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Superior Court of California,
County of San Diego
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Clerk of the Superior Court
By Mariejo Guyot, Deputy Clerk

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF SAN DIEGO**

11
12 JENNIFER PHAN, an individual, on
13 behalf of herself and on behalf of all
14 persons similarly situated,

15 Plaintiff,

16 v.

17 BARTELL HOTELS MANAGEMENT
18 COMPANY, a California Corporation; and
19 DOES 1-50, Inclusive,

20 Defendant(s).

Case No. 37-2022-00009712-CU-OE-CTL

**REPRESENTATIVE ACTION
COMPLAINT FOR:**

- 1) Civil Penalties Pursuant to Labor Code §2699, *et seq.*, for violations of Labor Code §§ 201, 202, 203, 204, 226(a), 226(a)(8)226.3, 226.7, 351, 510, 512, 558, 1194, 1197, 1197.1, 1198, 2802, and the California Code of Regulations

Judge:
Dept:

Date Action Filed:

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23 Plaintiff JENNIFER PHAN (“PLAINTIFF”), on behalf of the people of the State of
24 California and as “AGGRIEVED EMPLOYEES” acting as a private attorney general under
25 the Labor Code Private Attorney General Action of 2004, § 2699, *et seq.* (“PAGA”) only,
26 alleges on information and belief, except for her own acts and knowledge which are based
27 on personal knowledge, the following:

28 ///

1 **INTRODUCTION**

2 1. PLAINTIFF brings this action against BARTELL HOTELS MANAGEMENT
3 COMPANY (“DEFENDANT” or “DEFENDANTS”) seeking only to recover PAGA civil
4 penalties for herself, and on behalf of all current and former aggrieved employees that
5 worked for DEFENDANT. PLAINTIFF does **not seek to recover anything other than**
6 **penalties as permitted by California Labor Code § 2699**. To the extent that statutory
7 violations are mentioned for wage violations, PLAINTIFF does not seek underlying general
8 and/or special damages for those violations in this action, but simply the civil penalties
9 permitted by California Labor Code § 2699. Notwithstanding, PLAINTIFF is not
10 abandoning her right to pursue her individual claims for, *inter alia*, Defendant’s alleged sex
11 discrimination, pregnancy discrimination, failure to accommodate, wage violations, and/or
12 general or special damages arising from those violations, and she fully intends to, at a future
13 date, pursue claims for those individual claims and damages.

14 2. California has enacted the PAGA to permit an individual to bring an action on
15 behalf of herself and on behalf of others for PAGA penalties *only*, which is the precise and
16 sole nature of this action.

17 3. Accordingly, PLAINTIFF seeks to obtain all applicable relief for
18 DEFENDANT’S violations under PAGA and solely for the relief as permitted by PAGA –
19 that is, penalties and any other relief the Court deems proper pursuant to the PAGA. Nothing
20 in this complaint should be construed as attempting to obtain any relief that would not be
21 available in a PAGA-only action.

22 **PRELIMINARY ALLEGATIONS**

23 1. Defendant BARTELL HOTELS MANAGEMENT COMPANY
24 (“DEFENDANT” or “DEFENDANTS”) is a California Corporation and at all relevant
25 times mentioned herein conducted and continues to conduct substantial and regular
26 business in California.

27 2. DEFENDANT is a California Corporation and at all relevant times
28 mentioned herein operates restaurants and hotels in San Diego County.

1 3. PLAINTIFF was employed by DEFENDANT in California as a non-exempt
2 employee entitled to minimum wages, overtime pay and meal and rest periods from July
3 2021 to August 2021. PLAINTIFF was at all times during her employment with
4 DEFENDANT entitled to be paid minimum wages and entitled to the legally required off-
5 duty meal, rest periods and paid training. PLAINTIFF from time to time was unable to
6 take off duty meal and rest periods as a result of DEFENDANT's work obligations.
7 PLAINTIFF was also required to be paid for her rest periods and training. DEFENDANT
8 did not separately and/or properly compensate PLAINTIFF for her meal, rest periods and
9 training. PLAINTIFF was at all times relevant mentioned herein classified by
10 DEFENDANT as a non-exempt employee paid in whole or in part on an hourly basis.

11 4. PLAINTIFF was at all times during her employment with DEFENDANT
12 entitled to be paid minimum wages and entitled to the legally required off-duty meal, rest
13 periods and paid training. PLAINTIFF from time to time were unable to take off duty
14 meal and rest periods as a result of DEFENDANT's work obligations. PLAINTIFF was
15 also required to be paid for her COVID-19 checks, meal periods, rest periods and training.
16 DEFENDANT did not separately and/or properly compensate PLAINTIFF for her
17 COVID-19 checks, meal periods, rest periods and training. PLAINTIFF was at all times
18 relevant mentioned herein classified by DEFENDANT as a non-exempt employee paid in
19 whole or in part on an hourly basis.

20 5. PLAINTIFF, and such persons that may be added from time to time who satisfy the
21 requirements and exhaust the administrative procedures under the Private Attorney General
22 Act, bring this Representative Action on behalf of the State of California with respect to
23 herself and all individuals who are or previously were employed by DEFENDANT in
24 California (the "AGGRIEVED EMPLOYEES") during the time period of October 13, 2020
25 until the present (the "PAGA PERIOD").

26 6. PLAINTIFF, on behalf of herself and all AGGRIEVED EMPLOYEES presently or
27 formerly employed by DEFENDANT during the PAGA PERIOD, brings this representative
28 action pursuant to Labor Code § 2699, *et seq.* seeking penalties for DEFENDANT'S
violation of California Labor Code §§ 201, 202, 203, 204 *et seq.*, 226(a), 226(a)(8), 226.3,

1 226.7, 227.3, 246 *et seq.*, 351, 510, 512, 558, 1194, 1197, 1197.1, 1198, 2802, and the
2 applicable Wage Orders. Based upon the foregoing, PLAINTIFF and all AGGRIEVED
3 EMPLOYEES are aggrieved employees within the meaning of Labor Code § 2699, *et seq.*

4 7. The true names and capacities, whether individual, corporate, subsidiary, partnership,
5 associate or otherwise of Defendants DOES 1 through 50, inclusive, are presently unknown
6 to PLAINTIFF who therefore sues these Defendants by such fictitious names pursuant to
7 Cal. Civ. Proc. Code § 474. PLAINTIFF will seek leave to amend this Complaint to allege
8 the true names and capacities of Does 1 through 50, inclusive, when they are ascertained.
9 PLAINTIFF is informed and believes, and based upon that information and belief alleges,
10 that the Defendants named in this Complaint, including DOES 1 through 50, inclusive, are
11 responsible in some manner for one or more of the events and happenings that proximately
12 caused the injuries and damages hereinafter alleged.

13 8. The agents, servants and/or employees of the Defendants and each of them acting on
14 behalf of the Defendants acted within the course and scope of his, her or its authority as the
15 agent, servant and/or employee of the Defendants, and personally participated in the conduct
16 alleged herein on behalf of the Defendants with respect to the conduct alleged herein.
17 Consequently, the acts of each Defendant are legally attributable to the other Defendants
18 and all Defendants are jointly and severally liable to PLAINTIFF and the other
19 AGGRIEVED EMPLOYEES, for the loss sustained as a proximate result of the conduct of
20 the Defendants' agents, servants and/or employees.

