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Assigned for All Purposes
Judge Willian Claster
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Attorneys for Plaintiff,
JOSE FABIAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
(UNLIMITED JURISDICTION)

JOSE FABIAN,

Plaintiff,

vs.

LIDO SHIPYARD SAUSAGE, CO., a
California corporation; JAMES SABATINO
OGNIBENE, an individual; and DOES 1 to 25,
inclusive,

Defendant(s).

Case No.: 30-2023-01346933-CU-OE-CXC

COMPLAINT FOR DAMAGES FOR:

- 1) Failure to Pay All Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198);
- 2) Failure to Provide Rest Breaks (Lab. Code §§ 226.7 and 1198);
- 3) Failure to Provide Meal Periods (Lab. Code §§ 226.7, 512 and 1198);
- 4) Failure to Provide Accurate Itemized Wage Statements (Lab. Code § 226);
- 5) Failure To Pay Wages When Employment Ends (Lab. Code §§ 201–203);
- 6) Failure to Pay Wages Owed Every Pay Period (Lab. Code § 204);
- 7) Failure to Provide Personnel Records;
- 8) Failure to Provide Pay Records;
- 9) Civil Penalties (Lab. Code §§ 2698, *et seq.*);
- 10) Harassment in Violation of the FEHA (Gov. Code § 12940(j));
- 11) Failure To Prevent, Investigate, and Remedy Harassment in Violation of the FEHA (Gov. Code, §§ 12940(j)(1) & (k));
- 12) Negligent Hiring, Retention,

Supervision, & Training;
13) Wrongful Constructive Discharge In
Violation of Public Policy; and
14) Unfair Competition (Bus. & Prof.
Code, § 17200 *et seq.*)

JURY TRIAL DEMANDED

COMES NOW Plaintiff, JOSE FABIAN (hereafter “Plaintiff”), and complains and alleges as follows:

INTRODUCTION

1. Plaintiff brings this action based on alleged violations of the California Labor Code, Industrial Welfare Commission Order No. 5-2001 (hereafter “the Wage Order”), the Business and Professions Code, and public policy against LIDO SHIPYARD SAUSAGE, CO., a California corporation; JAMES SABATINO OGNIBENE, an individual, and DOES 1 to 25, inclusive, (collectively “Sabatino’s” or “Defendants”).

JURISDICTION AND VENUE

2. Jurisdiction and venue are proper in this Court and this action is properly filed in the County of Orange because Defendants LIDO SHIPYARD SAUSAGE, CO., JAMES SABATINO OGNIBENE, and DOES 1 to 25, inclusive, do business in the County of Orange and because Defendants’ obligations and liabilities arise therein, and because the work that was performed by Plaintiff in the County of Orange is the subject of this action. Moreover, Plaintiff’s damages sought herein exceed \$25,000.

THE PARTIES

3. Plaintiff Jose Fabian is a resident of the city of Costa Mesa in Orange County, California. At all relevant times, Plaintiff was an “employee” within the meaning of Title 8 California Code of Regulations Section 11050 and an “Aggrieved Employee” within the meaning of Labor Code Section 2699(c).

4. Defendant LIDO SHIPYARD SAUSAGE, CO. (a.k.a. Sabatino’s Lido Shipyard Sausage Company) was and is a California corporation with its principal place of

1 business located at 251 Shipyard Way, Newport Beach, CA 92663, and which employed
2 Plaintiff. As such, it is a citizen of California based on Plaintiff's information and belief.

3 5. Defendant JAMES SABATINO OGNIBENE is a citizen of California based on
4 Plaintiff's information and belief.

5 6. In relevant part, Labor Code section 558.1 states:

6 (a) Any employer or other person acting on behalf of an employer, who violates,
7 or causes to be violated, any provision regulating minimum wages or hours and
8 days of work in any order of the Industrial Welfare Commission, or violates, or
9 causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be
10 held liable as the employer for such violation.

11 (b) For purposes of this section, the term "other person acting on behalf of an
12 employer" is limited to a natural person who is an owner, director, officer, or
13 managing agent of the employer, and the term "managing agent" has the same
14 meaning as in subdivision (b) of Section 3294 of the Civil Code.

15 7. Based on Plaintiff's information and belief, Defendant JAMES SABATINO
16 OGNIBENE is a natural person, and an owner, director, officer, and/or managing agent of
17 Defendant LIDO SHIPYARD SAUSAGE, CO., who directly or indirectly, or through his
18 agent, employed or exercised control over the wages, hours, or working conditions of Plaintiff
19 and the Aggrieved Employees (defined below). Therefore, he is liable to Plaintiff and the
20 Aggrieved Employees for his violations of, or causing Defendants to violate, Labor Code
21 sections 203, 226, 226.7, 1194, and 2802 pursuant to Labor Code section 558.1.

