

WHITEHEAD EMPLOYMENT LAW
JACOB N. WHITEHEAD, ESQ. (SBN 266123)
reception@jnwpc.com
7700 Irvine Center Drive, Suite 930
Irvine, CA 92618
Tel.: (949) 674-4922

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Attorneys for Plaintiffs Tobin Bell, Darius Nercessian, and Andrea Aguari, each on their own behalf and in their representative capacity for all similarly-situated Aggrieved Employees

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

TOBIN BELL, an individual; DARIUS
NERCESSIAN, an individual; and ANDREA
AGUARI, an individual, each on their own
behalf, and in their representative capacity on
behalf of all other similarly-situated
Aggrieved Employees,

Plaintiffs,

v.

BENIHANA INTERNATIONAL, INC., a
Delaware corporation; BENIHANA
NATIONAL CORP., a Delaware
corporation; and BENIHANA CARLSBAD
CORP., a Delaware corporation; and DOES 1
through 25, inclusive,

Defendants.

Case No. : 37-2020-00038597-CU-OE-CTL

**COMPLAINT FOR DAMAGES FOR
VIOLATION OF LABOR CODE § 2698 Et
Seq. (Private Attorneys General Act of 2004)**

Plaintiffs, TOBIN BELL, DARIUS NERCESSIAN, and ANDREA AGUARI,
("Plaintiffs") each on their own behalf and in their representative capacity for all similarly-
situated Aggrieved Employees hereby bring this Complaint ("Complaint") against
BENIHANA INTERNATIONAL, INC., A DELAWARE CORPORATION; BENIHANA
NATIONAL CORP., a Delaware CORPORATION; AND BENIHANA CARLSBAD CORP.,

1 a Delaware corporation; and DOES 1 through 25, inclusive (“Defendants”) and state and allege
2 as follows:

3 **INTRODUCTION**

4 1. This action is brought pursuant to Labor Code section 2698 *et seq.* (Private Attorneys
5 General Act of 2004) (the “PAGA”) for Defendants’ violations of Labor Code sections 201-203,
6 204, 226(a), 226.7, 510, 512, 1174, 1194 and 2802 and applicable provisions of the Industrial
7 Wage Commission (IWC).

8 2. This complaint challenges Defendants’ systemic illegal employment practices resulting in
9 violations of the Labor Code against Plaintiffs and the Aggrieved Employees.

10 3. Plaintiffs are informed and believe and based thereon allege that Defendant and DOES 1
11 through 25, jointly and severally acted intentionally and with deliberate indifference and
12 conscious disregard to Plaintiffs’ rights by failing to lawfully compensate Plaintiffs their full and
13 proper wages for all hours worked in compliance with the California Labor Code and applicable
14 Industrial Wage Order (“IWC”) No. 5-2001; failed to provide them with Labor Code and IWC
15 compliant rest and meal break periods; and failed to reimburse them for work-related expenses
16 incurred in the discharge of their duties as further alleged herein.

17 **THE PARTIES**

18 4. Plaintiff TOBIN BELL is and was, at all times relevant to this Complaint, an adult
19 individual working for Defendants in San Diego County, California.

20 5. Plaintiff DARIUS NERCESSIAN is and was at all times relevant to the Complaint, an
21 adult individual working for Defendants in San Francisco County, California.

22 6. Plaintiff ANDREA AGUARI is and was at all times relevant to the Complaint, an adult
23 individual working for Defendants in San Francisco County, California.

24 7. At all times relevant to this Complaint, Defendant, BENIHANA INTERNATIONAL,
25 INC. is and was a Delaware corporation, doing business and employing persons throughout the
26 United States, including the State of California, where it employed Plaintiffs and the Aggrieved
27 Employees.
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1 8. At all times relevant to this Complaint, Defendant BENIHANA NATIONAL CORP. is
2 and was a Delaware corporation doing business and employing persons throughout the United
3 States, including the State of California, where it employed Plaintiffs and the Aggrieved
4 Employees.

5 9. At all times relevant to this Complaint, Defendant BENIHANA CARLSBAD CORP. is
6 and was a Delaware corporation doing business and employing persons in California, where it
7 employed Plaintiff and the Aggrieved Employees.

8 10. Defendants jointly and severally control and operate over 70 Asian themed restaurants in
9 the United States, including approximately 15 to 20 locations within the State of California.

10 11. Plaintiffs are unaware of the true names or capacities of Defendants sued herein under the
11 fictitious names DOES 1 through 25, inclusive, but pray for leave to amend and serve such
12 fictitiously named Defendants pursuant to California Code of Civil Procedure section 474 once
13 their names and capacities become known.

14 12. Plaintiffs are informed and believe, and thereon allege, that DOES 1 through 25, inclusive,
15 are the partners, agents, owners, shareholders, managers, principals or employees of Defendants
16 and/or and were acting on behalf of Defendants.

17 13. Plaintiffs are informed and believe, and thereon allege, that each and all of the acts and
18 omissions alleged herein was performed by or is attributable to Defendants, each acting as the
19 agent for the other, with legal authority to act on the other's behalf. The acts of any and all
20 Defendants were in accordance with, and represent the policy of, all Defendants.

21 14. At all times herein mentioned, Defendants, and each of them, ratified each and every act
22 or omission complained of herein. At all times herein mentioned, Defendants, and each of them,
23 aided and abetted the acts and omissions of each and all of the other Defendants in proximately
24 causing the damages herein alleged.

25 15. Plaintiffs are informed and believe, and thereon allege, that each of the Defendants is in
26 some manner intentionally, negligently or otherwise responsible for the acts, omissions,
27 occurrences and transactions alleged herein.
28

1 **JURISDICTION**

2 16. This Court has jurisdiction over the violations of the PAGA and Labor Code sections
3 201-203, 204, 226(a), 226.7, 510, 512, 1174(d), 1194, 2802 and applicable orders of the
4 Industrial Wage Commission ("IWC").