21 **THE CONDUCT**

22 9. During the PAGA PERIOD, DEFENDANT failed to accurately calculate and pay
23 PLAINTIFF and other AGGRIEVED EMPLOYEES for all their time worked, including
24 minimum and overtime wages. DEFENDANT unlawfully and unilaterally failed to
25 accurately calculate wages for time worked and penalties for meal and rest periods owed to
26 PLAINTIFF and other AGGRIEVED EMPLOYEES in order to avoid paying these
27 employees the correct compensation. As a result, PLAINTIFF and other AGGRIEVED
28 EMPLOYEES forfeited wages due to them for working without compensation at the correct

1 minimum wage and overtime rates. DEFENDANT'S uniform policy and practice to not pay
2 the AGGRIEVED EMPLOYEES the correct compensation for all time worked in
3 accordance with applicable law is evidence by DEFENDANT's business records.

4 10. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT is
5 required to pay PLAINTIFF and AGGRIEVED EMPLOYEES for all their time worked,
6 meaning the time during which an employee is subject to the control of an employer,
7 including all the time the employee is suffered or permitted to work. DEFENDANT required
8 PLAINTIFF and AGGRIEVED EMPLOYEES to work without paying them for all the time
9 they are under DEFENDANT's control. Specifically, DEFENDANT required PLAINTIFF
10 to work while clocked out. As a result, the PLAINTIFF and other AGGRIEVED
11 EMPLOYEES forfeited minimum wage and overtime compensation by regularly working
12 without their time being accurately recorded and without compensation at the applicable
13 minimum wage and overtime rates. DEFENDANT's uniform policy and practice not to pay
14 PLAINTIFF and other AGGRIEVED EMPLOYEES for all time worked is evidenced by
15 DEFENDANT's business records.

16 11. In violation of the applicable sections of the California Labor Code and the
17 requirements of the Industrial Welfare Commission ("IWC") Wage Orders, DEFENDANT
18 as a matter of company policy, practice and procedure, intentionally and knowingly failed
19 to compensate PLAINTIFF and the other AGGRIEVED EMPLOYEES at the correct rate
20 of pay for all overtime worked and correct meal premium pay for all meal period violations.
21 This uniform policy and practice of DEFENDANT is intended to purposefully avoid the
22 payment of the correct overtime compensation as required by California law which allowed
23 DEFENDANT to illegally profit and gain an unfair advantage over competitors who
24 complied with the law. To the extent equitable tolling operates to toll claims by the
25 AGGRIEVED EMPLOYEES against DEFENDANT, the PAGA PERIOD should be
26 adjusted accordingly.

27 12. During the PAGA PERIOD, DEFENDANT failed to provide all the legally required
28 off-duty meal breaks to PLAINTIFF and the other Aggrieved Employees as required by the

1 applicable Wage Order and Labor Code. The nature of the work performed by PLAINTIFF
2 and Aggrieved Employees did not prevent these employees from being relieved of all of
3 their duties for the legally required off-duty meal periods. DEFENDANT'S meal period
4 policies and practices were unlawful because PLAINTIFF and other Aggrieved Employees
5 were far too over-booked and overworked to take a timely off-duty thirty (30) minute meal
6 period. As a result of their rigorous work schedules, PLAINTIFF and other Aggrieved
7 Employees were often not fully relieved of duty by DEFENDANT for their meal periods.
8 Additionally, DEFENDANT's failure to provide PLAINTIFF and the Aggrieved Employees
9 with legally required meal breaks prior to their fifth (5th) hour of work is evidenced by
10 DEFENDANT's business records. As a result, PLAINTIFF and other members of the
11 Aggrieved Employees forfeited meal breaks without additional compensation and in
12 accordance with DEFENDANT's strict corporate policy and practice.

13 13. Further, DEFENDANT failed to provide PLAINTIFF and Aggrieved Employees
14 with a second off-duty meal period on workdays in which these employees were required by
15 DEFENDANT to work ten (10) hours of work from time to time. As a result,
16 DEFENDANT'S failure to provide PLAINTIFF and the Aggrieved Employees with legally
17 required meal breaks is evidenced by DEFENDANT's business records which contain no
18 record of these breaks.

19 14. In addition, DEFENDANT failed to compensate PLAINTIFF and Aggrieved
20 Employees for their rest periods as required by the applicable Wage Order and Labor Code.
21 DEFENDANT did not have a policy or practice which paid for off-duty rest periods to
22 PLAINTIFF and the other Aggrieved Employees. As a result, DEFENDANT's failure to
23 provide PLAINTIFF and the Aggrieved Employees with all the legally required paid rest
24 periods is evidenced by DEFENDANT's business records.

25 15. On numerous occasions, PLAINTIFF and other Aggrieved Employees were required
26 to work while not clocked in. DEFENDANT maintained a company-wide policy of refusing
27 to pay Aggrieved Employees, like PLAINTIFF, for all hours worked, even during training.
28 Specifically, DEFENDANT maintained a company-wide pattern and practice of altering

1 employees' timecards to eliminate numerous hours worked. As a result, DEFENDANT
2 failed to compensate PLAINTIFF and the Aggrieved Employees wages for all hours worked.

3 16. Under California law, every employer shall pay to each employee, on the established
4 payday for the period involved, not less than the applicable minimum wage for all hours
5 worked in the payroll period, whether the remuneration is measured by time, piece,
6 commission, or otherwise. Hours worked is defined in the applicable Wage Order as "the
7 time during which an employee is subject to the control of an employer, and includes all the
8 time the employee is suffered or permitted to work, whether or not required to do so.

9 17. From time to time, when DEFENDANT did not accurately record PLAINTIFF'S and
10 other Aggrieved Employees' missed meal and rest breaks and/or also failed to pay the proper
11 minimum wages, the wage statements issued to PLAINTIFF and other Aggrieved
12 Employees by DEFENDANT violated California law, and in particular, Labor Code Section
13 226(a). Aside, from the violations listed above in this paragraph, DEFENDANT failed to
14 issue PLAINTIFF and Aggrieved Employees an itemized wage statement that lists all the
15 requirements under California Labor Code 226 *et seq.*

16 18. DEFENDANT as a matter of corporate policy, practice and procedure, intentionally,
17 knowingly and systematically failed to reimburse and indemnify PLAINTIFF and the other
18 Aggrieved Employees for required business expenses incurred by the PLAINTIFF and other
19 Aggrieved Employees in direct consequence of discharging their duties on behalf of
20 DEFENDANT. Under California Labor Code Section 2802, employers are required to
21 indemnify employees for all expenses incurred in the course and scope of their employment.
22 Cal. Lab. Code § 2802 expressly states that "an employer shall indemnify his or her
23 employee for all necessary expenditures or losses incurred by the employee in direct
24 consequence of the discharge of his or her duties, or of his or her obedience to the directions
25 of the employer, even though unlawful, unless the employee, at the time of obeying the
26 directions, believed them to be unlawful."

