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COPY DELIVERED

Date: 4/9/12 Int: EG

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO
SAN BERNARDINO JUSTICE CENTER
COMPLEX LITIGATION DEPARTMENT

NOAH LATKIN, an individual, MATTHEW
GUEVARA SERAFIN, an individual, on behalf
of themselves and all others similarly situated,

Plaintiffs,

v.

HILTON WORLDWIDE HOLDINGS, INC., a
Delaware corporation; DT MANAGEMENT
LLC, an Arizona limited liability company;
MEMPHIS SHARED SERVICES, business
entity form unknown; PARK HOTELS AND
RESORTS, LLC, a Delaware limited liability
company; DOUBLETREE MANAGEMENT
LLC, a Delaware limited liability company; and
Does 1-50,

Defendants.

Case No.: CIVSB 2028931

CLASS ACTION

**FIRST AMENDED COMPLAINT FOR
DAMAGES:**

(1) Violations of Bus. & Prof. Code
§§ 17200-17208 [UCL];

(2) Conversion;

(3) Breach of Contract – Third Party
Beneficiary; and

(4) Penalties under PAGA

Demand for Jury Trial

INTRODUCTION

1. Introduction and Summary.

(a) This is a class and representative action for conversion and misappropriation of gratuities paid by hotel customers to banquet workers at the DoubleTree by Hilton – Ontario Airport (“Hotel”). Over the last four years or more, owners and managers of the Hotel implemented a systematic and perfidious scheme to deprive their own employees – low wage hospitality workers – of gratuities left by customers.

(b) There are five Defendants. Plaintiffs are informed and believe, and based on such information and belief allege, that each of these Defendants plays some role in owning, operating and/or managing the Hotel and controlling or influencing its labor relations policies:

(i) Park Hotel and Resorts, the owner of the Hotel real estate; (ii) Hilton Worldwide Holdings, which franchises and/or manages the Hotel; (iii) DT Management, which manages the Hotel and pays some of the banquet workers; (iv) Memphis Shared Services, which pays some of the banquet workers and may have some management role in operating the Hotel; and (v) DoubleTree Management, which also plays a role in operating and managing the Hotel. (These five entities are referred to collectively as “Defendants,” and individually as a “Defendant.”)

(c) Plaintiffs (and the class they seek to represent) are banquet servers at the Hotel. For banquets at the Hotel, Defendants charge patrons a 16.5% gratuity on top of their food and beverage bill, which is contractually required to be paid to servers, and where applicable, bussers and/or bartenders. Defendants developed a point system under which they calculated the workers’ relative share of these gratuities. But surreptitiously, Defendants withheld a considerable amount of these paid gratuities from deserving workers, keeping it for themselves and paying some of it to supervisory employees for whom it was not intended.

(d) Defendants’ deceitful purloining of working peoples’ gratuities violates California Labor Code § 351, which prohibits employers from retaining gratuities and requires that such gratuities be paid immediately to the employees for whom they were intended (and by the next regular payday if paid by credit card). Defendants’ actions also constitute conversion and breach of contract under California common law. This Complaint seeks restitution, monetary damages,

1 penalties under the Labor Code Private Attorneys General Act of 2004, as amended (“PAGA”) (Cal.
2 Labor Code §§ 2698, *et seq.*), punitive damages, and attorneys’ fees for Defendants’ unlawful
3 conduct.

4 **KEY ACTORS AND CLASS DEFINITION**

5 2. Latkin. Plaintiff Noah Latkin (“Latkin”) resides in Los Angeles County, California.
6 He has been an employee of Defendants during the relevant statutory period and worked in the
7 Hotel’s banquet services as a server.

8 3. Guevera Serafin. Plaintiff Matthew Guevara Serafin (“Guevara Serafin”) resides in
9 Riverside County, California. He has been an employee of Defendants during the relevant statutory
10 period and worked in the Hotel’s banquet services as a server. Latkin and Guevara Serafin will
11 sometimes be collectively referred to as “Plaintiffs,” “Named Plaintiffs,” and “Class
12 Representatives.”

