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ENRIQUE MARTINEZ, and ERIC TRUMPE

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

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Clerk of the Superior Court
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
SAN DIEGO CENTRAL DIVISION

ENRIQUE MARTINEZ, an individual,
ERIC TRUMPE, an individual,

Plaintiffs,

v.

OMNI HOTELS MANAGEMENT
CORPORATION, and DOES 1 through
25, Inclusive,

Defendants.

Case No. 37-2020-00022617-CU-OE-CTL

PLAINTIFF'S COMPLAINT FOR:

**REPRESENTATIVE ACTION
COMPLAINT UNDER THE PRIVATE
ATTORNEY GENERAL ACT ("PAGA")
FOR:**

1. Failure to calculate Plaintiffs' and aggrieved employees base rate correctly for the purpose of overtime payment;
2. Failure to calculate Plaintiffs and aggrieved employees base rate correctly for the purposes of sick-time payments;
3. Failure to provide accurate wage statements to Plaintiffs and aggrieved employees;
4. Failure to authorize or permit rest breaks; and
5. Failure to pay all wages due upon termination of employment.

[JURY TRIAL DEMANDED]

COMES NOW, the Plaintiff alleging against Defendants as follows:

INTRODUCTION

1. Plaintiffs worked as banquet servers for Defendants at the Omni La Costa Spa and Resort. Banquet servers and many other types of employees of the Defendant at that hotel receive both an hourly wage and “service fees”. During the course of employment Defendants violated wage and hour law by refusing to include Plaintiffs’ and similar situated employees service fees in calculations of overtime and sick-time rates of pay. Additionally, Defendants systematically fail to authorize and permit Plaintiffs and similarly situated employees taking rest breaks. Plaintiffs were each aggrieved by these violations, and now seek civil penalties under the California Private Attorney General Act (“PAGA”) for these violations.

PARTIES AND

GENERAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

2. Plaintiff ENRIQUE MARTINEZ, (hereinafter “Plaintiff” or “Plaintiffs” collectively) is, and at all times relevant herein was, a resident of the County of San Diego in the State of California.
3. Plaintiff ERIC TRUMPE, (hereinafter “Plaintiff” or “Plaintiffs” collectively) is, and at all times relevant herein was, a resident of the County of San Diego in the State of California.
4. Plaintiffs believe and thereon allege that at all times relevant herein, Defendant OMNI HOTELS MANAGEMENT CORPORATION, (hereinafter “OMNI”) is a business entity, form unknown.
5. On information and belief, OMNI is doing business in the State of California, County of San Diego. Specifically, OMNI is and has during all relevant times operated the Omni La Costa Resort and Spa, where Plaintiffs and fellow aggrieved employees work.
6. Plaintiffs are ignorant to the true names and capacities of Defendants sued herein as DOES 1 through 25, and therefore sues these Defendants by such fictitious names. Plaintiff will amend this Complaint to allege the true names and capacities when they are ascertained.
7. Plaintiffs believe and thereon allege that each “Doe” Defendant is responsible in some manner for the occurrences herein alleged, and Plaintiff’s injuries and damages as herein alleged are

1 directly, proximately and/or legally caused by Defendants and their acts.

2 8. Plaintiffs are informed and believe and thereon allege that the aforementioned DOES are
3 somehow responsible for the acts alleged herein as the agents, employers, representatives or
4 employees of other named Defendants, and in doing the acts herein alleged were acting within
5 the scope of their agency, employment or representative capacity of said named Defendants.

6 9. The tortious acts and omissions alleged herein were performed by Defendants' management
7 level employees. Defendants allowed and/or condoned a continuing pattern of unlawful
8 practices in violation of the California Labor Code, and have caused, and will continue to
9 cause, Plaintiff's economic damage in an amount to be proven at trial.

10 **JURISDICTION AND VENUE**

11 10. This Court has jurisdiction over all causes of action asserted herein pursuant to the
12 California Constitution, Article VI, §10, because this case is a cause not given by statute to
13 other trial courts. The monetary damages sought by Plaintiffs total more than this Court's
14 jurisdictional minimum.

15 11. Plaintiffs are citizens of California because their domiciles are in California.

16 12. This Court has jurisdiction over Defendants because they conduct substantial business in
17 California and have intentionally availed themselves of the laws and markets of California
18 through the operation of their business in California.

19 13. Venue is proper in this Court because Defendants do not reside in the State of California.

