 (D. Del. 1990); *Newberg on Class Actions,* 4th Ed. § 4.25 at 4-84. "Rather, the court must determine whether the members of the class seek a remedy to a common legal grievance and whether the common questions of law and fact central to the litigation are common to all class members." 132 F.R.D. at 375.

"[P]redominance will be found where generalized evidence may prove or disprove elements of a claim." *In re Hartford Sales Practices Litigation,* 192 F.R.D. 592, 604 (D. Minn. 1990). "The fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance." *Buchholtz*, 62 F.R.D. at 598. "When determining whether common questions predominate courts 'focus on the liability issue....and if the liability issue is common to the class, common questions are held to predominate over individual questions." *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 114 F.R.D. 48, 52 (S.D.N.Y. 1987), quoted in *Lewy 1990 Trust v. Investment Advisors, Inc.*, 650 N.W.2d 445, 456 (Minn. App. 2002) (affirmed granting of class certification); *Dura-Bilt Corp. v. Chase Manhattan, Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981)." Just as 23(a)(2) does not require that all questions of law of fact be common, 23(b)(3) only requires that such questions predominate over individual ones." *Molina v. Mallah Org., Inc.*, 144 F.R.D. 37, 41 (S.D.N.Y. 1992).

In this case, Defendants' admissions as to their failure to comply with the statute establishes for all employees predominance. *Exhibit "2"*. Defendants' admissions establish a statutory violation of H.R.S. §480B-14. Consequently, when the jury finds that Defendants violated H.R.S. §481B-14, they will be deemed under H.R.S. § 480B-4 to have engaged in unfair methods of competition in violation of HRS Chapter 480 as to each class member.

> Remedies. Any person who violates this chapter ***shall be deemed to have engaged in an unfair method of competition*** and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of section 480-2.

This common issue of law so permeates the case that liability is anticipated to be confirmed by way of summary judgment. There are also common questions of fact relating to the Defendants' policy of distribution (or failure to distribute) of the service charge to Plaintiffs and the putative Class members. The putative Class members have all been damaged the same way: by not being paid part of the service charge that was due them. Common questions of law and fact thereby abound in this matter and clearly predominate over any individual issues that may arise.

2. A Class Action Is Superior To Other Methods For Fair And Efficient Adjudication Of The Controversy.

In deciding whether a class action is superior to the maintenance of individual suits, a court should consider four factors that are "pertinent" to the certification inquiry: a) the interest of members of the Class in individually controlling the prosecution or defense of separate actions; b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the Class; c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; d) the difficulties likely to be encountered in the management of the class action. FRCP Rule 23(b)(3)(A)-(D).

a. The interests of individual members of the Class.

The comments of the Rules Advisory Committee provide the following guidance with respect to the first factor:

> The interests of individuals in conducting separate lawsuits may be so strong as it calls for denial of a class action. On the other hand, these interests may be a theoretical rather than practical; the Class may have a high decree of cohesion and prosecution of the action through a representative would be quite objectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.

Rules Advisory Committee Notes to 1966 Amendments to Rule 23, Fed. R. Civ.P.

Class action treatment is a superior method of adjudication in this case. Rule 23(b)(3)'s procedural device was designed to conserve the resources of both the court and the parties. The central inquiry therefore, in determining whether to certify a class under Rule 23(b)(3) is whether economies of time, effort, and expense will be achieved, and whether uniformity of decisions will be attained. *See Newberg on Class Actions* § 17 at 17-48 (4th ed. 2002). *See also Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968) ("the proper function of the court is to apply the Rule in a manner best calculated to...advance, or at least not prejudice, recognized goals of public policy"). In certifying the class, the court will be able to process the large number of claims with the least possible strain upon the total resources of the court system, while

advancing the public policies of fair labor practices and payment of due wages and benefits for the employees.

There is no other litigation on behalf of the Class members or relating to service charges at the Fairmont Orchid. Thus, the court dockets do not reflect a noticeable interest on the part of employees in filing separate actions. Consequently, parts (A) and (B) of Rule 23(b)(3) require no discussion. *Philadelphia Electric Co.*, 43 F.R.D. at 458.