13 4. Hilton Worldwide Holdings. Defendant Hilton Worldwide Holdings Inc. (“Hilton”) is
14 an American-based multinational hospitality company that manages and franchises hotels and
15 resorts. It is incorporated in Delaware and its headquarters are in McLean, Virginia. DoubleTree is
16 considered one of Hilton’s upscale hotel brands. Plaintiffs are informed and believe, and based on
17 such information and belief allege, that Hilton franchises and/or manages the Hotel.

18 5. DT Management. DT Management LLC (“DT”) is a limited liability company
19 incorporated in Arizona with headquarters in McLean, Virginia. It operates a chain of hotels.
20 Plaintiffs are informed and believe, and based on such information and belief allege, that DT
21 manages the Hotel on behalf of Defendants Hilton and/or Park.

22 6. Memphis Shared Services. Memphis Shared Services (“Shared Services”) is a
23 business entity of unknown legal form that does business in the State of California and the County of
24 San Bernardino as “Hilton Memphis Shared Services.” Shared Services maintains a business address
25 in Memphis, Tennessee. Plaintiffs are informed and believe, and based on such information and
26 belief allege, that Shared Services employs and/or payrolls Plaintiffs and/or members of the Plaintiff
27 Class, and/or manages the Hotel on behalf of Defendants Hilton and/or Park.
28

1 7. Park Hotels. Park Hotels and Resorts, Inc. (“Park”), named as Doe 1, is a real estate
2 investment trust incorporated in the state of Delaware with headquarters in Tysons, Virginia. It owns
3 many hotel and resort properties, including the DoubleTree Hotel in Ontario, San Bernardino
4 County, California.

5 8. DoubleTree Management. DoubleTree Management LLC (“DoubleTree
6 Management”) is a limited liability company incorporated in Delaware with headquarters in
7 McLean, Virginia. It operates a chain of hotels. Plaintiffs are informed and believe, and based on
8 such information and belief allege, that DoubleTree Management manages the Hotel on behalf of
9 Defendants Hilton and/or Park.

10 9. Does 2 through 50. Plaintiffs are ignorant of the true names and capacities of
11 Defendants sued herein as Does 2 through 50, inclusive, and therefore sue these Defendants by such
12 fictitious names and capacities. Plaintiffs will seek leave to amend this complaint to allege the true
13 names and capacities of said fictitiously named Defendants once they have been ascertained.
14 Plaintiffs are informed and believe, and based on such information and belief allege, that at all
15 relevant times, each of the fictitiously named Defendants was an agent or employee of the named
16 Defendants and/or was acting within the course and scope of said agency or employment at the time
17 of the events herein alleged, and/or was acting directly or indirectly in the interest of Defendants in
18 relation to Plaintiffs and the Plaintiff Class. Plaintiffs are further informed and believe, and based on
19 such information and belief allege, that each of the fictitiously named Defendants aided and assisted
20 the named Defendants in committing the wrongful acts alleged herein, and that Plaintiffs’ damages,
21 as alleged herein, were proximately caused by such Defendants. To the extent that the conduct and
22 omissions alleged herein were perpetrated by one or more Defendants, the remaining Defendants
23 confirmed and ratified said conduct and omissions. Defendants Hilton, DT, Shared Services, Park,
24 Doubletree Management, and Does 2-50 will sometimes be collectively referred to as “Defendants.”

25 10. Agency. Plaintiffs are informed and believe, and based on such information and belief
26 allege, that at all times herein relevant, each of the Defendants, including each fictitiously named
27 Defendant, was the agent, servant, joint venturer, authorized representative, successor, purchaser,
28 and/or assignee of each of the other Defendants, and, except as provided herein, in doing the acts and

1 things hereinafter alleged, was acting within the course and scope of said agency, joint venture,
2 representation, succession, purchase, assignment, consent, approval and subsequent satisfaction of
3 each of the remaining Defendants. Each of the Defendants was authorized and empowered by each
4 of the other Defendants to act and did act as the principal, agent, representative, successor, purchaser
5 and/or assignee of each of the other Defendants. Plaintiffs are further informed and believe and
6 thereon allege that, except as provided herein, each Defendant was acting within the course and
7 scope of its authority in performing the acts herein alleged, and that the acts of each Defendant as
8 alleged herein were authorized and/or ratified by the other Defendants.

