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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

JACQUELINE MAGALLON GARCIA,
individually and on behalf of all others
similarly situated,

Plaintiff,

vs.

DIAMOND RESORTS INTERNATIONAL
MARKETING, INC., a California
corporation; PETER MAINEZ, an individual
and DOES 1-100, inclusive,

Defendants.

Case No.: CVRI 2201958

CLASS ACTION AND INDIVIDUAL
COMPLAINT FOR DAMAGES FOR:

- 1. SEXUAL HARASSMENT (Individual)**
- 2. RETLIATION (Individual)**
- 3. FAILURE TO PREVENT**
HARASSMENT/RETALIATION (Individual)
- 4. FAILURE TO PAY OVERTIME (Class)**
- 5. FAILURE TO PROPERLY CALCULATE**
AND PAY MEAL PERIOD PREMIUMS
(Class)
- 6. FAILURE TO PROPERLY PAY SICK**
LEAVE (Class)
- 7. FAILURE TO PAY ALL WAGES DUE AND**
OWING AT END OF EMPLOYMENT
(Class)
- 8. UNLAWFUL BUSINESS PRACTICES**
(Class)

Plaintiff Jacqueline Magallon Garcia (“Magallon-Garcia” or “Plaintiff”) brings this class and individual action against Diamond Resorts International Marketing, Inc., Peter Mainez, and Does 1 through 100, for violations of the California Government Code, California Labor Code and the Business and Professions Code.

PARTIES

1. Magallon Garcia is and at all times relevant herein was employed in La Quinta, Riverside County, California, and was an “employee” as defined by the California Labor Code

1 (“Labor Code”) and the applicable California Industrial Wage Commission (“IWC”) Order(s) and
2 employed by Diamond Resorts International Marketing, Inc.

3 2. Defendant Diamond Resorts International Marketing, Inc. (“Diamond”) is a corporation
4 organized and existing under the laws of the State of California, which does business within Riverside
5 County, California. At all relevant times Diamond was an employer as defined by California
6 Government Code section 12926, subdivision (d) and the California Labor Code and was Magallon-
7 Garcia’s employer.

8 3. Defendant Peter Mainez (“Mainez”) is an individual believed to reside within Palm
9 Springs, Riverside County, California. At all relevant times, Mainez was employed by Diamond and
10 was a supervisor as that term is defined in California Government Code section 12926, subdivision (t).

11 4. Diamond, Mainez, and Does 1-100 are collectively referred to as Defendants.

12 5. Plaintiff is not aware of the true names and capacities of the Defendants sued herein as
13 Does 1 through 100, whether individual, corporate, associate, or otherwise and therefore sue such
14 Defendants by these fictitious names. Plaintiff will amend this Complaint to allege their true names
15 and capacities when ascertained. Plaintiff is informed and believe, and on that basis allege, that each
16 of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged
17 and that Plaintiff’s injuries and damages herein alleged were legally caused by such Defendants.
18 Unless otherwise indicated, each Defendant was acting within the course and scope of said agency
19 and/or employment, with the knowledge and/or consent of said co-Defendant.

20 6. Plaintiff is informed and believe and thereupon allege that at all times mentioned
21 herein, each of the Defendants, including each Doe Defendant, was acting as the agent, servant,
22 employee, partner and/or joint venturer of and was acting in concert with each of the remaining
23 Defendants, including each Doe Defendant, in doing the things herein alleged, while at all times acting
24 within the course and scope of such agency, service, employment partnership, joint venture and/or
25 concert of action. Each Defendant, in doing the acts alleged herein, was acting both individually and
26 within the course and scope of such agency and/or employment, with the knowledge and/or consent of
27 the remaining Defendants.

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1 **JURISDICTION AND VENUE**

2 7. Pursuant to California Code of Civil Procedure section 395, subdivision (a), this Court
3 is the proper Court, and this action is properly filed in the Superior Court of California for the County
4 of Riverside because Plaintiff and Mainez reside in Riverside County, and Diamond conducts business
5 in this County and Plaintiff has performed work for Diamond within Riverside County. Plaintiff
6 hereby demands a jury trial.

7 **GENERAL ALLEGATIONS**

8 8. Plaintiff was hired by Diamond to work in marketing at the concierge desk of the Palm
9 Canyon Resort in February 2019.

10 9. At the time Plaintiff was hired, Mainez was a senior employee in the VIP Concierge of
11 the Palm Canyon Resort.

12 10. In her role as a marketing representative for the resort concierge desk, Plaintiff was
13 initially paid a base hourly rate of \$13.00 per hour plus sales commissions. Her hourly wage was
14 inexplicably reduced to \$12.00 per hour beginning after the initial pay period she was employed by
15 Diamond.

16 11. Throughout Plaintiff's employment, her commission pay was governed by a number or
17 written "pay plan" documents. The plans outlined the commissions calculations per specific type of
18 sale (tours, arrivals, etc.). None of the commission plans outlined or identified any basis for "clawing"
19 back commissions nor outlined that commissions paid were being "advanced" in any way.