Defendants have admitted that they did not distribute all of the service charge collected to their employees as tip income. *Exhibit "2"*. The amount of the share of any one employee of the service charge is not of sufficient magnitude that an individual employee would be prepared to mount his or her own separate lawsuit, particularly in the face of the expense of pursuing international defendants.

Given the total service charge misappropriated by the Hotel and the number of employees in the putative class, the average class member claims to retained service charges leaves each individual with claims barely exceeding $10,000, based on the data currently available. It is this very fact that each individual claim is too small to justify a separate lawsuit that encourages businesses to engage in such practices. The difficulties in enforcement of individual judgments, and the costs that would be incurred by proceeding with individual suits would be out of proportion to the individual recovery. Given the amount at issue per employee,

individual suits would be cost-prohibitive, and employees would be effectively prevented from recovering their damages.

Additionally, existing employees may fear retaliation in their workplace should they come forward to initiate legal action while still in the employ of Defendants. A class action is the optimum, and probably the only, vehicle for these employees to obtain redress. There are no other means to adjudicate the claims cost-effectively. "Rule 23 was intended to provide claimants with a method of redressing claims that are too small to warrant individual lawsuits." *Robin v. Doctors Officenters Corp.*, 123 F.R.D. 579, 582 (N.D. Ill. 1998). This is classically the type of suit for which Rule 23 was intended.

Finally, proceeding with individual litigation could lead to inconsistent judgments, creating confusion as to what constitutes legal conduct for Defendants, and can severely undermine the effectiveness of any sort of injunctive relief.

b. Litigation already commenced by or against members of the Class.

After a check of the Judiciary website, *Ho'ohiki*, Plaintiffs could not locate any suits filed against Defendants that may have been commenced by any other member of the putative Class. *See Faria Decl.* The lack of individual actions supports Plaintiffs' position that individual Class members either do not have the means or do not possess enough motivation to undertake to individually prosecute

their claims in separate litigation. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450 (D. N.J. 1997) (explaining that the paucity of individual actions in comparison to the large number of class members "suggests little individual interest in prosecuting actions against Prudential").

Class litigation is appropriate where class members have little incentive to litigate claims individually. The opinion in *In re Heritage Bond Litig.*, 2004 U.S. Dist. LEXIS 15386 (C.D. Cal. 2004) is instructive. There, plaintiffs sought certification of a class consisting of individuals who purchased Defendants' bonds. The plaintiffs presented evidence from a small number of class members showing that potential losses ranged from $5,000-$50,000, but argued that most Class Members' losses were small. *Id.* at 11. In holding that a class action was the superior method for adjudicating the elderly purchasers' claims, the Court reasoned:

> Thus, the class litigation of the claims of potentially hundreds, if not thousands, of Heritage bond purchasers not only gives plaintiffs with small claims a chance to obtain redress through aggregation against a well financed and organized defense but also promotes greater fiscal and logistical efficiency. Denying certification would be drastic because it would create the prospect of inefficient and costly multi-forum litigation that would not only be undesirable, but prejudicial to all parties-plaintiffs, defendants and witnesses – as well as the courts.

Id. The same reasoning is equally applicable here.

c. Concentrating the litigation on the particular forum.

This factor focuses on selection of the proper forum. *Newberg on Class Actions 4th*, § 4.31 (emphasis of factor is on forum selection). Defendants' business location is limited to Hawaii. The majority of members of the putative Class are believed to reside in Hawaii. The location where the majority of members reside, where the transactions took place, and where the bulk of evidence is maintained is highly relevant in determining appropriate venue. *Newberg on Class Actions 4th*, § 6:12. Consequently, this is the proper forum.

d. Difficulties in management of the class action.

