

**U.S. Department of Labor**

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**Issue Date: 30 November 2012**

CASE NO.: 2010-FLS-00008

*In the Matter of:*

HONG KONG ENTERTAINMENT (OVERSEAS)  
INVESTMENTS, LTD., d/b/a  
TINIAN DYNASTY HOTEL AND CASINO, and  
RAYMOND CHAN, an individual,  
Respondents,

and

CASE NO.: 2011-FLS-00004

*In the Matter of:*

KWAN MAN, an individual,  
Respondent.

**DECISION AND ORDER ORDERING PAYMENT OF CIVIL MONEY PENALTIES,  
APPROVING SETTLEMENT, AND DISMISSING RESPONDENT RAYMOND CHAN  
WITHOUT PREJUDICE**

These cases arise under the provisions of the Fair Labor Standards Act of 1938, as amended, (“FLSA”), 29 U.S.C. § 201, *et seq.*, for alleged violations of its overtime provisions by Respondent business, Hong Kong Entertainment Investments, Ltd. (“HKE”), doing business as Tinian Dynasty Hotel and Casino (“Tinian Dynasty”), and individuals, Raymond Chan and Kwan Man.

For the reasons set forth below, Respondents Hong Kong Entertainment (Overseas) Investments, Ltd., d/b/a Tinian Dynasty Hotel and Casino, and Kwan Man are ORDERED to pay civil money penalties in the amount of \$191,400.00, and Respondent Raymond Chan is DISMISSED without prejudice from this proceeding.

**PROCEDURAL BACKGROUND**

On August 31, 2007, the Plaintiff in this case, the Administrator of the Wage and Hour Division, United States Department of Labor (“Administrator”), issued a notice assessing civil money penalties in the amount of \$191,400.00 against Tinian Dynasty and Raymond Chan for willful and repeat violations of the provisions of the FLSA. Respondents Tinian Dynasty and

Raymond Chan timely filed an exception to the assessment of penalties on September 18, 2007, and on January 25, 2010, the Administrator referred the case to the Office of Administrative Law Judges for hearing and a determination of the violations and the appropriateness of the civil money penalties. This case was assigned docket number 2010-FLS-00008 and was set for hearing on December 15, 2010, before Judge Stephen Purcell. On October 13, 2010, Judge Purcell vacated the hearing at the request of the parties to give them time to conduct discovery and pursue settlement discussions. He ordered the parties to file periodic reports about the status of the case. The OALJ National Office referred this case to the San Francisco Office on March 18, 2011, for assignment to a judge. The case file was received on March 22, 2011, and on April 1, 2011, I issued a notice advising the parties that the case had been assigned to me for hearing and ordering the parties to continue filing a report every 45 days advising me of the status of their readiness for trial.

Meanwhile, on February 4, 2011, the Administrator issued a notice assessing civil money penalties in the amount of \$191,400.00 against Kwan Man, individually, for the same violations of the provisions of the FLSA. Respondent Kwan Man timely filed an exception to the notice of penalty on February 18, 2011,<sup>1</sup> and the matter was referred to the OALJ for hearing on March 22, 2011, and assigned docket number 2011-FLS-00004.

On April 15, 2011, the parties filed a stipulation to consolidate the cases involving Respondents Tinian Dynasty and Raymond Chan and Respondent Kwan Man. I approved the stipulation and ordered the two cases consolidated on April 29, 2011. The hearing in the consolidated cases was subsequently scheduled for March 20, 2012, to March 22, 2012.

On February 1, 2012, the Plaintiff filed a motion for summary decision against the Respondents, and Respondents filed a motion for partial summary decision. After receiving these motions, I vacated the hearing on February 6, 2012, and established a briefing schedule to address both motions.

I denied Respondents' Motion for Partial Summary Decision on April 16, 2012. On May 18, 2012, I issued an Order Granting in Part Plaintiff's Motion for Summary Decision and Setting Hearing ("Summary Decision Order"). The Plaintiff's Motion for Summary Decision asked me to find that Respondents had engaged in willful and repeated violations of the FLSA and to affirm the Administrator's assessment of \$191,400.00 in civil money penalties against them. I granted the Plaintiff's Motion for Summary Decision with respect to Respondents HKE and Kwan Man, finding that they had engaged in a willful and repeated violation of the FLSA, but denied it with respect to Respondent Chan because I found insufficient basis for finding that he should be found personally liable as an employer under the FLSA and set the matter for further hearing on September 6, 2012. Though I found the civil money penalties were appropriate, I declined to order payment of the penalties until Respondent Chan's personal liability was determined.