20 12. Despite the fact Diamond did not outline any legitimate basis for deducting previously
21 earned and paid sales commissions, there was a sales commission chargeback labeled as "S Comm
22 Chrgback" on nearly each one of Plaintiff's wage statements. These sales commissions chargebacks
23 resulted in unauthorized deductions from nearly each of Plaintiff's paychecks throughout her
24 employment.

25 13. Commissions were not paid during every single bi-weekly pay period and, routinely,
26 did not amount to more than 50% of Plaintiff's total earnings. At all relevant times, Plaintiff was a
27 non-exempt employee entitled to meal and rest periods and overtime for hours worked beyond eight
28 (8) in a workday and forty (40) in a workweek.

1 14. Plaintiff regularly worked overtime hours, but was never paid overtime at 1.5 or 2 times
2 her “regular rate of pay.” Instead, each time Plaintiff worked overtime hours, she was paid at 1.5
3 times her base hourly wage—her commissions earnings were never factored in. Plaintiff is informed
4 and believes Diamond had a policy, pattern, and practice of only compensating hourly non-exempt
5 employees who earned other remuneration like Plaintiff (i.e. commissions, bonuses, etc.) at 1.5 times
6 his/her base hourly rate for overtime, instead of the requisite 1.5 times the “regular rate”.

7 15. In addition, whenever Plaintiff was provided meal period premiums for meal periods
8 she was denied by Diamond, those premiums were paid solely at Plaintiff’s base hourly rate. See
9 Exhibit 1 (wage statement 02/09/20-02/22/20). Plaintiff is informed and believes Diamond had a
10 policy, pattern, and practice of only compensating hourly non-exempt employees who earned other
11 remuneration like Plaintiff (i.e. commissions, bonuses, etc.) at his/her base hourly rate for meal/rest
12 period premiums.

13 16. Similarly, when Plaintiff redeemed paid sick leave, she was only compensated for those
14 hours at her base hourly wage instead of the regular rate required by applicable law. Exh. 1. Plaintiff
15 is informed and believes Diamond had a policy, pattern, and practice of only compensating hourly
16 non-exempt employees who earned other remuneration like Plaintiff (i.e. commissions, bonuses, etc.)
17 at his/her base hourly rate for redeemed sick leave.

18 17. Plaintiff performed well at the concierge desk and caught the eye of Mainez in VIP
19 Concierge. He began taking an interest in her work and encouraging her to move to the VIP
20 Concierge where she would have the opportunity to earn more in commissions. Plaintiff assumed
21 Mainez’s interest and advice was professionally motivated and initially welcomed his input,
22 experience, and recommendations.

23 18. In June 2019, Mainez recommended Plaintiff be transferred to VIP Concierge because
24 she was performing so well. Plaintiff is now informed and believes Mainez’s motivation was to make
25 Plaintiff feel indebted to him so he could lay the foundation for a romantic relationship she might feel
26 obligated to participate in.

27 19. Plaintiff was transferred to VIP Concierge in late June 2019, which required her to
28 work more closely with Mainez. Plaintiff’s direct supervisor was Vanessa Diaz, but Mainez was also

1 a supervisor/manager in the department and had authority/input with respect to Plaintiff's job.

2 Whenever Ms. Diaz was not physically present onsite during Plaintiff's shifts, Mainez was Plaintiff's
3 acting supervisor.

4 20. Beginning in the fall of 2019, Mainez began taking an increased interest in Plaintiff and
5 crossing the line to the point of making Plaintiff uncomfortable. Mainez began liking all of Plaintiff's
6 photos on social media—at least the ones that did not include her boyfriend. This made Plaintiff
7 uncomfortable, although she was afraid of the consequences if she upset Mainez since he had helped
8 her get the transfer to VIP Concierge.

9 21. In an effort to discourage Mainez without angering or upsetting him, Plaintiff jokingly
10 told Mainez he should stop liking her posts or people would start to think they were dating. In
11 response, Mainez told her he wouldn't mind that and implied he was interested in a relationship.
12 Plaintiff reminded Mainez she had a boyfriend, in a further attempt to subtly discourage him without
13 making him angry or upset.

14 22. Mainez was the unofficial social chairperson of the employees at the resort and Plaintiff
15 was afraid she would be ostracized and excluded if she rejected Mainez publicly or harshly and thus
16 she continued to attempt to discourage him without making him angry or upset.

17 23. Despite Plaintiff's efforts, Mainez's romantic advances and attempts to "get closer" to
18 Plaintiff did not stop. Rather, when Plaintiff requested time off over Thanksgiving to visit her
19 boyfriend, Mainez tried to influence her supervisors not to approve her request. Plaintiff now
20 understands Mainez was trying to interfere in her relationship in an effort to provide himself a better
21 opportunity to pursue her.

22 24. In December 2019, Mainez took things too far.

23 25. On one occasion in December, Plaintiff, Mainez, and another co-worker attended an
24 event dinner at the Tramway that Plaintiff believes was sponsored by Diamond. All planned to go
25 out in downtown Palm Springs after the event. At the last minute, the other co-worker backed out,
26 but Plaintiff felt obligated/pressured to still attend with Mainez.

27 26. Mainez's house is near downtown so Plaintiff parked her vehicle near Mainez's
28 house and the two rode scooters downtown. When the two arrived back at Mainez's apartment,

1 Mainez tried to kiss Plaintiff, told her he had feelings for her, and that he wanted to date her. He
2 confessed he had had a crush on her since she started working for Diamond (since the first time he
3 saw her) and was very aggressive in his tone and actions.