27 19. In violation of the applicable sections of the California Labor Code and the
28 requirements of the Industrial Welfare Commission ("IWC") Wage Order, DEFENDANT

1 as a matter of company policy, practice and procedure, intentionally, knowingly and
2 systematically failed to compensate PLAINTIFF and the other Aggrieved Employees for
3 missed meal and rest periods. This uniform policy and practice of DEFENDANT is intended
4 to purposefully avoid the payment for all time worked as required by California law which
5 allows DEFENDANT to illegally profit and gain an unfair advantage over competitors who
6 complied with the law. To the extent equitable tolling operates to toll claims by the
7 Aggrieved Employees against DEFENDANT, the PAGA PERIOD should be adjusted
8 accordingly.

9 20. As a result of DEFENDANT's intentional disregard of the obligation to meet this
10 burden, DEFENDANT failed to properly calculate and/or pay all required compensation for
11 work performed by the members of the CALIFORNIA CLASS and violated the California
12 Labor Code and regulations promulgated thereunder as herein alleged.

13 21. Specifically as to PLAINTIFF, DEFENDANT failed to provide all the legally
14 required off-duty meal breaks to her and paid rest periods to her as required by the applicable
15 Wage Order and Labor Code. DEFENDANT failed to compensate PLAINTIFF for her
16 missed meal and rest breaks. The nature of the work performed by PLAINTIFF did not
17 prevent her from being relieved of all of her duties for the legally required off-duty meal
18 periods. Further, DEFENDANT failed to provide PLAINTIFF with a second off-duty meal
19 period each workday in which PLAINTIFF was required by DEFENDANT to work ten (10)
20 hours of work. As a result, DEFENDANT'S failure to provide PLAINTIFF with the legally
21 required second off-duty meal period is evidenced by DEFENDANT's business records.
22 From time to time, and as a result of DEFENDANT not accurately recording all missed meal
23 and rest periods, and failing to pay minimum wages due for all time worked, the wage
24 statements issued to PLAINTIFF by DEFENDANT violated California law, and in
25 particular, Labor Code Section 226(a). To date, DEFENDANT has yet to pay PLAINTIFF
26 all of her wages due to her and all premiums due to her for missed meal and rest breaks and
27 DEFENDANT has failed to pay any penalty wages owed to her under California Labor Code
28 Section 203.

1 22. Cal. Lab. Code § 226 provides that every employer shall furnish each of his or her
2 employees with an accurate itemized wage statement in writing showing, among other
3 things, gross wages earned and all applicable hourly rates in effect during the pay period and
4 the corresponding amount of time worked at each hourly rate. From time to time,
5 DEFENDANT violated Cal. Lab. Code § 226 by failing to provide accurate wage
6 statements. Additionally, DEFENDANT violated Cal. Lab. Code § 226(a)(8) by failing to
7 list the correct legal entity that employed PLAINTIFF. DEFENDANT failed to issue to
8 PLAINTIFF an itemized wage statement that lists all the requirements under California
9 Labor Code 226 *et seq.* As a result, DEFENDANT provided PLAINTIFF and the other
10 AGGRIEVED EMPLOYEES with wage statements which violate Cal. Lab. Code § 226 *et*
11 *seq.*

12 23. Cal. Lab. Code § 204 provides that “[a]ll wages. . . earned by any person in any
13 employment are due and payable twice during each calendar month, on days designated in
14 advance by the employer as the regular paydays.” Further, Cal. Lab. Code § 204(d) expressly
15 requires employers to pay employees all wages owed within seven (7) days of the close of
16 the payroll period. DEFENDANT from time to time failed to pay PLAINTIFF and other
17 AGGRIEVED EMPLOYEES all wages owed to them within seven (7) days of the close of
18 the payroll period.

19 24. During the PAGA PERIOD, pursuant to DEFENDANT’S company policies and
20 practices, PLAINTIFF and other AGGRIEVED EMPLOYEES were forced to forfeit
21 gratuities left for them by customers to DEFENDANT’s agents who provided no service to
22 the customers that resulted in the gratuity. DEFENDANT routinely added anywhere from
23 18%-22% service charges to its food and beverages banquet bills. These service charges
24 were in the form of automatic charges which customers are required to pay, and which
25 reasonably appear to be gratuities for the service staff. It is typical and customary in the
26 hospitality industry that establishments impose gratuity charges in the range of 18%-22% of
27 the food and beverage bill. Thus, when customers have paid these charges, it is reasonable
28 for them to have believed they were gratuities to be paid to the service staff. Indeed, because

1 many of these charges are depicted to customers, and the custom in the food and beverage
2 industry that gratuities in the range of 18%-22% are paid for food and beverage service,
3 customers have paid these charges reasonably believing they were remitted to the service
4 staff. However, DEFENDANT has not remitted the total proceeds of these gratuities to the
5 non-managerial employees who serve the food and beverages. Instead, DEFENDANT has a
6 policy and practice of retaining for itself a portion of these gratuities and/or using a portion
7 of these gratuities to pay managers or other non-service employees. As a result,
8 PLAINTIFFS and AGGREIVED EMPLOYEES have not received the total proceeds of the
9 gratuities, to which they are entitled to under California law.

10 25. DEFENDANT is generally in the business of owning and operating hotels,
11 and restaurants. In addition, DEFENDANT also provides banquet services to large groups,
12 such as wedding parties and other banquet events. During the PAGA PERIOD,
13 PLAINTIFFS and other AGGRIEVED EMPLOYEES were in the “chain of service” and
14 earned gratuities based on their service for their customers. However, PLAINTIFFS and
15 AGGRIEVED EMPLOYEES were forced to forfeit portions of their gratuities, which said
16 gratuities were kept by DEFENDANT and their agents who were not in the chain of service
17 from which the gratuity resulted. PLAINTIFFS and other AGGRIEVED EMPLOYEES
18 contend that any gratuities kept by DEFENDANT were illegal and in violation of California
19 law because PLAINTIFFS and other AGGRIEVED EMPLOYEES not DEFENDANT,
20 provided the service for to whom the gratuity should have been paid.

21 26. California Labor Code § 351 establishes the requirements for an employer regarding
22 the payment of gratuities. Specifically, gratuities are the sole property of the employees.
23 California Labor Code § 351 expressly prohibits employers and their agents from collecting,
24 taking, or receiving any portion of a gratuity. California Labor Code § 350(e) defines the
25 term “gratuity” as including any money that has been paid or given or left for an employee
26 by a patron of a business over and above the actual amount due the business for services
27 rendered or for goods, food, drink or articles sold or served to such patron. Labor Code §
28 353 requires employers to keep accurate records of all gratuities they receive, directly or

1 indirectly.

2 27. Although tip pooling is not expressly prohibited by the Labor Code, employees who
3 mandate tip pooling must only distribute pooled tips to employees in the “chain of service.”
4 By distributing tips to DEFENDANT directly and to their agents who were not in the “chain
5 of service,” DEFENDANT has violated and continue to violate the legal requirements for
6 handling pooled tips and violated the holding in *O’Grady v. Merchant Exchange*
7 *Productions, Inc.*, No. A148513 (Court of Appeals of California, First District, Division
8 Two.)