The fourth factor concerns difficulties in managing the action. This includes the size or contentiousness of the Class, the onerousness of complying with notice requirements, the number of Class members who may try to intervene and participate, and the presence of special and individual issues. 7A Wright, Miller, & Kane, *Federal Practice and Procedure* §1780 (1986). Manageability is a ground for denying class certification only when such difficulties make a class action less fair and efficient than some other method. *Newberg on Class Actions 4th*, § 4.32. *See also, In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 358 (E.D. Pa. 1976); *In re Prudential*, 962 F. Supp. at 525 ("[M]ost courts hold manageability difficulties cannot support denial of class certification when no

other practical litigation alternative exists."); *Newberg* § 4.32; *In re Workers' Compensation*, 130 F.R.D. 99, 110 (D.Minn. 1990) ("dismissal for management reasons is never favored"). Moreover, "the difficulties likely to be encountered in the management of a class action are not important when weighed against the benefits to the class, and any sub-class thereof, and to the administration of justice." *Technograph Printed Circuits, Ltd. V. Methode Electronics, Inc.*, 285 F. Supp. 714, 724-725 (N.D.Ill. 1986).

Courts disfavor denial of class certification on the grounds of "vaguely perceived manageability obstacles" because such an action would be "counter to the policy behind Rule 23, and because that court [would be] discounting unduly its power and creativity in dealing with a class action flexibly as difficulties arise." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 528 (S.D.N.Y. 1996). Additionally, when "each class members' claims center on common questions and [when there is] overlap between the requisite questions of proof. . .[the] economies of scale are magnified when weighed against the burden [the various] court systems would endure in trying numerous duplicative suits." *Hanrahan v. Britt*, 174 F.R.D. 356, 365-66 (E.D. Pa. 1997) (alterations added).

The proposed Class is very manageable. Liability focuses on whether Defendants engaged in a common course of conduct. That same company has detailed electronic databases identifying its employees, the service charges paid to

employees and the service charges collected from its customers. Plainly, a class with available electronic records is highly manageable. Accordingly, maintenance of this suit as a class action represents the most efficient and economical procedure for adjudicating Plaintiffs' claims by providing Class members with their "day in court" without overburdening the judicial system with a multiplicity of duplicative lawsuits. *Accord Joint Executive Bd. Of Culinary/Bartender Trust Fund v. Las Vegas Sands*, 244 F.3d 1152, 1163 (9th Cir. 201), cert. denied 534 U.S. 973, 122 S. Ct. 395, 151 L.Ed.2d 299 (2001) ("'If a comparative evaluation of other procedures reveals no other realistic possibilities, [the] superiority portion of Rule 23(b)(3) has been satisfied.'"); *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1112 (5th Cir. 1978) ("The claims of a large number of individuals can be adjudicated at one time, with less expense than would be incurred in any other form of litigation.").

Class adjudication also benefits Defendants. Defendants will be relieved of having to potentially defend multiple lawsuits and its culpability will be decided in one proceeding. In addition, documents, fact witnesses and expert testimony need only be presented once.

Finally, no other practical litigation alternative exists. "[W]here a court has already made a finding that common issues predominate over individualized losses, we would be hard pressed to conclude that a class action is less manageable than individual actions." *Klay v. Humana Inc.*, 382 F.3d 1241, 1273 (11th Cir.

204), *cert. denied* 543 U.S. 1081, 125 S. Ct. 877, 160 L.Ed2d 825 (2005). For all these reasons, a class action is unquestionably the superior method of adjudication.

With Defendants' business records, adequate notice can be provided to the putative Class members. The mailing addresses of the Class members are already compiled in Defendants' records. Class counsel has previously handled claims for classes of up to 42,000 and has been able to handle the logistics in those cases. *See Faria Decl.* There are no other means through which these claims could economically be brought, and the plaintiffs would effectively be deprived of a remedy altogether if class certification is denied. "If there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928, 89 S. Ct. 1194, L.Ed.2d 459 (1969).

IV. CLASS NOTICE IS WARRANTED UPON CERTIFICATION

This action has been pending since April, 2010. In order to comply with the necessary notice requirements set forth under FRCP Rule 23(c)(2), notice to the class of the pendency of this action is warranted and appropriate at this juncture. Federal Rules of Civil Procedure Rule 23(c)(2) provides:

> In any class action maintained under subdivision (b)(3), the Court shall direct to the members of the class the best notice practicable under the circumstances, including

> individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so request by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusions; and (C) any member who does not request exclusion may, if the member desires enter an appearance through counsel.