4 27. Plaintiff was extremely uncomfortable and pulled away from Mainez, who grabbed
5 her wrist so hard it left a mark. Plaintiff was frightened and intimidated by Mainez's aggressive
6 romantic advances. In order to get out of the situation without further angering Mainez, Plaintiff
7 made an excuse to leave and told Mainez they could talk further about a relationship the next day.

8 28. Plaintiff never had any intention or interest in a relationship with Mainez, she just
9 wanted to get out of the situation. After this interaction, Mainez began invading Plaintiff's
10 personal space while at work and making her increasingly uncomfortable. Mainez continually
11 asked her when they were going to start dating and she repeatedly and continually made excuses
12 and put him off. Undeterred, Mainez would stand close to Plaintiff, frequently touch her, and
13 always involve himself in the work she was doing and interfering with her job.

14 29. Also in December 2019, Plaintiff reported to Diamond that she felt uncomfortable.
15 Plaintiff is informed and believes that other co-workers reported Mainez's unwelcome behavior
16 towards Plaintiff because it made them uncomfortable as well.

17 30. Diamond purported to "investigate" the situation, but the individuals with authority
18 over the investigation were all close personal friends of Mainez. In addition, because Mainez was a
19 strong revenue source for Diamond, Plaintiff is informed and believes Diamond was motivated to not
20 find any wrongdoing on his part (and/or to ignore the wrongdoing it uncovered). Moreover, the
21 "investigation" lasted less than a week and did not involve taking statements from anyone other than
22 Plaintiff and Mainez.

23 31. Rather than take any action to protect Plaintiff from Mainez's inappropriate behavior,
24 or issue any cognizable discipline to Mainez, Diamond supervisor "Kim" admonished Plaintiff that
25 both she and Mainez had "equally behaved inappropriately", provided Plaintiff a copy of the Anti-
26 Harassment Policy, and took no further action.

27 32. Although Plaintiff had not engaged in any behavior that could be considered a violation
28 of Diamond's anti-harassment policy—she was merely the victim and raised concerns—Diamond

1 advised her there would be a zero tolerance policy moving forward, implying that she had done
2 something wrong.

3 33. Because of Diamond's refusal to discipline Mainez or otherwise protect Plaintiff from
4 his inappropriate behavior, Plaintiff had no reasonable choice but to request a transfer back to the
5 resort concierge (out of VIP) so that Mainez would have less access to her and ability to interfere with
6 her work environment.

7 34. As a result of Mainez's harassment and Diamond's unwillingness to take any corrective
8 action—instead chastising and blaming Plaintiff for the situation—Plaintiff suffered considerable
9 differential wage loss. By way of specific example, Magallon-Garcia earned \$4,952.77 in gross wages
10 in VIP Concierge during the December 15-December 28, 2019 pay period and a mere \$1,027.21 while
11 in the general concierge during the January 26-February 8, 2020 pay period.

12 35. The significant wage reduction resulted directly from Diamond's refusal to discipline
13 Mainez or otherwise protect Plaintiff from his behavior (i.e. by transferring his assignment or
14 otherwise ensuring he would not have further access to/contact with Plaintiff without detrimentally
15 impacting the victim).

16 36. Because of the substantial wage loss she suffered as a result of the transfer following
17 her complaints about Mainez, and because she felt wholly unsupported and retaliated against by
18 Diamond, Plaintiff had no reasonable choice but to resign her position with Diamond. She provided a
19 2 week notice on February 24, 2020. Diamond terminated Plaintiff's employment on February 28,
20 2020.

21 37. At the time of Plaintiff's separation, there were outstanding wages owed to her because
22 of Diamond's failures to properly calculate and pay overtime, meal period premiums, and redeemed
23 sick leave. Those wages were knowingly and intentionally withheld and remain outstanding to date,
24 subjecting Diamond to imposition of statutory waiting time penalties pursuant to Labor Code section
25 203.

26 38. From at least four years prior to the filing of this action, Diamond has adopted and
27 employed unfair business practices. These unfair business practices include, but are not limited to,
28 failing to properly pay all overtime wages due, failing to properly pay all sick wages due, failing to

properly calculate and pay meal/rest period premiums, and making unlawful deductions from employee wages.

39. On March 3, 2022, Plaintiff filed a complaint of harassment and retaliation against Mainez and Diamond with the California Department of Fair Employment & Housing (“DFEH”). She received a right-to-sue notice and served copies of her DFEH Complaint and RTS on Defendants via certified mail that same day.

