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11 *ANTIGUA CANTINA & GRILL, INC.*

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF SACRAMENTO**

14 ANTIGUA CANTINA & GRILL, INC., a
15 dissolved California corporation,
16 individually and on behalf of all others
17 similarly situated,

18 Plaintiff,

19 vs.

20 MARKSTEIN BEVERAGE CO. OF
21 SACRAMENTO, a California
22 Corporation; and DOES 1 through 100,
23 inclusive,

24 Defendants.

Case No.: 34-2020-00286915-CU-BC-GDS

**[AMENDED PROPOSED] ORDER
CERTIFYING A SETTLEMENT CLASS,
PRELIMINARILY APPROVING CLASS
ACTION SETTLEMENT, AND
DIRECTING NOTICE TO THE
SETTLEMENT CLASS**

Date: November 19, 2021

Time: 11:30 a.m.

Dept.: 37

Judge: Hon. Kevin R. Culhane

Hearing to be Conducted via Zoom

<https://saccourt.zoom.us/my/dept37a>

[Complaint Filed: 10/9/2020]

FILED / ENDORSED

NOV 22 2021

By A. O'Donnell, Deputy Clerk

1 This matter came before the Court on Plaintiffs' Notice of Motion and Memorandum in
2 Support of Preliminary Approval of Class Action Settlement.

3 Plaintiff filed its Class Action Complaint on October 9, 2020 ("Complaint"). In its
4 Complaint, Plaintiff alleged various claims against Defendant Markstein Beverage Co. of
5 Sacramento ("Markstein" or "Defendant"). Plaintiff alleged that Markstein charged a late fee
6 on invoices for the sale of alcoholic beverages that are unpaid, in whole or in part, on the 43rd
7 day after the date of delivery. Plaintiff alleged that Bus. & Prof. Code § 25509(a) only permits a
8 late fee equal to one percent (1%) of the unpaid balance to be charged on the 43rd day after
9 delivery, and each 30 days thereafter. Plaintiff alleges that Markstein charges a late fee of two
10 percent (2%) – the 1% referenced by § 25509(a) -- plus a Carrying Charge equal to an additional
11 1%. Plaintiff asserted causes of action for Declaratory Relief, Breach of Contract, Money Had
12 and Received, Open Book Account, and violations of California's Unfair Competition Law
13 (Cal. Bus. and Prof. Code § 17200 et seq.). Plaintiff sought compensatory damages, restitution
14 of amounts paid by putative class members for the overcharges, injunctive relief, costs, and
15 attorneys' fees.

16 Plaintiffs and Markstein have entered into a Settlement Agreement and Release dated
17 September 9, 2021 (the "Settlement Agreement") following good faith, arm's-length
18 negotiations in which the Parties have agreed to settle this case (the "Action"), subject to the
19 approval and determination of the Court as to the fairness, reasonableness, and adequacy of the
20 Settlement Agreement which, if approved, will result in dismissal of the Action with prejudice.

21 The Court, having reviewed the Settlement Agreement, including the exhibits attached
22 thereto, and good cause appearing based on the record,

23 **IT IS HEREBY ORDERED:**

24 1. **Class Certification for Settlement Purposes Only.** The Settlement Agreement
25 provides for a Settlement Class defined as follows:

26 All California retailers of alcoholic beverages who either (1) paid a
27 Carrying Charge to Markstein at any time during the period beginning
28 October 9, 2016 through the Execution Date ("Class Period"), or (2) were

1 assessed a Carrying Charge that was not paid, or (3) are parties to a
2 contract with Markstein that provides for a Carrying Charge.

3 The Action is provisionally certified as a class action for settlement purposes only, in
4 accordance with Code of Civil Procedure §382 and California Rule of Court. The Court finds
5 for settlement purposes that: (a) the Settlement Class is so numerous that joinder of all
6 Settlement Class members would be impracticable; (b) there are issues of law and fact common
7 to the Settlement Class; (c) the claims of the Settlement Class Representative is typical of and
8 arise from the same operative facts as the claims of the Settlement Class members; (d) the
9 Settlement Class Representative and Settlement Class counsel will fairly and adequately protect
10 the interests of the Settlement Class, as the Settlement Class Representative has no interests
11 antagonistic to or in conflict with those of the Settlement Class, and the Settlement Class
12 Representative has retained experienced and competent counsel to prosecute this matter on
13 behalf of the Settlement Class; (e) questions of law or fact common to Settlement Class
14 members predominate over any questions affecting only individual members; and (f) a class
15 action and class settlement is superior to other methods available for a fair and efficient
16 resolution of this controversy. The Court finds that it will likely be able to certify the Settlement
17 Class for purposes of judgment at the Final Approval Hearing.