FRCP Rule 23(c)2 (emphasis added).

Notice is required upon certification of the class as the court has an obligation to "protect the interests of absent class members at all stages of litigation." *Montalvo v. Chang,* 64 Haw. 345, 358, 641 P.2d 1321, 1331 (1982), *overruled on other grounds, Chun v. Board of Trustees of Employees' Retirement System,* 92 Haw. 432, 992 P.2d 127 (Hawaii 2000). Notice serves to protect the interests of members that may wish to opt out and bind those that do not. *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1125 (9th Cir. 1977). Without prompt notice, class members will not have adequate time to exercise the various options to opt out or to have separate counsel as allowed by FRCP Rule 23.

With regard to the timing of class notice, Newberg on Class Actions provides:

> There is no occasion for any notice until the propriety of the class action has been determined, at least tentatively. But if it seems obvious that if notice is to be effective – if class members are to have a meaningful opportunity to request exclusion, appear in the action, object to the representation, etc. **- the invitation must go out as promptly as the**

circumstances will permit. The Manual for Complex Litigation advises that notice generally be given promptly after class certification.

Newberg, § 8:9 (4th ed. 2002) (emphasis added).

In this case FRCP Rule 23(c)(2) requires the "best notice practicable under the circumstances". Courts have universally held that "best notice practicable" under FRCP Rule 23(c)(2), is satisfied by mailed notice to class members. *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, (5th Cir. Fla. 1977) (where individual notice could be given to class members compiled from Defendants' retail delivery report cards, mail out was best); *Malby v. General Electric Credit Corp.*, 61 F.R.D. 59, 1973 U.S. Dist. LEXIS 11417, 18 Fed. R. Serv. 2d (Callaghan) 737 (N.D. Ohio 1973) (individual notice was most appropriate because individual members could be determined); *Ouellette v. International Paper Co.,* 86 F.R.D. 476, 1980 U.S. Dist. LEXIS 10930, 29 Fed. R. Serv. 2d (Callaghan) 789 (D. Vt. 1980), (when class members' identity could be found from town records, individual mail out notice was most appropriate); *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1977 U.S. App. LEXIS 5723, 24 Fed. R. Serv. 2d (Callaghan) 1123, 1978-1 Trade Cas. (CCH) P61825 (9th Cir. Cal. 1977), (notice provisions require individual notice by mail).

Plaintiffs' counsel has prepared a draft proposed notice for mailing to the Class, attached hereto is *Exhibit "1"*. Plaintiffs' counsel intends to send the

approved notice to the last known addresses of every class member identified by Defendants. *The Manual for Complex Litigation (Third)*, §30.211.

Plaintiffs suggest that the mailed notices be disseminated as soon as practicable following certification. Newberg advises that the "bulk of notices directing 30-to-60 day intervals between mailing or publishing class notice and the filing of an affirmative response by class members." *Newberg*, § 8:37 (4th ed. 1992). Consequently, Plaintiffs would suggest a deadline to opt out of 60 days after the notices are sent.

As has been established, this Court has jurisdiction over the claims at issue and the parties involved in this action. The forms of the notices attached contain all of the essential elements necessary to satisfy the requirements of law including the Federal Rules of Civil Procedure and federal and state due process provisions, including the class definition, the identities of the Parties and their counsel, and information regarding the manner in which requests for exclusions or to opt out may be submitted and a deadline for doing so. The foregoing notice plan satisfies due process and all requirement of Hawai'i and Federal law, and constitutes the best practical notice under the circumstances of the Case.

V. CONCLUSION

For all the foregoing reasons Plaintiffs respectfully requests that the instant Motion be granted, the Class certified, and Plaintiffs' Notice Plan approved.

DATED: Honolulu, Hawaii, August, 30, 2010.

/s/ Brandee J.K. Faria
JOHN FRANCIS PERKIN
BRANDEE J.K. FARIA
JAMES. J. BICKERTON
Attorneys for Plaintiffs
BRIAN FLYNN AND NICHOLAS BONAR individually and on behalf of all others similarly situated.