5 17. This Court has jurisdiction over all Defendants, because upon information and belief, each
6 party has sufficient minimum contacts in California or otherwise intentionally avails itself of
7 California law so as to render the exercise of jurisdiction over it by the California courts consistent
8 with traditional notions of fair play and substantial justice.

9 18. Venue is proper in this Court because, upon information and belief, the named Defendants
10 transact business and/or have office in this county and the acts and omissions alleged herein took
11 place in this county.

12 19. The civil penalties sought in this action exceed the minimum jurisdiction limits of this
13 Court and will be established according to proof at trial.

14 **ALTER EGO, AGENCY AND JOINT EMPLOYERS**

15 20. Plaintiffs are informed and believe, and based thereon allege, that there exists such a unity
16 of interest and ownership between Defendants that the individuality and separateness of
17 Defendants has never existed or has ceased to exist.

18 21. Plaintiffs are informed and believe, and based thereon allege, that despite the formation
19 of purported corporate existence, Defendants are in reality one and the same including, but not
20 limited to, because:

- 21
- 22 a. Defendants are completely dominated and controlled by the same company, which
23 committed the violations of laws as set forth in this complaint, and which has hidden
24 and currently hide behind separate company formations to perpetrate frauds,
25 circumvent statutes, or accomplish some other wrongful or inequitable purpose;
- 26 b. DOES 1–25, inclusive, have acted on behalf of the other Defendants, who violate, or
27 cause to be violated, the provisions regulating minimum wages or hours and days of
28 work in any order of the Industrial Welfare Commission, or violates, or causes to be

1 violated, the California Labor Code;

2 c. DOES 1–25, inclusive, are owners, managers, officers, or managing agents of the
3 other Defendants, and the term “managing agent” has the same meaning as in
4 subdivision (b) of Section 3294 of the California Civil Code;

5 d. DOES 1–25, inclusive, derive actual and significant monetary benefits by and
6 through the other Defendants, and their unlawful conduct, and by using the other
7 Defendants as the funding source for their own personal expenditures;

8 e. Plaintiffs are informed and believe that Defendants, while really one and the same,
9 were segregated to appear as though separate and distinct for purposes of perpetrating
10 a fraud, circumventing a statute, or accomplishing some other wrongful or inequitable
11 purpose;

12 f. Plaintiffs are informed and believe that Defendants do not comply with all requisite
13 corporate formalities to maintain a legal and separate corporate existence; and

14 g. Plaintiffs are informed and believe, and based thereon allege, that the business affairs
15 of Defendants are and at all times relevant were so mixed and intermingled that the
16 same cannot reasonably be segregated, and the same are in inextricable confusion.
17 Defendants’ purported separateness is and at all times relevant was used as a mere
18 shell and conduit for the conduct of certain of Defendants’ affairs, and are and were
19 the alter ego of one another. The recognition of the separate existence of Defendants
20 would not promote justice in that it would permit Defendants to insulate themselves
21 from liability to Plaintiff for violations of the Labor Code and other statutory
22 violations. The corporate existence of Defendants should be disregarded in equity
23 and for the ends of justice because such disregard is necessary to avoid fraud and
24 injustice to Plaintiff herein.

25 22. Accordingly, each of Defendants is the alter ego of one another, and the fiction of their
26 separate corporate existence must be disregarded.

27 23. As a result of the aforementioned facts, Plaintiffs are informed and believe, and based
28 thereon allege, that Defendants were Plaintiffs’ joint employers by virtue of a joint enterprise, and

1 that Plaintiffs were employees of Defendants. Plaintiffs performed services for each and every
2 one of Defendants, and to the mutual benefit of all Defendants, and all Defendants shared control
3 of Plaintiffs as employees, either directly or indirectly, and the manner in which Defendants'
4 business was and is conducted.

5 **GENERAL ALLEGATIONS**

6 24. Plaintiffs and the Aggrieved Employees currently work or formerly worked for
7 Defendants throughout the State of California during the relevant period. Plaintiffs and the
8 Aggrieved Employees worked at Defendants' "Benihana" restaurants.

9 25. Plaintiff, Tobin Bell was employed by Defendants from approximately April 8, 2014 to
10 March 16, 2020. During his employment, he worked at Defendants' Benihana restaurants in San
11 Diego and Carlsbad, California as a general manager.

12 26. Plaintiff, Darius Nercessian was employed by Defendants from approximately July of
13 2014 to March 23, 2020. During his employment, he worked at Defendants' Benihana restaurants
14 in San Francisco, California as a manager.

15 27. Plaintiff, Andrea Aguari was employed by Defendants from approximately October 28,
16 2015 to May 15, 2020. During her employment, she worked at Defendants' Benihana restaurants
17 in San Francisco, California as a general manager.

18 28. Up until approximately March 19th of 2020 when the governor of California ordered a
19 state-wide lockdown, the Plaintiffs, were paid as salaried managers, for performing normal
20 restaurant management duties. However, with the shut-down orders in place in March of 2020,
21 many restaurant owners, including Defendants quickly amended their normal policies, procedures
22 and practices. Primarily, hundreds – (approximately eighty percent) of Defendants' employees
23 were furloughed and laid off. With the massive furloughs and dine-in options now foreclosed,
24 many restaurants, including Defendants, pivoted their operational focus to ramping up their pick-
25 up and delivery services to their customers. Defendants retained skeletal crew in their California
26 restaurants during the Covid shut down, and required a scant handful of workers and managers to
27 handle all the work.
28

1 29. To facilitate Defendants' new operational focus and mandates, Plaintiffs, and many
2 similarly-situated managers or acting managers, were instructed by Defendants to assume new
3 non-management roles performing non-exempt duties of kitchen workers, such as food prep,
4 clean up, preparing and packing food orders for customers' pick up or delivery, emptying
5 trash, cleaning parking lots and job duties normally reserved for non-exempt employees.
6 Throughout the Covid-19 shut down, Plaintiffs were no longer primarily engaged in
7 performing executive, administrative or professional duties, nor were any of them devoting more
8 than fifty percent of their time engaged in performing executive, administrative or professional
9 duties. The hours they worked were long and grueling, often as long as 12 hours per day, with
10 no rest breaks and no meal breaks.