9 11. Integrated Enterprise/Joint Employers. Plaintiffs are informed and believe and
10 thereon allege that Defendants have common management, centralized control of labor relations,
11 common ownership and financial control, overlapping employees, common corporate headquarters,
12 and interrelated operations such that these entities operated as a single integrated enterprise and/or as
13 joint employers with regard to Plaintiffs' employment.

14 12. Common Employment. Plaintiffs and all members of the Plaintiff Class as defined
15 below are or were employed by Defendants, within the state of California, during the relevant
16 statutory period.

17 13. Definition of Class. Named Plaintiffs Latkin and Guevara Serafin bring these claims
18 on behalf of a class of persons ("Plaintiff Class") which consists of all current and former servers,
19 bussers, and bartenders who provide or provided banquet services during banquet events at the Hotel
20 which are or were governed by Defendants' Banquet Event Order or functional equivalent ("BEO"),
21 for which a 16.5% gratuity ("the Gratuity") was charged to and collected by Defendants from
22 patrons and customers and specifically designated to be paid and fully distributed to them (the
23 "Gratuity"), but who were denied full distribution of the Gratuity. These current and former
24 employees were employed by Defendants at some time since commencement of the relevant
25 statutory period, and Defendants did not fully distribute the Gratuity to them pursuant to the express
26 terms of the BEO and as required by California Labor Code § 351. Defendants' failure to pay the
27 full amount of the Gratuity to the Plaintiff Class, is and was a result of unlawful policies and
28 practices that were commonly applied to all members of the Plaintiff Class.

14. Business & Professions Code §§ 17200 *et seq.* Plaintiffs bring this action on behalf of themselves, the general public, and all others similarly situated pursuant to Business and Professions Code §§ 17200, *et seq.*

15. PAGA. Plaintiffs also bring this action on behalf of the State of California under PAGA, Labor Code §§ 2698, *et seq.*

RELEVANT FACTS

16. Hotel Provides Banquet Services. Defendants provide lodging and other typical hotel-related services to patrons, including but not limited to banquet services.

17. Banquet Staff. Defendants maintain a part-time staff of employees to provide services at banquets. Banquet staff includes supervisors, who are called “banquet managers” and “banquet captains,” and non-supervisory service staff consisting of lead servers, regular servers, bartenders, barbacks, busboys, and housemen.¹

18. Patron Gratuity is Included in Standard Banquet Contract Terms.

a. The BEO. Plaintiffs are informed and believe, and based on such information and belief allege, that every patron who contracts for banquet services at the Hotel with Defendants is required to sign a BEO. Every BEO contains a provision requiring the patron to pay 16.5% of the food and beverage total as a gratuity for the servers and other staff. The text of Defendants' standard BEO includes the following:

“Final count must be a minimum guarantee of contracted meals which is due 4 business days prior to your function date. 16.5% of the Food and Beverage total plus applicable state or local tax will be added to your account as a gratuity and fully distributed to servers, and where applicable, bussers and or bartenders assigned to the event. 5.5% of the food and beverage total, plus applicable state and local tax will be added to your account as a service charge. This service charge is not a gratuity and is the property of the hotel to cover discretionary costs of the event. Subject to change.”

¹ Housemen are employees who set up and break down tables, chairs and miscellaneous equipment used for banquet events. Housemen are and were considered “servers” for purposes of distributing gratuities under the BEOs.

1 b. The Banquet Event Order – Additional Terms and Conditions. The standard
2 BEO expressly incorporates the Banquet Event Order – Additional Terms and Conditions located on
3 <http://hiltondistribution.com/us-beo/addlterms.htm>. This document includes the following relevant
4 provisions:

5 **“Additional Definitions.**

6 ‘Gratuity’ refers to a charge based on your Event’s food and beverage total,
7 plus any applicable state and/or local taxes, which will be added to your account and
8 will be fully distributed to servers, and where applicable, bussers and/or bartenders
9 assigned to the Event.