9 28. DEFENDANT’s conduct, as set forth above, in failing to remit to non-
10 managerial banquet service employees the total proceeds of gratuities added to banquet
11 customers’ bills constitutes a violation of California Labor Code Section 351. This violation
12 is enforceable pursuant to the California Unfair Competition Law, Cal. Bus. And Prof. Code
13 17200 *et seq.* DEFENDANT’s conduct constitutes unlawful, unfair, and/or fraudulent
14 business acts or practices, in that DEFENDANT has violated California Labor Code Section
15 351 in not remitting to the non-managerial service employees the total gratuities that were
16 charged to customers. PLAINTIFF and the AGGRIEVED EMPLOYEES have been
17 damaged in an amount according to proof at trial, including the loss of gratuities to which
18 they were entitled and seek all penalties, fees and costs of suit.

19 29. By reason of this uniform conduct applicable to PLAINTIFF and all
20 AGGRIEVED EMPLOYEES, DEFENDANT engaged in a company-wide policy and
21 procedure which fails to accurately calculate and record the correct compensation for all
22 time worked by PLAINTIFF and other AGGRIEVED EMPLOYEES. The proper
23 calculation of these employees’ compensation is the DEFENDANT’s burden. As a result of
24 DEFENDANT’s intentional disregard of the obligation to meet this burden, DEFENDANT
25 fails to properly calculate and/or pay all required compensation for work performed by the
26 AGGRIEVED EMPLOYEES and violated the California Labor Code and regulations
27 promulgated thereunder as herein alleged.

28 30. All of the conduct and violations alleged herein occurred during the PAGA

1 PERIOD. To the extent that any of the conduct and violations alleged herein did not affect
2 PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those violations
3 that affected other AGGRIEVED EMPLOYEES pursuant to *Carrington v. Starbucks Corp.*
4 2018 AJDAR 12157 (Certified for Publication 12/19/18).

5 **JURISDICTION AND VENUE**

6 31. This Court has jurisdiction over this Action pursuant to California Code of
7 Civil Procedure, Section 410.10.

8 32. Venue is proper in this Court pursuant to California Code of Civil Procedure,
9 Sections 395 and 395.5, because DEFENDANT (i) currently maintain and at all relevant
10 times maintained restaurants and hotels in this County and/or conducts substantial business
11 in this County, and (ii) committed the wrongful conduct herein alleged in this County
12 against AGGRIEVED EMPLOYEES.

13 **FIRST CAUSE OF ACTION**

14 **VIOLATION OF THE PRIVATE ATTORNEYS GENERAL ACT**

15 **[Cal. Lab. Code §§ 2698 *et seq.*]**

16 **(Alleged by PLAINTIFF against all DEFENDANTS)**

17 33. PLAINTIFF realleges and incorporates by this reference, as though fully set
18 forth herein, the prior paragraphs of this Complaint.

19 34. PAGA is a mechanism by which the State of California itself can enforce
20 state labor laws through the employee suing under the PAGA who does so as the proxy or
21 agent of the state's labor law enforcement agencies. An action to recover civil penalties
22 under PAGA is fundamentally a law enforcement action designed to protect the public and
23 not to benefit private parties. The purpose of the PAGA is not to recover damages or
24 restitution, but to create a means of "deputizing" citizens as private attorneys general to
25 enforce the Labor Code. In enacting PAGA, the California Legislature specified that "it
26 was ... in the public interest to allow aggrieved employees, acting as private attorneys
27 general to recover civil penalties for Labor Code violations ..." (Stats. 2003, ch. 906, § 1).
28 Accordingly, PAGA claims cannot be subject to arbitration.

1 35. PLAINTIFF, and such persons that may be added from time to time who
2 satisfy the requirements and exhaust the administrative procedures under the Private
3 Attorney General Act, bring this Representative Action on behalf of the State of California
4 with respect to herself and all individuals who are or previously were employed by
5 DEFENDANTS in California during the time period of May 19, 2020 until the present (the
6 "AGGRIEVED EMPLOYEES").

7 36. On October 13, 2021, PLAINTIFF gave written notice by certified mail to
8 the Labor and Workforce Development Agency (the "Agency") and the employer of
9 the specific provisions of this code alleged to have been violated as required by Labor
10 Code § 2699.3. See **Exhibit #1**, attached hereto and incorporated by this reference herein.
11 The statutory waiting period for PLAINTIFF to add these allegations to the Complaint has
12 expired. As a result, pursuant to Section 2699.3, PLAINTIFF may now commence a
13 representative civil action under PAGA pursuant to Section 2699 as the proxy of the State
14 of California with respect to all AGGRIEVED EMPLOYEES as herein defined.

15 37. The policies, acts and practices heretofore described were and are an
16 unlawful business act or practice because Defendant (a) failed to pay PLAINTIFF and
17 other AGGRIEVED EMPLOYEES minimum wages and overtime wages, (b) failed to
18 provide PLAINTIFF and other AGGRIEVED EMPLOYEES legally required meal and
19 rest breaks, (c) failed to provide accurate itemized wage statements, (d) failed to pay
20 gratuities, and (e) failed to timely pay wages, all in violation of the applicable Labor Code
21 sections listed in Labor Code §2699.5, including but not limited to Labor Code §§ 201,
22 202, 203, 204, 226(a), 226(a)(8), 226.7, 351, 510, 512, 558, 1194, 1197, 1197.1, 1198,
23 2802 and the applicable Industrial Wage Order(s), and thereby gives rise to statutory
24 penalties as a result of such conduct. PLAINTIFF hereby seeks recovery of civil penalties
25 as prescribed by the Labor Code Private Attorney General Act of 2004 as the representative
26 of the State of California for the illegal conduct perpetrated on PLAINTIFF and the other
AGGRIEVED EMPLOYEES.

27 38. Some or all of the conduct and violations alleged herein occurred during the
28 PAGA PERIOD. To the extent that any of the conduct and violations alleged herein did

1 not affect PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those
2 violations that affected other AGGRIEVED EMPLOYEES. (*Carrington v. Starbucks*
3 *Corp.* (2018) 30 Cal.App.5th 504, 519; See also *Huff v. Securitas Security Services USA,*
4 *Inc.* (2018) 23 Cal. App. 5th 745, 751 [“PAGA allows an “aggrieved employee”—a person
5 affected by **at least one** Labor Code violation committed by an employer—to **pursue**
6 **penalties for all the Labor Code violations committed by that employer.**”], Emphasis
7 added, reh'g denied (June 13, 2018).)

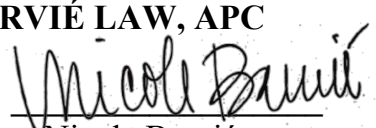
8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiff prays for a judgment against each Defendant, jointly and
10 severally, as follows:

- 11 1. On behalf of the State of California and with respect to all AGGRIEVED
EMPLOYEES:
- 12 a. Recovery of civil penalties as prescribed by the Labor Code Private
13 Attorneys General Act of 2004;
- 14 b. An award of penalties, attorneys’ fees and costs of suit, as allowable under
15 the law, including, but not limited to, pursuant to Labor Code § 226, §1194
16 and §2699(g); and
- 17 c. For such other relief as the Court deems just and proper.

