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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: CIVIL TERM: PART 19

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KAZUMI KATO, TRAM DANG and JONATHAN CLEMENT,  
Plaintiff(s),

- against -

MASA NEW YORK d/b/a MASA RESTAURANT and  
MASAYOSHI TAKAYAMA,

Defendant(s).

-----X

Index No. 104578/09

60 Centre Street  
New York, New York 10007  
September 17, 2009

B E F O R E: HONORABLE EDWARD H. LEHNER, J.S.C.

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MICHAEL MANISTER  
OFFICIAL COURT REPORTER

1 - Proceedings -

2  
3 THE COURT: We have a motion for class  
4 certification. Who is the movant?

5 MR. GREENBAUM: Your Honor, there is  
6 also a motion to strike the reply.

7 THE COURT: Strike the reply?

8 MR. GREENBAUM: Yes. They filed a  
9 motion, we filed our opposition.

10 THE COURT: We don't have such a motion.  
11 Does anyone have that?

12 MS. SCHULMAN: Yes, your Honor.

13 MR. GREENBAUM: They were both on the  
14 calendar.

15 THE COURT: Sir, I say we don't have it.  
16 Is it before us today?

17 You have it?

18 MR. GOLDMAN: It is their cross-motion.

19 THE COURT: Do you have a copy, sir?

20 MR. GREENBAUM: Yes.

21 THE COURT: It's a memorandum of law.  
22 Do you have that?

23 Off the record.

24 (Discussion held off the record.)

25 THE COURT: What is it you want to  
26 strike?

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2 MR. GREENBAUM: Reply brief submitted by  
3 the plaintiff in support of their motion.

4 THE COURT: It says to strike  
5 plaintiff's reply. You don't mean that, you mean  
6 a reply memorandum?

7 MR. GREENBAUM: Correct.

8 THE COURT: Why do you want to do that?

9 MR. GREENBAUM: It was untimely.

10 THE COURT: This was done in July. It's  
11 two months ago. Have you had a chance to read --  
12 you have had a chance to read it and respond.  
13 Have you done it?

14 MR. GREENBAUM: Your Honor, the original  
15 motion for class certification was not filed with  
16 sufficient notice to provide plaintiffs an  
17 opportunity to submit a reply brief.

18 THE COURT: Counsel, it's two months  
19 ago. You had plenty of time. Is there anything  
20 else you want to submit on this?

21 MR. GREENBAUM: No, your Honor.

22 THE COURT: Motion for class  
23 certification.

24 Is it failing to turn over tips that are  
25 put on the bill or is it just sharing the tips  
26 with nonservice personnel?

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2 MS. SCHULMAN: It's both, your Honor.

3 THE COURT: Well, is there something  
4 wrong in sharing tips with the people who prepare  
5 food, is that a wrong?

6 MS. SCHULMAN: It's a wrong if the  
7 employer requires the servers to do so, as we  
8 allege happened in this case.

9 THE COURT: Is there something wrong in  
10 the chef, kitchen people sharing tips, is that  
11 wrong? I'm asking the law, but I would think as  
12 a restaurateur, who is more important, the guy  
13 who cooked the food and prepared it or the guy  
14 who brings it out to me in half a second? Is  
15 there some reason that the preparers cannot share  
16 tips, is that illegal?

17 MS. SCHULMAN: Yes, it is, under New  
18 York Labor Law 196(d).

19 THE COURT: It says tips cannot be  
20 shared with nonservice personnel?

21 MS. SCHULMAN: That's right.

22 THE COURT: Is that true, you agree?

23 MR. GREENBAUM: Tips cannot be shared  
24 with nonservice personnel. However, it is our  
25 opinion based on the opinion of the New York  
26 State Department of Labor, the sushi chefs,

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2 people in question, are serving personnel.

3 THE COURT: You mean if you are sitting  
4 there at the bar and they cook it in front of  
5 you --

6 MR. GREENBAUM: Benihana.

7 THE COURT: Are they service personnel?

8 MS. SCHULMAN: They have to actually  
9 serve and take orders from customers.

10 THE COURT: They cook the food in the  
11 middle, is that service?

12 MS. SCHULMAN: It could be.

13 In this case we contend that the sushi  
14 chef did not in fact directly serve the customer,  
15 they did not have that direct customer  
16 interaction.