10 ‘Service charge’ refers to a charge based on your Event’s food and beverage
11 total, plus any applicable state and/or local taxes, which will be added to your
12 account, and that is not a gratuity but rather is the property of the Hotel to cover
13 discretionary and administrative costs of the Event.

14 * * *

15 **Full Cancellation.**

16 As products and services must be purchased and scheduled in advance,
17 cancellation notices received by Hotel seven (7) days or less in advance of the Event
18 will incur a cancellation fee equal to 100% of the charges (including labor, **gratuities**,
19 service charges, rentals and applicable taxes) for the final guarantee or contracted
20 number of guests, whichever is higher.” (Emphasis added.)

21 19. Method of Distributing Gratuities. Defendants advised Plaintiffs and the Plaintiff
22 Class orally at the time of hire that they maintain a gratuity distribution formula that (i) assigns
23 points to banquet employees for every hour worked, and then (ii) divides the total amount of
24 gratuities collected from patrons by the total amount of points earned, in order to (iii) arrive at a per
25 hour gratuity figure paid to the employees each pay period.² Plaintiffs are informed and believe, and
26 based on such information and belief allege, that servers (including, where applicable, bartenders,

27 _____
28 ² The numerator is the amount of gratuities collected, the denominator is the total
number of hours worked, and the quotient is the amount of the per-point (or per hour) gratuity.

1 barbacks and bussers) are assigned 1 point for every hour worked. Lead servers are assigned 1.25
2 points for every hour worked. Housemen receive an individually negotiated or assigned number of
3 points (usually ranging from 0.5 to 1.3 points per hour worked). Banquet captains are assigned 1.5
4 points for every hour worked. All banquet workers receive a fraction of a point for every fraction of
5 an hour worked.³ Defendants never furnished any of the Plaintiffs with a written description of the
6 gratuity point policy.

7 20. Example of Calculation of Gratuity Points. Below is a hypothetical example of how
8 gratuity distribution is calculated:

- 9 • Total event revenue: \$20,000.00
- 10 • Total gratuities received (16.5% of \$20,000): \$3,300.00
- 11 • Total points earned by banquet staff: 200
- 12 • Total points earned by non-managerial staff: 175
- 13 • Total points earned by supervisory banquet captains: 25
- 14 • If the total amount of gratuities were distributed to employees who earned points, the
15 amount of gratuity assigned per point would be \$16.50 ($\$3,300.00 \div 200 = \16.50).
- 16 • If Defendants distributed less than the full \$3,300.00, then the amount of per point
17 would be 1/200 of whatever total amount of gratuities was distributed. For example,
18 if Defendants only distributed \$3,000.00 of the gratuities, the amount of gratuity
19 assigned per point would be \$15.00 ($\$3,000.00 \div 200 = \15.00).

20 21. Example of Distribution of Gratuities. In the example above, if a server like Plaintiff
21 Latkin [who was assigned one point for every hour worked] worked 8 hours at a banquet for which
22 the full amount of Gratuities was distributed, he would receive 8 points, and thus \$132.00 ($\$16.50 \times$
23 $8 = \$132.00$). If a banquet captain [who was assigned 1.5 points for every hour worked] worked 8
24 hours at a banquet, they would receive \$198.00 ($12 \text{ points} \times \$16.50 = \$198.00$) if the full amount of
25 gratuities was distributed.

26 22. Supervisory Employees Always Improperly Receive Share of Gratuities. For the past
27 four or more years, Defendants paid Plaintiffs and Plaintiff Class in accordance with the gratuity
28

³ For example, a server who worked 4.5 hours in a day would be assigned 4.5 points.

1 distribution formula described in Paragraphs 18-20 above. Plaintiffs are informed and believe, and
2 based on such information and belief allege, that Defendants always improperly included
3 supervisory banquet captains among those to whom gratuities were distributed, notwithstanding the
4 prohibition on the payment of gratuities to supervisory employees under law and the terms of the
5 BEO.

