

BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP

Norman B. Blumenthal (State Bar #068687)

Kyle R. Nordrehaug (State Bar #205975)

Aparajit Bhowmik (State Bar #248066)

Nicholas J. De Blouw (State Bar #280922)

2255 Calle Clara

La Jolla, CA 92037

Telephone: (858)551-1223

Facsimile: (858) 551-1232

Website: www.bamlawca.com

GOMEZ TRIAL ATTORNEYS, APLC

John Gomez (State Bar #171485)

Emilia Arutunian (State Bar #305824)

655 Broadway, 17th Floor

San Diego, CA 92101

Telephone: (619) 237-3490

Assigned for all purposes:

Judge William D. Claster

Dept. CX104

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

BRENELL WHITFIELD and ADRIANA
VALDEZ, on behalf of the State of
California, as private attorneys general,

Plaintiffs,

vs.

BURTON RESTAURANTS, LLC, a
California Limited Liability Company;
HIGH PERFORMANCE HOSPITALITY
LLC, a California Limited Liability
Company; and DOES 1 through 50,
inclusive,

Defendants.

Case No. 30-2023-01320264-CU-OE-CXC

**REPRESENTATIVE ACTION
COMPLAINT FOR:**

1. Civil Penalties Pursuant to Labor Code
§ 2699, *et seq.* for violations of Labor
Code §§ 201, 202, 203, 204 *et seq.*, 210,
218, 221, 226(a), 226.7, 227.3, 246 *et*
seq., 510, 512, 558(a)(1)(2), 1194, 1197,
1197.1, 1198, 2802, California Code of
Regulations, Title 8, Section 11040,
Subdivision 5(A)-(B), California Code of
Regulations, Title 8, Section 11070(14)
(Failure to Provide Seating), and the
applicable Wage Order(s).

1 Plaintiffs Brenell Whitfield and Adriana Valdez (“PLAINTIFFS”), on behalf of the
2 people of the State of California and as “aggrieved employees” acting as private attorneys
3 general under the Labor Code Private Attorney General Act of 2004, § 2699, *et seq.* (“PAGA”)
4 only, allege on information and belief, except for their own acts and knowledge which are based
5 on personal knowledge, the following:

6 **INTRODUCTION**

7 1. PLAINTIFFS bring this action against High Performance Hospitality LLC and
8 Burton Restaurants, LLC (referred to as “DEFENDANT”) seeking only to recover PAGA civil
9 penalties for themselves, and on behalf of all current and former aggrieved employees that
10 worked for DEFENDANT. PLAINTIFFS do **not seek to recover anything other than**
11 **penalties as permitted by California Labor Code § 2699.** To the extent that statutory
12 violations are mentioned for wage violations, PLAINTIFFS do not seek underlying general
13 and/or special damages for those violations, but simply the civil penalties permitted by
14 California Labor Code § 2699.

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

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

23 **THE PARTIES**

24 4. Burton Restaurants, LLC is California limited liability company that at all
25 relevant times mentioned herein conducted and continues to conduct substantial business in the
26 state of California.

27 5. High Performance Hospitality LLC is California limited liability company that
28

1 at all relevant times mentioned herein conducted and continues to conduct substantial business
2 in the state of California.

3 6. PLAINTIFFS allege there has existed a unity of interest and ownership between
4 High Performance Hospitality LLC and Burton Restaurants, LLC as evidenced by pay stubs,
5 California Secretary of State registered business information, and the companies PLAINTIFFS
6 worked for, such that an individuality and separateness between the entities has ceased and both
7 defendants are referred to herein as (“DEFENDANT”).”

8 7. DEFENDANT owns and operates retail stores in California including Dunkin
9 Donut’s and Jimmy John’s.

10 8. Plaintiff Whitfield was employed by DEFENDANT in California from October
11 of 2021 to November 2022. Plaintiff Whitfield was at all times classified by DEFENDANT as
12 a non-exempt employee, paid on an hourly basis, and entitled to the legally required meal and
13 rest periods and payment of minimum and overtime wages due for all time worked.

14 9. Plaintiff Valdez was employed by DEFENDANT in California from September
15 of 2022 to October 8, 2022. Plaintiff Valdez was at all times classified by DEFENDANT as a
16 non-exempt employee, paid on an hourly basis, and entitled to the legally required meal and rest
17 periods and payment of minimum and overtime wages due for all time worked.