CLASS ACTION ALLEGATIONS

40. Plaintiff seeks to maintain this action as a class action as to the Fourth through Eighth Causes of Action. Plaintiff brings this action, on behalf of herself and all others similarly situated, as a class action pursuant to Code of Civil Procedure 382. The putative classes which Plaintiff seeks to represent consist of the following:

- a. All current and former non-exempt California employees of Diamond who earned commissions, non-discretionary bonuses and/or other items of compensation during a workweek he/she also worked overtime on at least one occasion between May 12, 2018 through the date of trial (the “Regular Rate Class”);
- b. All current and former non-exempt California employees of Diamond who earned commissions, non-discretionary bonuses and/or other items of compensation during a workweek he/she was also paid a meal period premium on at least one occasion between May 12, 2018 through the date of trial (the “Meal Period Regular Rate Class”);
- c. All current and former non-exempt California employees of Diamond who earned commissions, non-discretionary bonuses and/or other items of compensation during a workweek he/she also redeemed accrued and available sick leave on at least one occasion between May 12, 2018 through the date of trial (the “Sick Pay Class”);
- d. All current and former and California employees of Diamond who earned commissions and have “commission” chargebacks/deductions taken from his

her wages on at least one occasion between May 12, 2018 through the date of trial (the “Commission Chargeback Class”)

- e. All members of the Regular Rate Class, the Meal Period Regular Rate Class, and the Sick Pay Class whose employment ended between May 12, 2019 and the date of trial (the “Waiting Time Penalty Sub-Class”).

The Regular Rate Class, the Meal Period Regular Rate Class, the Sick Pay Class, the Commission Chargeback Class, and the Waiting Time Penalty Sub-Class will all collectively be referred to as the Class.

41. The Class is so numerous that joinder of all members is impracticable, and the disposition of their claims in a class action is a benefit to the parties and to the Court. Plaintiff is informed and believes, and based thereon alleges, that Defendants employ more than 100 employees who satisfy each respective class definition. Although the exact number and identity of class members is not presently known, they can be identified in Defendants’ records through coordinated discovery pursuant to this class action.

42. This action may be maintained as a class because the questions of law and fact which are common to class members clearly predominate over any questions affecting only individual members and because a class action is superior to other available methods for adjudicating the controversy.

43. There are numerous common questions of law and fact arising out of Defendants’ conduct. This class action focuses on Defendants’ systematic failure to: (a) properly calculate and pay overtime/doubletime; (b) properly calculate and pay meal period premiums; (c) properly calculate and pay redeemed sick leave; and (d) timely pay all wages due at owing at the end of their employees’ employment.

44. Furthermore, common questions of fact and law predominate over any questions affecting only individual members of the class. The predominating common or class-wide questions of law and fact include the following:

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- a. Whether Defendants failed to include their non-exempt employees' non-discretionary bonuses, commissions, and other items of compensation when calculating their regular rate of pay for purposes of overtime;
- b. Whether Defendants failed to include their non-exempt employees' non-discretionary bonuses, commissions, and other items of compensation when calculating their regular rate of pay for purposes of meal period premiums;
- c. Whether Defendants failed to include their non-exempt employees' non-discretionary bonuses, commissions, and other items of compensation when calculating the rate of sick pay provided;
- d. Whether Defendants' practice of charging back commissions constituted unlawful deductions from employee wages;
- e. Whether the alleged violations constitute unfair business practices;
- f. Whether any failures to pay wages upon separation were willful;
- g. Whether the Class is entitled to unpaid wages, statutory penalties and/or restitutionary relief, and the amount of the same.

45. Plaintiff's claims are typical of the claims of the members of the Class as a whole, all of whom have sustained and/or will sustain damage and injury as a proximate and/or legal result of the alleged violations of Defendants. Plaintiff's claims are typical of those of the Class because Defendants subjected Plaintiff and each member of the Class to the same violations alleged herein.

46. The defenses of Defendants, to the extent that such defenses apply, are applicable generally to the whole Class and are not distinguishable as to the proposed class members.

47. Plaintiff will fairly and adequately protect the interests of all members of the Class, and has retained attorneys with extensive experience in litigation, including class and representative actions. Plaintiff has no interests that conflict with those of the Class. Plaintiff is able to fairly and adequately protect the interests of all members of the class because it is in his best interest to prosecute the claims alleged herein in order to obtain the full compensation due himself and the other class members.

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1 48. A class action is superior to any other method available for fairly and efficiently
2 adjudicating the controversy because 1) joinder of individual class members is not practicable, 2)
3 litigating the claims of individual class members would be unnecessarily costly and burdensome and
4 would deter individual claims, 3) litigating the claims of individual class members would create a risk
5 of inconsistent or varying adjudications that would establish incompatible standards of conduct for
6 Defendants, 4) class members still working for Defendants may be fearful of retaliation if they were to
7 bring individual claims, 5) class members would be discouraged from pursuing individual claims
8 because the damages available to them are relatively small, and 6) public policy encourages the use of
9 the class actions to enforce employment laws and protect individuals who, by virtue of their
10 subordinate position, are particularly vulnerable.

11 49. Judicial economy will be served by maintenance of this lawsuit as a class action. To
12 process numerous virtually identical individual cases will significantly increase the expense on the
13 Court, the class members, and Defendants, all while unnecessarily delaying the resolution of this
14 matter. There are no obstacles to effective and efficient management of this lawsuit as a class action
15 by this Court and doing so will provide multiple benefits to the litigating parties including, but not
16 limited to, efficiency, economy, and uniform adjudication with consistent results.

17 50. Notice of a certified class action and any result or resolution of the litigation can be
18 provided to class members by mail, email, publication, or such other methods of notice as deemed
19 appropriate by the Court.