18 **2. Settlement Class Representatives and Settlement Class Counsel.**

19 Plaintiff Antigua Cantina & Grill, Inc. is designated and appointed as Settlement Class
20 Representative. The Court finds that the Settlement Class Representative is similarly situated to
21 absent Class Members, typical of the Class, and that it will be an adequate Settlement Class
22 Representative.

23 The Court finds that the following counsel are experienced and adequate counsel and are
24 hereby designated as Settlement Class Counsel: Robert Green of Green & Noblin, P.C. and
25 Matthew Hess of Matthew E. Hess, Attorney at Law.

26 **3. Preliminary Settlement Approval.** Upon preliminary review, the Court finds
27 that the proposed Settlement is within the range of possible approval is fair, reasonable and
28 adequate, and thus warrants providing notice of the Settlement to the Settlement Class.

1 Accordingly, the Settlement is preliminarily approved and the Court finds that it will likely be
2 able to approve the Settlement at the Final Approval Hearing.

3 4. **Jurisdiction.** The Court has personal jurisdiction over the Parties before it.
4 Additionally, venue is proper in this court under Code of Civil Procedure §395(a).

5 5. **Final Approval Hearing.** A Final Approval Hearing shall be held on March 4,
6 2022 at 2:30 p.m. PST, in Department 37, Gordon D. Schaber Courthouse, located at 720 9th
7 Street, 5th Floor, Sacramento, CA 95814, to determine, among other things, whether: (a) this
8 matter should be finally certified as a class action for settlement purposes under Code of Civil
9 Procedure §382; (b) the Settlement should be finally approved as fair, reasonable, and adequate,
10 and finally approved; (c) the Action should be dismissed with prejudice in accordance with the
11 terms of the Settlement Agreement; (d) Settlement Class Members should be bound by the
12 releases set forth in the Settlement Agreement; (e) the application of Settlement Class Counsel
13 for an award of attorneys' fees, costs, and expenses (the "Fee Request") should be approved;
14 and (f) the application of Settlement Class Representatives for Service Awards (the "Service
15 Awards Request") should be approved.

16 Plaintiff's motion for final approval of the Settlement, Service Awards Request, and Fee
17 Request shall be filed with the Court at least 21 days prior to the deadline for submission of
18 objections specified in the Notice. By no later than seven (7) days prior to the Final Approval
19 Hearing, the Parties shall file responses, if any, to any objections, and any replies in support of
20 final approval of the Settlement and/or the Service Awards Request and Fee Request.

21 6. **Administration.** The Court appoints Angeion Group as the Settlement
22 Administrator, with responsibility for class notice and claims administration.

23 7. **Notice to the Class.** The proposed Notice Program set forth in the Settlement
24 Agreement and the forms of Notice (attached to the Settlement Agreement as Exhibits 2 and 3)
25 satisfy the requirements of Code of Civil Procedure and are hereby approved. Non-material
26 modifications to this Exhibits may be made without further order of the Court. The Settlement
27 Administrator is directed to carry out the Notice Program in conformance with the Settlement
28 Agreement.

1 Within thirty (30) days after this Preliminary Approval Order is issued by the Court (the
2 “Notice Deadline”), the Settlement Administrator shall complete the Notice Program in the
3 manner set forth in Section 4 of the Settlement Agreement.

4 In advance of the Final Approval Hearing, the Settlement Administrator shall provide
5 Settlement Class Counsel with a sworn declaration confirming that the Notice Program was
6 implemented in accordance with the Preliminary Approval Order, the Parties’ instructions, and
7 the Court’s approval. Settlement Class Counsel shall file such declaration with the Court as an
8 exhibit to or in conjunction with Settlement Class Representatives’ motion for final approval of
9 the Settlement.

10 8. **Findings Concerning Notice.** The Court finds that the form, content and method
11 of giving notice to the Class as described in Paragraph 7 of this Order and the Settlement
12 Agreement (including the exhibits thereto): (a) will constitute the best practicable notice to the
13 Settlement Class; (b) are reasonably calculated, under the circumstances, to apprise Settlement
14 Class Members of the pendency of the action, the terms of the proposed Settlement, and their
15 rights under the proposed Settlement, including but not limited to their rights to object to or
16 exclude themselves from the proposed Settlement and other rights under the terms of the
17 Settlement Agreement; (c) are reasonable and constitute due, adequate, and sufficient notice to
18 all Class Members and other persons entitled to receive notice; and (d) meet all applicable
19 requirements of law, including the Due Process Clause(s) of the United States Constitution. The
20 Court further finds that the Notice is written in plain language, uses simple terminology, and is
21 designed to be readily understandable by Class Members.