18 10. PLAINTIFFS, and such persons that may be added from time to time who satisfy
19 the requirements and exhaust the administrative procedures under the Private Attorney General
20 Act, brings this Representative Action on behalf of the State of California with respect to
21 themselves and all individuals who are or previously were employed by High Performance
22 Hospitality LLC and/or Burton Restaurants, LLC in California, including any employees staffed
23 with High Performance Hospitality LLC and/or Burton Restaurants, LLC by a third party, and
24 classified as non-exempt employees (“AGGRIEVED EMPLOYEES”) during the time period
25 of December 12, 2021 until a date as determined by the Court (the "PAGA PERIOD").

26 11. PLAINTIFFS, on behalf of themselves and all AGGRIEVED EMPLOYEES
27 presently or formerly employed by DEFENDANT during the PAGA PERIOD, bring this
28 representative action pursuant to Labor Code § 2699, *et seq.* seeking fixed civil penalties for

1 DEFENDANT's violation of California Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 218,
2 221, 226(a), 226.7, 227.3, 246 *et seq.*, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198,
3 2802, California Code of Regulations, Title 8, Section 11040, Subdivision 5(A)-(B),
4 California Code of Regulations, Title 8, Section 1 1070(14) (Failure to Provide Seating), and
5 the applicable Wage Order(s). Based upon the foregoing, PLAINTIFFS and all
6 AGGRIEVED EMPLOYEES are aggrieved employees within the meaning of Labor Code §
7 2699, *et seq.*

8 12. The true names and capacities, whether individual, corporate, subsidiary,
9 partnership, associate or otherwise of defendants DOES 1 through 50, inclusive, are
10 presently unknown to PLAINTIFFS who therefore sue these Defendants by such fictitious
11 names pursuant to Cal. Civ. Proc. Code § 474. PLAINTIFFS will seek leave to amend this
12 Complaint to allege the true names and capacities of Does 1 through 50, inclusive, when
13 they are ascertained. PLAINTIFFS are informed and believe, and based upon that
14 information and belief allege, that the Defendants named in this Complaint, including DOES
15 1 through 50, inclusive, are responsible in some manner for one or more of the events and
16 happenings that proximately caused the injuries and damages hereinafter alleged.

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

25 26 **THE CONDUCT**

27 14. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT
28 was required to pay PLAINTIFFS and the AGGRIEVED EMPLOYEES for all their time

1 worked, meaning the time during which an employee is subject to the control of an
2 employer, including all the time the employee is suffered or permitted to work.
3 DEFENDANT requires PLAINTIFFS and the AGGRIEVED EMPLOYEES to work
4 without paying them for all the time they are under DEFENDANT's control. Among other
5 things, DEFENDANT requires PLAINTIFFS to work while clocked out during what is
6 supposed to be PLAINTIFFS' off-duty meal break. PLAINTIFFS were from time to time
7 interrupted by work assignments while clocked out for what should have been
8 PLAINTIFFS' off-duty meal break. DEFENDANT, as a matter of established company
9 policy and procedure, administers a uniform practice of rounding the actual time worked and
10 recorded by PLAINTIFFS and the AGGRIEVED EMPLOYEES, always to the benefit of
11 DEFENDANT, so that during the course of their employment, PLAINTIFFS and the
12 AGGRIEVED EMPLOYEES are paid less than they would have been paid had they been
13 paid for actual recorded time rather than "rounded" time. Additionally, DEFENDANT
14 engages in the practice of requiring PLAINTIFFS and the AGGRIEVED EMPLOYEES to
15 perform work off the clock in that DEFENDANT, as a condition of employment, required
16 these employees to submit to mandatory temperature checks and symptom questionnaires for
17 COVID-19 screening prior to clocking into DEFENDANT's timekeeping system for the
18 workday. As a result, PLAINTIFFS and the AGGRIEVED EMPLOYEES forfeit minimum
19 wage, overtime wage compensation, and off-duty meal breaks by working without their time
20 being correctly recorded and without compensation at the applicable rates. DEFENDANT's
21 policy and practice not to pay PLAINTIFFS and the AGGRIEVED EMPLOYEES for all
22 time worked, is evidenced by DEFENDANT's business records.

23 15. State law provides that employees must be paid overtime and meal and rest
24 break premiums at one-and-one-half times their "regular rate of pay." PLAINTIFFS and the
25 AGGRIEVED EMPLOYEES are compensated at an hourly rate plus incentive pay that is
26 tied to specific elements of an employee's performance.