6 23. In Addition, Defendants Fail to Properly Pay Banquet Staff Full Share of Gratuities.
7 Plaintiffs are informed and believe, and based on such information and belief allege, that in addition
8 to improperly distributing a share of the Gratuity to supervisory banquet captains, Defendants also
9 withheld additional portions of the 16.5% Gratuity for their own use.

10 24. Defendants' Failure to Pay Full Gratuity to Banquet Staff is Unlawful. As a result of
11 Defendants' conduct described in Paragraphs 21 and 22 above, Defendants have unlawfully failed to
12 pay the full 16.5% Gratuity to Plaintiffs and the Plaintiff Class pursuant to the BEOs and California
13 Labor Code § 351.

14 **CLASS ALLEGATIONS**

15 25. Proposed Class and Nature of Class Claims. Plaintiffs Latkin and Guevara Serafin, as
16 Class Representatives, bring this action on their own behalf and on behalf of a class comprised of all
17 current and former non-supervisory servers, bussers, and bartenders who provide or provided
18 banquet services during banquet events at the Hotel which are or were governed by the BEO, for
19 which a 16.5% gratuity is or was charged to and collected by Defendants from patrons and
20 customers and specifically designated to be paid and fully distributed to them, but who were denied
21 full distribution of the Gratuity.

22 26. Numerosity. The size of the Plaintiff Class makes a class action both necessary and
23 efficient. Plaintiffs estimate that the Plaintiff Class consists of more than 40 current and former
24 employees. The identities, addresses, and precise number of members of the Plaintiff Class are
25 ascertainable from Defendants' records but are so numerous that joinder is impracticable.

26 27. Typicality. The claims of the Class Representatives are typical of the claims of the
27 class as a whole. The Class Representatives are employed by Defendants, work at the Hotel as
28 banquet servers, and were denied full distribution of the Gratuity because of Defendants' unlawful

1 employment policies and practices. The unlawful policies and practices that have operated to deny
2 the Class Representatives their full portion of the Gratuity for the work they performed for which the
3 Gratuity was collected are typical of the unlawful practices that have and will continue to operate to
4 deny other members of the Plaintiff Class the compensation to which they are entitled.

5 28. Common Questions of Law and Fact. This case poses common questions of law and
6 fact affecting the rights of all Plaintiff Class members, including but not limited to: whether the
7 failure to pay and distribute the entire Gratuity to the employees for the work they performed for
8 which the charges were collected (i) is unlawful under Labor Code § 351, (ii) constitutes unlawful
9 conversion, and/or (iii) constitutes a breach of contract under a third party beneficiary theory; what
10 relief is necessary to remedy Defendants' unfair and unlawful business practices and other conduct
11 as alleged herein; and other questions of law and fact.

12 29. Adequacy of Class Representation. Class Representatives Latkin and Guevara Serafin
13 can adequately and fairly represent the interests of the Plaintiff Class as defined above, because their
14 individual interests are consistent with, and not antagonistic to, the interests of the Class.

15 30. Adequacy of Counsel for the Class. Counsel for the Plaintiff Class possess the
16 requisite resources and ability to prosecute this case as a class action and are experienced labor and
17 employment attorneys who have successfully litigated other cases involving similar issues.

18 31. Propriety of Class Action Mechanism. Class certification is appropriate because
19 Defendants implemented a scheme which is generally applicable to the Plaintiff Class, making it
20 appropriate to issue final injunctive relief and corresponding declaratory relief with respect to the
21 class as a whole. Class certification is also appropriate because the common questions of law and
22 fact predominate over any questions affecting only individual members of the class. Further, the
23 prosecution of separate actions against Defendants by individual class members would create a risk
24 of inconsistent or varying adjudications which would establish incompatible standards of conduct for
25 Defendants. For all these and other reasons, a class action is superior to other available methods for
26 the fair and efficient adjudication of the controversy set forth in this complaint.