20 **FIRST CAUSE OF ACTION**
21 **VIOLATION OF GOVERNMENT CODE § 12940(j)**
22 **(Sex Harassment)**
 Against all Defendants

23 51. Plaintiff hereby realleges and incorporates by reference each and every allegation as
24 though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this
25 cause of action.

26 52. FEHA explicitly prohibits any employer or any other person from harassing an
27 employee on the basis of sex. Gov. Code § 12940(j). An employer is responsible for sexual
28 harassment perpetrated by a supervisor. An employer is also responsible for sexual harassment

1 perpetrated by a non-supervisory employee if it either knows or should have known of the
2 harassment and fails to take immediate and appropriate corrective action. Gov. Code § 12940(j).
3 In addition, an employee is personally liable for any harassment prohibited under Gov. Code §
4 12940 that is perpetrated by the employee. Gov. Code § 12940(j)(3).

5 53. Diamond was at all relevant times an employer pursuant to Gov. Code §12940(j)(4)
6 and were therefore barred from harassing its employees on the basis of sex. Gov. Code § 12940(j).

7 54. The sexual harassment Plaintiff was subjected to by Mainez as set forth above
8 created an abusive working environment in violation of Gov. Code § 12940(j) and constitutes both
9 hostile work environment harassment as well as quid pro quo harassment. The Defendants and
10 each of them and/or their agents/employees/clients harassed Plaintiff and/or failed to take
11 immediate and appropriate corrective action. The harassment was sufficiently pervasive and severe
12 as to alter the conditions of Plaintiff's employment and to create a hostile or abusive work
13 environment.

14 55. As a direct and legal result of the Defendants' harassment and the resulting hostile
15 work environment, Plaintiff has suffered emotional distress, pain and suffering, and has lost
16 income and related benefits, past and future.

17 56. The acts taken toward Plaintiff were carried out by and/or ratified by the Defendants
18 and/or managing agent employees of the Defendants acting in a fraudulent, oppressive, and
19 malicious manner in order to injure or damage Plaintiff, thereby justifying an award to her of
20 punitive damages in a sum appropriate to punish and make an example of the defendants, and each
21 of them.

22 57. Wherefore, Plaintiff has been damaged as set forth below and requests relief as
23 hereafter provided.

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1 **SECOND CAUSE OF ACTION**
2 **VIOLATION OF GOVERNMENT CODE SECTION 12940(h)**
3 **(Retaliation)**
4 **Against Diamond and DOES 1-100**

5 58. Plaintiff hereby realleges and incorporates by reference each and every allegation as
6 though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this
7 cause of action.

8 59. The FEHA explicitly prohibits any employer or any other person from discharging,
9 expelling or discriminating against any person because the person has opposed any practices
10 forbidden by FEHA or because the person has filed a complaint, testified or assisted in any
11 proceeding under the FEHA. Gov. Code § 12940(h). Retaliation is unlawful regardless of whether
12 the underlying complaint formally demonstrates a violation of the FEHA or not. *Yanowitz v.*
13 *L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043.

14 60. Nevertheless, as set forth above, Defendants retaliated against Plaintiff for making a
15 good faith complaint about Mainez and his harassing/abusive behavior towards her—for opposing
16 an illegal practice proscribed by the FEHA—in violation of Gov. Code § 12940(h).

17 61. Specifically, Diamond reprimanded Plaintiff, refused to discipline Mainez, and
18 transferred Plaintiff to a less lucrative position. The entrenched animus towards her for
19 complaining ultimately afforded Plaintiff no reasonable choice but to separate from Diamond in
20 February 2020.

21 62. As a result of Defendants' conduct, Plaintiff has suffered damages.

22 63. Wherefore, Plaintiff has been damaged as set forth below and requests relief as
23 hereafter provided.

24 **THIRD CAUSE OF ACTION**
25 **VIOLATION OF GOVERNMENT CODE SECTION 12940(k)**
26 **(Failure to Prevent Discrimination)**
27 **Against Diamond and DOES 1-100**

28 64. Plaintiff hereby realleges and incorporates by reference each and every allegation as
29 though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this
30 cause of action.

1 65. The FEHA also requires an employer to take all reasonable steps necessary to
2 prevent discrimination and harassment from occurring. Gov. Code § 12940(k).

3 66. Diamond was at all times relevant herein Plaintiff's employer pursuant to
4 Government Code section 12926(d) and was therefore required to prevent discrimination pursuant
5 to Government Code section 12940(k).

6 67. Defendants knew or should have known of the harassment by Mainez and were in
7 fact put on notice of Mainez's ongoing improper conduct by Plaintiff. but did nothing to prevent
8 it. Mainez was not disciplined for attempting to physically accost Plaintiff. Plaintiff is informed
9 and believes Mainez had inappropriate relationships with other current and former female
10 employees before he made unwelcome advances to Plaintiff and that Diamond knew or should
11 have known of that history yet did nothing to reign in Mainez (including doing nothing after
12 Plaintiff's complaint). Consequently, Defendants failed to take all reasonable steps to prevent the
13 retaliation from occurring in violation of Government Code section 12940(k).

14 68. As a direct and proximate result of Defendants' conduct, Plaintiff has been harmed
15 and requests relief as hereafter provided.