27 16. The second component of PLAINTIFFS' and the AGGRIEVED
28 EMPLOYEES' compensation is DEFENDANT's non-discretionary incentive program that

1 paid PLAINTIFFS and the AGGRIEVED EMPLOYEES incentive wages based on their
2 performance for DEFENDANT. The non-discretionary incentive program provided all
3 employees paid on an hourly basis with incentive compensation when the employees met the
4 various performance goals set by DEFENDANT. However, when calculating the regular
5 rate of pay in order to pay overtime and meal and rest break premiums to PLAINTIFFS and
6 the AGGRIEVED EMPLOYEES, DEFENDANT failed to include the incentive
7 compensation as part of the employees' "regular rate of pay" for purposes of calculating
8 overtime pay and meal and rest break premium pay. Management and supervisors described
9 the incentive program to potential and new employees as part of the compensation package.
10 As a matter of law, the incentive compensation received by PLAINTIFFS and the
11 AGGRIEVED EMPLOYEES must be included in the "regular rate of pay." The failure to
12 do so has resulted in a underpayment of overtime compensation and meal and rest break
13 premiums to PLAINTIFFS and the AGGRIEVED EMPLOYEES by DEFENDANT.

14 17. As a result of their rigorous work schedules, PLAINTIFFS and the
15 AGGRIEVED EMPLOYEES were from time to time unable to take thirty (30) minute off
16 duty meal breaks and were not fully relieved of duty for their meal periods. PLAINTIFFS
17 and the AGGRIEVED EMPLOYEES were required from time to time to perform work as
18 ordered by DEFENDANT for more than five (5) hours during some shifts without receiving
19 a meal break. Further, DEFENDANT from time to time fails to provide PLAINTIFFS and
20 AGGRIEVED EMPLOYEES with a second off-duty meal period for some workdays in
21 which these employees were required by DEFENDANT to work ten (10) hours of work.
22 DEFENDANT also engaged in the practice of rounding the meal period times to avoid
23 paying penalties to PLAINTIFFS and the AGGRIEVED EMPLOYEES. PLAINTIFFS and
24 the AGGRIEVED EMPLOYEES therefore forfeit meal breaks without additional
25 compensation and in accordance with DEFENDANT's corporate policy and practice.

26 18. During the PAGA PERIOD, PLAINTIFFS and the AGGRIEVED
27 EMPLOYEES were also required from time to time to work in excess of four (4) hours
28 without being provided ten (10) minute rest periods. Further, these employees were denied

1 their first rest periods of at least ten (10) minutes for some shifts worked of at least two (2)
2 to four (4) hours from time to time, a first and second rest period of at least ten (10) minutes
3 for some shifts worked of between six (6) and eight (8) hours from time to time, and a first,
4 second and third rest period of at least ten (10) minutes for some shifts worked of ten (10)
5 hours or more from time to time. PLAINTIFFS and the AGGRIEVED EMPLOYEES were
6 also not provided with one hour wages in lieu thereof. Additionally, the applicable
7 California Wage Order requires employers to provide employees with off-duty rest periods,
8 which the California Supreme Court defined as time during which an employee is relieved
9 from all work related duties and free from employer control. In so doing, the Court held that
10 the requirement under California law that employers authorize and permit all employees to
11 take rest period means that employers must relieve employees of all duties and relinquish
12 control over how employees spend their time which includes control over the locations
13 where employees may take their rest period. Employers cannot impose controls that prohibit
14 an employee from taking a brief walk - five minutes out, five minutes back. Here,
15 DEFENDANT's policy restricted PLAINTIFFS and the AGGRIEVED EMPLOYEES from
16 unconstrained walks and is unlawful based on DEFENDANT's rule which states
17 PLAINTIFFS and the AGGRIEVED EMPLOYEES cannot leave the work premises during
18 their rest period.

19 19. During the PAGA PERIOD, DEFENDANT failed to accurately record and
20 pay PLAINTIFFS and the AGGRIEVED EMPLOYEES for the actual amount of time these
21 employees worked. Pursuant to the Industrial Welfare Commission Wage Orders,
22 DEFENDANT was required to pay PLAINTIFFS and the AGGRIEVED EMPLOYEES for
23 all time worked, meaning the time during which an employee was subject to the control of
24 an employer, including all the time the employee was permitted or suffered to permit this
25 work. DEFENDANT required these employees to work off the clock without paying them
26 for all the time they were under DEFENDANT's control. As such, DEFENDANT knew or
27 should have known that PLAINTIFFS and the AGGRIEVED EMPLOYEES were under
28 compensated for all time worked. As a result, PLAINTIFFS and the AGGRIEVED

1 EMPLOYEES forfeited time worked by working without their time being accurately
2 recorded and without compensation at the applicable minimum wage and overtime wage
3 rates. To the extent that the time worked off the clock does not qualify for overtime
4 premium payment, DEFENDANT fails to pay minimum wages for the time worked off-the-
5 clock in violation of Cal. Lab. Code §§ 1194, 1197, and 1197.1.