18 Dated: March 9, 2022

19 **BARVIÉ LAW, APC**

20 By: 
21 Nicole Barvié

22 Attorney for Plaintiff
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EXHIBIT 1

October 13, 2021

VIA ONLINE FILING TO LWDA and CERTIFIED MAIL TO DEFENDANT

Labor & Workforce Development Agency Attn. PAGA Administrator 1515 Clay Street, Ste. 801 Oakland, CA 94612 PAGA@dir.ca.gov <i>Via Online Submission</i>	Bartell Hotels Management Company c/o Richard Bartell 4875 N Harbor Dr. 5th Floor San Diego, CA 92106 <i>Via Certified Mail</i>
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Re: **Notice of Violation of California Labor Code Sections 201, 202, 203, 204 et seq. 210, 226(a), 226(a)(8), 226.7, 227.3, 246 et seq., 351, 510, 512, 558, 1194, 1197, 1197.1, 1198, 2802, Violation of Applicable Industrial Welfare Commission Wage Order(s), and Pursuant to California Labor Code Section 2699.5**

Dear Sir/Madam:

Our offices represent Plaintiff Jennifer Phan (“Plaintiff”), and other aggrieved employees in a proposed lawsuit against Bartell Hotels Management Company, a California Corporation (“Defendant”). Plaintiff has been employed by Defendant in California beginning July 21, 2021 to August 11, 2021 as a non-exempt employee, entitled to payment of all wages and the legally required meal and rest breaks, as well as certain non-discretionary incentive payments. Defendant, however, unlawfully failed to record and pay Plaintiff and other aggrieved employees for all of their time worked, and for all of their meal breaks and rest breaks. Defendant also failed to correctly calculate Plaintiff’s regular rate of pay for purposes of payment of overtime and sick time pay. Further, Defendant failed to timely pay Plaintiff and other aggrieved employees for earned wages. As a consequence of the aforementioned violations, Plaintiff further contends that Defendant failed to provide accurate wage statements to her, and other aggrieved employees, in violation of California Labor Code section 226(a). Said conduct, in addition to the foregoing, violates Labor Code §§ 201, 202, 203, 204, 210, 226, 226.7, 246, 510, 512, 558, 1194, 1197,





1197.1, 1198, 2802, violates the applicable Industrial Welfare Commission Wage Order(s), and is therefore actionable under California Labor Code section 2699.3.

Plaintiff seeks to represent a group of aggrieved employees defined as all non-exempt and exempt employees who worked for Defendant during the relevant claim period.

A true and correct copy of the proposed Complaint by Plaintiff against Defendant, which (1) identifies the alleged violations, (2) details the facts and theories which support the alleged violations, (3) details the specific work performed by Plaintiff, (4) sets forth the people/entities, dates, classifications, violations, events, and actions which are at issue to the extent known to Plaintiff, and (5) sets forth the illegal practices used by Defendant, is attached hereto. This information provides notice to the Labor and Workforce Development Agency of the facts and theories supporting the alleged violations for the agency's reference. Plaintiff therefore incorporate the allegations of the attached Complaint into this letter as if fully set forth herein. If the agency needs any further information, please do not hesitate to ask.

This notice is provided to enable Plaintiff to proceed with the Complaint against Defendant as authorized by California Labor Code section 2695, *et seq.* The lawsuit consists of other aggrieved employees. As counsel, our intention is to vigorously prosecute the claims as alleged in the Complaint, and to procure civil penalties as provided by the Private Attorney General Statute of 2004 on behalf of Plaintiff and all aggrieved California employees.

Your earliest response to this notice is appreciated. If you have any questions or concerns, please do not hesitate to contact me at the above number and address.

Sincerely,

Nicole Barvié
Attorney for Plaintiff

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3 nicole@barvielaw.com
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7
8
9 Attorney for Plaintiff JENNIFER PHAN
10
11

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF SAN DIEGO**
14

15 JENNIFER PHAN, an individual, on
16 behalf of herself and on behalf of all
17 persons similarly situated,

18 Plaintiff,

19 v.

20 BARTELL HOTELS MANAGEMENT
21 COMPANY, a Limited Liability
22 Partnership; and DOES 1-50, Inclusive,

23 Defendant(s).
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Case No. _____

**REPRESENTATIVE ACTION
COMPLAINT FOR:**

- 1) Civil Penalties Pursuant to Labor Code §2699, *et seq.*, for violations of Labor Code §§ 201, 202, 203, 204, 226(a), 226(a)(8)226.3, 226.7, 351, 510, 512, 558, 1194, 1197, 1197.1, 1198, 2802, and the California Code of Regulations

Judge:
Dept:

Date Action Filed:

29 Plaintiff JENNIFER PHAN (“PLAINTIFF”), on behalf of the people of the State of
30 California and as “AGGRIEVED EMPLOYEES” acting as a private attorney general under
31 the Labor Code Private Attorney General Action of 2004, § 2699, *et seq.* (“PAGA”) only,
32 alleges on information and belief, except for her own acts and knowledge which are based
33 on personal knowledge, the following:

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1 3. PLAINTIFF was employed by DEFENDANT in California as a non-exempt
2 employee entitled to minimum wages, overtime pay and meal and rest periods from July
3 2021 to August 2021. PLAINTIFF was at all times during her employment with
4 DEFENDANT entitled to be paid minimum wages and entitled to the legally required off-
5 duty meal, rest periods and paid training. PLAINTIFF from time to time was unable to
6 take off duty meal and rest periods as a result of DEFENDANT's work obligations.
7 PLAINTIFF was also required to be paid for her rest periods and training. DEFENDANT
8 did not separately and/or properly compensate PLAINTIFF for her rest periods and
9 training. PLAINTIFF was at all times relevant mentioned herein classified by
10 DEFENDANT as a non-exempt employee paid in whole or in part on an hourly basis.

11 4. PLAINTIFF, and such persons that may be added from time to time who satisfy the
12 requirements and exhaust the administrative procedures under the Private Attorney General
13 Act, bring this Representative Action on behalf of the State of California with respect to
14 herself and all individuals who are or previously were employed by DEFENDANT in
15 California (the "AGGRIEVED EMPLOYEES") during the time period of October 13, 2020
16 until the present (the "PAGA PERIOD").

17 5. PLAINTIFF, on behalf of herself and all AGGRIEVED EMPLOYEES presently or
18 formerly employed by DEFENDANT during the PAGA PERIOD, brings this representative
19 action pursuant to Labor Code § 2699, *et seq.* seeking penalties for DEFENDANT'S
20 violation of California Labor Code §§ 201, 202, 203, 204 *et seq.*, 226(a), 226(a)(8), 226.3,
21 226.7, 227.3, 246 *et seq.*, 351, 510, 512, 558, 1194, 1197, 1197.1, 1198, 2802, and the
22 applicable Wage Orders. Based upon the foregoing, PLAINTIFF and all AGGRIEVED
23 EMPLOYEES are aggrieved employees within the meaning of Labor Code § 2699, *et seq.*

24 6. The true names and capacities, whether individual, corporate, subsidiary, partnership,
25 associate or otherwise of Defendants DOES 1 through 50, inclusive, are presently unknown
26 to PLAINTIFF who therefore sues these Defendants by such fictitious names pursuant to
27 Cal. Civ. Proc. Code § 474. PLAINTIFF will seek leave to amend this Complaint to allege
28 the true names and capacities of Does 1 through 50, inclusive, when they are ascertained.

1 PLAINTIFF is informed and believes, and based upon that information and belief alleges,
2 that the Defendants named in this Complaint, including DOES 1 through 50, inclusive, are
3 responsible in some manner for one or more of the events and happenings that proximately
4 caused the injuries and damages hereinafter alleged.

