

PERKIN & FARIA

JOHN F. PERKIN #1673
BRANDEE J.K. FARIA #6970
Topa Financial Center, Bishop Street Tower
700 Bishop Street, Suite 1111
Honolulu, Hawaii 96813
Telephone : (808) 523-2300

2011 APR 25 PM 4: 12

A. MARPLE
CLERK

and

BICKERTON LEE DANG & SULLIVAN

JAMES J. BICKERTON #3085-0
Bickerton Lee Dang & Sullivan
745 Fort Street, Suite 801
Honolulu, Hawaii 96813
Telephone: (808) 599-3811

Attorneys for Plaintiffs
MARTI SMITH AND JONALEN KELEKOMA,
individually and on behalf of
All others similarly situated,

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

MARTI SMITH AND JONALEN
KELEKOMA, individually and on behalf of
all others similarly situated,

CIVIL NO. 11-1-0818-04. PWB
(Class Action)

Plaintiffs,

COMPLAINT

vs.


KAWAIILOA DEVELOPMENT LLP d.b.a.
GRAND HYATT KAUAI RESORT & SPA;
HYATT HOTEL CORPORATION;
and DOE DEFENDANTS 1-50,

Defendants.

COMPLAINT

Plaintiffs MARTI SMITH AND JONALEN KELEKOMA, individually and on behalf of
all persons similarly situated, for complaint against Defendants KAWAIILOA DEVELOPMENT

I do hereby certify that this is a full, true and
correct copy of the original on file in this office.


Clerk, Circuit Court, First Circuit

LLP d.b.a.; GRAND HYATT KAUAI RESORT & SPA; HYATT HOTEL CORPORATION;
and DOE DEFENDANTS 1-50, alleges as follows:

Parties

1. Plaintiff MARTI SMITH, (Plaintiff “SMITH”) is, and at all times relevant here to was, a resident of the City of Lawai, County of Kauai, State of Hawaii.

2. Plaintiff JONALEN KELEKOMA, (Plaintiff “KELEKOMA”) is, and at all times relevant here to was, a resident of the City of Lihue, County of Kauai, State of Hawaii.

3. At all times relevant hereto, Defendant KAWAILOA DEVELOPMENT, LLP, (“Defendant Kawaihoa”) was a Hawaii LIMITED LIABILITY PARTNERSHIP, with its headquarters in Honolulu, Hawaii. Kawaihoa has been engaged in the business of, *inter alia*, operating Hotel and restaurants, providing food and lodging in Hawaii, on the island of Kauai, and has owned and operated the Grand Hyatt Kauai Resort & Spa, the Poipu Bay Bar & Grill and Yum Cha, at all relevant times herein. Defendant Kawaihoa was and is the employer or former employer of each of the members of the proposed class described below consisting of certain past and present employees of said hotel and/or are or were engaged in the practices described herein. Defendants are hereinafter referred to occasionally and collectively as “the Hotel”.

4. At all material times, Defendant HYATT HOTEL CORPORATION, was a corporation with its headquarters in Chicago, Illinois. On information and belief, Defendant HYATT HOTEL CORPORATION operates and manages the Grand Hyatt Kauai Resort & Spa. Hereafter HYATT HOTEL CORP. and KAWAILOA DEVELOPMENT, LLP are sometimes collectively referred to as “Defendants”.

5. Doe Defendants 1-50 are persons, partnerships, associations, companies, corporations, or entities whose names, identities, capacities, activities and/or responsibilities are presently unknown to Plaintiffs or their attorneys, except that Doe Defendants 1-50 were and/or are connected in some manner with the named Defendants and/or were the agents, principals, parents, subsidiaries, servants, employees, representatives, co-venturers, associates, consultants, owners, lessees, lessors, guarantors, assignees, assignors, licensees, and/or licensors of Defendant and were or are in some manner presently unknown to Plaintiffs MARTI SMITH AND JONALEN KELEKOMA, or their attorneys engaged, or involved in the activities alleged herein or responsible for the activities of which Plaintiffs' complain, or should be subject to the relief Plaintiffs seeks. Plaintiffs MARTI SMITH AND JONALEN KELEKOMA, pray for leave to certify the true names, identities, capacities, activities and/or responsibilities of Doe Defendants 1-50 when, through further discovery in this case, the same are ascertained. Plaintiffs have made a good faith effort to identify said Doe Defendants prior to filing the Complaint, including interviewing witnesses and reviewing documents and records on file with the Department of Commerce and Consumer Affairs, the City & County of Honolulu and the Circuit Court of the First Circuit.