16 **FOURTH CAUSE OF ACTION**
17 **VIOLATION OF CALIFORNIA LABOR CODE §§ 510 & 1198**
18 **(Failure to Pay Overtime)**
19 **Against Defendants**
20 **On behalf of Plaintiff and the Regular Rate Class**

21 69. Plaintiff hereby realleges and incorporates by reference each and every allegation set
22 forth above as though fully set forth herein, except as said paragraphs are inconsistent with the
23 allegations of this cause of action.

24 70. Pursuant to California Labor Code section 510, any work in excess of eight hours in
25 one workday and any work in excess of 40 hours in any one workweek and the first eight hours
26 worked on the seventh day of work in any one workweek shall be compensated at the rate of no less
27 than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours
28 in one day shall be compensated at the rate of no less than twice the regular rate of pay for an

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1 employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be
2 compensated at the rate of no less than twice the regular rate of pay of an employee.

3 71. Pursuant to California Labor Code section 1198, the maximum hours of work and
4 standard conditions of labor fixed by the commission shall be the maximum hours of work and the
5 standard conditions of labor for employees and the employment of any employee for longer hours than
6 those fixed by the commission or under conditions of labor prohibited by the order is unlawful.

7 72. The “regular rate of pay” includes all remuneration for employment paid to the
8 employee and includes, but is not limited to, hourly earnings, salary, piece work earnings,
9 commissions, non-discretionary bonuses, and the value of meals and lodging. See 29 U.S.C. § 207(e);
10 DLSE Enforcement Policies and Interpretations Manual Section 49.

11 73. During the relevant time period, Plaintiff and the other members of the Regular Rate
12 Class regularly worked overtime.

13 74. During the relevant time period, Defendants intentionally and willfully failed to pay the
14 proper overtime wages due to Plaintiff and the other members of the Regular Rate Class.

15 75. Wherefore, Plaintiff the other members of the Regular Rate Class have been injured as
16 set forth above and request relief as hereafter provided.

17 **FIFTH CAUSE OF ACTION**
18 **VIOLATION OF LABOR CODE §§ 226.7, 512 and IWC WAGE ORDERS**
19 **(Failure to Properly Calculate and Pay Meal Period Premiums)**
20 **Against Defendants**
21 **On behalf of Plaintiff and the Meal Period Regular Rate Class**

22 76. Plaintiff hereby realleges and incorporates by reference each and every allegation set
23 forth above as though fully set forth herein, except as said paragraphs are inconsistent with the
24 allegations of this cause of action.

25 77. Labor Code § 226.7 requires employers to provide employees meal breaks as mandated
26 by Order of the Industrial Welfare Commission. It states:

- 27 a. No employer shall require any employee to work during any meal or rest period
28 mandated by an applicable order of the Industrial Welfare Commission.
- b. If an employer fails to provide an employee a meal period or rest period in
accordance with an applicable order of the Industrial Welfare Commission, the

1 employer shall pay the employee 1 additional hour of pay at the employee's
2 regular rate of compensation for each work day that the meal or rest period is
3 not provided

4 78. The "regular rate of compensation" at which meal period premiums must be paid is the
5 "regular rate of pay" and must include *all* remuneration paid to the employee, including all
6 commissions, non-discretionary bonuses, piece rate earnings, etc. *Ferra v. Loews Hollywood Hotel,*
7 *LLC* (2021) 11 Cal.5th 858, 863.

8 79. During the relevant time period, Plaintiff and the other members of the Meal Period
9 Regular Rate Class were denied compliant meal breaks and were paid meal period premiums at only
10 the base hourly rate instead of the requisite "regular rate of compensation" or "regular rate of pay".

11 80. Wherefore, Plaintiff and the other members of the Meal Period Regular Rate Class have
12 been injured as set forth above and request relief as hereafter provided.

13 **SIXTH CAUSE OF ACTION**
14 **VIOLATION OF LABOR CODE §§ 218, 233, 246 et seq.**
15 **(Failure to Pay Wages)**
16 **Against Defendants**
17 **On Behalf of Plaintiff and the Sick Pay Class**

18 81. Plaintiff hereby realleges and incorporates by reference each and every allegation set
19 forth above as though fully set forth herein, except as said paragraphs are inconsistent with the
20 allegations of this cause of action.

21 82. Labor Code section 246(l) requires that employers pay sick time pay to non-exempt
22 employees at that employee's "regular rate of pay."

23 83. The "regular rate of pay" includes all remuneration for employment paid to the
24 employee and includes, but is not limited to, hourly earnings, salary, piece work earnings, shift
25 differentials, commissions, non-discretionary bonuses, and the value of meals and lodging. See 29
26 U.S.C. § 207(e); DLSE Enforcement Policies and Interpretations Manual Section 49.

27 84. During the relevant time period, Defendants failed to include commissions,
28 incentive payments, non-discretionary bonuses, and/or other items of compensation when
determining the "regular rate of pay" for Plaintiff and their other non-exempt California employees
for purposes of sick time pay.

1 85. According to the California Supreme Court, sick pay is a form of wages. *Murphy v.*
2 *Kenneth Cole Productions* (2007) 40 Cal.4th 1094, 1103.