11 30. As a direct consequence, during the relevant statutory period, Defendants misclassified
12 and compensated the Plaintiffs as exempt employees, even though they were no longer
13 performing their former executive, administrative or professional exempt job and duties.
14 Plaintiffs were therefore entitled to a.) be paid an hourly wage for all hours worked, including
15 overtime compensation, b.) to receive compliant meal-and-rest breaks; c.) to receive premium
16 pay for missed or non-compliant rest and meal break periods; and d.) to receive accurate wage
17 statements.

18 31. Defendants exercise/exercised control over the wages and working conditions of the
19 Plaintiffs and similarly situated, Aggrieved Employees and are therefore joint employers of the
20 Plaintiffs and are equally liable for the unpaid wages owed to Plaintiffs and similarly situated
21 Aggrieved Employees in California as alleged herein.

22 32. Plaintiffs allege on information and belief that from Defendants failed to record all the
23 hours they worked including time worked responding to questions and cell phone calls and text
24 communications while off the clock and therefore, failed to pay the Plaintiffs and Aggrieved
25 Employees overtime compensation when they worked more than eight hours in a workday or
26 forty hours in a workweek.

27 33. During the statutory period Plaintiffs and the Aggrieved Employees were not relieved of
28

1 all duties nor allowed to take uninterrupted rest breaks of at least 10 minutes after working four
2 hours or a major fraction thereof.

3 34. Defendants likewise failed to relieve Plaintiffs and the Aggrieved Employees of all duties
4 in order to allow them to take uninterrupted meal breaks of at least 30 minutes after working five
5 (5) hours. When Defendants did permit them their rest or meal breaks, they expected to remain
6 accessible at all times to attend to duties or other business needs. Such work-related interruptions
7 during meal or rest breaks were routine.

8 35. Plaintiffs did not waive their right to meal breaks at any time.

9 36. Plaintiffs further allege on information and belief that the Aggrieved Employees likewise
10 never waived their right to meal breaks.

11 37. Defendants failed to pay Plaintiffs all wages they earned. Defendants failed to pay them
12 for all the hours they worked during the Covid-19 shut down.

13 38. Plaintiffs allege on information and belief that Defendants similarly failed to pay the
14 Aggrieved Employees all wages they earned.

15 39. Defendants required Plaintiffs and the Aggrieved Employees to use their personal cell
16 phones to perform their work-related duties. Defendants required all of its employees, including
17 Plaintiffs and the Aggrieved Employees to install and use the Hot Schedules app on their personal
18 cell phones to send and receive work-related communications and to check work schedules. The
19 app is only free if you download it to a desktop computer. However, Plaintiffs and the Aggrieved
20 Employees had to pay \$2.99 in order to download the Hot Schedules app to their personal cell
21 phones to perform their work duties both during and outside of their scheduled work shifts.
22 Defendants never reimbursed Plaintiffs and similarly situated employees for the purchase of the
23 apps or for their personal cell phone expenses.

24 40. In addition, Plaintiff, Tobin Bell and Plaintiff, Darius C. Nercessian, and others similarly
25 situated utilized their personal laptops and wi-fi to perform their work-related duties as well. At
26 no time have Defendants reimbursed Plaintiff and similarly situated Aggrieved Employees for
27 expenses incurred in the use of their personal laptops and wi-fi.
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1 41. Further, throughout the relevant statutory term of Plaintiffs' employment, they incurred
2 and were not reimbursed for travel related expenses. Plaintiff, Tobin Bell, for example, traveled
3 from San Diego to the Benihana restaurant in Carlsbad (which he also managed) three time a
4 week, a 29-mile trip, one way. However, Defendants never paid Plaintiff, Tobin Bell for the use
5 of his personal vehicle including mileage and or gasoline expenses, and similarly failed to
6 reimburse Plaintiffs and the Aggrieved Employees for their work-related travel expenses.

7 42. Plaintiffs allege on information and belief that Defendants likewise required the
8 Aggrieved Employees to use their vehicles for work-related travel but failed to reimburse the
9 Aggrieved Employees for those work-related expenses.

10
11 **CAUSE OF ACTION**
12 **VIOLATION OF THE PAGA**
13 **(As to Defendants and Does 1 – 25, inclusive)**

14 43. Plaintiffs reallege and incorporate by reference all preceding paragraphs as though fully
15 set forth herein.

16 44. PAGA expressly establishes that any provision of the California Labor Code which
17 provides for a civil penalty to be assessed and collected by the Labor and Workforce Development
18 Agency (the "LWDA"), or any of its departments, divisions, commissions, boards, agencies or
19 employees for a violation of the California Labor Code, may be recovered through a civil action
20 brought by an aggrieved employee on behalf of himself or herself, and other current or former
21 employees.

22 45. Plaintiffs have complied with all Labor Code section 2699.3 requirements for
23 commencing a civil action under the PAGA and seek all recoverable penalties for Labor Code
24 violations as permitted and proscribed by the PAGA, including remedies available under Labor
25 Code §§ 2699, 2699.5, and 2933.3, among others.

26 46. Specifically, Plaintiffs for themselves and on behalf of all current and/or formed
27 Aggrieved Employees, seek the penalties provided by Labor Code § 2699(f) for violations, inter
28 alia, Labor Code §§ 201-203, 204, 226(a), 226.7, 510, 1174(d), 1194, 2802 and applicable IWC

1 No. 5-2001 in an amount sufficient to recover all unpaid wages, unpaid overtime wages, meal and
2 rest period premiums.