I vacated the September 6, 2012, hearing on August 29, 2012, after a telephone conference call with counsel for the parties held the same day during which the parties advised me that they had reached a settlement of this entire case which would eliminate the need for the

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<sup>1</sup> His exception was incorrectly dated February 18, 2010, but the mistake was an obvious one.

hearing. On November 27, 2012, the Plaintiff submitted a signed settlement agreement between the Administrator and Respondent Raymond Chan which provides that Respondent Chan is to be dismissed without prejudice from this case subject my issuing a decision assessing civil money penalties against Respondents Tinian Dynasty and Kwan Man and their payment of the civil money penalties within a certain time frame.

#### APPROVAL OF SETTLEMENT AGREEMENT AND DISMISSAL OF RAYMOND CHAN

The settlement agreement submitted by the parties on November 27, 2012, provides the following:

1. The proceedings against Raymond Chan is dismissed without prejudice;
2. The Administrator will not file a new Order of Reference against Mr. Chan for repeat and willful violations of the FLSA for the time period from March 16 to May 26, 2007, if Respondents Tinian Dynasty and Kwan Man pay the entire assessed civil money penalty of \$191,400.00 to the Administrator or begin payment of the assessed civil money penalty in accordance with a repayment plan agreed to by the parties within 60 days of the issuance of a final, unappealable order requiring Tinian Dynasty and Kwan Man to pay the civil money penalty of \$191,400.00.<sup>2</sup>
3. If there is a final, unappealable order requiring Tinian Dynasty and Kwan Man to pay the assessed civil money penalty of \$191,400.00 to the Administrator and neither Tinian Dynasty nor Kwan Man pay the civil money penalty within 60 days of the Order or begin payment of the civil money penalty in accordance with an agreed repayment plan, the Administrator will file a new Order of Reference against Raymond Chan for repeat and willful violations of the FLSA for the time period from March 16 to May 26, 2007.
4. If there is a final, unappealable order requiring Tinian Dynasty and Kwan Man to pay civil money penalties in an amount other than \$191,400.00, Tinian Dynasty and Kwan Man will pay new amount in the manner agreed to for the \$191,400.00 civil money penalty.
5. If the Administrator files a new Order of Reference against Raymond Chan for repeat and willful violations of the FLSA for the time period from March 16 to May 26, 2007, Raymond Chan and the Administrator agree to stipulate to all factual findings and legal issues resolved in any final, unappealable order against Tinian Dynasty or Kwan Man, except whether Raymond Chan has personal liability as an employer under the FLSA. Raymond Chan will waive any defense as to the timeliness of the filing of the new Order of Reference, including the statute of limitations or laches for the time period from March 16 to May 26, 2007

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<sup>2</sup> Pursuant to the provisions of 29 C.F.R. §§ 580.12(e) and 580.13, this Decision and Order will become final if a petition for review is not received by the Administrative Review Board within 30 days of the date of this Decision and Order. Thus, this Decision and Order will become final and unappealable 60 days from the date it is issued.

6. If the Administrator files a new Order of Reference against Raymond Chan for repeat and willful violations of the FLSA for the time period from March 16 to May 26, 2007, the parties will request and agree that the case will be heard by me.

I have reviewed the Settlement Agreement and find that it fairly and adequately resolves all pending issues in this matter with regard to Raymond Chan. Accordingly, the Settlement Agreement is APPROVED, and it is hereby ORDERED that Raymond Chan be DISMISSED WITHOUT PREJUDICE from this proceeding subject to the conditions set out in the Settlement Agreement.

### ANALYSIS AND FINDINGS

Dismissal of Raymond Chan as a party from this proceeding leaves unresolved the issue of the civil money penalties assessed against Respondents Tinian Dynasty and Kwan Man. I have already decided that Tinian Dynasty and Kwan Man violated the FLSA violations in my Summary Decision Order partially granting the Administrator's motion for summary decision.