17 THE COURT: But you agree that the  
18 people who prepare food cannot share in tips.

19 MR. GREENBAUM: People in the back of  
20 the house, in the kitchen, correct, cannot share  
21 in tips under New York law. But these are not  
22 people, the people in question are not people in  
23 the back of the house. People in the back of the  
24 house do not share in tips in this situation.

25 THE COURT: The claim is that -- do you  
26 automatically add tips to the bill?

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2 MR. GREENBAUM: There's two different  
3 claims here; there is a service charge which is  
4 automatically added to the bill.

5 THE COURT: Is that 20 percent?

6 MR. GREENBAUM: I believe it's  
7 20 percent.

8 THE COURT: You don't know?

9 MR. GREENBAUM: I'm not sure if it is 15  
10 or 20 percent.

11 THE COURT: It is the higher one from  
12 what they allege.

13 MR. GREENBAUM: But there's a second  
14 claim here that in addition to the service  
15 charge, when people leave, customers leave  
16 gratuities, that the sushi chefs are not allowed  
17 to share in the gratuities, it is the plaintiff's  
18 position, and we disagree with that position  
19 because we believe they are service personnel.

20 THE COURT: That is a fact question.

21 If the sushi chef has to give it to  
22 someone to carry it, you believe be they cannot  
23 share?

24 MR. GREENBAUM: We do not agree. Our  
25 position is that they are part of the service  
26 operation, they are in the front of the house,

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2 they are chatting with the customers.

3 THE COURT: You mean if they do their  
4 cooking in the open as opposed to in the back,  
5 that's different than if they prepare the food in  
6 the back?

7 MR. GREENBAUM: Correct.

8 THE COURT: And is there law on this?  
9 This is not the first sushi restaurant to be  
10 involved in this kind of litigation.

11 MR. GREENBAUM: There are federal and  
12 state opinion letters.

13 THE COURT: Letters?

14 MR. GREENBAUM: I'm not aware of a case  
15 under New York law that specifically addresses  
16 the issue.

17 THE COURT: If you are saying the chef  
18 is out in the open, he can share?

19 MR. GREENBAUM: The chef is generally a  
20 manager. A manager can never share in tips. But  
21 if it was a chef who was not a manager, who was  
22 just a line chef who is standing in the open, who  
23 is bar service process, it is our position --

24 THE COURT: Even though he doesn't hand  
25 the plate to the patron? If he has to give it to  
26 a waitress to give it to the patron, even though

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2 out in the open -- you hear my question? The  
3 question is, the chef is out in the open, he is  
4 preparing sushi but he gives it to a waitress to  
5 give it to the patron.

6 MR. GREENBAUM: We do not believe that  
7 is a determinative factor. What we believe  
8 matters, the chef is part of the process. For  
9 example --

10 THE COURT: The chef is always part of  
11 the process. But you agree that it is in the  
12 back, he doesn't share.

13 Now, he is part of the process and I  
14 would think the more important process, but  
15 that's neither here nor there, I gather.

16 The law so requires, so be it. But I'm  
17 not sure what you are saying. Is it merely the  
18 fact that the chef is out in the open allows him  
19 to share?

20 MR. GREENBAUM: It is the fact that he  
21 is an integral part of the service process as  
22 observed by the customers.

23 THE COURT: So you mean it is the  
24 observation -- so if you see the observation, he  
25 can share?

26 MR. GREENBAUM: If you see the chef and



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2 the chef interacts with the customers, he can  
3 share. If the chef was behind a visible curtain,  
4 then he or she would not be permitted to share.

5 THE COURT: You mean if he's told I want  
6 it rare, I want it medium, then he shares?

7 MR. GREENBAUM: If he is directly  
8 chatting with the customer and he is not a  
9 manager, yes, we believe that he can share.

10 THE COURT: Even though the food itself  
11 has to be delivered not by the chef but by a  
12 waitress or waiter?

13 MR. GREENBAUM: Correct.

14 THE COURT: What do you say to that  
15 legal question?

16 MS. SCHULMAN: Well, our position is  
17 that the key is whether the chefs are having  
18 substantial interaction with customers and  
19 providing direct service to customers. If they  
20 are having merely incidental conversation --

21 THE COURT: Incidental. You want to  
22 know who won the ball game, that's no good, but  
23 if they say do you want this rare or medium-rare,  
24 then they can share?