20 **PRIVATE ATTORNEY GENERAL ACT ALLEGATIONS**

21 14. Plaintiff ENRIQUE MARTINEZ was employed by Defendants during the statutory PAGA
22 period, and was aggrieved by one or more the violations of the California Labor Code
23 described in this complaint.

24 15. Plaintiff ERIC TRUMPE was employed by Defendants during the statutory PAGA period,
25 and was aggrieved by one or more the violations of the California Labor Code described in
26 this complaint.

27 16. Plaintiff ENRIQUE MARTINEZ was employed by Defendants when Defendants' policies
28 violated California wage and hour law during the statutory period.

1 17. Plaintiff ERIC TRUMPE was employed by Defendants when Defendants' policies violated
2 California wage and hour law during the statutory period.

3 18. Plaintiffs, as aggrieved employees, bring this action on their own behalf and on behalf of other
4 aggrieved current, former, and future employees of Defendants who work(ed) for Defendants
5 in the state of California, and who are/were subjected to the policies of the Defendants when
6 Defendants:

7 a. Paid an illegally low overtime rate;

8 b. Paid an illegally low paid sick leave rate;

9 c. Failed to authorize and permit rest breaks;

10 d. Failed to provide accurate wage statements; and

11 e. Failed to pay all wages due upon termination of the employment relationship.

12 **Illegally Low Overtime and Sick Pay Rates:**

13 19. Plaintiffs work for the Defendants as banquet servers at the La Costa resort in San Marcos,
14 California. Plaintiffs have worked for Omni while the California Health Workplaces Healthy
15 Families Act, ARTICLE 1.5. 'Paid Sick Days' [sections §§ 245-249] as has been in place.
16 During this period the Omni has illegally calculated the rate of the sick leave pay in
17 contradiction to the mandate of Labor Code Section § 246(l)(1)-(2). Omni pays sick leave at
18 simple hourly rates of Plaintiffs and similarly situated employees, and refuse to include all
19 compensation in calculating the sick leave rate, as required by Labor Code Section § 246(l)(1)-
20 (2). Specifically, Plaintiffs and many similarly situated employees are paid significant sums
21 of wages in the form of "service fees" up and above each employees' simple hourly rate. Omni
22 has refused to include these wages in their calculations sick leave rates.

23 20. Plaintiffs and similarly situated employees have been paid sick leave at an illegally low rate
24 due to this code violation within the PAGA period.

25 21. Similarly, Omni pays its employees, including Plaintiffs and similarly situated employees, an
26 illegally low overtime rate in violation of the Labor Code, Industrial Wage Order 5, and
27 *Alvarado v Dart* (2019) 4 Cal 5th 542. Omni does this by refusing to include all wages in
28 calculating base rates, and paying overtime rates based on multiples of simple hourly rates.

22. The Defendants pay their employees an hourly rate, and a bonus or “service fees”.

23. However, when Defendants pay overtime premiums to workers who receive service fee bonuses, including Plaintiffs, they failed to include the bonuses in their overtime base rate calculations - instead Defendants simply pay overtime based on the hourly rate. Because many employees, including Plaintiffs make a significant portion of their income from service fees, this amounts to a significant under calculations and underpayment of overtime.

24. Here Omni failed to calculate a correct overtime rate by refusing to include all wages earned in the overtime rate calculations. Plaintiffs and similarly situated employees owed unpaid overtime premiums.

Failure to Authorize and Permit Rest Breaks:

25. Omni has a policy and practice of failing to authorize and permit rest breaks as required by the Labor Code and Industrial Wage Order 5, and *Brinker v Superior Court* (2012) 53 Cal 4th 1004. The Defendants fail to provide scheduled rest breaks times, fail to allow employees including Plaintiffs to take rest breaks, and reprimand employees who do take rest breaks.

26. IWC Wage Order No. 5-2001, item 12 requires employers to authorize and permit off-duty rest periods during which an employee must be relieved of any and all work-related duties. *Brinker v Superior Court* (2012) 53 Cal 4th 1004; *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 269. Additionally, a lawful off-duty rest period is not provided where an employer fails to relinquish control over how employees spend their time. *Id.* Under Labor Code § 226.7, an employer is required to pay an employee one (1) additional hour of pay at the employee’s regular rate of pay for each workday in which a lawful rest period was not provided. *See also* IWC Wage Order No. 5-2001, item 12.