5 7. The agents, servants and/or employees of the Defendants and each of them acting on
6 behalf of the Defendants acted within the course and scope of his, her or its authority as the
7 agent, servant and/or employee of the Defendants, and personally participated in the conduct
8 alleged herein on behalf of the Defendants with respect to the conduct alleged herein.
9 Consequently, the acts of each Defendant are legally attributable to the other Defendants
10 and all Defendants are jointly and severally liable to PLAINTIFF and the other
11 AGGRIEVED EMPLOYEES, for the loss sustained as a proximate result of the conduct of
12 the Defendants' agents, servants and/or employees.

13 THE CONDUCT

14 8. During the PAGA PERIOD, DEFENDANT failed to accurately calculate and pay
15 PLAINTIFF and other AGGRIEVED EMPLOYEES for all their time worked, including
16 minimum and overtime wages. DEFENDANT unlawfully and unilaterally failed to
17 accurately calculate wages for time worked and penalties for meal and rest periods owed to
18 PLAINTIFF and other AGGRIEVED EMPLOYEES in order to avoid paying these
19 employees the correct compensation. As a result, PLAINTIFF and other AGGRIEVED
20 EMPLOYEES forfeited wages due to them for working without compensation at the correct
21 minimum wage and overtime rates. DEFENDANT'S uniform policy and practice to not pay
22 the AGGRIEVED EMPLOYEES the correct compensation for all time worked in
23 accordance with applicable law is evidence by DEFENDANT's business records.

24 9. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT is
25 required to pay PLAINTIFF and AGGRIEVED EMPLOYEES for all their time worked,
26 meaning the time during which an employee is subject to the control of an employer,
27 including all the time the employee is suffered or permitted to work. DEFENDANT required
28 PLAINTIFF and AGGRIEVED EMPLOYEES to work without paying them for all the time

1 they are under DEFENDANT's control. Specifically, DEFENDANT required PLAINTIFF
2 to work while clocked out. As a result, the PLAINTIFF and other AGGRIEVED
3 EMPLOYEES forfeited minimum wage and overtime compensation by regularly working
4 without their time being accurately recorded and without compensation at the applicable
5 minimum wage and overtime rates. DEFENDANT's uniform policy and practice not to pay
6 PLAINTIFF and other AGGRIEVED EMPLOYEES for all time worked is evidenced by
7 DEFENDANT's business records.

8 10. In violation of the applicable sections of the California Labor Code and the
9 requirements of the Industrial Welfare Commission ("IWC") Wage Orders, DEFENDANT
10 as a matter of company policy, practice and procedure, intentionally and knowingly failed
11 to compensate PLAINTIFF and the other AGGRIEVED EMPLOYEES at the correct rate
12 of pay for all overtime worked and correct meal premium pay for all meal period violations.
13 This uniform policy and practice of DEFENDANT is intended to purposefully avoid the
14 payment of the correct overtime compensation as required by California law which allowed
15 DEFENDANT to illegally profit and gain an unfair advantage over competitors who
16 complied with the law. To the extent equitable tolling operates to toll claims by the
17 AGGRIEVED EMPLOYEES against DEFENDANT, the PAGA PERIOD should be
18 adjusted accordingly.

19 11. During the PAGA PERIOD, DEFENDANT failed to provide all the legally required
20 off-duty meal breaks to PLAINTIFF and the other Aggrieved Employees as required by the
21 applicable Wage Order and Labor Code. The nature of the work performed by PLAINTIFF
22 and Aggrieved Employees did not prevent these employees from being relieved of all of
23 their duties for the legally required off-duty meal periods. DEFENDANT'S meal period
24 policies and practices were unlawful because PLAINTIFF and other Aggrieved Employees
25 were far too over-booked and overworked to take a timely off-duty thirty (30) minute meal
26 period. As a result of their rigorous work schedules, PLAINTIFF and other Aggrieved
27 Employees were often not fully relieved of duty by DEFENDANT for their meal periods.
28 Additionally, DEFENDANT's failure to provide PLAINTIFF and the Aggrieved Employees

1 with legally required meal breaks prior to their fifth (5th) hour of work is evidenced by
2 DEFENDANT's business records. As a result, PLAINTIFF and other members of the
3 Aggrieved Employees forfeited meal breaks without additional compensation and in
4 accordance with DEFENDANT's strict corporate policy and practice.

5 12. Further, DEFENDANT failed to provide PLAINTIFF and Aggrieved Employees
6 with a second off-duty meal period on workdays in which these employees were required by
7 DEFENDANT to work ten (10) hours of work from time to time. As a result,
8 DEFENDANT'S failure to provide PLAINTIFF and the Aggrieved Employees with legally
9 required meal breaks is evidenced by DEFENDANT's business records which contain no
10 record of these breaks.

11 13. In addition, DEFENDANT failed to compensate PLAINTIFF and Aggrieved
12 Employees for their rest periods as required by the applicable Wage Order and Labor Code.
13 DEFENDANT did not have a policy or practice which paid for off-duty rest periods to
14 PLAINTIFF and the other Aggrieved Employees. As a result, DEFENDANT's failure to
15 provide PLAINTIFF and the Aggrieved Employees with all the legally required paid rest
16 periods is evidenced by DEFENDANT's business records.

17 14. On numerous occasions, PLAINTIFF and other Aggrieved Employees were required
18 to work while not clocked in. DEFENDANT maintained a company-wide policy of refusing
19 to pay Aggrieved Employees, like PLAINTIFF, for all hours worked, even during training.
20 Specifically, DEFENDANT maintained a company-wide pattern and practice of altering
21 employees' timecards to eliminate numerous hours worked. As a result, DEFENDANT
22 failed to compensate PLAINTIFF and the Aggrieved Employees wages for all hours worked.

23 15. Under California law, every employer shall pay to each employee, on the established
24 payday for the period involved, not less than the applicable minimum wage for all hours
25 worked in the payroll period, whether the remuneration is measured by time, piece,
26 commission, or otherwise. Hours worked is defined in the applicable Wage Order as "the
27 time during which an employee is subject to the control of an employer, and includes all the
28 time the employee is suffered or permitted to work, whether or not required to do so.

1 16. From time to time, when DEFENDANT did not accurately record PLAINTIFF'S and
2 other Aggrieved Employees' missed meal and rest breaks and/or also failed to pay the proper
3 minimum wages, the wage statements issued to PLAINTIFF and other Aggrieved
4 Employees by DEFENDANT violated California law, and in particular, Labor Code Section
5 226(a). Aside, from the violations listed above in this paragraph, DEFENDANT failed to
6 issue PLAINTIFF and Aggrieved Employees an itemized wage statement that lists all the
7 requirements under California Labor Code 226 *et seq.*

8 17. DEFENDANT as a matter of corporate policy, practice and procedure, intentionally,
9 knowingly and systematically failed to reimburse and indemnify PLAINTIFF and the other
10 Aggrieved Employees for required business expenses incurred by the PLAINTIFF and other
11 Aggrieved Employees in direct consequence of discharging their duties on behalf of
12 DEFENDANT. Under California Labor Code Section 2802, employers are required to
13 indemnify employees for all expenses incurred in the course and scope of their employment.
14 Cal. Lab. Code § 2802 expressly states that "an employer shall indemnify his or her
15 employee for all necessary expenditures or losses incurred by the employee in direct
16 consequence of the discharge of his or her duties, or of his or her obedience to the directions
17 of the employer, even though unlawful, unless the employee, at the time of obeying the
18 directions, believed them to be unlawful."