3 47. Defendants have failed and refused to pay Plaintiffs and the Aggrieved Employees the
4 required compensation for all hours worked and failed to keep time records as required by law.

5 48. Defendants' policies and practices violated California law as pled herein.

6 49. On June 8, 2020, Plaintiff Tobin Bell, on behalf of himself and all similarly situated
7 Aggrieved Employees, submitted a written Notice to the LWDA setting forth the alleged facts
8 and identifying the specific provisions of the Labor Code that he contended were violated by
9 Defendants. A true and correct copy of the June 8, 2020 PAGA Notice is attached hereto as
10 **Exhibit A**. More than 65 days have passed since Plaintiff, Tobin Bell submitted his PAGA Notice
11 and, to date, he has not received a response from the LWDA indicating its intent to investigate
12 his claims.

13 50. Each of the Plaintiffs were either misclassified as exempt employees and/or were non-
14 exempt employees and are "Aggrieved Employees" as defined by California Labor Code section
15 2699(c) in that they are all former and/or current employees of Defendants, and one or more of
16 the alleged violations was committed against them.

17 **Unpaid Wages**

18 51. At all relevant times, Labor Code section 200(a) provided: "'Wages' includes all amounts
19 for labor performed by employees of every description, whether the amount is fixed or ascertained
20 by the standard of time, task, piece, commission basis, or other method of calculation."

21 52. At all relevant times, Labor Code section 204 provided in relevant part: "All wages, other
22 than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any
23 employment are due and payable twice during each calendar month, on days designated in
24 advance by the employer as the regular paydays. Labor performed between the 1st and 15th days,
25 inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month
26 during which the labor was performed, and labor performed between the 16th and the last day,
27 inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following
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1 month.”

2 53. As alleged above, Defendants failed to pay Plaintiffs all wages they earned. Defendants
3 failed to pay for all hours worked beginning March 19, 2020 to the present time period, and/or up
4 to the date of their termination or discharge.

5 54. Plaintiffs allege on information and belief that Defendants likewise failed to pay the
6 Aggrieved Employees all wages they earned.

7 55. At all relevant times, Labor Code section 218.5 provided in relevant part: “(a) In any
8 action brought for the nonpayment of wages . . . the court shall award reasonable attorney’s fees
9 and costs to the prevailing party if any party to the action requests attorney’s fees and costs upon
10 the initiation of the action.”

11 56. Plaintiffs request attorney’s fees and costs pursuant to Labor Code section 218.5.

12 **Unpaid Overtime Compensation**

13 57. At all relevant times, Labor Code section 510 provided in relevant part: “Any work in
14 excess of eight hours in one workday and any work in excess of 40 hours in any one workweek
15 and the first eight hours worked on the seventh day of work in any one workweek shall be
16 compensated at the rate of no less than one and one-half times the regular rate of pay for an
17 employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less
18 than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours
19 on any seventh day of a workweek shall be compensated at the rate of no less than twice the
20 regular rate of pay of an employee.”

21 58. As alleged above, during the statutory period Plaintiffs worked more than eight hours in
22 one workday and/or more than 40 hours in one workweek, but Defendants failed to pay them
23 overtime compensation for those overtime hours worked. As further alleged above, Defendants
24 failed to pay overtime compensation to the Plaintiffs for the first eight hours worked on the
25 seventh day of work in any one workweek.

26 59. Plaintiffs allege on information and belief that Defendants likewise failed to pay the
27 Aggrieved Employees overtime compensation when they worked more than eight hours in one
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1 workday and/or more than 40 hours in one workweek, and failed to pay overtime compensation
2 to the Aggrieved Employees for the first eight hours worked on the seventh day of work in any
3 one workweek.

4 60. As alleged above, Defendants failed to pay Plaintiffs “double-time” compensation when
5 they worked more than 12 hours in one workday, and when they worked more than eight hours
6 on the seventh day of work in one workweek.

7 61. Plaintiffs allege on information and belief that Defendants likewise failed to pay the
8 Aggrieved Employees “double-time” compensation when they worked more than 12 hours in one
9 workday, and when they worked more than eight hours on the seventh day of work in one
10 workweek.

11 62. Defendants knew or should have known that Plaintiffs and the Aggrieved Employees were
12 working overtime and “double-time” hours.

13 63. At all relevant times, Labor Code section 1194(a) provided in relevant part: “any
14 employee receiving less than . . . the legal overtime compensation applicable to the employee is
15 entitled to recover in a civil action the unpaid balance of the full amount of this . . . overtime
16 compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.”

17 **Failure to Maintain Accurate Payroll Records**

18 64. At all relevant times, Labor Code section 1174(d) required employers to maintain accurate
19 payroll records showing, among other things, the hours worked daily by employees.

20 As alleged above, Plaintiffs were working long hours, often in excess of 12 hours, plus
21 working off the clock fielding calls and work from home. Defendants did not record or provide
22 the Plaintiffs any ability to record their hours because they continued paying them as though they
23 were exempt employees – even though after March 19, 2020 (due to the Covid shut down and the
24 massive furlough and layoffs of Defendants’ employees) Plaintiffs and similarly situated
25 Aggrieved Employees were spending far greater than fifty percent of their working shifts
26 performing manual kitchen labor and clean up duties formerly performed and reserved for non-
27 exempt workers. As a result, Defendants failed to maintain accurate records of the hours worked
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1 by Plaintiffs and the other Aggrieved Employees in violation of Labor Code section 1174(d) after
2 March 19, 2020.

3 **Failure to Provide Accurate Itemized Wage Statements**

4 65. At all relevant times, Labor Code section 226(a) required employers to provide an accurate
5 itemized statement to each employee at the time of each payment of wages showing, among other
6 things, the total hours worked by the employee and the gross wages earned.