6 20. From time to time, DEFENDANT also failed to provide PLAINTIFFS and the
7 AGGRIEVED EMPLOYEES with complete and accurate wage statements which failed to
8 show, among other things, the correct gross and net wages earned. Cal. Lab. Code § 226
9 provides that every employer shall furnish each of his or her employees with an accurate
10 itemized wage statement in writing showing, among other things, gross wages earned and all
11 applicable hourly rates in effect during the pay period and the corresponding amount of time
12 worked at each hourly rate. PLAINTIFFS and the AGGRIEVED EMPLOYEES were paid
13 on an hourly basis. As such, the wage statements should reflect all applicable hourly rates
14 during the pay period and the total hours worked, and the applicable pay period in which the
15 wages were earned pursuant to California Labor Code Section 226(a). The wage statements
16 DEFENDANT provided to PLAINTIFFS and the AGGRIEVED EMPLOYEES failed to
17 identify such information. More specifically, the wage statements failed to identify the
18 accurate total hours worked each pay period. When the hours shown on the wage statements
19 were added up, they did not equal the actual total hours worked during the pay period in
20 violation of Cal. Lab. Code 226(a)(2). Aside, from the violations listed above in this
21 paragraph, DEFENDANT failed to issue to PLAINTIFFS an itemized wage statement that
22 lists all the requirements under California Labor Code 226 *et seq.* As a result, DEFENDANT
23 from time to time provided PLAINTIFFS and the AGGRIEVED EMPLOYEES with wage
24 statements which violated Cal. Lab. Code § 226.

25 21. Cal. Lab. Code § 204(d) provides, the requirements of this section shall be
26 deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if
27 the wages are paid not more than seven (7) calendar days following the close of the payroll
28 period. Cal. Lab. Code § 210 provides:

1 in [I]n addition to, and entirely independent and apart from, any other penalty provided
2 this article, every person who fails to pay the wages of each employee as provided in
3 Sections. . . 204. . . shall be subject to a civil penalty as follows: (1) For any initial
4 violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For
each subsequent violation, or any willful or intentional violation, two hundred dollars
(\$200) for each failure to pay each employee, plus 25 percent of the amount
unlawfully withheld.

5 22. DEFENDANT from time to time failed to pay PLAINTIFFS and the
6 AGGRIEVED EMPLOYEES within seven (7) days of the close of the payroll period in
7 accordance with Cal. Lab. Code § 204(d), including but not limited to for the “Hourly”
8 regular wage payments.

9 23. DEFENDANT underpaid sick pay wages to PLAINTIFFS and the
10 AGGRIEVED EMPLOYEES by failing to pay such wages at the regular rate of pay in
11 violation of Cal. Lab. Code Section 246. Specifically, PLAINTIFFS and other non-exempt
12 employees earn non-discretionary remuneration. Rather than pay sick pay at the regular rate
13 of pay, DEFENDANT underpays sick pay to PLAINTIFFS and the AGGRIEVED
14 EMPLOYEES at their base rates of pay.

15 24. Cal. Lab. Code Section 246(1)(2) requires that paid sick time for nonexempt
16 employees be calculated by dividing the employee’s total wages, not including overtime
17 premium pay, by the employee’s total hours worked in the full pay periods of the prior 90
18 days of employment.

19 25. DEFENDANT violated Cal. Lab. Code Section 246 by failing to pay sick pay
20 at the regular rate of pay. PLAINTIFFS and the AGGRIEVED EMPLOYEES routinely
21 earned non-discretionary incentive wages which increased their regular rate of pay.
22 However, when sick pay was paid, it was paid at the base rate of pay for PLAINTIFFS and
23 the AGGRIEVED EMPLOYEES, as opposed to the correct, higher regular rate of pay, as
24 required under Cal. Lab. Code Section 246.

25 26. As a pattern and practice, DEFENDANT regularly failed to pay PLAINTIFFS
26 and the AGGRIEVED EMPLOYEES their correct wages and accordingly owe waiting time
27 penalties pursuant to Cal. Lab. Code Section 203. Further, PLAINTIFFS are informed and
28 believe and based thereon allege that such failure to pay sick pay at regular rate was willful,

1 such that the AGGRIEVED EMPLOYEES whose employment has separated are entitled to
2 waiting time penalties pursuant to Cal. Lab. Code Sections 201-203.