25 MS. SCHULMAN: It has to be a  
26 significant part of their job.

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2 THE COURT: If they ask how do you want  
3 this hamburger cooked, does that make them  
4 part --

5 MS. SCHULMAN: Not if that's all there  
6 is.

7 THE COURT: What else do they have to  
8 do?

9 MS. SCHULMAN: As you were saying --

10 THE COURT: "I want it medium-rare,  
11 chef", is that enough?

12 MS. SCHULMAN: As you were saying  
13 before --

14 THE COURT: Don't answer what I said  
15 before, answer what I'm asking now.

16 MS. SCHULMAN: I'm sorry.

17 THE COURT: I'm saying the chef is  
18 taking orders from the customers how he wants it  
19 cooked, he or she wants it cooked; is that  
20 interaction enough?

21 MS. SCHULMAN: No.

22 THE COURT: What else does he have to  
23 do?

24 MS. SCHULMAN: The chef has to be  
25 serving customers.

26 THE COURT: Well, then are you saying

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2 that the chef has to do the service? I thought  
3 you said something before. I thought you said if  
4 he interacts with the customer, that's  
5 sufficient. Did I mishear you?

6 MS. SCHULMAN: No, you did not mishear  
7 me.

8 THE COURT: What is your position? You  
9 are looking to your colleague.

10 Do you want to yield to him?

11 MS. SCHULMAN: Perhaps on this point.

12 MR. GOLDMAN: The chef can never  
13 participate in the tip pool.

14 THE COURT: Never?

15 MR. GOLDMAN: Never, never.

16 THE COURT: Why is that?

17 MR. GOLDMAN: Because he doesn't provide  
18 service.

19 THE COURT: What if he does provide --  
20 Benihana, as I remember the chefs there, they are  
21 in the middle and they give the food to the  
22 customer. Is that sufficient?

23 Just answer my question, if you would,  
24 based on the facts I gave you.

25 MR. GOLDMAN: No, it is not sufficient.  
26 Benihana has been the subject of many lawsuits.

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2 THE COURT: Forget Benihana. I haven't  
3 been to Benihana I can't remember when.

4 Assuming the chef is standing there  
5 cooking the food in the middle of the restaurant  
6 or middle of a bunch of tables and he cooks it  
7 and gives it to the customer, is that enough?

8 MR. GOLDMAN: That's an incidental  
9 situation. That doesn't happen that often.

10 THE COURT: I just asked you assuming  
11 that happens --

12 MR. GOLDMAN: No, it is still not --

13 THE COURT: Why not? He is a server,  
14 isn't he?

15 MR. GOLDMAN: He is not serving. His  
16 primary duty is to prepare the food.

17 THE COURT: Even though he serves it and  
18 he has a primary -- doing something else, he  
19 can't share?

20 MR. GOLDMAN: Yes, your Honor.

21 THE COURT: Under law or under -- under  
22 state law or did you just make that up?

23 MR. GOLDMAN: I can tell you under state  
24 law and federal law the chef may never  
25 participate in the tip pool.

26 THE COURT: Even though he delivers the

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2 food, is the question.

3 MR. GOLDMAN: There's no case on point,  
4 your Honor.

5 THE COURT: All right. Fair enough.

6 And what should the result be? If he is  
7 serving the food why shouldn't he share even if  
8 he cooks?

9 MR. GOLDMAN: There's probably 50 or 60  
10 seats and only a few at the sushi bar. If you  
11 have ever been in a sushi bar, there's only a few  
12 seats. He can't be possibly walking around the  
13 restaurant --

14 THE COURT: I have seen sushi bars where  
15 people line up on the bar, the chef is there,  
16 does his thing and here's your sushi.

17 MR. GOLDMAN: There's also a waitress  
18 that provides backup service.

19 THE COURT: But the sushi chef is  
20 actually giving food to the patron.

21 MR. GOLDMAN: That's the exception to  
22 the rule.

23 THE COURT: You are probably a better  
24 restaurant customer than the poor judge.

25 The only issue here is what's wrong with  
26 class certification? We got to the merits of the

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2 case. On the issue we have been talking about,  
3 is it relevant to the motion?