7 66. Due to the allegations described above, as a result of Defendants' failure to pay all wages
8 due, including overtime wages, and failure to maintain or record accurate payroll records,
9 Defendants likewise failed to provide accurate itemized wage statements to Plaintiffs and the
10 Aggrieved Employees, in violation of Labor Code section 226(a).

11 **Meal & Rest Break Violations**

12 67. At all relevant times, Labor Code section 512(a) provided in relevant part: "An employer
13 shall not employ an employee for a work period of more than five hours per day without providing
14 the employee with a meal period of not less than 30 minutes . . . An employer shall not employ
15 an employee for a work period of more than 10 hours per day without providing the employee
16 with a second meal period of not less than 30 minutes . . ."

17 68. At all relevant times, the California Industrial Welfare Commission's Order No. 5-2001,
18 which applies to Defendants' industry, provided in relevant part: "Every employer shall authorize
19 and permit all employees to take rest periods, which insofar as practicable shall be in the middle
20 of each work period. The authorized rest period time shall be based on the total hours worked
21 daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof."

22 69. During the relevant time period, Plaintiffs allege that they worked virtually non-stop
23 through their shifts without receiving any rest break or meal break periods. They were not
24 relieved of all duties and allowed to take uninterrupted rest breaks of at least 10 minutes after
25 working four hours or a major fraction thereof.

26 70. Plaintiffs further allege on information and belief that Defendants likewise failed to
27 relieve the Aggrieved Employees of all duties and allow them to take uninterrupted rest breaks of
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1 at least 10 minutes after working four hours or a major fraction thereof.

2 71. In addition, Plaintiffs allege that they were not relieved of all duties and allowed to take
3 uninterrupted meal breaks of at least 30 minutes after working five (5) hours. When or if Plaintiffs
4 were permitted to eat a meal, such breaks were never duty free, as they were required to remain
5 accessible to attend to customers' orders or other business needs.

6 72. Plaintiffs allege on information and belief that the Aggrieved Employees likewise were
7 rarely relieved of all duties and allowed to take uninterrupted meal breaks of at least 30 minutes
8 after working five (5) hours, and that when or if they were permitted to eat a meal, such breaks
9 were never duty free as the Aggrieved Employees were expected to remain accessible to tend to
10 customers' orders or other business needs.

11 73. Plaintiffs also allege that they were not relieved of all duties and allowed to take a second
12 uninterrupted meal break of at least 30 minutes after working ten (10) hours. When Defendants
13 did permit Plaintiffs to eat a meal, they were always expected to remain accessible to attend to
14 customers' orders or other business needs.

15 74. Moreover, Plaintiffs allege on information and belief that during the statutory period, the
16 Aggrieved Employees likewise were not relieved of all duties and allowed to take a second
17 uninterrupted meal break of at least 30 minutes after working shifts in excess of ten (10) hours,
18 and that when Defendants did allow them to eat a meal, they were nevertheless expected to remain
19 accessible at all times to attend to customers' orders or other business needs.

20 75. Plaintiffs did not waive their right to meal breaks at any time.

21 76. Plaintiffs allege on information and belief that the Aggrieved Employees likewise never
22 waived their right to meal breaks at any time.

23 77. At all relevant times, Labor Code section 226.7(b) provided in relevant part: "An
24 employer shall not require an employee to work during a meal or rest or recovery period mandated
25 pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial
26 Welfare Commission . . ."

27 78. At all relevant times, Labor Code section 226.7(c) provided in relevant part: "If an
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1 employer fails to provide an employee a meal or rest or recovery period in accordance with a state
2 law, including, but not limited to, an applicable statute or applicable regulation, standard, or order
3 of the Industrial Welfare Commission . . . the employer shall pay the employee one additional
4 hour of pay at the employee's regular rate of compensation for each workday that the meal or rest
5 or recovery period is not provided.

6 79. Despite Defendants' failure to provide Labor Code and IWC compliant meal and rest
7 breaks to Plaintiffs, Defendants never paid Plaintiffs "premium" pay for unprovided meal breaks
8 and rest breaks, in violation of Labor Code section 226.7.

9 80. Plaintiffs also allege on information and belief that despite Defendants' failure to provide
10 meal and rest breaks to the Aggrieved Employees, Defendants never paid the Aggrieved
11 Employees "premium" pay for unprovided meal breaks and rest breaks, in violation of Labor
12 Code section 226.7.

13 **Failure to Timely Pay Final Wages Upon Termination or Discharge**

14 81. At all relevant times, Labor Code section 201(a) provided in relevant part: "If an employer
15 discharges an employee, the wages earned and unpaid at the time of discharge are due and payable
16 immediately."

17 82. As a consequence of Defendants' failure to pay Plaintiffs wages for every hour of work
18 performed, including time worked off the clock, and overtime compensation, as alleged above,
19 Defendants failed to timely pay all final wages to Plaintiffs and the Aggrieved Employees, who
20 separated from their employment with Defendants during the statutory period in violation of
21 Labor Code section 201.

22 83. At all relevant times, Labor Code section 203(a) provided in relevant part: "If an employer
23 willfully fails to pay, without abatement or reduction, in accordance with Sections 201 . . . any
24 wages of an employee who is discharged . . . the wages of the employee shall continue as a penalty
25 from the due date thereof at the same rate until paid or until an action therefor is commenced; but
26 the wages shall not continue for more than 30 days."

27 84. As a result of Defendants' violation of Labor Code section 201, Plaintiffs and the
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1 Aggrieved Employees are entitled to the “waiting time” penalties described in Labor Code section
2 203.

3 **Failure to Reimburse for Work-Related Expenses**

4 85. At all relevant times, Labor Code section 2802 provided that an employer shall indemnify
5 his or her employees for all necessary expenditures or losses incurred by the employee in direct
6 consequence of the discharge of his or her duties.