1 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

2 32. On December 10, 2020, Plaintiffs filed an administrative notice with the California
3 Labor Workforce Development Agency (“LWDA”) under PAGA, Labor Code §§ 2698, *et seq.*
4 Plaintiffs submitted their administrative notice through the LWDA’s online filing system and served
5 the administrative notice on all five Defendants via certified mail, return receipt requested. The
6 administrative complaint notified the LWDA and Defendants of the Labor Code violations set forth
7 in this Complaint. Plaintiffs submitted their administrative complaint to the LWDA with a filing fee
8 of seventy-five dollars (\$75). To date, more than 65 days have passed since Plaintiffs filed their
9 administrative notice, and Plaintiffs have received no response from the LWDA. Based on the
10 LWDA’s non-response, Plaintiffs believe that the LWDA has decided not to prosecute this case for
11 the penalties that Plaintiffs are seeking under PAGA.

12 **FIRST CAUSE OF ACTION**

13 **VIOLATIONS OF BUSINESS & PROFESSIONS CODE §§ 17200 *et seq.* AND**

14 **LABOR CODE § 351**

15 **(Against All Defendants)**

16 33. Plaintiffs hereby incorporate by reference each and every allegation contained in
17 paragraphs 1 through 32 above, inclusive, as if fully set forth herein.

18 34. California Labor Code § 351 provides:

19 “No employer or agent shall collect, take, or receive any gratuity or a part thereof that
20 is paid, given to, or left for an employee by a patron . . . Every gratuity is hereby
21 declared to be the sole property of the employee or employees to whom it was paid,
22 given, or left for . . . Payment of gratuities made by patrons using credit cards shall be
23 made to the employees not later than the next regular payday following the date the
24 patron authorized the credit card payment.”

25 35. California Labor Code § 351 is enforceable under California’s Unfair Competition
26 Law (“UCL”), California Business & Professions Code §§ 17200 *et seq.*, and a claim for a violation
27 of Labor Code § 351 may be pursued as a class action pursuant to Business & Professions Code
28 § 17203.

1 36. At all material times, Defendants violated Labor Code § 351 by paying banquet
2 captains, who are managerial and supervisory employees, a portion of gratuities which are the sole
3 property of Plaintiffs and the Plaintiff Class (non-managerial and non-supervisory servers, bussers,
4 and bartenders) pursuant to the BEOs. For example, using the hypothetical figures in Paragraph 19
5 above in which banquet captains were assigned 25 points, banquet captains were paid (25 x 16.50 =)
6 \$412.50 that should have been distributed to non-managerial and non-supervisory servers.

7 37. At all material times, Defendants further violated Labor Code § 351 by failing to
8 distribute the full 16.5% Gratuity which was the sole property of Plaintiffs and the Plaintiff Class
9 (non-managerial and non-supervisory servers, bussers, and bartenders) pursuant to the BEOs.

10 38. As a direct result of Defendants' actions, as described above, Plaintiffs and similarly
11 situated banquet employees have been damaged in the amount of gratuities unlawfully withheld
12 from them, whether those moneys were paid to supervisory and managerial banquet captains or
13 otherwise withheld from them.

14 39. The underpayment of the amounts collected as gratuities to the Plaintiffs and the
15 Plaintiff Class is a consequence of Defendants' unlawful compensation policies and practices which
16 were centrally devised, implemented, communicated, and applied to all members of the Plaintiff
17 Class.

18 40. As a result of Defendants' unlawful conduct, Plaintiffs and the Plaintiff Class have
19 been and continue to be systematically deprived of the gratuities to which they are entitled by law, to
20 the detriment of themselves, their families, and to the public at large.

21 41. Defendants' actions constitute unfair competition within the meaning of Business &
22 Professions Code § 17200 because they constitute unlawful, unfair, and fraudulent business
23 practices, and/or unfair, deceptive, untrue or misleading advertising.

24 42. Plaintiffs and the Plaintiff Class are entitled to, and hereby seek such relief as may be
25 necessary to restore to them the funds of which Plaintiffs and the Plaintiff Class have been deprived,
26 by means of Defendants' unlawful and unfair business practices.

27 43. Pursuant to Business & Professions Code § 17203, injunctive relief is necessary to
28 prevent Defendants from continuing to engage in unfair business practices as alleged herein.

