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Déjà Vu Services, Inc., Harry Mohney, Grapevine Entertainment, Inc. d/b/a Déjà Vu Showgirls; Nite Life East, LLC d/b/a Little Darlings; SP Star Enterprise, Inc. d/b/a Déjà Vu; Coldwater, LLC d/b/a Deja Vu Showgirls; 3610 Barnett Ave., LLC d/b/a Adult Superstore; Jolar Cinema of San Diego, Ltd. d/b/a Jolar Cinema Showgirls; Showgirls of San Diego, Inc. d/b/a Deja Vu Showgirls; Bijou – Century, LLC d/b/a New Century Theatre; BT California, LLC d/b/a The Penthouse Club & Steakhouse; Chowderhouse, Inc., d/b/a Hungry I; Deja Vu – San Francisco, LLC d/b/a Centerfolds; Deja Vu Showgirls of San Francisco, LLC d/b/a Little Darlings of San Francisco; Gold Club – S.F., LLC d/b/a Gold Club; S.A.W. Entertainment, Ltd., d/b/a Hustler San Francisco and the Condor Club; San Francisco Garden of Eden, LLC d/b/a Garden of Eden; San Francisco Roaring 20's, LLC d/b/a Roaring 20's; and Stockton Enterprises, LLC d/b/a Deja Vu Showgirls

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

JANE ROES 1-4, individually and on behalf of all others similarly situated,

Plaintiff,

v.

Deja Vu Services, Inc., et al.,

Defendant.

Case No. 37-2018-28044-CU-OE-CTL

DEFENDANTS' RESPONSE TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

Assigned to: Hon. Timothy Taylor
Dept: C-72
Complaint Filed: July 6, 2018

Hearing date: November 30, 2018
Hearing time: 1:30 p.m.

I. INTRODUCTION AND SUMMARY

Objectors untimely opposed the motion for preliminary approval of class action settlement, with briefing that exceeded this Court's page limitations without leave to do so, claiming (1) there is insufficient information on the value of class' claims, (2) there is a lack of justification for a "minimal" or "discounted" settlement, (3) the settlement was obtained through "collusion", and (4) the decision to convert to employee status has zero value because it "had nothing to do with" this settlement. The objections should be overruled for the following reasons, as discussed further below:

(1) The Objectors do not have standing to object, because they did not perform at any of the Clubs owned and operated by Defendants during the defined Class Periods and therefore have no interest in this settlement and no basis to assert an objection[1];

(2) In addition to the historical data and discovery obtained in prior litigations by Plaintiffs' counsel, the Defendants shared substantial information on the value of the Class Claims which allowed Plaintiffs' counsel to value the claims, understand the risks of this litigation, and negotiate a fair, adequate and reasonable settlement;

(3) The Objectors' claim that the settlement is "too low" is rooted in intentional misinformation, using comparisons to other settlements and decisions with business operations that have no relation to the Defendants here, and gives "zero" value to any of the Defendants' substantial defenses (including significant payment offsets) or to the conversion required by the Settlement Agreement;

(4) The Parties did not collude in reaching this settlement. The Defendants didn't ask to be sued; rather, experienced and knowledgeable attorneys with clients who *actually performed* during the class period independently filed this action and after an exchange of information and arms-length negotiations aided by a former federal judge, the Parties were able to reach a settlement; and

(5) The settlement includes a particularly painful and expensive requirement to *convert*

[1] This issue is fully briefed in Defendants' Opposition to the Motion to Intervene and should be incorporated by reference as if fully set forth herein to avoid a duplication of briefing.

thousands of un-willing contractors into employees after a 30-year method of operation for which they received repeated court and governmental approval. This has never before been achieved.

While Defendants contend that the lack of standing by the Objectors is sufficient grounds alone to overrule the pending objections, Defendants address the points raised in the opposition to assure the Court that its original inclination to grant preliminary approval is the proper course.

II. ARGUMENT

1. PLAINTIFFS HAVE ADEQUATELY VALUED THE SETTLEMENT.[2]

Objectors ask this Court to disregard California law, which requires preliminary approval of the settlement if the court determines it is within the range of possible approval, and instead employ the more rigorous standard reserved for final approval at the outset because two judges in the Northern District of California have done so in two cases where counsel for the Objectors Shannon Liss – Riordan ("Liss") was counsel of record. While this is not required by any binding precedent nor can it even be considered a "trend" as Objectors characterize, even if the Court were to evaluate this settlement under this more rigorous standard, the settlement here still passes muster.