7 86. As alleged above, during the relevant statutory period, Defendants required all of its
8 workers, including Plaintiffs and the Aggrieved Employees to download, install and use the Hot
9 Schedules application on their personal cell phones to send and receive work-related
10 communications. Although the application was free to download to a computer desktop, it is not
11 free to install onto a cell phone. Therefore, all of Defendants’ employees who downloaded the
12 Hot Schedules application to their personal cell phones had to pay \$2.99 for the app. Plaintiffs
13 and all similarly situated Aggrieved Employees routinely used their personal cell phones and
14 sometimes their personal laptops and wi-fi for work related communications and duties both
15 during their scheduled shifts and outside of their scheduled work shifts. However, Defendants
16 failed to reimburse Plaintiffs and the Aggrieved Employees for the expenses incurred for the
17 utilization of their personal cell phones, computers and wi-fi.

18 87. Further Plaintiff Tobin Bell was required to use his personal vehicle to travel for work-
19 related purposes. During the statutory period, Plaintiff Tobin Bell, traveled three times weekly
20 from the Benihana in San Diego, California to the Benihana in Carlsbad, California – a trip of
21 approximately 27 miles one way, as he was assigned to manage both restaurants. At no time
22 have Defendants ever reimbursed Mr. Tobin for the use of his personal vehicle, nor any mileage
23 or gasoline expenses incurred for his work-related travel.

24 88. Plaintiffs allege on information and belief that Defendants likewise required the
25 Aggrieved Employees to use their vehicles for work-related travel but failed to reimburse the
26 Aggrieved Employees for those work-related expenses.

27 89. As a result of Defendants’ violation of Labor Code section 2802, Plaintiffs and the
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1 Aggrieved Employees seek reimbursement for all expenses they have incurred in discharging
2 and performing their work duties during the relevant statutory period, as well as their attorney's
3 fees and costs.

4 **Damages**

5 90. Pursuant to California Labor Code § 2699, Plaintiffs request and are entitled to recover
6 from Defendants unpaid wages, civil penalties, interest, attorneys' fees and costs pursuant,
7 as well as all statutory penalties against Defendants, and each of them, including but not
8 limited to:

9 91. Civil Penalties under California Labor Code § 2699 in the amount of a hundred dollars
10 (\$100) for each aggrieved employee per pay period for the initial violation, and two
11 hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent
12 violation;

13 92. Penalties under California Labor Code § 1199 in the amount of fifty dollars (\$50) for each
14 aggrieved employee per pay period for the initial violation, and one hundred dollars (\$100)
15 for each aggrieved employee per pay period for each subsequent violation;

16 93. Penalties under Labor Code § 1197.1 in the amount of a hundred dollars (\$100) for each
17 aggrieved employee per pay period for the initial violation, and two hundred fifty dollars
18 (\$250) for each aggrieved employee per pay period for each subsequent violation;

19 94. Any and all additional penalties and sums as provided by the Labor Code and/or other
20 statutes; and

21 95. Attorneys' fees and costs pursuant to Labor Code §§ 218.5, 1194, 2699, 2802 and any other
22 applicable statute.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiffs and the Aggrieved Employees pray for judgment as follows:

- 25 1. Upon the Cause of Action, for civil penalties and wages pursuant to statute as set forth
26 in Labor Code § 2698 *et seq.*, for Defendants' violations of Labor Code sections 201-
27 203, 204, 226 (a), 226.7, 510, 512, 1174(d), 1194 and 2802;

- 1 2. Upon the Cause of Action, for attorneys' fees and costs pursuant to Labor Code §§ 1194,
2 2699, and any other applicable statute; and
3 3. For such other and further relief the Court may deem just and proper.

4
5 DATED: October 13, 2020

WHITEHEAD EMPLOYMENT LAW

6
7 By: 
8 JACOB N. WHITEHEAD, ESQ.
9 Attorney for Plaintiffs and the Aggrieved Employees
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EXHIBIT A



June 8, 2020

Via Online Filing

California Labor & Workforce Development
Agency
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

Thomas Baldwin, CEO
BENIHANA CARLSBAD CORP.
21500 Biscayne Blvd., Suite 900
Aventura, FL 33180

**Via Certified Mail (Return Receipt
Requested)**

Corporate Creations Network Inc., Registered
Agent for
BENIHANA CARLSBAD CORP.
4640 Admiralty Way, 5th Floor
Marina del Rey, CA 90292

Thomas Baldwin, CEO
BENIHANA NATIONAL CORP.
21500 Biscayne Blvd., Suite 900
Aventura, FL 33180

Thomas Baldwin, CEO
BENIHANA INTERNATIONAL CORP.
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Corporate Creations Network Inc., Registered
Agent for
BENIHANA INTERNATIONAL CORP.
4640 Admiralty Way, 5th Floor
Marina del Rey, CA 90292

Re: *Notice Pursuant to the Private Attorneys General Act,
California Labor Code § 2699.3 (the "PAGA")*

Dear Sir:

Plaintiff, Tobin Bell ("Plaintiff"), has retained our firm to represent him and other similarly-situated current and former employees who were employed by Benihana Carlsbad Corp., a Delaware corporation; Benihana National Corp., a Delaware corporation; and Benihana International Corp., a Delaware corporation (hereinafter, "Defendants") in the Benihana-branded restaurant locations throughout the State of California.

This letter formally serves to notify Defendants of Plaintiff's intent to file a PAGA class action complaint against Defendants stating causes of action against Defendants for violations of the Labor Code seeking penalties, attorney's fees, costs, interest, and injunctive relief. Plaintiff alleges that Defendants have violated and are continuing to violate numerous provisions of the California Labor Code as further detailed below.