1 Defendants, and persons acting in concert with them, have done, are now doing, and will continue to
2 do or cause to be done, the above-described unlawful acts unless restrained and enjoined by this
3 Court. Unless the relief prayed for below is granted, a multiplicity of actions will result. Plaintiffs
4 have no plain, speedy, or adequate remedy at law, in that it is difficult to measure the amount of
5 monetary damages that would compensate Plaintiffs and the Plaintiff Class or the general public for
6 Defendants' wrongful acts. Further, pecuniary compensation alone would not afford adequate and
7 complete relief. The above-described acts will cause great and irreparable damage to Plaintiffs, the
8 Plaintiff Class, and the general public if injunctive relief is not granted.

9 44. Plaintiffs are entitled to recover attorneys' fees, costs, and expenses pursuant to
10 California Code of Civil Procedure § 1021.5 because the successful prosecution of this action will
11 (a) confer a significant pecuniary benefit on the general public or a large class of persons, (b) the
12 necessity and financial burden of private enforcement are such as to make the award appropriate, and
13 (c) such fees should not in the interest of justice be paid out of Plaintiffs' recovery.

14 SECOND CAUSE OF ACTION

15 CONVERSION

16 (Against All Defendants)

17 45. Plaintiffs hereby incorporate by reference each and every allegation contained in
18 paragraphs 1 through 44 above, inclusive, as if fully set forth herein.

19 46. Defendants unlawfully exercised control over, and converted the property of
20 Plaintiffs and members of the Plaintiff Class, because (i) the Plaintiff Class had a right to possess all
21 gratuities for their benefit under the BEOs; (ii) Defendants substantially interfered with the Plaintiff
22 Class's property by knowingly or intentionally withholding a portion of these gratuities from them,
23 including by paying a portion of them to managerial and supervisory employees or otherwise
24 diverting such gratuities; (iii) the Plaintiff Class did not consent to the withholding of these
25 gratuities, and any consent would have been null and void as a matter of law; (iv) the Plaintiff Class
26 was harmed; and (v) Defendants' conduct was a substantial factor in causing the Plaintiff Class's
27 harm.
28

47. As a direct and foreseeable result of the previously mentioned acts of Defendants, Plaintiffs and the Plaintiff Class lost and will continue to lose gratuities in an amount to be proven at the time of trial, but exceeding the limited jurisdictional threshold of this Court.

48. At all relevant times, Defendants' gratuity distribution policy was adopted, maintained and implemented by Defendants' managing agents, officers or directors, acting on Defendants' behalf. The acts of Defendants, by and through their managing agents, officers or directors, were committed in a deliberate, cold, callous, fraudulent and intentional manner in order to injure and damage the Plaintiff Class, and/or with a conscious disregard of their legal rights. Accordingly, to the extent permitted by law, Plaintiffs and the Plaintiff Class are entitled to seek and recover punitive damages against Defendants.

THIRD CAUSE OF ACTION

BREACH OF CONTRACT – THIRD PARTY BENEFICIARIES

(Against All Defendants)

49. Plaintiffs hereby incorporate by reference each and every allegation contained in paragraphs 1 through 48 above, inclusive, as if fully set forth herein.

50. Defendants and their banquet customers entered contracts (BEOs) under which banquet customers agreed to pay 16.5% of their banquet food and beverage total plus applicable state or local tax as a gratuity that Defendants agreed to fully distribute to members of the Plaintiff Class.

51. Plaintiffs are informed and believe and thereon allege that banquet customers paid 16.5% of their banquet food and beverage total plus applicable state or local tax to Defendants as a gratuity that would be fully distributed to the Plaintiff Class.

52. Plaintiffs are informed and believe and thereon allege that Plaintiffs and the Plaintiff Class were third party beneficiaries to the contracts (BEOs) between Defendants and the banquet customers because a motivating purpose of Defendants and banquet customers was to benefit the Plaintiff Class.

53. Defendants breached their contracts (BEOs) with banquet customers by failing to distribute to Plaintiffs and the Plaintiff Class the full amount of the 16.5% Gratuity.

54. Plaintiffs and the Plaintiff Class were harmed by the Defendants' breach of the contract.

55. Defendants' breach of the contract was a substantial factor in causing the harm to Plaintiffs and the Plaintiff Class.