3 27. Pursuant to Cal. Lab. Code Section 221, "It shall be unlawful for any employer
4 to collect or receive from an employee any part of wages theretofore paid by said employer
5 to said employee." DEFENDANT fails to pay all compensation due to PLAINTIFFS and
6 the AGGRIEVED EMPLOYEES, made unlawful deductions from compensation payable to
7 PLAINTIFFS and the AGGRIEVED EMPLOYEES, fails to disclose all aspects of the
8 deductions from compensation payable to PLAINTIFFS and the AGGRIEVED
9 EMPLOYEES, and thereby fails to pay these employees all wages due at each applicable
10 pay period and upon termination.

11 28. DEFENDANT intentionally and knowingly failed to reimburse and indemnify
12 PLAINTIFFS and the AGGRIEVED EMPLOYEES for required business expenses incurred
13 by the PLAINTIFFS and the AGGRIEVED EMPLOYEES in direct consequence of
14 discharging their duties on behalf of DEFENDANT. Under California Labor Code Section
15 2802, employers are required to indemnify employees for all expenses incurred in the course
16 and scope of their employment. Cal. Lab. Code § 2802 expressly states that "an employer
17 shall indemnify his or her employee for all necessary expenditures or losses incurred by the
18 employee in direct consequence of the discharge of his or her duties, or of his or her
19 obedience to the directions of the employer, even though unlawful, unless the employee, at
20 the time of obeying the directions, believed them to be unlawful."

21 29. In the course of their employment PLAINTIFFS and the AGGRIEVED
22 EMPLOYEES as a business expense, were required by DEFENDANT to use their own
23 personal cellular phones as a result of and in furtherance of their job duties as employees for
24 DEFENDANT but are not reimbursed or indemnified by DEFENDANT for the cost
25 associated with the use of their personal cellular phones for DEFENDANT's benefit.
26 Specifically, PLAINTIFFS and the AGGRIEVED EMPLOYEES were required by
27 DEFENDANT to use their personal cellular phones. As a result, in the course of their
28 employment with DEFENDANT, PLAINTIFFS and the AGGRIEVED EMPLOYEES

1 incurred unreimbursed business expenses which included, but were not limited to, costs
2 related to the use of their personal cellular phones all on behalf of and for the benefit of
3 DEFENDANT.

4 30. In violation of the applicable sections of the California Labor Code and the
5 requirements of the applicable Industrial Welfare Commission ("IWC") Wage Order,
6 DEFENDANT as a matter of company policy, practice and procedure, intentionally,
7 knowingly and systematically failed to provide PLAINTIFFS and the other AGGRIEVED
8 EMPLOYEES suitable seating when the nature of these employees' work reasonably
9 permitted sitting.

10 31. DEFENDANT knew or should have known that PLAINTIFFS and other
11 AGGRIEVED EMPLOYEES were entitled to suitable seating and/or were entitled to sit
12 when it did not interfere with the performance of their duties, and that DEFENDANT did
13 not provide suitable seating and/or did not allow them to sit when it did not interfere with
14 the performance of their duties.

15 32. By reason of this conduct applicable to PLAINTIFFS and all AGGRIEVED
16 EMPLOYEES, DEFENDANT violated California Labor Code Section 1198 and Wage
17 Order 4-2001, Section 14 by failing to provide suitable seats. PLAINTIFFS seek penalties
18 on behalf of PLAINTIFFS and other AGGRIEVED EMPLOYEES as provided herein.
19 Providing suitable seating is the DEFENDANT's burden. As a result of DEFENDANT's
20 intentional disregard of the obligation to meet this burden, DEFENDANT violated the
21 California Labor Code and regulations promulgated thereunder as herein alleged.

22 33. The employment of PLAINTIFFS and some AGGRIEVED EMPLOYEES has
23 terminated and DEFENDANT has not tendered payment of all wages owed as required by
24 law. Additionally, at all times during the term of PLAINTIFFS' employment with
25 DEFENDANT, PLAINTIFFS and other AGGRIEVED EMPLOYEES earned and accrued
26 vested vacation and holiday time on the date of their termination pursuant to
27 DEFENDANT's uniform vacation policies and applicable California law. The amount of
28 vacation pay PLAINTIFFS and the other AGGRIEVED EMPLOYEES earned and