Plaintiff is informed and believes that the alleged Labor Code violations are ongoing, systematic, and uniform. If Defendants fails to cure the alleged violations, Plaintiff will bring an action against Defendants under the PAGA as provided by California law.¹ During the relevant statutory period, Defendants formerly employed Plaintiff and currently employ or formerly employed other similarly-situated employees throughout California (collectively, the "Aggrieved Employees") as *both* exempt and non-exempt employees who worked as managers, chefs and other restaurant staff (hereinafter, "Covered Positions"). Plaintiff alleges that Defendants have violated the California Labor Code injuring Plaintiff and the Aggrieved Employees for failure to pay all wages when due, for failure to pay overtime, for failure to provide accurately itemized wage statements, for failure to maintain accurate records of all hours worked, for failure to pay all wages due upon termination and for failure to reimburse expenses incurred in the necessary discharge of their work related duties.

Facts and Theories Supporting the Alleged Labor Code Violations

As a manager, Plaintiff was compensated as a salaried exempt employee. However, as soon as the Covid-19 shut-down of restaurant operations in California, Defendants terminated and/or laid off nearly all of their regular, hourly exempt workers and retained only skeletal staff - including Plaintiff and similarly-situated managers, and chefs, who were forced to perform non-exempt manual employee duties throughout their scheduled shifts such as taking orders, cooking

¹ Without limitation, Plaintiff, if permitted, will seek any and all penalties otherwise capable of being collected by the Labor & Workforce Development Agency ("LWDA"). This includes each of the following, as is set forth in Labor Code § 2699.5, which states:

The provisions of subdivision (a) of Section 2699.3 apply to any alleged violation of the following provisions: subdivision (k) of Section 96, Sections 98.6, 201, 201.3, 201.5, 201.7, 202, 203, 203.1, 203.5, 204, 204a, 204b, 204.1, 204.2, 205, 205.5, 206, 206.5, 208, 209, and 212, subdivision (d) of Section 213, Sections 221, 222, 222.5, 223, and 224, subdivision (a) of Section 226, Sections 226.7, 227, 227.3, 230, 230.1, 230.2, 230.3, 230.4, 230.7, 230.8, and 231, subdivision (c) of Section 232, subdivision (c) of Section 232.5, Sections 233, 234, 351, 353, and 403, subdivision (b) of Section 404, Sections 432.2, 432.5, 432.7, 435, 450, 510, 511, 512, 513, 551, 552, 601, 602, 603, 604, 750, 751.8, 800, 850, 851, 851.5, 852, 921, 922, 923, 970, 973, 976, 1021, 1021.5, 1025, 1026, 1101, 1102, 1102.5, and 1153, subdivisions (c) and (d) of Section 1174, Sections 1194, 1197, 1197.1, 1197.5, and 1198, subdivision (b) of Section 1198.3, Sections 1199, 1199.5, 1290, 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 1296, 1297, 1298, 1301, 1308, 1308.1, 1308.7, 1309, 1309.5, 1391, 1391.1, 1391.2, 1392, 1683, and 1695, subdivision (a) of Section 1695.5, Sections 1695.55, 1695.6, 1695.7, 1695.8, 1695.9, 1696, 1696.5, 1696.6, 1697.1, 1700.25, 1700.26, 1700.31, 1700.32, 1700.40, and 1700.47, paragraphs (1), (2), and (3) of subdivision (a) of and subdivision (e) of Section 1701.4, subdivision (a) of Section 1701.5, Sections 1701.8, 1701.10, 1701.12, 1735, 1771, 1774, 1776, 1777.5, 1811, 1815, 2651, and 2673, subdivision (a) of Section 2673.1, Sections 2695.2, 2800, 2801, 2802, 2806, and 2810, subdivision (b) of Section 2929, and Sections 3095, 6310, 6311, and 6399.

and preparing food for “to-go” orders, emptying trash, cleaning parking lots, and similar job duties normally reserved and assigned to non-exempt employees that Defendants had either terminated or laid off. During this time period, Plaintiff and other managers were being paid as though they were still salaried exempt, when in fact they were performing all of the duties of regular, hourly exempt employees and thus, entitled to the same protections and benefits under California law, including payment for overtime worked and for time worked off the clock.

Furthermore, at all relevant times during the statutory period, Plaintiff and similarly-situated Aggrieved Employees routinely utilized their personal cell phones to conduct their work-related duties. Defendants required employees to download a group app onto their personal cell phones which cost them \$2.99 to download and install from the app store. Although “theoretically” the app was available through Defendants’ website, Defendants were aware that the version of the app on the Benihana did not include the scheduling feature everyone using the app needed to have, especially managers. The scheduling feature however was only available on the version that you pay for through the app store. Thus Plaintiff and the Aggrieved Employees were forced to personally incur the app fees in order for the app to be fully functional. At no time have defendants ever reimbursed Plaintiff or the Aggrieved Employees for the expenses they necessarily incurred in the use of their personal cell phones, computers and internet in order to perform their work-related duties.

A. Failure to Pay Overtime Compensation

At all times relevant, Labor Code section 510 was in force and effect. Section 510 provides in relevant part: *“Any work in excess of eight hours in one workday and any work in excess of 40 hours in one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate for pay for an employee.”*

At all times relevant, Labor Code section 1194 was in force and effect. Subdivision (a) of Section 1194 provides in relevant part that *“any employee receiving less than . . . the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.”*

At all times relevant, Plaintiff and the Aggrieved Employees performed work for Defendants. As stated supra, during the statutory period, following the Covid-19 shutdown of restaurants to the public, Plaintiff and a substantial number of the Aggrieved Employees who were compensated as salaried exempt workers were no longer performing their normal duties associated with their exempt positions and instead were forced to perform the duties of all the non-exempt employees who had been terminated or furloughed or laid off, working more than eight (8) hours in one workday and/or more than forty (40) hours in one workweek without being paid overtime. Thus during a significant portion of the statutory period, Defendants knew or should have known that Plaintiff and these similarly-situated Aggrieved Employees were in fact misclassified as salaried exempt and were working overtime hours without being the overtime compensation to which they were entitled.