3 86. Labor Code section 233 provides that “any employer who provides sick leave for
4 employees shall permit an employee to use in any calendar year the employee's accrued and
5 available sick leave entitlement, in an amount not less than the sick leave that would be accrued
6 during six months at the employee's then current rate of entitlement, for the reasons specified in
7 subdivision (a) of Section 246.5.”

8 87. During the relevant time period, Defendants intentionally and willfully failed to pay
9 Plaintiff and the other members of the Sick Pay Class their sick pay at the rate of pay required by
10 law. Accordingly, Plaintiff and the other members of the Sick Pay Class did not receive the full
11 amount of paid sick time that they were entitled to receive by law, and were therefore denied the
12 right to use sick leave within the meaning of Labor Code sections 233(a) and (c).

13 88. Any employer who violates Labor Code section 233 is liable to employees for the
14 greater of one days’ pay or actual damages, reasonable equitable relief, and reasonable attorneys’
15 fees and costs. Labor Code §233(d), (e).

16 89. Further, Labor Code section 218 authorizes a private right of action to recover unpaid
17 wages.

18 90. Wherefore, Plaintiff and the other members of the Sick Pay Class have been injured as
19 set forth above and request relief as hereafter provided.

20 **SEVENTH CAUSE OF ACTION**
21 **VIOLATION OF LABOR CODE §§ 201, ET SEQ.**
22 **(Failure to Pay All Wages Due and Owing at End of Employment)**
23 **Against Defendants**
24 **On behalf of Plaintiff and the Waiting Time Penalty Sub-Class**

25 91. Plaintiff hereby realleges and incorporates by reference each and every allegation set
26 forth above as though fully set forth herein, except as said paragraphs are inconsistent with the
27 allegations of this cause of action.

28 92. California Labor Code section 201 provides that if an employer discharges an employee,
the wages earned and unpaid at the time of discharge are due and payable immediately.

1 93. California Labor Code section 202 requires an employer to pay an employee all earned
2 wages within 72 hours of the employee quitting his or her employment, or immediately at the time of
3 quitting if the employee has given 72 hours previous notice of his or her intention to quit.

4 94. As set forth above, Plaintiff and the other members of the Waiting Time Penalty Sub-
5 Class were not timely paid all of their earned but unpaid wages, including overtime wages, meal period
6 premiums and redeemed sick pay, when their employment with Defendants ended.

7 95. Wherefore, Plaintiff and the other members of the Waiting Time Penalty Sub-Class
8 have been injured as set forth above and request relief as hereafter provided.

9 **EIGHTH CAUSE OF ACTION**
10 **VIOLATION OF CALIFORNIA BUSINESS AND PROFESSIONS CODE §§ 17200 *ET SEQ.***
11 **(Unfair Business Practices)**
12 **Against Defendants**
13 **On behalf of Plaintiff, the Regular Rate Class, the Meal Period Regular Rate Class, the Sick Pay**
14 **Class, and the Commission Chargeback Class**

15 128. Plaintiff hereby realleges and incorporates by reference each and every allegation set
16 forth above as though fully set forth herein, except as said paragraphs are inconsistent with the
17 allegations of this cause of action.

18 129. The statutory violations alleged above, specifically including the alleged violations of
19 Labor Code sections 221 resulting from Diamond's pattern and practice of "charging back" earned
20 commissions to members of the Commission Chargeback Class, are unfair business practices within
21 the meaning of the Unfair Competition Law (Business and Professions Code sections 17200 *et seq.*).
22 These violations include, but are not limited to failing to properly pay overtime, failing to properly
23 calculate and pay meal period premiums, failing to properly compensate for sick pay, and making
24 unlawful deductions from earned commissions wages.

25 130. Wherefore, Plaintiff and the other members of the Regular Rate Class, the Meal Period
26 Regular Rate Class, the Sick Pay Class, and the Commission Chargeback Class have been damaged as
27 set forth above and request relief as hereafter provided.

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1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays judgment against Defendants as follows:

3 **As to the First through Third Causes of Action:**

- 4 1. For compensatory, special, and general damages, including lost wages and related
5 benefits, medical expenses, and emotional distress in an amount according to proof,
6 but in excess of the minimum jurisdictional limit of this Court;
- 7 2. For statutory attorneys' fees and costs, including those available under Gov. Code §
8 12965(b) and Code of Civil Procedure § 1021.5;
- 9 3. For prejudgment and post-judgment interest according to any applicable provision
10 of law or as otherwise permitted by law, including that available under Civil Code
11 §§ 3287 and 3289, according to proof;
- 12 4. For injunctive and declaratory relief, including, but not limited to, an order
13 prohibiting Defendants from further violating FEHA, and requiring Defendants to
14 conduct training for all employees, supervisors, and management on the
15 requirements of FEHA, the rights and remedies of those who allege a violation of
16 FEHA, and the employer's internal grievance procedures, for purposes of
17 effectuating the purpose of FEHA, pursuant to Gov. Code § 12965(c)(3); and
- 18 5. For such other and further relief as the Court deems proper.