4 MR. GREENBAUM: Yes. The issues that  
5 you are --

6 THE COURT: Why are they relevant? I  
7 think I went off on a tangent.

8 MR. GREENBAUM: There are two claims in  
9 this case. There is one claim based on, as you  
10 accurately stated before, the service charge.  
11 There is a second claim based on these additional  
12 gratuities, to use the legal term, that customers  
13 add in addition to the service charge on many  
14 occasions.

15 THE COURT: If you put in a restaurant  
16 20 percent and I leave money on the table or I  
17 add it on the check.

18 MR. GREENBAUM: Correct.

19 THE COURT: Does it make any difference?

20 MR. GREENBAUM: Does it make any  
21 difference of --

22 THE COURT: Is the issue any different  
23 if I leave cash on the table or I add it to the  
24 check?

25 MR. GREENBAUM: In regard to whether or  
26 not the chef is allowed to have the money, no,

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2 the issue is not different.

3 THE COURT: Is the waitress -- and what  
4 do you think should be done? If the money is  
5 left on the table, the waitress picks it up, is  
6 that something that can be shared?

7 MR. GREENBAUM: If the money is left on  
8 the table, the service personnel have the right  
9 to share the money.

10 THE COURT: Who?

11 MR. GREENBAUM: The service personnel,  
12 which in our opinion is the nonmanagerial sushi  
13 chefs.

14 THE COURT: How many people are in this  
15 class? Is this one restaurant or a chain?

16 MR. GREENBAUM: One restaurant and it's  
17 over 40 people.

18 THE COURT: What restaurant is this?

19 MS. SCHULMAN: Masa Restaurant.

20 MR. GOLDMAN: Very famous, Time Warner  
21 Center. It is about -- my wealthy law assistant  
22 advises me this is the wealthy restaurant in the  
23 Time Warner Building. It is about \$300, 400 a  
24 seat. I mean it's very, very expensive.

25 THE COURT: 400?

26 MR. GOLDMAN: It's very, very expensive.

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2 THE COURT: \$400, you add 20 percent,  
3 that's -- okay.

4 The issue then is why shouldn't we  
5 certify it?

6 MR. GREENBAUM: There are two claims  
7 brought by plaintiffs.

8 THE COURT: I got it, there are two  
9 claims. Why shouldn't we certify?

10 MR. GREENBAUM: The claims with regard  
11 to the class diametrically --

12 THE COURT: So what?

13 MR. GREENBAUM: If this class is  
14 certified as --

15 THE COURT: The class you want is all  
16 the service personnel? Who is the class?

17 MS. SCHULMAN: All the servers.

18 THE COURT: Servers.

19 MS. SCHULMAN: Yes.

20 THE COURT: Is this a union?

21 MS. SCHULMAN: I don't believe so.

22 MR. GOLDMAN: It's definitely not.

23 THE COURT: If there was a union?

24 MR. GOLDMAN: It would have some effect.

25 THE COURT: Can the union negotiate the  
26 share with the chef back people?



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2 MR. GOLDMAN: Definitely not the chef.  
3 That would be against New York law.

4 THE COURT: They can't even negotiate.

5 MR. GOLDMAN: As I understand it. I'm  
6 not up on union law.

7 THE COURT: You're not?

8 MR. GOLDMAN: No, I'm sorry, sir.

9 THE COURT: Why shouldn't I certify,  
10 sir?

11 MR. GREENBAUM: The first claim is a  
12 service charge.

13 THE COURT: One is 20 percent and they  
14 are sharing -- you are saying 20 percent is being  
15 shared with nonservice personnel.

16 MR. GREENBAUM: And the first claim, we  
17 believe that even if plaintiff prevails on that  
18 claim and the service charge needs to be  
19 distributed to service staff, those service staff  
20 include the sushi chefs who are not a member of  
21 the proposed class.