For final approval, the trial court is to evaluate whether the settlement is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 408, (2010). The court is "to consider and weigh the nature of the claim, possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Kullar v. Foot Locker Retail, Inc.* 168 Cal.App. 4th 116, 133, (2008). In order to make this determination, the court must be provided with basic information regarding the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of the claims is fair and reasonable. *Id*. Plaintiffs have met these requirements in their pending Motion for Preliminary Approval ("Motion"). The Motion, all 353 pages with exhibits not including

[2] Defendants urge the Court to read the Preliminary Approval Order issued in *Jane Roe v. SFBSC Management, LLC* found at Exhibit 35 to the Declaration of Bradley Shafer as there the court addresses nearly identical objections asserted by these same Objectors, finding that the settlement "viewed as a whole" met the standards for preliminary approval.

declarations filed in support, provides the information necessary for the Court to conclude that the settlement is fair and reasonable and therefore worthy of final approval – even though only preliminary approval is sought at this point.

The Motion clearly sets forth the information necessary to deem the settlement fair, reasonable, and adequate: it sets out the basis for the misclassification claims alleged; it details the highly disputed legal and factual issues (including the valid defenses) impacting the negotiations; it discusses the information received via formal discovery in previous litigations and informal discovery provided to value the pending claims; and it sets out the business judgment used by the Parties to determine that the pending settlement is fair, reasonable, and adequate under the circumstances in light of the claims alleged and the available defenses. See Motion at pages 19-26.

The Motion and supporting Declarations also include Plaintiffs' valuation of the claims and what was used to arrive at the potential recovery of $32,029,352.45, before any defenses are considered. Objectors misrepresent that the Motion makes only a "single statement regarding their expected recovery" to argue that there has been an insufficient damages analysis by Plaintiffs' counsel. See Objection at page 12. However, the Declarations submitted in support of the Motion provide detailed information on what was used to arrive at Plaintiffs' valuation of the potential recovery, assuming all claims proved to be true. See Kashima Dec. at ¶¶ 4 and 5; See Thompson Dec. at ¶¶ 11-15. To argue that despite this information the Court is prohibited from undertaking an analysis as to whether the settlement is fair is just simply inaccurate.

Objectors assert additional inaccuracies to arrive at their preposterous conclusion that the potential recovery should be approximately $70,000,000.00 more than Plaintiffs' counsel have estimated.[3] Objectors allege that the class "has not received any wages", were forced to "tip out" club personnel, had to pay "rent" or "stage fees" (as much as "$240 per shift") etc. See Proposed Complaint in Intervention at pp. 13-14. These allegations are demonstrably *false* and have no relation to the business operations of these Defendants. The Defendants here establish mandatory

[3]Liss argued to the court in *Cotter v. Lyft* that that a settlement value of less than 2% of the possible recovery **is** justifiable after an assessment of the substantial risks of further litigation, which is the percentage of the total recovery she contends this settlement represents even based on her exaggerated estimation. See Plaintiff's Motion for Preliminary Approval at 2016 WL 3345535 pp 25-26 and footnote 18, Bokmuller Dec. at Ex. 1.

fees that are imposed on customers for the purchase of personal dances and entertainment sessions ("Dance Fees"). Declaration of Don Krontz ("Krontz Dec.") at ¶ 5. Those Dance Fees are not to be paid to the Entertainers directly. *Id*. Nor do Entertainers pay -- as alleged -- any type of "house fee" or "rent." *Id*. at ¶ 10. The Defendants take all Dance Fees into their gross receipts and from those receipts they pay the Entertainer a contracted-for percentage of the Dance Fee paid by the customer which is paid *to the Entertainer* in cash with a receipt on the day she performed. *Id*. at ¶ 7. The Defendants then issue a Form 1099 to the Entertainer at the end of the year memorializing all such payments. *Id*. Customers can and do pay voluntary tips directly to the Entertainer over and above the Dance Fees. *Id*. at ¶ 6. The Dance Fees are segregated to avoid co-mingling them with these tips and, unlike employees of the Defendants, Entertainers do not report their tip income to Defendants (which, contrarily, is legally required of all "regularly tipped" employees so that taxes and other withholdings due on tip income are taken out of the employee's wages). *Id*. Entertainers need not tip, and are specifically discouraged from tipping, Defendants' personnel. *Id*. at ¶ 11. At the time of contracting, Entertainers are required to review and sign an acknowledgment that they are not required or encouraged to tip any staff; the acknowledgement containing a "hotline" number for the Entertainer to call if she experiences any pressure to tip employees. *Id*. Just delineating those simple facts shows how wildly exaggerated Objectors' valuation is because none of those "damages" apply *to these Defendants*.