22 9. **Exclusion from Class.** Any Settlement Class Member who wishes to be
23 excluded from the Settlement Class must mail a written notification of such intent to exclude
24 himself or herself from the Settlement Class to the Settlement Administrator at the address
25 provided in the Notice, postmarked no later than forty-five (45) calendar days after the Notice
26 Deadline (the “Opt-Out Deadline”). The written notification must

- 1 (a) the name of this Action (*Antigua Cantina & Grill, Inc. v. Markstein*
2 *Beverage Company, Inc.*);
- 3 (b) the full name, email address, postal address and telephone number of the
4 person requesting to be excluded;
- 5 (c) the words "Request for Exclusion" at the top of the document; and
- 6 (d) a statement with the following language: "I request that I be excluded
7 from the Settlement in *Antigua Cantina & Grill, Inc. v. Markstein*
8 *Beverage Company, Inc.*, Sacramento County Superior Court Case No. 1-
9 4-2020-00286915-CU-BC-GDS. I understand that by requesting to be
10 excluded from the Class, I am not entitled to receive any benefits under
11 the Settlement."

12 The Request for Exclusion must be personally signed by the Class Member who seeks to
13 opt out, even if the document is prepared by an actual or purported agent or attorney acting on
14 behalf of the Class Member. Opt out requests can only be presented for an individual Class
15 Member. No one may opt out on behalf of a group of Class Members.

16 Each Class Member who does not submit a Request for Exclusion substantially in
17 compliance with this Section within the deadline set by the Court shall be deemed to participate
18 in the Settlement and all releases provided in this Agreement. For purposes of determining
19 timeliness, Requests for Exclusion shall be deemed to have been submitted on the date
20 postmarked by the postal service or other mail delivery service or the date upon which it is
21 emailed.

22 The Settlement Administrator shall provide the Parties with copies of all completed opt-
23 out notifications, and a final list of all who have timely and validly excluded themselves from
24 the Settlement Class, which Settlement Class Counsel may move to file under seal with the
25 Court no later than ten (10) days prior to the Final Approval Hearing.

26 **10. Objections and Appearances.** A Settlement Class Member who complies with
27 the requirements of this paragraph may object to the Settlement, the Service Awards Request, or
28 the Fee Request.

No Settlement Class Member shall be heard, and no papers, briefs, pleadings, or other
documents submitted by any Settlement Class Member shall be received and considered by the

1 Court, unless the objection is filed with the Court no later than forty-five (45) calendar days
2 after the Notice Deadline. For an objection to be considered by the Court, the objection must
3 also set forth:

- 4 (a) the name of the Action (*Antigua Cantina & Grill, Inc. v. Markstein*
5 *Beverage Company, Inc.*);
- 6 (b) the full name, email address, postal address, and telephone number of the
7 person objecting;
- 8 (c) the word "Objection" at the top of the document;
- 9 (d) that the objector has reviewed the definition of the term "Class" set forth
10 in the Settlement Agreement and understands that the objector is a Class
11 Member and has not opted out of the Class;
- 12 (e) that copies of any other documents that the objector wishes to submit in
13 support of their position are attached to the objection;
- 14 (f) a statement of whether the objector intends to appear at the Final
15 Approval Hearing and whether the objector will be represented by their
16 own counsel at that hearing;
- 17 (g) in clear and concise terms, the legal and factual arguments supporting the
18 objection; and
- 19 (h) a signature from the objector.

20 Class Members who fail to submit a timely written objection to the Settlement in
21 compliance with this paragraph will be deemed to have waived the right to have their objections
22 to the Settlement considered by the Court. Class Members who exclude themselves from the
23 Settlement shall not be entitled to object to the Settlement, and any objections submitted for and
24 by a Class Member who has excluded himself or herself will be invalid and shall be disregarded
25 by the Court.