Defendants are therefore liable for nonpayment of overtime compensation to Plaintiff and the Aggrieved Employees in an amount to be determined according to proof at trial. Defendants are further liable for interest thereon, reasonable attorney's fees, and costs of suit.

B. Failure to Provide Accurate Itemized Wage Statements

At all times relevant, Labor Code section 226 was in force and effect. Subdivision (a) of Section 226 requires employers to provide accurate itemized wage statements showing, among other things, the total hours worked by the employee and the net wages earned. As a result of Defendants' failure to pay Plaintiff and the Aggrieved Employees overtime compensation they earned, Defendants likewise failed to provide accurately itemized wage statements to Plaintiff and the Aggrieved Employees showing all hours worked including both regular and overtime hours and compensation for same.

Subdivision (e) of Labor Code section 226 provides that an employee suffering injury as a result of a knowing and intentional failure to provide accurate itemized wage statements is entitled to an aggregate penalty of four thousand dollars (\$4,000.00), and is entitled to an award of costs and reasonable attorney's fees. As a result of Defendants' knowing and intentional failure to provide accurately itemized wage statements to Plaintiff and the Aggrieved Employees, Defendants are liable to pay each of them penalties, attorney's fees, and costs as set forth in Labor Code section 226(e).

C. Failure to Timely Pay All Wages Earned Twice Monthly

At all times relevant, Labor Code section 200 was in force and effect. Subdivision (a) of Section 200 defines "wages" as "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." Subdivision (b) of Section 200 defines "labor" as all work or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment.

At all times relevant, Labor Code section 204 was in force and effect. Subdivision (a) of Section 204 requires employers to pay employees all wages earned no less than twice monthly. As a result of Defendants' failure to pay Plaintiff and the Aggrieved Employees all overtime compensation they earned, Defendants have likewise violated Labor Code section 204 by failing to pay them all wages earned no less than twice monthly.

At all times relevant, Labor Code section 210 was in force and effect. Section 210 provides in relevant part that an employer that violates Labor Code section 204 is subject to a penalty of one hundred dollars (\$100.00) for any initial violation for each failure to pay each employee, and two hundred dollars for each subsequent violation or any willful or intentional violation, plus 25 percent of the amount unlawfully withheld.

At all times relevant, Labor Code section 218 was in force and effect. Section 218 provides that "nothing in this article shall limit the right of any wage claimant to sue directly or through an

assignee for any wages or penalty due him under this article.” As a result of Defendants’ willful and intentional violations of Labor Code section 204, Defendants are liable to Plaintiff and the Aggrieved Employees for the penalties described above.

D. Failure to Maintain Accurate Records of All Hours Worked by Plaintiff and the Aggrieved Employees

At all times relevant, Labor Code section 1174 was in force and effect. Subdivision (d) of Section 1174 provides in relevant part that every employer must: “Keep, at a central location in the state or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments.” Defendants violated Labor Code section 1174 by failing to track and maintain accurate payroll records showing the hours worked daily by Plaintiff and the Aggrieved Employees.

At all times relevant, Labor Code section 1174.5 was in force and effect. Section 1174.5 provides in relevant part that any employer *who willfully fails to maintain accurate and complete records required by subdivision (d) of Section 1174* is subject to a civil penalty of five hundred dollars (\$500.00). As a result of Defendants’ violation of Labor Code section 1174, Defendants are liable to Plaintiff and the Aggrieved Employees for these civil penalties.

E. Failure to Pay All Wages Due Upon Separation or Termination of Employment

At all times relevant, Labor Code section 201 was in force and effect. Subdivision (a) of 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.

At all times relevant, Labor Code section 202 was in force and effect. Subdivision (a) of Section 202 provides that if employees not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable no later than 72 hours thereafter, unless the employee has given 72 hours advance notice of their intention to quit, in which case the employee is entitled to their wages at the time of quitting.

At all times relevant, Labor Code section 203 was in force and effect. Subdivision (a) of Section 203 provides that an employer who willfully fails to pay, without abatement or reduction, in accordance with sections 201 and 202, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefore is commenced, but the wages shall not continue for more than 30 days.

Defendants violated Labor Code sections 201 and 202 by failing to timely pay Plaintiff and the Aggrieved Employees all wages earned within the required time limits, including the overtime wages they were due. Defendants are therefore liable to Plaintiff and the Aggrieved Employees for the “waiting time penalties” set forth in Labor Code section 203.

G. Failure To Reimburse Necessary Work Related Expenses (Labor Code Section 2802)

At all times relevant, Labor Code Section 2802 was in force and effect. Under Labor Code Section 2802, *“(a) An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.”*

As indicated above, the Plaintiff and Aggrieved employees utilized their personal cell phones/data/computerized devices and internet service and were forced to purchase and download an app from the app store in order to perform their work-related duties with no reimbursement from Defendants. The Plaintiff and Aggrieved employees did not waive their rights to such reimbursement.

The Defendants have failed to reimburse the Plaintiff and the Aggrieved Employees for their work related expenses. As a consequence, pursuant to Section 2802, the Plaintiff and the Aggrieved Employees are entitled to recover their expenses plus attorneys’ fees, interest, expenses and costs of suit.

Conclusion

Defendants have violated the foregoing provisions of the California Labor Code. Plaintiff requests that the LWDA investigate the above allegations and provide notice of the allegations under PAGA’s provisions. Alternatively, Plaintiff requests that the LWDA inform him if it does not intend to investigate these violations, so that he may bring an action under the PAGA for the violations discussed in this letter.

Should you have any questions or comments regarding the foregoing, or any aspect of this matter, please do not hesitate to contact our offices.

Sincerely,

WHITEHEAD EMPLOYMENT LAW


Jacob N. Whitehead, Esq.