2. THE SETTLEMENT IS NOT "MINIMAL" OR "DISCOUNTED".

Objectors spend multiple pages arguing that this settlement is insufficient because other cases against non-related entities that operate in a completely different manner have resulted in more favorable settlements or awards. However, what is significant is that not a single one of those cases involved claims against these Defendants or any business operations equivalent to how these Defendants operate in California. See Declaration of Bradley Shafer ("Shafer Dec.") at Ex. 37, pp. 12 (other court ruling – in *rejecting* Liss's objections in *that case* - that "the key question is not Plaintiffs' likelihood of success against the defendants in cases cited by the objectors, but their likelihood of success against *Defendants here*." [citation omitted and emphasis added]). Nor do Objectors cite a single case where conversion to employment was a term of the settlement.

The likelihood of recovery here is not a slam dunk as Objectors would lead this Court to believe. These Defendants and the other clubs in the Deja Vu Group have a long history of prevailing on dancer misclassification cases both in California and federally. While Defendants can present to this Court no fewer than *29* rulings finding exotic dancers to be independent contractors as opposed to employees (*13* of which involve Clubs in the Deja Vu Group; Shafer Dec. at ¶¶ 7-33), what should be the most salient for this Court is a jury verdict in San Francisco in the case of dancer Tracy Buel, *who performed at one of the Defendant Clubs here*, that *rejected* her claim that she was an employee and *which was affirmed* by the Court of Appeal in *Buel v. Chowder House, Inc.*, 2006 WL 1545860 (Cal. App. 1st Dist.). Additionally, no less than 5 times has the State of California concluded that the Entertainers were properly classified as independent contractors – with two of these decisions involving Defendants sued here. Shafer Dec. at ¶¶ 8, 9, and 19.

Significantly, there are also two decisions that have found exotic dancers to be independent contractors, and not employees, under the type of "ABC" test recently adopted by the California Supreme Court in *Dynamex*. First is *Kelly Perry v. Little Darlings Development Center* (a club in the Deja Vu Group), where a Maryland state trial court denied a dancer's claim for worker's compensation benefits by finding her to have performed as an independent contractor as opposed to an employee. In the 2014 ruling, the court noted that the dancer was given the option of being an employee and that she could have received a wage and be subject to control, but that she chose instead to be an independent contractor. Moreover, like the Defendants here, the club did not set a schedule for her; did not require a specific numbers of days of work from her; did not require her to wear specific outfits; did not choose her music or stage name; did not tell her how to dance; did not require her to sell drinks; and "importantly" did not keep her from working for other establishments. Shafer Dec. at ¶ 17. Second is a decision of the Indiana Department of Workforce Development, Unemployment Insurance Appeals, in the case of *In Re: Condross Corp.*, concluding that dancers were indeed independent contractors and not employees under the ABC test. *Id.* at ¶ 25. For Objectors to conclude that a finding of employment status is a certainty is baseless, even under the ABC test.

Additionally, Defendants have strong defenses to these claims that Objectors don't even acknowledge when asserting that this settlement is insufficient, but are required to be considered by this Court in determining whether the settlement is fair, reasonable, and adequate.

First and foremost, each of the potential class members executed arbitration agreements containing comprehensive class and collective action waivers. As such, this action cannot proceed as a class action for state law claims or a "collective" action under the FLSA. Rather, any claims would be required to proceed through individualized arbitration[4] and making recovery for the majority of class members unlikely.[5]

Second, in determining the classification issue, *Dynamex* cannot be applied retroactively. *See Newman v. Emerson Radio* (1989) 48 Cal.3d 937, 978 (a court (or arbitrator) should decline to retroactively apply a new rule articulated in a judicial decision when "retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine reasonable reliance of parties on the previously existing state of the law"). *Dynamex* is also inapplicable to the Labor Code claims not enforceable through wage orders, the FLSA claims and the PAGA claims. *See Thurman v. Bayshore Transit Mgmt., Inc*. (2012) 203 Cal.App.4th 1112, 1131-32 (PAGA penalties disallowed, because PAGA only allows for civil penalties for violation of the labor code.)

Third, even in the unlikely event that misclassification could be established, there would be no valid wage or overtime claims because the Defendants maintain detailed documentation (payment records and Forms 1099[6]) of the contract payments they make to the Entertainers, which

[4] Objectors argue that PAGA claims are not subject to arbitration; however, in *Epic*, the Court ruled that its comment in *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 565-66, stating that employees are absolutely entitled to litigate their claims "through resort to administrative and judicial forums" was "dicta" (the Court actually using the term "dicta" *three times* to make the point). *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1628-29 (emphasis added). If claims that could otherwise be litigated administratively can be compelled into individual arbitration, so then can a qui tam action such as PAGA.