19 18. In violation of the applicable sections of the California Labor Code and the
20 requirements of the Industrial Welfare Commission ("IWC") Wage Order, DEFENDANT
21 as a matter of company policy, practice and procedure, intentionally, knowingly and
22 systematically failed to compensate PLAINTIFF and the other Aggrieved Employees for
23 missed meal and rest periods. This uniform policy and practice of DEFENDANT is intended
24 to purposefully avoid the payment for all time worked as required by California law which
25 allows DEFENDANT to illegally profit and gain an unfair advantage over competitors who
26 complied with the law. To the extent equitable tolling operates to toll claims by the
27 Aggrieved Employees against DEFENDANT, the PAGA PERIOD should be adjusted
28 accordingly.

1 19. As a result of DEFENDANT's intentional disregard of the obligation to meet this
2 burden, DEFENDANT failed to properly calculate and/or pay all required compensation for
3 work performed by the members of the CALIFORNIA CLASS and violated the California
4 Labor Code and regulations promulgated thereunder as herein alleged.

5 20. Specifically as to PLAINTIFF, DEFENDANT failed to provide all the legally
6 required off-duty meal breaks to her and paid rest periods to her as required by the applicable
7 Wage Order and Labor Code. DEFENDANT failed to compensate PLAINTIFF for her
8 missed meal and rest breaks. The nature of the work performed by PLAINTIFF did not
9 prevent her from being relieved of all of her duties for the legally required off-duty meal
10 periods. Further, DEFENDANT failed to provide PLAINTIFF with a second off-duty meal
11 period each workday in which PLAINTIFF was required by DEFENDANT to work ten (10)
12 hours of work. As a result, DEFENDANT'S failure to provide PLAINTIFF with the legally
13 required second off-duty meal period is evidenced by DEFENDANT's business records.
14 From time to time, and as a result of DEFENDANT not accurately recording all missed meal
15 and rest periods, and failing to pay minimum wages due for all time worked, the wage
16 statements issued to PLAINTIFF by DEFENDANT violated California law, and in
17 particular, Labor Code Section 226(a). To date, DEFENDANT has yet to pay PLAINTIFF
18 all of her wages due to her and all premiums due to her for missed meal and rest breaks and
19 DEFENDANT has failed to pay any penalty wages owed to her under California Labor Code
20 Section 203.

21 21. Cal. Lab. Code § 226 provides that every employer shall furnish each of his or her
22 employees with an accurate itemized wage statement in writing showing, among other
23 things, gross wages earned and all applicable hourly rates in effect during the pay period and
24 the corresponding amount of time worked at each hourly rate. From time to time,
25 DEFENDANT violated Cal. Lab. Code § 226 by failing to provide accurate wage
26 statements. Additionally, DEFENDANT violated Cal. Lab. Code § 226(a)(8) by failing to
27 list the correct legal entity that employed PLAINTIFF. DEFENDANT failed to issue to
28 PLAINTIFF an itemized wage statement that lists all the requirements under California

1 Labor Code 226 *et seq.* As a result, DEFENDANT provided PLAINTIFF and the other
2 AGGRIEVED EMPLOYEES with wage statements which violate Cal. Lab. Code § 226 *et*
3 *seq.*

4 22. Cal. Lab. Code § 204 provides that “[a]ll wages. . . earned by any person in any
5 employment are due and payable twice during each calendar month, on days designated in
6 advance by the employer as the regular paydays.” Further, Cal. Lab. Code § 204(d) expressly
7 requires employers to pay employees all wages owed within seven (7) days of the close of
8 the payroll period. DEFENDANT from time to time failed to pay PLAINTIFF and other
9 AGGRIEVED EMPLOYEES all wages owed to them within seven (7) days of the close of
10 the payroll period.

11 23. During the PAGA PERIOD, pursuant to DEFENDANT’S company policies and
12 practices, PLAINTIFF and other AGGRIEVED EMPLOYEES were forced to forfeit
13 gratuities left for them by customers to DEFENDANT’s agents who provided no service to
14 the customers that resulted in the gratuity. DEFENDANT routinely added anywhere from
15 18%-22% service charges to its food and beverages banquet bills. These service charges
16 were in the form of automatic charges which customers are required to pay, and which
17 reasonably appear to be gratuities for the service staff. It is typical and customary in the
18 hospitality industry that establishments impose gratuity charges in the range of 18%-22% of
19 the food and beverage bill. Thus, when customers have paid these charges, it is reasonable
20 for them to have believed they were gratuities to be paid to the service staff. Indeed, because
21 many of these charges are depicted to customers, and the custom in the food and beverage
22 industry that gratuities in the range of 18%-22% are paid for food and beverage service,
23 customers have paid these charges reasonably believing they were remitted to the service
24 staff. However, DEFENDANT has not remitted the total proceeds of these gratuities to the
25 non-managerial employees who serve the food and beverages. Instead, DEFENDANT has a
26 policy and practice of retaining for itself a portion of these gratuities and/or using a portion
27 of these gratuities to pay managers or other non-service employees. As a result,
28 PLAINTIFFS and AGGREIVED EMPLOYEES have not received the total proceeds of the

1 gratuities, to which they are entitled to under California law.

2 24. DEFENDANT is generally in the business of owning and operating hotels,
3 and restaurants. In addition, DEFENDANT also provides banquet services to large groups,
4 such as wedding parties and other banquet events. During the PAGA PERIOD,
5 PLAINTIFFS and other AGGRIEVED EMPLOYEES were in the “chain of service” and
6 earned gratuities based on their service for their customers. However, PLAINTIFFS and
7 AGGRIEVED EMPLOYEES were forced to forfeit portions of their gratuities, which said
8 gratuities were kept by DEFENDANT and their agents who were not in the chain of service
9 from which the gratuity resulted. PLAINTIFFS and other AGGRIEVED EMPLOYEES
10 contend that any gratuities kept by DEFENDANT were illegal and in violation of California
11 law because PLAINTIFFS and other AGGRIEVED EMPLOYEES not DEFENDANT,
12 provided the service for to whom the gratuity should have been paid.

13 25. California Labor Code § 351 establishes the requirements for an employer regarding
14 the payment of gratuities. Specifically, gratuities are the sole property of the employees.
15 California Labor Code § 351 expressly prohibits employers and their agents from collecting,
16 taking, or receiving any portion of a gratuity. California Labor Code § 350(e) defines the
17 term “gratuity” as including any money that has been paid or given or left for an employee
18 by a patron of a business over and above the actual amount due the business for services
19 rendered or for goods, food, drink or articles sold or served to such patron. Labor Code §
20 353 requires employers to keep accurate records of all gratuities they receive, directly or
21 indirectly.

22 26. Although tip pooling is not expressly prohibited by the Labor Code, employees who
23 mandate tip pooling must only distribute pooled tips to employees in the “chain of service.”
24 By distributing tips to DEFENDANT directly and to their agents who were not in the “chain
25 of service,” DEFENDANT has violated and continue to violate the legal requirements for
26 handling pooled tips and violated the holding in *O’Grady v. Merchant Exchange*
27 *Productions, Inc.*, No. A148513 (Court of Appeals of California, First District, Division
28 Two.)