19 **As to the Fourth through Eighth Causes of Action:**

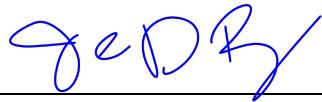
- 20 1. That this Court certify the Class;
- 21 2. That this Court appoint Plaintiff as the representative of the Class;
- 22 3. That this Court appoint Mayall Hurley, P.C. as Class Counsel;
- 23 4. That this Court award actual, compensatory, special, and general damages as well as
24 restitutionary relief to Plaintiff and the members of the Class;
- 25 5. That this Court award injunctive relief, including that available under Labor Code
26 section 226(h), 248.5(e), and Business and Professions Code Section 17203;
- 27 6. That this Court award penalties and liquidated damages including, but not limited to,
28 those available under Labor Code sections 203, 226, 226.7 and 1194.2;

- 1 7. That this Court award statutory attorneys’ fees and costs, including those available
2 under Labor Code sections 218.5, 226(e)(1), 226(h), 248.5(e), and 1194, as well as
3 Code of Civil Procedure section 1021.5;
4 8. That this Court award prejudgment and post-judgment interest according to any
5 applicable provision of law or as otherwise permitted by law; and
6 9. That this Court award such other and further relief as the court deems just and proper.

7 **DATED:** May 12, 2022

MAYALL HURLEY P.C.

8
9 By _____


ROBERT J. WASSERMAN

JENNY D. BAYSINGER
Attorneys for Plaintiff and the Putative Class

EXHIBIT 1

Employee Full Name	Jacqueline Magallon Garcia	Employer Name	Diamond Resorts International Marketing, Inc.
Job Title	Concierge-CA	Employer Phone Number	7026848000
National Identifier	XXX-XX-9435	Organization	PCR-Marketing In House
Employee Number	78616	Pay Basis	Hourly
Latest Hire Date	19-Feb-2019	Frequency	Week
Original Hire Date	19-Feb-2019	Shift	
Adjusted Service Date	19-Feb-2019	Bargaining Unit	
Assignment Number	78616	Collective Agreement	
Location	DRI Palm Canyon Resort	Contract	
Position		Grade	
Payroll	Sales	Employer BIN	
Employee Address	78330 Winter Cove Ct La Quinta, CA 92253 US	Employer Address	10600 W Charleston Blvd Las Vegas Las Vegas, NV 89135 US

Pay Period and Salary							
Assignment Number	Assignment Type	Pay Period	Payment Date	Pay Begin Date	Pay End Date	Pay Rate	Annual Salary
78616	Primary	Bi-Week	28-Feb-2020	09-Feb-2020	22-Feb-2020	13.00	27,040.00

Summary					
	Gross	Pre-Tax	Taxes	Deductions	Net Pay
Current	1,097.03	114.72	194.70	38.53	749.08
YTD	11,458.44	752.80	3,102.15	192.65	7,410.84

Hours and Earnings								
Description	Start Date	End Date	Rate	Current Hours	Current Amount	Current Period Amount	YTD Hours	YTD Amount
Overtime 1_5					0	0.00	0.43	7.74
Sales Bonus					0	0.00	0.00	1,690.00
S Comm Chrgback					-1188.4	-1,188.40	0.00	-6,041.40
SalesCommission					1215	1,215.00	0.00	10,461.20
Spiff Award					0	0.00	0.00	420.00
Holiday Pay			13.00	8	104	104.00	32.00	408.00
Regular Pay			13.00	56.08	729.04	729.04	285.36	3,636.06
Meal Period			13.00	1	13	13.00	1.00	13.00
Vac CA PTO					0	0.00	8.00	104.00
CA Sick Time			13.00	16	208	208.00	40.00	520.00
DT Premium				0	0	0.00	0.10	0.54
OT Premium			1.91	8.56	16.39	16.39	104.82	239.30

Pre Tax Deductions			
Description	Current	YTD	
Medical	71.35	356.75	
Vision	2.82	14.10	
Dental	7.64	38.20	
PS 401K Plan	32.91	343.75	

Taxes			
Description	Current	YTD	
Federal Tax	92.74	1,597.09	
Social Security	62.94	685.06	
Medicare	14.72	160.22	
CA State Tax	14.15	549.29	
CA Disability	10.15	110.49	

After Tax Deductions			
Description	Current	YTD	
Critical Illness	1.44	7.20	
Vol Life	3.08	15.40	
VPI Pet	18.26	91.30	
Transamerica Life	11.14	55.70	
GoodRX	4.61	23.05	

Accruals		
Description	Current	Balance
Vacation	80.00	80.00
Sick	0.00	0.00

Tax Withholding Information						
Type	Marital Status	Exemptions	Sec Exemp	Additional Amount	Override Amount	Override Percentage
California	Single/Married w/Two Incomes	0	0	0.00	0.00	0.00
Federal	Single	0		0.00	0.00	0.00

Net Pay Distribution				
Deposit/Check Number	Bank Name	Account Type	Account Number	Amount
545166212	US Bank	C	XXXXXXXX3957	749.08

Third Party Pay Distribution				
Deposit/Check Number	Bank Name	Account Type	Account Number	Amount

Other Information	
Description	Value
PS 401K Plan YTD ER	171.88
PS 401K Plan ER	16.46

Message(s)
No Message(s) Found