1 accumulated is evidenced by DEFENDANT's business records. Additionally,
2 DEFENDANT also underpaid accrued vested vacation wages to PLAINTIFFS and other
3 AGGRIEVED EMPLOYEES by failing to pay such wages at the regular rate of pay and
4 more specifically the final rate of pay that included all non-discretionary incentive
5 compensation. Rather than pay vacation wages at the regular rate of pay, DEFENDANT
6 underpaid vacation wages to PLAINTIFFS and other AGGRIEVED EMPLOYEES at their
7 base rates of pay, instead of including all of PLAINTIFFS' and other AGGRIEVED
8 EMPLOYEES' non-discretionary incentive compensation into the vacation wage payment
9 calculations. DEFENDANT failed to specify in DEFENDANT's written vacation policy the
10 rate at which PLAINTIFFS and other AGGRIEVED EMPLOYEES would be paid vacation
11 upon leaving employment with DEFENDANT. As a result of DEFENDANT's unlawful
12 practice, policy and procedure to deny paying the PLAINTIFFS and other AGGRIEVED
13 EMPLOYEES all of their vested vacation and holiday time, DEFENDANT failed to pay the
14 PLAINTIFFS and other AGGRIEVED EMPLOYEES all vested vacation time as wages due
15 upon employment termination, in violation of the California Labor Code, Sections 201, 202,
16 203 and 227.3. Similarly, DEFENDANT underpaid waiting time penalties to PLAINTIFFS
17 and other AGGRIEVED EMPLOYEES at their base rates of pay, instead of including all of
18 PLAINTIFFS' and other AGGRIEVED EMPLOYEES' non-discretionary compensation
19 into the waiting time penalty calculations. This failure by DEFENDANT is believed to be
20 the result of DEFENDANT's unlawful, unfair and deceptive refusal to provide compensation
21 for earned, accrued and vested vacation and holiday time, as well as the corresponding
22 waiting time penalties that were paid. DEFENDANT perpetrated this unlawful, unfair and
23 deceptive practice to the detriment of PLAINTIFFS and other AGGRIEVED EMPLOYEES.
24 DEFENDANT's uniform practice and policy of failing to pay the AGGRIEVED
25 EMPLOYEES for all vested vacation and holiday time accumulated at employment
26 termination violated and continues to violate Section 227.3 of the California Labor Code.

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

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

5
6 **JURISDICTION AND VENUE**

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

9 36. Venue is proper in this Court pursuant to California Code of Civil Procedure,
10 Sections 395.5 and 393, because DEFENDANT operates in locations across California,
11 employs AGGRIEVED EMPLOYEES across California, including in this County, and
12 committed the wrongful conduct herein alleged in this County against AGGRIEVED
13 EMPLOYEES.

14
15 **FIRST CAUSE OF ACTION**

16 **For Violation of the Private Attorneys General Act**

17 **[Cal. Lab. Code §§ 2698, *et seq.*]**

18 **(By PLAINTIFFS and Against All Defendants)**

19 37. PLAINTIFFS reallege and incorporate by this reference, as though fully set
20 forth herein, the prior paragraphs of this Complaint.

21 38. PAGA is a mechanism by which the State of California itself can enforce state
22 labor laws through the employee suing under the PAGA who do so as the proxy or agent of
23 the state's labor law enforcement agencies. An action to recover civil penalties under
24 PAGA is fundamentally a law enforcement action designed to protect the public and not to
25 benefit private parties. The purpose of the PAGA is not to recover damages or restitution,
26 but to create a means of "deputizing" citizens as private attorneys general to enforce the
27 Labor Code. In enacting PAGA, the California Legislature specified that "it was ... in the
28 public interest to allow aggrieved employees, acting as private attorneys general to recover

1 civil penalties for Labor Code violations ..." Stats. 2003, ch. 906, § 1. Accordingly, PAGA
2 claims cannot be subject to arbitration.

3 39. PLAINTIFFS, and such persons that may be added from time to time who
4 satisfy the requirements and exhaust the administrative procedures under the Private
5 Attorney General Act, bring this Representative Action on behalf of the State of California
6 with respect to themselves and all individuals who are or previously were employed by High
7 Performance Hospitality LLC and/or Burton Restaurants, LLC in California, including any
8 employees staffed with High Performance Hospitality LLC and/or Burton Restaurants, LLC
9 by a third party, and classified as non-exempt employees ("AGGRIEVED EMPLOYEES")
10 during the time period of December 12, 2021 until a date as determined by the Court (the
11 "PAGA PERIOD").