The following discussion and findings are based on the findings in my Summary Decision Order and the entire record in this case. Since I found Tinian Dynasty and Mr. Kwan<sup>3</sup> to be in violation of the FLSA and discussed the arguments made on that issue and evidence that supported those findings in my Summary Decision Order, I will not repeat the detailed discussion here and will simply summarize the key findings from the record and the Summary Decision Order that are necessary to resolve the issue of the appropriateness of the civil money penalties.

#### Basis for Civil Money Penalty Assessment

The Wage and Hour Division of the U.S. Department of Labor ("Wage and Hour Division") conducted an investigation into the payroll practices of Tinian Dynasty<sup>4</sup> for the period from March 16 to May 26, 2007. After the investigation was completed, the Administrator issued a notice on August 31, 2007, to HKE and Tinian Dynasty ("Notice") informing them that the investigation disclosed violations of Section 7 of the FLSA resulting from the failure to pay statutory overtime pay for hours worked in excess of 40 hours per week to workers who were covered by the FLSA. The Notice informed them that the violations resulted in underpayments totaling \$309,816.21 that was due to 348 employees. Based on these findings and the fact that an earlier Wage and Hour Division investigation conducted in 2001 had revealed other violations of the overtime pay provisions of the FLSA and resulted in assurances by HKE that the FLSA would be complied with in the future, the Administrator assessed civil money penalties totaling \$191,400.00 against Tinian Dynasty and HKE for these violations.

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<sup>3</sup> Though Mr. Kwan's name is "Kwan Man," he indicated at his deposition that it is customary to address him as Mr. Kwan.

<sup>4</sup> Tinian Dynasty and HKE are used interchangeably since HKE was doing business as Tinian Dynasty.

## Factual Findings

### *1999 to 2001 Wage and Hour Investigation*

The Wage and Hour Division also conducted an investigation into HKE's payroll practices for the period from February 6, 1999, to February 9, 2001 ("First Investigation").

The First Investigation resulted in the filing of a complaint in U.S. District Court for the District of the Northern Mariana Islands on April 19, 2002, alleging that Tinian Dynasty and Kwan Man had violated various provisions of the FLSA, including Sections 7 and 15(a)(2). (Exhibit 6 to Declaration of Attorney Joseph Lake in Support of Plaintiff's Motion for Summary Decision.) This complaint led to the filing of a Consent Judgment on September 30, 2002, signed by Tinian Dynasty and Kwan Man in which Tinian Dynasty and Kwan Man agreed to comply with the FLSA and to pay \$591,535.02 in unpaid overtime wages that were due 436 Tinian Dynasty employees. (Exhibit 7 to Declaration of Attorney Joseph Lake in Support of Plaintiff's Motion for Summary Decision.)

### *2007 Wage and Hour Investigation*

The current case involves findings from the Wage and Hour Division investigation for the period from March 16 to May 26, 2007.<sup>5</sup> The Wage and Hour Division investigator found that during the period covered by the Second Investigation, HKE failed to pay 348 employees \$309,816.21 in regular and overtime pay that was due the employees under the FLSA. (Exhibit T-1 of Declaration of District Director Terence Trotter in Support of Plaintiff's Motion for Summary Decision.) After the investigation was completed, on July 2, 2007, HKE signed a Back Wage Compliance and Payment Agreement with the Wage and Hour Division in which HKE agreed to pay the wages that were owed and to comply with the FLSA. (Exhibit H1 of Declaration of Investigator Richard Hamilton in Support of Plaintiff's Motion for Summary Decision.) On August 31, 2007, District Director Trotter assessed the \$191,400.00 in civil money penalties that are the subject of the current proceeding. (Exhibit T-1 of Declaration of District Director Terence Trotter in Support of Plaintiff's Motion for Summary Decision.)