22 THE COURT: You say they should be  
23 shared. So that will cause a denial of the  
24 lawsuit.

25 Why shouldn't the class be certified  
26 merely because there's a factual issue as to

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2 whether these sushi chefs should also share, why  
3 would that prevent certification? It might  
4 result in a defeat of the case if the class  
5 should not prevail because the sushi service  
6 should share, then the plaintiff would lose.

7 MR. GREENBAUM: But, your Honor, the  
8 issue of whether or not plaintiffs prevail on the  
9 merits and the issue of who is entitled to  
10 damages are two separate issues. Plaintiffs  
11 could prevail on the merits, which we disagree  
12 with, the facts are not before the Court, and  
13 proof of the first claim that the service charge  
14 should be distributed to all service personnel.  
15 But under the proposed class, the service  
16 personnel does not include the sushi chefs.

17 THE COURT: So then they lose if it goes  
18 to the merits, right?

19 MR. GREENBAUM: I'm not sure I  
20 understand your question.

21 THE COURT: Then they lose the lawsuit.  
22 If they didn't include the sushi chefs who you  
23 say should be shared, then they would lose, would  
24 they not, they are not entitled to all the tips?  
25 Wouldn't that result in a dismissal of the  
26 action?

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2 MR. GREENBAUM: No. Because in the  
3 first cause of action, the service charge was not  
4 distributed to anyone, the service charge was  
5 retained by the restaurant. And the restaurant  
6 paid all of the servers well above minimum wage.  
7 The restaurant did not take a tip credit.

8 So plaintiffs could prevail on a claim  
9 that all or a portion of that service charge  
10 should be dispersed to service personnel.

11 Based on recent case under New York law,  
12 however, based on the proposed class, the  
13 individuals in the proposed class would receive a  
14 windfall because it is our belief that others in  
15 the proposed class, others -- excuse me --

16 THE COURT: Why would the proposed class  
17 win if they are not entitled to all of the tips?  
18 Why would they win if in fact the chefs should  
19 also share, why would they prevail?

20 MR. GREENBAUM: Because the claim here  
21 is that the defendants improperly retained the  
22 service charge.

23 THE COURT: And they improperly retained  
24 it and gave it to your chefs.

25 MR. GREENBAUM: No, your Honor.

26 THE COURT: Is there a claim --

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2 MR. GREENBAUM: It was not distributed.

3 THE COURT: It was not distributed

4 totally?

5 MR. GREENBAUM: The service charge was  
6 not distributed in any many.

7 THE COURT: And retained by the  
8 management, is that the claim?

9 MS. SCHULMAN: Yes, it is.

10 THE COURT: So the management is keeping  
11 part of the tips, is that the claim, not giving  
12 it to any employees?

13 MS. SCHULMAN: They charge 20 percent  
14 automatic gratuity that they don't distribute to  
15 anyone.

16 THE COURT: Just the owner keeps it.

17 MS. SCHULMAN: I don't know who keeps  
18 it.

19 THE COURT: Well, it is not distributed  
20 to any employees.

21 MS. SCHULMAN: That's right. That's our  
22 understanding anyway.

23 THE COURT: If they gave it to the  
24 captains or those type of people, maitre di.

25 MR. GOLDMAN: We'll find that out in  
26 discovery.

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2 THE COURT: What do you say to his  
3 argument on the class?

4 MR. GOLDMAN: Well, I don't think they  
5 are allowed --

6 THE COURT: He is saying there are other  
7 people that should be in the class because if you  
8 are unlawfully keeping money, it should also go  
9 to the other people.

10 MR. GOLDMAN: If it turns out there are  
11 people when we get to discovery and find out, we  
12 will amend the complaint and add those people and  
13 come back before you and have additional class.

14 THE COURT: But if that's the end of the  
15 legal issue, should they share or not share?

16 MR. GOLDMAN: If Jane Doe is a server  
17 and she is being denied her tips lawfully, it  
18 doesn't matter whether John Doe is also not being  
19 denied his tips, it just means that the class  
20 should be bigger than it is and we'll discover  
21 that.