12 40. On December 12, 2022, PLAINTIFFS gave written notice by electronic mail
13 to the Labor and Workforce Development Agency (the "Agency") and by certified mail to
14 the employer of the specific provisions of this code alleged to have been violated as required
15 by Labor Code § 2699.3. See **Exhibit #1**, attached hereto and incorporated by this reference
16 herein (*PAGA Notice only without draft complaint*). The statutory waiting period for
17 PLAINTIFFS to add these allegations to the Complaint has expired. As a result, pursuant to
18 Section 2699.3, PLAINTIFFS may now commence a representative civil action under
19 PAGA pursuant to Section 2699 as the proxies of the State of California with respect to all
20 AGGRIEVED EMPLOYEES as herein defined.

21 41. The policies, acts and practices heretofore described were and are an unlawful
22 business act or practice because DEFENDANT (a) failed to provide PLAINTIFFS and the
23 AGGRIEVED EMPLOYEES accurate itemized wage statements, (b) failed to properly
24 record and provide legally required meal and rest periods, (c) failed to pay minimum wages,
25 (d) failed to pay overtime wages and sick pay wages, (e) failed to reimburse employees for
26 required expenses, (f) failed to provide wages when due, and (g) failed to provide suitable
27 seating, all in violation of the applicable Labor Code sections listed in Labor Code §§ 201,
28 202, 203, 204 *et seq.*, 210, 218, 221, 226(a), 226.7, 227.3, 246 *et seq.*, 510, 512,

1 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations, Title 8,
2 Section 11040, Subdivision 5(A)-(B), California Code of Regulations, Title 8, Section 1
3 1070(14) (Failure to Provide Seating), and the applicable Wage Order(s), and thereby gives
4 rise to civil penalties as a result of such conduct.¹ PLAINTIFFS hereby seek recovery of
5 only civil penalties as prescribed by the Labor Code Private Attorney General Act of 2004 as
6 the representatives of the State of California for the illegal conduct perpetrated on
7 PLAINTIFFS and the AGGRIEVED EMPLOYEES.

8
9 **PRAYER FOR RELIEF**

10 WHEREFORE, PLAINTIFFS pray for judgment against each Defendant, jointly and
11 severally, as follows:

12 1. On behalf of the State of California and with respect to all AGGRIEVED
13 EMPLOYEES:

14 A) Recovery of civil penalties as prescribed by the Labor Code Private
15 Attorneys General Act of 2004; and,

16 B) An award of attorneys' fees and cost of suit, as allowable under the
17 law, including, but not limited to, pursuant to Labor Code §2699.

18 Dated: April 19, 2023 BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW
19 LLP

20
21 By: /s/ Nicholas De Blouw
22 Norman B. Blumenthal
23 Kyle R. Nordrehaug
24 Nicholas J. De Blouw

25 **GOMEZ TRIAL ATTORNEYS, APLC**
26 John Gomez (State Bar #171485)
27 Emilia Arutunian (State Bar #305824)
28 655 Broadway, 17th Floor

¹Plaintiffs specifically exclude and/or do not allege any claims under California Labor Code §558(a)(3).

San Diego, CA 92101
Telephone: (619) 237-3490
Website: www.thegomezfirm.com

Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 1

BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP

**2255 CALLE CLARA
LA JOLLA, CALIFORNIA 92037**

Web Site: www.bamlawca.com

San Diego | San Francisco | Sacramento | Los Angeles | Riverside | Santa Clara | Orange | Chicago

Phone: (858) 551-1223

Fax: (858) 551-1232

WRITERS E-MAIL:

Nick@bamlawca.com

WRITERS EXT:

1004

December 12, 2022

CA2826

VIA ONLINE FILING TO LWDA AND CERTIFIED MAIL TO DEFENDANT

Labor and Workforce Development
Agency
Online Filing

High Performance Hospitality LLC
Certified Mail #70222410000247761656
JONATHAN GARMAN
2560 PROGRESS STREET
VISTA, CA 92081

Burton Restaurants, LLC
Certified Mail #70222410000247761663
JONATHAN GARMAN
2560 PROGRESS STREET
VISTA, CA 92081

Re: Notice Of Violations Of California Labor Code Sections §§ 201, 202, 203, 204 *et seq.*, 210, 218, 221, 226(a), 226.7, 227.3, 246 *et seq.*, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations, Title 8, Section 11040, Subdivision 5(A)-(B), California Code of Regulations, Title 8, Section 1 1070(14) (Failure to Provide Seating), Violation of Applicable Industrial Welfare Commission Wage Order(s), and Pursuant To California Labor Code Section 2699.5.