[5] Liss has acknowledged this point stating "An adverse decision revering this Court's rulings regarding the enforceability of Uber's 2013 and 2014 arbitration clauses could destroy the certified class in this case, making recovery unfeasible for the vast majority of class members." Bokmuller Dec. at Ex. 2 thereto, at ¶18.

[6] Representative samplings of these records were provided to Plaintiffs' counsel and considered in their valuation of these claims. Plaintiffs' counsel concedes in their Motion and supporting declarations that the average dancer made well over minimum wage and rarely worked overtime.

demonstrates that the Entertainers have been paid far in excess of the applicable minimum wage. Kashima Dec. at ¶ 4 ("the average dancer made approximately $40 per hour"). The Defendants also maintained "time" records showing that it is the rare occasion that any Entertainer ever performed for more than 8 hours. Thompson Dec. at ¶ 14 ("the average hours performed was 5.3 hours per day.") Moreover, the Entertainers are paid in cash daily, obviating any "waiting time" claims; they were permitted to take breaks -- unlimited in duration -- whenever they wanted; they were specifically protected from having to tip out any of the personnel of the Defendants; and their receipts satisfy the Labor Code requirements for wage statements. See Krontz Dec. at ¶¶ 7, 8, 11, and 12. As such, no Labor Code violations could be established even in the unlikely event that misclassification was proven.

Fourth, Objectors completely dismiss the critical fact that the settlement is *paying entertainers who were already paid far in excess of what they would have earned if they were classified as employees* – and the massive value of the millions of dollars in offsets for those payments. Kashima Dec. at ¶4; see also Krontz Dec. at ¶ 13. The law allows offset in such situations, including to prevent unjust enrichment (or "double dipping"). See *Moody v. Razooly*, 2003 WL 464076 (Cal. App. Feb. 25, 2003); See also *Labriola v. Clinton Entertainment Management, LLC*, 2017 WL 1150989 (N.D. Ill.), at *11-18 (summary judgment granted where there was a finding that entertainers received more in Dance Fee payments than the applicable minimum wage.) Not that it is legally necessary to obtain an offset, but the Roe plaintiffs and the putative class members agreed in writing to permit offset in order to avoid unjust enrichment. Krontz Dec. at Ex. 4 at ¶VII(B). Once the offset is applied, any individualized claims for failure to pay minimum wage or overtime wages have no actual value.

Fifth, the history of Defendants prevailing on the misclassification claims is relevant to the value of the PAGA claims. Pursuant to PAGA, employees can seek penalties for violations of certain provisions of the Labor Code. Cal. Lab. Code § 2698, *et seq*. The LWDA has *discretion* to assess a civil penalty for violations of the Labor Code, under PAGA and in turn, "a court is authorized to exercise the same discretion subject to the same limitations and conditions, to assess a civil penalty." Cal. Lab. Code § 2699 (e)(1). In any action by an aggrieved employee seeking a penalty under

PAGA, "a court may award a lesser amount than the maximum civil penalty amount specified by [the act] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is *unjust, arbitrary and oppressive, or confiscatory*." Cal. Lab. Code § 2699 (e)(2) (clarification and emphasis added).[7] Here, where the Defendants have won against repeated claims of misclassification and even a jury has found an entertainer who performed at one of the Defendants' clubs to have been an independent contractor instead of an employee (*which was affirmed on appeal*), and where numerous decisions of the EDD have found that exotic dancers were not misclassified, the chance of sizable penalties under PAGA is significantly reduced; a fact reflected in this Settlement.

All of these risks were considered by Plaintiffs' counsel when evaluating settlement. Because of the likelihood that the class would never be certified, that the claims would be subject to arbitration, that there could be a finding that these individuals were properly classified as independent contractors, that even if there was a finding of misclassification the actual value of these wage claims are minimal and would be offset by the significant payments to these dancers documented by Form 1099s - the agreement to pay $1,500,000.00 with conversion to employment status under *enhanced* employment terms was determined to be fair, reasonable and adequate by Plaintiffs' counsel.

3. THERE WAS NO "COLLUSION" OR "REVERSE AUCTION"

Defendants didn't ask to be sued as Objectors baldly assert. Rather, experienced and knowledgeable attorneys who had clients that performed during the class period sued Defendants based on a belief that the recent decision in *Dynamex* supported their claims. In turn, the Defendants' determined to use their money to negotiate a settlement instead of wasting it on more of the same repetitive lengthy litigation they have already been through three times.