Class Action Allegations

6. Plaintiffs bring this case as a class action pursuant to Rule 23 of the Hawai'i Rules of Civil Procedure, on behalf of themselves and all others who are similarly situated consisting of:

All past and present non-management employees of the Hotel who, on and after April 25, 2005, 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.

The period on and after April 25, 2005 is hereafter referred to as "the Class period."

7. Since April 25, 2005, over 100 servers, porters, bartenders and other employees of Defendants have worked on banquets and other food service events at the Hotel in connection with which the Hotel' customers were charged a fee denominated as a service charge or "gratuity". Thus, the members of the Class are sufficiently numerous that joinder of all members in a single action is impracticable. The members of the Class resided in the state of Hawaii during their employment, and on information and belief, the vast majority, if not all members, continue to reside in the state of Hawaii presently.

6. A class action is appropriate in this case for one or more of the following reasons:

a. The prosecution of separate actions by individual members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, the amount at stake for many of the Class members, while not insignificant, is not great enough to enable each of them to maintain separate suits against Defendants.

b. Many members of the Class are still employed at the Hotel and would be afraid to seek vindication of their rights through an individual action even if such were cost effective because of the fear or jeopardizing or losing their employment and livelihood.

c. The Defendants have acted on grounds generally applicable to the Class, making appropriate declaratory relief with respect to the Class as a whole as set forth below.

9. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class, and a class

action is superior to other available methods for the fair and efficient adjudication of the controversy. Among the questions of law and fact common to the named Plaintiffs and the Class are, *inter alia*:

- a) Whether Defendants have imposed service charges on the Hotel' customers for food and beverage and retained portions of such charges instead of distributing it to the employees who provided the service; in violation of HRS §481B-14;
- b) Whether Defendants' above-described conduct violates HRS §388-6;
- c) Whether Defendants' above described conduct is an unfair method of competition in violation of HRS Chapter 480; and
- d) The nature and extent of class-wide injuries and the measure of damages for the injuries.

10. Class action treatment is superior to the alternatives for the fair and efficient adjunction of the controversy alleged herein. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single action simultaneously, efficiently, and without duplication of the expenses that numerous individual actions would entail. No difficulties are likely to arise in the management of this class action that will preclude its purpose as a class action, and no superior alternatives exist for the fair and efficient adjunction of this controversy. Without a class action, Defendants will likely retain the benefit of their wrongdoing and may continue the course of their actions, which could result in further damages.

11. A database of employees past and present is maintained by Defendants which includes employees' names and addresses and their dates of employment and the dates on which they worked. Other databases maintained by Defendants reflect the food and beverage sales for which service charges were imposed, the dollar amounts of those charges, the amounts that were distributed to employees and the amounts that were not so distributed, and the dates of the events associated with those charges. Thus, records are readily available for purposes of identifying all members of the Class and providing notice of the instant class action to all Class members and determining the nature and size of each member's claim.

12. Plaintiffs MARTI SMITH AND JONALEN KELEKOMA will fairly and adequately represent the interests of the class. Plaintiffs know of no conflicts of interest among members of the class.

13. The Plaintiff Class is represented by counsel who have experience litigating class action litigation in this jurisdiction and who will adequately represent the interests of the entire class.

Allegations of Wrongdoing and Damage

14. Plaintiff MARTI SMITH is an employee of KAWAIILOA DEVELOPMENT LLP at the Grand Hyatt Kauai Resort & Spa and has worked there from 1995-2001 and then from 2003 until the present. Plaintiff MARTI SMITH works as a food server or waitress in the banquet department of the Grand Hyatt Kauai Resort & Spa and served food and beverages at numerous banquet and other functions during this period.

15. Plaintiff JONALEN KELEKOMA, is an employee of KAWAIILOA DEVELOPMENT LLP at the Grand Hyatt Kauai Resort & Spa and has worked there from 1997 until the present. Plaintiff JONALEN KELEKOMA works as a food server or waitress in

the banquet department of the Grand Hyatt Kauai Resort & Spa and served food and beverages at numerous banquet and other functions during this period.