27. Plaintiffs assert that Defendants have a practice and policy of failing to authorize or permit rest breaks. Plaintiffs and similarly situated employees are owed unpaid rest period premiums.

Defendants failed to provide accurate wage statements:

28. Labor Code § 226(a) requires employers to provide employees wage statements stating among other things hourly rates of pay, including overtime rates. Labor Code § 246(i) requires employers provide sick leave rates on or with wage statements. Defendants failed to accurately

1 record and state overtime and sick leave rates. This violates Labor Code §§ 226(a),(e), 226.3,
2 and 246(i).

3 **Defendants failure to pay all wages due at the time of the termination of employment:**

4 29. The Defendants failed to pay Plaintiffs and similarly situated employees all wages due upon
5 termination in violation of Labor Code 201, 202, and 203. Plaintiffs and similarly situated
6 employees are due rest break premium wages, sick leave wages, and overtime.

7 **FIRST CAUSE OF ACTION**

8 **PRIVATE ATTORNEY GENERAL ACT**

9 **(Against All Defendants)**

10 **[Cal. Labor Code §§ 2698-2699.5]**

11 30. Plaintiffs re-allege and incorporate by reference each and every allegation contained in the
12 preceding and subsequent paragraphs as though fully set forth herein.

13 31. Plaintiffs are "aggrieved employees" within the meaning of California Labor Code § 2699(c),
14 and proper representatives to bring a civil action on behalf of themselves and other current
15 and former employees of Defendants pursuant to the procedures specified in California
16 Labor Code §2699.3, because Plaintiffs were employed by Defendants and the alleged
17 violations of the California Labor Code were committed against Plaintiffs.

18 32. Pursuant to the PAGA, Labor Code §§ 2698-2699.5, Plaintiffs seek to recover civil penalties,
19 including but not limited to penalties under California Labor Code §§ 2699, 203, 210, 225.5,
20 248.5 1197.1, 1199, and the applicable IWC Wage Order, from Defendants in a
21 representative action for the violations set forth above, including but not limited to violations
22 of California Labor Code §§ 98.6, 1102.5, 201, 202, 203, 204, 226, 226.3, 245-249 ,1194, 1197,
23 and 1198.

24 33. Plaintiffs seek civil penalties pursuant to the PAGA for violations of the Labor Code,
25 including:

26 a. Paid an illegally low overtime rate (Labor Code §§ 200, 204, 210, 510, 1194, 1194.2,
27 1197, 1197.1 and 1198);

28 b. Paid an illegally low paid sick leave rate (Labor Code §§ 246(1)(1)-(2));

- 1 c. Failed to authorize and permit rest breaks (Labor Code §§ 226.7, 558, and IWC
2 Wage Order #5-2001);
3 d. Failed to provide accurate wage statements (Labor Code §§ 226, 226.3 246(i)); and
4 e. Failed to pay all wages due upon termination of the employment relationship (Labor
5 Code §§ 200, 201, 202, and 203).

6 34. Plaintiffs are also entitled to an award of reasonable attorneys' fees and costs pursuant to
7 California Labor Code § 2699(g)(1).

8 35. Plaintiffs have satisfied the requirements of Labor Code § 2699.3. On March 11th, 2020,
9 Plaintiffs sent notice to Defendants and the California Labor and Workforce Development
10 Agency (LWDA) notifying them of the specific violations and the facts and theories
11 supporting those violations. The Department of Industrial Relations chose to investigate, and
12 then to extend their investigation by the statutorily allowed period of time, but have not
13 issued a citation to Mortenson. Plaintiffs have, therefore, exhausted their administrative
14 remedies as required by Labor Code §2699.3.

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1 **WHEREFORE** Plaintiff prays for the following relief:

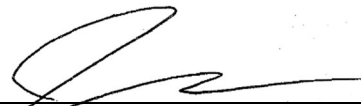
- 2 1. For civil penalties pursuant to the PAGA (Labor Code 2698 et seq.);
- 3 2. For costs of suit, including attorneys' fees as permitted by law, including those
- 4 available pursuant to Labor Code section 2699(g);
- 5 3. For an award of interest, including prejudgment interest, at the legal rate as permitted
- 6 by law;
- 7 4. For such other and further relief as the Court deems proper and just under all the
- 8 circumstances.

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10 Dated: July 1, 2020

HEWGILL COBB & LOCKARD, APC

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Justin Hewgill, Esq.

14 Attorney for PLAINTIFFS

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