22 THE COURT: But that is not determined  
23 at trial. If the trial determines these chefs  
24 should also share, you would also agree they  
25 share in the recovery, right? If it's determined  
26 at trial that his argument is correct, that these

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2 chefs who are providing service --

3 MR. GOLDMAN: I mean it is possible,  
4 your Honor, but we're in the stage of just  
5 getting class certification.

6 THE COURT: Would you agree that if a  
7 trial determines that these people should be  
8 considered service personnel --

9 MR. GOLDMAN: We might lose on the  
10 second count but still win on the first count.

11 THE COURT: But you would agree if they  
12 are -- if it is found that they are service  
13 personnel, they share in the tips, right?

14 MR. GOLDMAN: Yes, your Honor.

15 THE COURT: With that in mind, I see no  
16 reason to not certify the class with that  
17 understanding that if the personnel turns out to  
18 be different, they share.

19 MR. GREENBAUM: Your Honor, may I make a  
20 second point, please? There's a second cause of  
21 action here that deals with the gratuities left  
22 on the table which were retained by service staff  
23 including the sushi chefs. So within this class,  
24 within the potential scope of recovery there is a  
25 conflict within class members. Potential class  
26 members who plaintiff's counsel just acknowledged

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2 could potentially receive recovery are  
3 adversaries to the proposed plaintiffs within the  
4 litigation.

5 THE COURT: So what? Why should that  
6 result in a denial? You mean if the action were  
7 brought by 40 individual servers, that's the way  
8 it should go?

9 MR. GREENBAUM: Your Honor, how is it --

10 THE COURT: Does that make more sense,  
11 counsel? They can bring an action on behalf of  
12 40 names, employees, it is not a cast of  
13 thousands.

14 MR. GREENBAUM: As you know, it is an  
15 opt-out class under New York law. When would the  
16 sushi chefs ever be given the opportunity to be  
17 notified that they have an opportunity to be part  
18 of the class and opt-out of the case? How can we  
19 go with two conflicting claims?

20 Our opposition about the second claim,  
21 the sushi chefs are customarily tipped employees.  
22 So simultaneously we are going to be  
23 litigating --

24 THE COURT: You see, you represent the  
25 restaurant, you don't represent the sushi chefs.

26 MR. GREENBAUM: Right.

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2 THE COURT: You don't represent the  
3 chefs.

4 MR. GREENBAUM: Restaurant and its  
5 owner.

6 THE COURT: They will have a right --  
7 those individuals, you don't represent them, do  
8 you?

9 MR. GREENBAUM: No.

10 THE COURT: They will have such rights.  
11 If they are aware of the litigation, they will  
12 hire a lawyer and decide what they want to do; do  
13 they want to opt in, opt out.

14 MR. GREENBAUM: The certified class does  
15 not include them. How can they opt out?

16 THE COURT: I will allow that in the  
17 order to be settled herein that anyone who wishes  
18 to join can join. Any problem with that?

19 MR. GOLDMAN: No, your Honor.

20 MR. GREENBAUM: If I may ask a question?

21 THE COURT: Yes.

22 MR. GREENBAUM: I totally understand  
23 that in regard to the first claim and the open  
24 issue as to whether or not they are service  
25 personnel. But how do we proceed with the second  
26 claim where plaintiffs are arguing that they are



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2 not properly within the class for purposes of the  
3 left gratuities? They are not going to  
4 understand one way or another whether they are  
5 part of a proposed class, whether they are not  
6 part of a proposed class.

7 THE COURT: Why are they going to make  
8 the same argument? I'm a service personnel and  
9 all tips should be shared.

10 MR. GREENBAUM: So then, your Honor, if  
11 I understand correctly, plaintiffs are going to  
12 be representing sushi chefs as part of the  
13 proposed class, that the order that you just --

14 THE COURT: Sushi chefs should not be  
15 part of the class, that's what they are saying.

16 MR. GREENBAUM: Correct.

17 THE COURT: Now the sushi chefs are  
18 going to come in and say we want to be part of  
19 the class, what would happen?

20 MR. GOLDMAN: First of all, that's not  
21 going to happen. I have tried a case with his  
22 predecessor. And they will represent the sushi  
23 chefs and they will tout them out across the  
24 stand and each of them will say I do service, run  
25 around and get them water, and we will sit and  
26 listen for days about how the sushi chef does

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2 service. Their firm will represent the sushi  
3 chefs. But if he doesn't then, we will represent  
4 them and then I guess I can contact them as well.