### *The FLSA Applies and the Violations Were Repeat and Willful*

HKE was engaged in interstate commerce and generated revenues of more than \$500,000 during all relevant time periods. It employed hundreds of workers which it hired, paid, and fired. Kwan Man was the President and Chairman of HKE and had the final say about almost every feature of the employment relationship HKE had with its workers. He exercised economic control over HKE's employees and qualifies as an employer under the FLSA. (Summary Decision Order, pp. 7, 13.)<sup>6</sup> Both HKE and Mr. Kwan are employers covered by the FLSA. HKE failed to promptly pay overtime wages to its workers from March 16, 2007, to May 26, 2007. This failure to promptly pay the overtime wages violated Section 7 of the FLSA.

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<sup>5</sup> This will be referred to as the Second Investigation.

<sup>6</sup> Some of these findings are taken from my Summary Decision Order which identified the basis for the findings. Instead of reiterating the evidence relied on, I will simply refer to where the finding is found in my Summary Decision Order.

Mr. Kwan has known the basic principles of the FLSA since 1998, including that workers have to be paid on time, which at HKE meant within two weeks after payday. He was aware after the First Investigation that HKE had to pay its workers within two weeks after they worked. (Summary Decision Order, p. 9.)

During the period covered by the First Investigation, some of HKE's employees were not paid the overtime wages they were owed within two weeks of their regular pay day. HKE was informed after the First Investigation that it had violated the FLSA from 1999 to 2001 with the late payment of wages and overtime wages to its employees. Those violations were resolved in a consent judgment entered into by HKE and the Administrator in 2002 in which HKE agreed to comply with the requirements of the FLSA in the future. (Exhibit 7 to Declaration of Attorney Joseph Lake in Support of Plaintiff's Motion for Summary Decision.) Thus, HKE was well aware of the FLSA requirements before the violations took place in 2007. HKE's and Mr. Kwan's knowledge of the FLSA requirements renders any failure to comply with the overtime pay provisions willful.

Moreover, in light of the violations revealed in the First Investigation, these violations of the overtime wage provisions of the FLSA were repeat violations.

Thus, I find HKE engaged in willful and repeated violations of Section 7 of the FLSA in 2007.

*The Mandatory Considerations for Assessment of Civil Money Penalties Were Properly Considered*

Any person who repeatedly or willfully violates Section 7 of the FLSA is subject to civil money penalties. 29 U.S.C. § 16(e)(2); 29 C.F.R. § 578.3(a). To determine the amount of the civil money penalty for willful or repeat violations of Section 7 of the FLSA, the Administrator is required to consider: 1) the seriousness of the violations; and 2) the size of the employer's business. 29 C.F.R. § 578.4(a). The violations at issue here were serious given the fact that HKE had been investigated earlier and found to have violated the same provision of the FLSA, the large number of employees involved, and the amount of wages that were owed to the employees. With respect to the size of the employer's business, HKE was the largest private employer on the island of Tinian, where Tinian Dynasty was located, and one of the larger employers in the Commonwealth of the Northern Mariana Islands.

The Administrator felt that both mandatory factors weighed in favor of the assessment of civil money penalties. (Declaration of District Director Terence Trotter<sup>7</sup> in Support of Plaintiff's Motion for Summary Decision, pp. 3-4.) I agree and find the Administrator's consideration of the mandatory factors under 29 C.F.R. § 578.4(a) was correct.

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<sup>7</sup> District Director Trotter was acting on behalf of the Administrator for the Wage and Hour Division in his capacity as the Area Director for the Wage and Hour Division.

*The Discretionary Considerations for Assessment of Civil Money Penalties Were Properly Considered*

Under 29 C.F.R. § 578.4(b), “[w]here appropriate, the Administrator may also consider other relevant factors in assessing the penalty, including but not limited to;” 1) good faith efforts to comply, 2) the employer’s explanation for the violations, 3) previous history of violations, 4) the employer’s commitment to future compliance, 5) the interval between violations, 6) the number of employees affected, and 7) whether there is any pattern to the violations. 29 C.F.R. § 578.4(b)(1)-(7).