26 11. Any Class Member who wishes to be heard at the Fairness Hearing must mail or
27 email a written Notice of Intention to Appear to Class Counsel and Defense Counsel, received
28 or postmarked no later than forty-five (45) calendar days following the Settlement Notice Date.
The Notice of Intention to Appear must set forth the following:

- (i) the name of this Action (*Antigua Cantina & Grill, Inc. v. Markstein*
Beverage Company, Inc.);

- 1 (j) the full name, email address, postal address and telephone number of the
2 person intending to appear at the Fairness Hearing;
- 3 (k) the words "Notice of Intention to Appear" at the top of the document;
- 4 (l) the points the person wishes to present at the Fairness Hearing; and
- 5 (m) the identity (name, address, email address and telephone number) of any
6 lawyer who represents the Class Member and who will speak on the
Member's behalf at the Fairness Hearing.

7 If Final Judgment is entered, any Settlement Class Member who fails to object in the
8 manner prescribed herein shall be deemed to have waived his or her objections and shall be
9 forever barred from making any such objections in the Action or in any other proceeding or
10 from challenging or opposing, or seeking to reverse, vacate, or modify any approval of the
11 Settlement Agreement, the Service Awards Request, or the Fee Request.

12 12. **Termination of Settlement.** This Order shall become null and void and shall be
13 without prejudice to the rights of the Parties, all of whom shall be restored to their respective
14 positions existing immediately before this Court entered this Order, if the Settlement is not
15 finally approved by the Court or is terminated in accordance with Paragraph 4.8 of the
16 Settlement Agreement. In such event, the Settlement and Settlement Agreement shall become
17 null and void and be of no further force and effect, and neither the Settlement Agreement nor
18 the Court's orders, including this Order, relating to the Settlement shall be used or referred to
19 for any purpose whatsoever.

20 13. **Use of Order.** This Order shall be of no force or effect if Final Judgment is not
21 entered or there is no Effective Date and shall not be construed or used as an admission,
22 concession, or declaration by or against Markstein of any fault, wrongdoing, breach, or liability.
23 Nor shall this Order be construed or used as an admission, concession, or declaration by or
24 against any Settlement Class Representative or any other Settlement Class Member that his or
25 her claims lack merit or that the relief requested is inappropriate, improper, unavailable, or as a
26 waiver by any Party of any defense or claims he, she, or it may have in this litigation or in any
27 other lawsuit.

14. **Stay of Proceedings.** Except as necessary to effectuate this Order, this Action and all deadlines set by the Court or by rule in this Action are stayed and suspended pending the Final Approval Hearing and issuance of the Final Judgment, or until further Order of this Court.

15. **Continuance of Hearing.** The Court reserves the right to adjourn or continue the Final Approval Hearing and related deadlines without further written notice to the Class. If the Court alters any of those dates or times, the revised dates and times shall be posted on the website maintained by the Settlement Administrator.

16. **Summary of Deadlines.** The preliminarily approved Settlement shall be administered according to its terms pending the Final Approval Hearing. Deadlines arising under the Settlement Agreement and this Order include but are not limited to:

Notice Deadline: Thirty (30) calendar days after the issuance of this Preliminary Approval Order;

Motion for Service Awards, Attorneys' Fees and Costs: Twenty One (21) calendar days prior to the Objection and Opt-Out Deadlines;

Opt-Out and Objection Deadlines: Forty-five (45) calendar days after the Notice Deadline;

Replies in Support of Final Approval, Service Awards and Fee Requests: 7 calendar days prior to the Final Approval Hearing; and

Final Approval Hearing: March 4, 2022 at 2:30 p.m.

IT IS SO ORDERED.

Date:

Hon. Kevin R. Culhane

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PROOF OF SERVICE

I, Ryan J. Sullivan, hereby declare as follows:

I am employed by Green & Noblin, P.C., 2200 Larkspur Landing Circle, Suite 101, Larkspur, CA 94939. I am over the age of eighteen years and am not a party to this action. On November 19, 2021, I served the within document(s):

[AMENDED PROPOSED] ORDER CERTIFYING A SETTLEMENT CLASS, RELIMINARILY APPROVING CLASS ACTION SETTLEMENT, AND DIRECTING NOTICE TO THE SETTLEMENT CLASS

- ☒ by electronic transmission of a PDF attachment of the above listed document(s) via my e-mail address to the email address(es) set forth below on this date.
- ☐ by placing the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Pedro, California addressed as set forth below.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ by depositing the document(s) listed above in a sealed envelope with delivery fees provided for a FedEx pick up box or office designated for overnight delivery, and addressed as set forth below.

Michael W. Scarborough
Helen Eckert
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
Telephone: 415.434.9100
Facsimile: 415.434.3947
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heckert@sheppardmullin.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, executed on November 19, 2021, at Larkspur, California.

/s/ Ryan J. Sullivan
Ryan J. Sullivan