5 THE COURT: But the argument is you have  
6 a conflict; how can you represent them if you sue  
7 them?

8 MR. GOLDMAN: We can contact them. If  
9 he says his firm doesn't represent them, we'll  
10 contact them and find out if there is a conflict.

11 THE COURT: There is a conflict.

12 MR. GOLDMAN: Maybe we need to refer  
13 them to another attorney. But I think their firm  
14 is going to be representing all of these people  
15 and they are all going to say --

16 THE COURT: They are all going to say we  
17 want to share. I assume it reduces the  
18 restaurant's salary obligations that the sushi  
19 chefs share. If they share in tips, that  
20 probably reduces the demand for salaries.

21 MR. GREENBAUM: Correct.

22 MR. GOLDMAN: That's the crux of it,  
23 your Honor.

24 THE COURT: I don't know why the class  
25 shouldn't be certified. I guess the problem is  
26 you are opposed to them being part of the class

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2 as you stand here today.

3 MS. SCHULMAN: Yes.

4 Your Honor, if I may --

5 THE COURT: One at a time. I'm dealing  
6 with it.

7 That's right, you oppose --

8 MR. GOLDMAN: At this point we oppose  
9 them being part of the class.

10 THE COURT: How are their rights going  
11 to be adequately adjudicated?

12 MR. GOLDMAN: At this point in time  
13 their firm will represent them. And if they have  
14 a conflict, they will then disclose it to the  
15 alleged sushi chefs and the alleged servers and  
16 then they can decide whether or not they are  
17 going to seek outside counsel. Right now --

18 THE COURT: And what will outside  
19 counsel do for them?

20 MR. GOLDMAN: I assume outside counsel  
21 will call us first.

22 THE COURT: If you were representing  
23 them, what would you do?

24 MR. GOLDMAN: I will say let's sit down  
25 and interview them first.

26 THE COURT: What is the legal -- they

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2 want to share. What should they do?

3 MR. GOLDMAN: I don't believe they are  
4 entitled to a share.

5 THE COURT: I know you believe it, but  
6 he believes they should. And these sushi chefs  
7 now want to participate in this litigation, how  
8 do they do it?

9 MR. GOLDMAN: It would reduce our share  
10 of the chefs.

11 We're going down this road -- sort of  
12 he's got you on this intellectual track that is  
13 not going to materialize.

14 THE COURT: Why not?

15 MR. GOLDMAN: I've dealt with this law  
16 firm and dealt with these cases. They are going  
17 to get on the stand and say we do service and --

18 THE COURT: How does it get resolved?

19 MR. GOLDMAN: The jury or judge makes a  
20 decision as to whether or not they are servers.

21 THE COURT: And if they are servers?

22 MR. GOLDMAN: Damages to our class  
23 members would be less. It still doesn't give  
24 them the right to take the tips. It still  
25 doesn't give Masa and the restaurant the right to  
26 take these astronomical --

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2 THE COURT: I'm going to certify the  
3 class and I want to figure out how to handle to  
4 see if you can get an appropriate provision  
5 dealing with the sushi chef.

6 How many is that, half dozen?

7 MR. GREENBAUM: No, more than that,  
8 probably 15 to 20, because it goes back about  
9 four or five years. At any given time there's  
10 three to five.

11 THE COURT: I'm granting the motion for  
12 class certification with a settling order. See  
13 if you can come up with language that would  
14 theoretically protect the sushi chef and also  
15 protect the restaurant. Other than that, we have  
16 a claim with 40 individuals suing. What's the  
17 difference?

18 MR. GREENBAUM: Your Honor --

19 THE COURT: That's enough. I think I  
20 understand your argument.

21 The motion is granted as aforesaid.  
22 Settle order.

23 The foregoing constitutes the order of  
24 the Court.

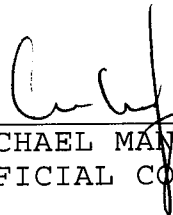
25 (Whereupon, the proceedings were  
concluded.)

- Proceedings -

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C E R T I F I C A T I O N

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT  
OF THE ORIGINAL STENOGRAPHIC MINUTES TAKEN OF  
THIS PROCEEDING.



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MICHAEL MANISTER  
OFFICIAL COURT REPORTER