[7] In her Uber settlement declaration, Liss acknowledges the low nature of PAGA awards, including the fact that "a significant number of courts have approved PAGA allocations that are simply $10,000 or less, regardless of the settlement value of the case and regardless of the valuation (if any) of the PAGA claim." Bokmuller Dec. at Ex. 2 thereto, at ¶ 85 & n.7 (collecting cases where courts approved single digit percentages of potential recover).

Defendants did not just agree to pay $1,500,000.00 and convert all of the Entertainers to employees because they thought they were getting off cheap. Rather, after a lengthy mediation with former federal Judge Victor E. Bianchini and a weighing of the risks on both sides, the Parties reached this unprecedented settlement.

Before finalizing the Settlement Agreement, and in an effort to resolve all pending claims against them, the Defendants sought to negotiate with Liss in an attempt to obviate her well-known history of objecting to settlements and to resolve all pending claims initiated by her against them once and for all. While Liss characterizes it as "window dressing", the Defendants and Plaintiffs each paid toward a *$20,000.00 per day fee for a Mediator who was hand-picked by Liss* and their representatives traveled to San Francisco at considerable expense to be present at a place and on a date hand-picked (and made non-negotiable) by Liss. Defendants attempted to negotiate with Liss for 8 hours to resolve all outstanding claims against the Defendants, and was prepared to pay new money to settle objectors' individual claims, but to no avail.

This Settlement Agreement was not acquired through collusion -- it was negotiated with the help of a seasoned mediator, it was handled by attorneys who had many dancer class action cases under their respective belts, after an exchange of detailed information and evaluation of the risks of litigation, culminating in a fair, reasonable, and adequate result.

4. **DEFENDANTS WOULD NOT HAVE CONVERTED BUT FOR THIS SETTLEMENT.**

The settlement includes a particularly painful and expensive requirement to convert thousands of unwilling contractors into employees after a 30-year method of operation for which these Defendants received repeated court and governmental approval. Notably, conversion is a term Objector's counsel has *never achieved* in any of her listed and known cases.

Objectors dismiss the conversion as having no value, and contend that the Defendants "decided on their own" to convert these entertainers into employees, and "indeed had already done so by November 1, 2018". This conclusion lacks any factual support and is just plain wrong. The Defendants would not have converted had they not been required to as a condition of this settlement. Krontz Dec. at ¶ 14; Declaration of Gary Marlin ("Marlin Dec") at ¶ 5. The requirement of conversion puts these Defendants at a huge business disadvantage with respect to their competitors

because these Entertainers do not want to be classified as employees and many therefore have left Defendants' establishments and are now performing elsewhere.[8]

As the Court accurately noted during the previous hearing, the purpose of conversion by the preliminary approval date is to close any potential liability on the issue and avoid a multiplicity of suits. To allow an open period of liability after preliminary approval would invite additional litigation, undermining the Defendants' attempt to achieve finality on the misclassification issue. Defendants recognize this and that is why they have agreed to conversion at a substantial cost and risk to their business operations.

As this Court recognized, the conversion of the Entertainers to employees provides value to the Class. Objectors assert that conversion is required under *Dynamex* and not by way of this settlement. However, as this Court aptly pointed out, Defendants settled (and converted) because *they were sued*. Nevertheless, in an effort to provide the most conservative valuation estimate for conversion, Defendants do not ascribe "value" to the legal requirements of employee status (minimum wage, unemployment compensation, etc.). Rather, Defendants value only the "enhanced" employment terms of employment, negotiated by class counsel, which include Dance Fee commissions on top of minimum wage, as well as costumes, shoe allowances, etc.

Mark Cohen, a financial, statistical and rehabilitation economist, has analyzed the value of the enhanced employment terms. He estimates that over just a one-year period, the conversion of the Entertainers to employees will provide at least **$12,454,882.00** in value *over-and-above minimum wage to the Entertainers*. See Declaration of Mark Cohen at ¶ 23 and Ex. 3. This additionally illustrates that the settlement here is fair and reasonable.

III. CONCLUSION

For the reasons set forth above, the Objections to Preliminary Approval of the Settlement Agreement should be overruled.

Dated: November 21, 2018

CLARK HILL LLP

By: _____

Tammara N. Bokmuller, Esq.
Attorneys for Defendants

[8] As an example, 4 of the San Francisco based Defendants have lost 25% to 40% of their Entertainers following the conversion to employment status. Marlin Dec. at ¶ 5.