Dear Sir/Madam:

“Aggrieved Employees” refers to all individuals who are or previously were employed by High Performance Hospitality LLC and/or Burton Restaurants, LLC in California, including any employees staffed with High Performance Hospitality LLC and/or Burton Restaurants, LLC by a third party, and classified as non-exempt employees during the time period of December 12, 2022 until a date as determined by the Court. Our offices represent Plaintiffs Brenell Whitfield and Adriana Valdez (“Plaintiffs”) and other Aggrieved Employees in a lawsuit against High Performance Hospitality LLC and/or Burton Restaurants, LLC (“Defendant”). Plaintiff Whitfield was employed by Defendant in California as a non-exempt employee from October of 2021 to November of 2022 and entitled to the legally required meal and rest breaks and payment for all time worked under Defendant’s control. Plaintiff Valdez was employed by Defendant in California as a non-exempt employee from September of 2022 to October 8, 2022 and entitled to the legally required meal and rest breaks and payment for all time worked

under Defendant's control Defendant, however, unlawfully failed to record and pay Plaintiffs and other Aggrieved Employees for, including but not limited to, all of their time worked, including minimum and overtime wages, for all of their missed meal and rest break (and pay the meal and rest break premiums at the correct regular rates of pay), and for all of their time spent working off the clock. Moreover, when Defendant required Plaintiffs and Aggrieved Employees to report for work, but "furnished less than half said employee's usual or scheduled day's work," Defendant violated Cal. Code Regs., tit. 8 § 11040, subd. 5(A) by failing to pay Plaintiffs and Aggrieved Employees for at least two (2) hours' worth of work at their regular rate of pay. In addition, when Defendant required Plaintiffs and Aggrieved Employees to respond to and engage in additional work, this resulted in a second reporting for work in a single workday, and Defendant failed to pay these employees reporting time pay as required by Cal. Code Regs., tit. 8, § 11040, subd. 5(B). Further, Defendant failed to advise Plaintiffs and the other Aggrieved Employees of their right to take separately and hourly paid duty-free ten (10) minute rest periods. See *Vaquero v. Stoneledge Furniture, LLC*, 9 Cal. App. 5th 98, 110 (2017). Additionally, pursuant to Labor Code § 204 *et seq.*, Defendant failed to timely provide Plaintiffs and other Aggrieved Employees with their wages, including the "Retro Pay" payments, which were regular wage payments. Plaintiffs further contend that Defendant failed to provide accurate wage statements to Plaintiffs, and other Aggrieved Employees, in violation of California Labor Code section 226(a). Specifically, Plaintiffs and Aggrieved Employees were paid on an hourly basis. As such, the wage statements should reflect all applicable hourly rates during the pay period and the correct total hours worked, and the applicable pay period in which the wages were earned pursuant to California Labor Code Section 226(a). The wage statements Defendant provided to Plaintiffs and other Aggrieved Employees failed to identify such information. More specifically, the wage statements failed to identify the accurate total hours worked each pay period in violation of Cal. Lab. Code Section 226(a)(2) as when the hours were added up they did not equal the actual amount of hours worked each pay period. Additionally, Plaintiffs contend that Defendant failed to comply with Industrial Wage Order 7(A)(3) in that Defendant failed to keep time records showing when Plaintiffs began and ended each shift and meal period. Plaintiffs and other Aggrieved Employees perform tasks that reasonably permit sitting, and a seat would not interfere with their performance of any of their tasks that may require them to stand. Defendant failed to provide Plaintiffs and other Aggrieved Employees with suitable seats. Said conduct, in addition to the foregoing, as well as the conduct alleged in the incorporated Complaint, violates Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 218, 221, 226(a), 226.7, 227.3, 246, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations, Title 8, Section 11040, Subdivision 5(A)-(B), California Code of Regulations, Title 8, Section 11070(14) (Failure to Provide Seating), Violation of the applicable Industrial Welfare Commission Wage Order(s), and is therefore actionable under California Labor Code section 2699.3.

A true and correct copy of the Complaint by Plaintiffs against Defendant, which (i) identifies the alleged violations, (ii) details the facts and theories which support the alleged violations, (iii) details the specific work performed by Plaintiffs, (iii) sets forth the people/entities, dates, classifications, violations, events, and actions which are at issue to the extent known to Plaintiffs, and (iv) 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. Plaintiffs 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 Plaintiffs to proceed with the Complaint against Defendant as authorized by California Labor Code section 2699, *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 Plaintiffs and all Aggrieved 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.

Respectfully,

/s/ Nicholas J. De Blouw

Nicholas J. De Blouw, Esq.