16. At the vast majority of the aforesaid functions, Defendants charged the customers of the Hotel a “service charge” or “gratuity” that was calculated as percentage of the total cost of food and beverage, typically ranging between 20% and 22%, of which 15% to 16% (i.e. approximately $\frac{3}{4}$ of the service charge) went to staff. Defendants failed to distribute all of the service charge to the non-managerial employees who provided the service of the food and beverage to the customers, including Plaintiffs MARTI SMITH AND JONALEN KELEKOMA,, and all other members of the proposed Class, retaining 5% of the 15% or 6% of the 22% (i.e. approximately $\frac{1}{4}$ of the service charge). Although in most or all instances a portion of the service charge was paid to Plaintiffs MARTI SMITH AND JONALEN KELEKOMA, and the other employees who rendered the service, in each instance at least a portion of the service charge was retained by the Hotel. Defendants failed to clearly disclose to customers that a portion of the service charge was not distributed to the employees and was in fact retained by the Hotel.

17. The foregoing conduct by the Defendants occurred on multiple occasions after April 25, 2005 and continued to occur on information and belief until into 2009. Each instance of said conduct – charging a service charge and retaining a portion thereof without clearly disclosing such retention to the customer – was and is a violation of HRS §481B-14 and in turn, Chapter 388-6. By virtue of their aforesaid violations of Section 481B-14, Defendants have violated of HRS Chapter 388-6.

18. In the absence of the required disclosure to customers, all such service charges were payable in full to the employees who rendered the services, including Plaintiffs MARTI SMITH AND JONALEN KELEKOMA, and the other members of the proposed Class.

19. The competition in which Defendants are and were engaged or participating is the competition with other providers of hotel, restaurant and banquet services, and competition with Plaintiffs and the Class for tips and/or the service charge. Defendants derive an unfair advantage over their law-abiding competitors and Plaintiffs by (a) lowering their overall costs through the means of retaining tip income due under law to Plaintiffs and other Class members, (b) attracting customers by being able to offer customers seemingly lower “base” prices than law-compliant competitors through the retention of tip income, and (c) misleading customers into believing that the service charge would be paid as tip income and thereby obtaining the business of customers through an unfair and illegal business advantage over law-compliant hotels, restaurants and banquet service providers, and thereby obtaining the customers’ monies at the expense of Plaintiffs.

20. These unfair competitive advantages were gained by Defendants at the direct expense of Plaintiffs and other members of the Class, and Plaintiffs and the Class members were injured as a result of Defendants’ unfair method of competition and the Defendants’ unfair competitive behavior in the hotel food and beverage market.

21. In the absence of the required disclosure to customers, all such service charges were payable in full to the employees who rendered the services, including Plaintiffs MARTI SMITH AND JONALEN KELEKOMA, and the other members of the proposed class.

22. Defendants have failed to pay the entire service charge to said employees, as a result of which Plaintiffs MARTI SMITH AND JONALEN KELEKOMA, and the other

members of the proposed class have been injured in their business or property within the meaning of HRS Section 480-13(a), each in amounts that shall be proved at trial but in excess of any minimum jurisdictional amount of this Court. By virtue of the foregoing, Plaintiffs MARTI SMITH AND JONALEN KELEKOMA, and other members of the proposed class are entitled to treble damages in accordance with HRS Section 480-13(a).

23. Plaintiffs MARTI SMITH AND JONALEN KELEKOMA, and the other members of the proposed class are also entitled to (a) a declaratory judgment that Defendants' practice of retaining a portion of the service charge without clearly disclosing such retention to customers is an unfair method of competition and (b) an injunction prohibiting Defendants from further engaging in the

24. Defendants have failed to pay the entire service charge to said employees, as a result of which Plaintiffs MARTI SMITH AND JONALEN KELEKOMA,, and the other members of the proposed class are entitled to full payment and double damages under HRS Chapter 388.


WHEREFORE, Plaintiffs MARTI SMITH AND JONALEN KELEKOMA, individually and on behalf of all those similarly situated, prays for relief as follows:

- (1) For damages against the Defendants in an amount to be determined at trial pursuant to HRS, Chapter 388;
- (2) For reimbursement of costs and expenses, including reasonable provision for attorneys' fees in accordance with HRS Chapter 388 and Chapter 480;
- (3) For prejudgment interest;
- (4) For double or treble damages as provided by law;

(5) For declaratory judgment and a permanent injunction concerning Defendants' actions described above; and

(6) For such further and additional relief as the Court deems appropriate and just.

DATED: Honolulu, Hawaii, April 25, 2011



JAMES J. BICKERTON
JOHN F. PERKIN
BRANDEE J.K. FARIA
Attorneys for Plaintiff
MARTI SMITH AND JONALEN
KELEKOMA, individually and on behalf of all
others similarly situated.