56. As a result of Defendants' breach of the contract, Plaintiffs and the Plaintiff Class have suffered damages in an amount according to proof.

FOURTH CAUSE OF ACTION
CLAIM FOR PENALTIES UNDER PAGA
(Against All Defendants)

57. Plaintiffs hereby incorporate by reference each and every allegation contained in paragraphs 1 through 56 above, inclusive, as if fully set forth herein.

58. On a representative and/or a class action basis, Plaintiffs seek recovery of penalties under the Private Attorneys General Act of 2004 (“PAGA”), Labor Code §§ 2698, *et seq.*

59. PAGA permits an “aggrieved employee” to recover penalties on behalf of themselves and other current or former employees as a result of an employer’s violations of the Labor Code, including but not limited to violations of Labor Code § 351 alleged herein.

60. Defendants violated Labor Code § 351, which establishes an employer’s obligations to pay gratuities. Labor Code § 351 establishes that gratuities are the sole property of the employee and must be distributed to the employee no later than the next regular payday (for credit card tips). Labor Code § 350(e) defines the term “gratuity” as including any money that has been paid or given or left for an employee by a patron of a business over and above the actual amount due for services rendered or for goods, food, drink, or articles sold or served to such patron.

61. Labor Code § 351 expressly prohibits employers and their agents from collecting, taking, or receiving any portion of a gratuity.

62. Plaintiffs informed and believe, and based on such information and belief allege, that Defendants violated Labor Code § 351 by paying banquet captains, who are managerial and supervisory employees, a portion of gratuities which are the sole property of Plaintiffs and the

1 Plaintiff Class (non-managerial and non-supervisory servers, bussers, and bartenders) pursuant to the
2 BEOs.

3 63. Plaintiffs informed and believe, and based on such information and belief allege,
4 that Defendants further violated Labor Code § 351 by failing to distribute the full 16.5% Gratuity
5 which was the sole property of Plaintiffs and the Plaintiff Class (non-managerial and non-
6 supervisory servers, bussers, and bartenders) pursuant to the BEOs.

7 64. Plaintiffs are aggrieved employees because they are and were employed by the
8 alleged violators and the alleged violations were committed against them.

9 65. Plaintiffs request civil penalties against Defendants for their violations of the Labor
10 Code, as provided under Labor Code § 2699(f), plus attorneys' fees and costs, as provided under
11 Labor Code § 2699(g), in amounts to be proven at trial.

12 **PRAYER FOR RELIEF**

13 **WHEREFORE**, Plaintiffs respectfully pray that this Court award relief as follows:

- 14 1. An order certifying this case as a class action and appointing Plaintiffs and their
15 counsel to represent the Plaintiff Class;
- 16 2. Restitution of all Gratuities due, including but not limited to Gratuities withheld as a
17 result of Defendants' unlawful and unfair business practices, according to proof;
- 18 3. Damages for conversion and breach of contract, according to proof;
- 19 4. A permanent injunction enjoining and restraining Defendants from continuing the
20 unfair and unlawful business practices set forth above and requiring the establishment of appropriate
21 and effective means to prevent further violations;
- 22 5. Civil penalties under PAGA;
- 23 6. Punitive damages;
- 24 7. Declaratory relief;
- 25 8. Attorneys' fees pursuant to Code of Civil Procedure § 1021.5 and Labor Code
26 § 2699(g);
- 27 9. Prejudgment and post-judgment interest according to any applicable provision of law,
28 according to proof;

1 10. Costs of suit; and

2 11. Such other and further relief as the Court may deem just and proper.

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4 DATED: March ___, 2021 LAW OFFICES OF SCOTT R. AMES, PC
5 LAW OFFICES OF STEVEN J. KAPLAN, PC

6 By: _____

7 Scott R. Ames
8 Erin M. Kelly
9 Steven J. Kaplan

10 Attorneys for Plaintiffs Noah Latkin
11 and Matthew Guevara Serafin
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1 **JURY TRIAL DEMAND**

2 Plaintiffs demand a jury trial on all issues so triable.

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