The Administrator considered these discretionary factors and explained in responses to Respondents’ interrogatories how he considered them when he made his decision about the civil money penalties. (Exhibit L of Respondents’ Declarations and Exhibits Supporting Response to Summary Disposition Motion and Cross Motion for Summary Disposition of Certain Issues.) The Administrator found that it was “not apparent” that HKE made good faith efforts to comply with the FLSA’s overtime provisions, since HKE’s responsibilities were spelled out for them during the First Investigation and in the 2002 Consent Judgment but were not carried out. HKE explained that workers were paid late because business was slow. The Administrator considered this explanation but found it weighed in favor of civil money penalties because it did not indicate any confusion about the law or that the violations were “an honest mistake,” but rather demonstrated a conscious decision to let employees work when Respondents knew there was a substantial chance the workers could not be paid in compliance with the law.

The third factor looks at previous violations, “including whether the employer is subject to injunction against violations of the Act,” which the Respondents here were by virtue of the 2002 Consent Judgment. The Administrator gave the Respondents credit for their “commitment to future compliance” because they signed a Compliance Agreement in 2007, but this was discounted some since Respondents had broken the commitments they made in the 2002 Consent Judgment. The Administrator also found that the six year interval between the Respondents’ violations was “sizeable,” mitigating the CMP assessment. However, the very large number of employees, 348 employees, who were affected by the violation weighed in favor of civil money penalties. Lastly, the Administrator felt that the similarity between the violations in the First and Second Investigations created a “pattern of failing to pay wages when they were due.” (Exhibit L of Respondents’ Declarations and Exhibits Supporting Response to Summary Disposition Motion and Cross Motion for Summary Disposition of Certain Issues.)

I find that the discretionary factors for the assessment of civil money penalties were properly considered by the Administrator in assessing the amount of civil money penalties to impose.

*The Assessed Civil Money Penalties Are Affirmed*

The amount of the civil money penalties is left to the Administrator’s discretion. 29 C.F.R. § 578.4(b). As I stated in my Summary Decision Order, the statute does not empower the Respondents to assess their own CMP. Rather, as the trier of fact, my role is to evaluate whether the Plaintiff has shown that there is “an absence of evidence” that the Administrator’s decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5

U.S.C. § 706; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Respondents have the burden, therefore, not of convincing me that I should consider these additional facts, but that the Administrator not doing so violated either the statute or the APA's standard of review for administrative decisions. *See id.* Based on the law and facts before me, I see no such evidence, so I find that the Administrator's assessment was a valid exercise of his discretion under the statute.

HKE argued in its opposition to the Administrator's Motion for Summary Decision that its inability to pay its employees on time should have been a mitigating factor to reduce the civil money penalties. As I stated in my Summary Decision Order, not having enough money on hand to pay employees does not excuse violating the law. HKE had the option of decreasing the size of its workforce to a size that it could afford.

Thus, I find that the civil money penalty assessed against Tinian Dynasty and Kwan Man was appropriate and complied with 29 C.F.R. §§ 578.3-578.4.

### CONCLUSION

In conclusion, Tinian Dynasty and Kwan Man are employers covered by the Fair Labor Standards Act and violated the FLSA by failing to timely pay overtime wages owed to employees at Tinian Dynasty during the period from March 16, 2007, to May 26, 2007. These were repeat and willful violations of Section 7 of the FLSA. The Administrator properly considered both the mandatory and discretionary factors set out in the FLSA regulations for assessment of civil money penalties, and the \$191,400.00 in civil money penalties assessed for these violations was appropriate.

Accordingly, the \$191,400.00 in civil money penalties assessed against Tinian Dynasty and Kwan Man by the Administrator for their violation of Section 7 of the Fair Labor Standards Act in the period from March 16, 2007, to May 26, 2007, are **AFFIRMED**.

### ORDER

It is hereby **ORDERED** that the settlement agreement entered into by the Administrator and Raymond Chan be **APPROVED**, and Raymond Chan is **DISMISSED WITHOUT PREJUDICE** as a party to these proceedings.

The civil money penalties assessed against Tinian Dynasty and Kwan Man by the Administrator are **AFFIRMED**, and Tinian Dynasty and Kwan Man are **ORDERED** to pay \$191,400.00 in civil money penalties as provided for in the approved Settlement Agreement.

**NOTICE OF REVIEW:**

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**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal that is received by the Administrative Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 580.13. The address for the Board is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64272 (2002). Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the appeal with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 580.13.

If no appeal is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 580.12(e).

JENNIFER GEE  
Administrative Law Judge