1 27. DEFENDANT's conduct, as set forth above, in failing to remit to non-
2 managerial banquet service employees the total proceeds of gratuities added to banquet
3 customers' bills constitutes a violation of California Labor Code Section 351. This violation
4 is enforceable pursuant to the California Unfair Competition Law, Cal. Bus. And Prof. Code
5 17200 *et seq.* DEFENDANT's conduct constitutes unlawful, unfair, and/or fraudulent
6 business acts or practices, in that DEFENDANT has violated California Labor Code Section
7 351 in not remitting to the non-managerial service employees the total gratuities that were
8 charged to customers. PLAINTIFF and the AGGRIEVED EMPLOYEES have been
9 damaged in an amount according to proof at trial, including the loss of gratuities to which
10 they were entitled and seek all penalties, fees and costs of suit.

11 28. By reason of this uniform conduct applicable to PLAINTIFF and all
12 AGGRIEVED EMPLOYEES, DEFENDANT engaged in a company-wide policy and
13 procedure which fails to accurately calculate and record the correct compensation for all
14 time worked by PLAINTIFF and other AGGRIEVED EMPLOYEES. The proper
15 calculation of these employees' compensation is the DEFENDANT's burden. As a result of
16 DEFENDANT's intentional disregard of the obligation to meet this burden, DEFENDANT
17 fails to properly calculate and/or pay all required compensation for work performed by the
18 AGGRIEVED EMPLOYEES and violated the California Labor Code and regulations
19 promulgated thereunder as herein alleged.

20 29. All of the conduct and violations alleged herein occurred during the PAGA
21 PERIOD. To the extent that any of the conduct and violations alleged herein did not affect
22 PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those violations
23 that affected other AGGRIEVED EMPLOYEES pursuant to *Carrington v. Starbucks Corp.*
24 2018 AJDAR 12157 (Certified for Publication 12/19/18).

25 **JURISDICTION AND VENUE**

26 30. This Court has jurisdiction over this Action pursuant to California Code of
27 Civil Procedure, Section 410.10.

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1 31. Venue is proper in this Court pursuant to California Code of Civil Procedure,
2 Sections 395 and 395.5, because DEFENDANT (i) currently maintain and at all relevant
3 times maintained restaurants and hotels in this County and/or conducts substantial business
4 in this County, and (ii) committed the wrongful conduct herein alleged in this County
5 against AGGRIEVED EMPLOYEES.

6 **FIRST CAUSE OF ACTION**

7 **VIOLATION OF THE PRIVATE ATTORNEYS GENERAL ACT**

8 **[Cal. Lab. Code §§ 2698 *et seq.*]**

9 **(Alleged by PLAINTIFF against all Defendants)**

10 32. PLAINTIFF realleges and incorporates by this reference, as though fully set
11 forth herein, the prior paragraphs of this Complaint.

12 33. PAGA is a mechanism by which the State of California itself can enforce
13 state labor laws through the employee suing under the PAGA who does so as the proxy or
14 agent of the state's labor law enforcement agencies. An action to recover civil penalties
15 under PAGA is fundamentally a law enforcement action designed to protect the public and
16 not to benefit private parties. The purpose of the PAGA is not to recover damages or
17 restitution, but to create a means of "deputizing" citizens as private attorneys general to
18 enforce the Labor Code. In enacting PAGA, the California Legislature specified that "it
19 was ... in the public interest to allow aggrieved employees, acting as private attorneys
20 general to recover civil penalties for Labor Code violations ..." (Stats. 2003, ch. 906, § 1).
21 Accordingly, PAGA claims cannot be subject to arbitration.

22 34. PLAINTIFF, and such persons that may be added from time to time who
23 satisfy the requirements and exhaust the administrative procedures under the Private
24 Attorney General Act, bring this Representative Action on behalf of the State of California
25 with respect to herself and all individuals who are or previously were employed by
26 DEFENDANTS in California during the time period of May 19, 2020 until the present (the
"AGGRIEVED EMPLOYEES").

27 35. On October 13, 2021, PLAINTIFF gave written notice by certified mail to
28 the Labor and Workforce Development Agency (the "Agency") and the employer of

1 the specific provisions of this code alleged to have been violated as required by Labor
2 Code § 2699.3. See **Exhibit #1**, attached hereto and incorporated by this reference
3 herein. The statutory waiting period for PLAINTIFF to add these allegations to the
4 Complaint has expired. As a result, pursuant to Section 2699.3, PLAINTIFF may now
5 commence a representative civil action under PAGA pursuant to Section 2699 as the proxy
6 of the State of California with respect to all AGGRIEVED EMPLOYEES as herein
7 defined.

8 36. The policies, acts and practices heretofore described were and are an
9 unlawful business act or practice because Defendant (a) failed to pay PLAINTIFF and
10 other AGGRIEVED EMPLOYEES minimum wages and overtime wages, (b) failed to
11 provide PLAINTIFF and other AGGRIEVED EMPLOYEES legally required meal and
12 rest breaks, (c) failed to provide accurate itemized wage statements, (d) failed to pay
13 gratuities, and (e) failed to timely pay wages, all in violation of the applicable Labor Code
14 sections listed in Labor Code §2699.5, including but not limited to Labor Code §§ 201,
15 202, 203, 204, 226(a), 226(a)(8), 226.7, 351, 510, 512, 558, 1194, 1197, 1197.1, 1198,
16 2802 and the applicable Industrial Wage Order(s), and thereby gives rise to statutory
17 penalties as a result of such conduct. PLAINTIFF hereby seeks recovery of civil penalties
18 as prescribed by the Labor Code Private Attorney General Act of 2004 as the representative
19 of the State of California for the illegal conduct perpetrated on PLAINTIFF and the other
20 AGGRIEVED EMPLOYEES.

21 37. Some or all of the conduct and violations alleged herein occurred during the
22 PAGA PERIOD. To the extent that any of the conduct and violations alleged herein did
23 not affect PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those
24 violations that affected other AGGRIEVED EMPLOYEES. (*Carrington v. Starbucks*
25 *Corp.* (2018) 30 Cal.App.5th 504, 519; See also *Huff v. Securitas Security Services USA,*
26 *Inc.* (2018) 23 Cal. App. 5th 745, 751 [“PAGA allows an “aggrieved employee”—a person
27 affected by **at least one** Labor Code violation committed by an employer—to **pursue**
28 **penalties for all the Labor Code violations committed by that employer.**”], Emphasis
added, reh'g denied (June 13, 2018).)

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment against each Defendants, jointly and severally, as follows:

- 1. On behalf of the State of California and with respect to all AGGRIEVED EMPLOYEES:
 - a. Recovery of civil penalties as prescribed by the Labor Code Private Attorneys General Act of 2004; and
 - b. An award of penalties, attorneys’ fees and costs of suit, as allowable under the law, including, but not limited to, pursuant to Labor Code § 226 and/or §1194.

Dated: _____, 2021

BARVIÉ LAW, APC

By: _____
Nicole Barvié
Attorney for Plaintiff