22 8. The "Aggrieved Employees" are all current and former non-exempt or hourly
23 paid employees who worked for Defendants in California during the relevant time period
24 pursuant to California Labor Code section 2698, et. seq., the Labor Code Private Attorneys
25 General Act of 2004 ("PAGA").

26 9. At all times herein relevant, Defendants LIDO SHIPYARD SAUSAGE, CO.,
27 JAMES SABATINO OGNIBENE, and DOES 1 to 25, and each of them, were the agents,
28 partners, joint venturers, joint employers, representatives, servants, employees, successors-in-
interest, co-conspirators and assigns, each of the other, and at all times relevant hereto were
acting within the course and scope of their authority as such agents, partners, joint venturers,
representatives, servants, employees, successors, coconspirators and/or assigns, and all acts or

omissions alleged herein were duly committed with the ratification, knowledge, permission, encouragement, authorization and/or consent of each defendant designated as a DOE herein.

10. The true names and capacities, whether corporate, associate, individual or otherwise, of defendants DOES 1 through 25, inclusive, are unknown to Plaintiff who sues said defendants by such fictitious names. Plaintiff is informed and believes, and based on that information and belief alleges, that each of the defendants designated as a DOE is legally responsible for the events and happenings referred to in this Complaint, and unlawfully caused the injuries and damages to Plaintiff as alleged in this Complaint. Plaintiff will seek leave of court to amend this Complaint to show the true names and capacities when the same have been ascertained.

11. Plaintiff further alleges that Defendants including the unknown defendants identified as DOES, directly or indirectly controlled or affected the working conditions, wages, working hours, and conditions of employment of Plaintiff and the other Aggrieved Employees so as to make each of said Defendants employers and employers liable under the statutory provisions set forth herein.

GENERAL ALLEGATIONS

12. SABATINO'S first began to employ Plaintiff in or around December 2020. Plaintiff's job duties included dishwasher, prep cook, and generally assisting with kitchen work. Plaintiff generally worked Tuesday through Saturday from approximately 7:00 a.m. to 4:00/5:00 p.m. or 9:00 a.m. to 5:00/6:00 p.m. Plaintiff's employment ended on or around May 17, 2023.

13. At all relevant times, SABATINO'S issued wages to Plaintiff and all of the other Aggrieved Employees on a weekly basis and paid them by the hour. At all relevant times, SABATINO'S classified Plaintiff and all of the other Aggrieved Employees as non-exempt employees entitled to the protections of the Labor Code and the Wage Order. Plaintiff's latest rate of pay was approximately \$18.00 per hour.

14. SABATINO'S failed to pay Plaintiff and the other Aggrieved Employees for all time worked or subject to its control. Plaintiff and the other Aggrieved Employees consistently

1 worked “off the clock” in that the company had a policy and practice of rounding down work
2 hours and “time shaving” which led to Plaintiff and others not being paid for all hours worked,
3 which would include the minimum wage. Moreover, to the extent employees such as Plaintiff
4 and others worked through their meal periods and those meal periods were interrupted, they
5 were not compensated for that time, which would be akin to a minimum wage violation.

6 15. Due to the above “off the clock” violations, SABATINO’S failed to pay
7 Plaintiff and the Aggrieved Employees properly-calculated overtime wages. The Aggrieved
8 Employees’ actual work hours, which included the “off the clock” work as described above,
9 entitled them to overtime, however, it was not company policy to keep accurate track of all
10 hours worked and to pay employees the accurate amount of overtime, especially since the “off
11 the clock” work was not factored into the equation. Even on days when Plaintiff worked shifts
12 over 9 or 10 hours long, SABATINO’S did not pay him overtime pay at the rate of 1½ times
13 his regular rate of pay. Furthermore, any incentive payments and/or bonus payments were not
14 factored into employees’ regular rate of pay for purposes of deciphering the correct overtime
15 rate of pay. In addition, any bonus and/or incentive payments were not factored into the
16 correct meal and rest break premium pay per *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11
17 Cal. 5th 858, 863.

18 16. SABATINO’S failed to provide all compliant meal periods and authorize and
19 permit all compliant rest periods to which Plaintiff and the other Aggrieved Employees were
20 entitled. Plaintiff and the other Aggrieved Employees were entitled to take off-duty,
21 uninterrupted 30-minute meal periods before the fifth and tenth hours of work and to take
22 uninterrupted 10-minute rest periods for every four hours or major fraction thereof worked.
23 Due to the workload, Plaintiff and the Aggrieved Employees would not be able to take timely,
24 uninterrupted meal periods before the 5th hour worked. Throughout his employment tenure,
25 Plaintiff never took meal breaks, never clocked in and out for meal periods, and was never told
26 by SABATINO’S to take his meal periods. Similarly, Plaintiff and the other Aggrieved
27 Employees were not able to take their 10-minute rest breaks due to the work load/ press of
28 business. Throughout his employment tenure, Plaintiff never took rest breaks. On information

1 and belief, SABATINO'S did not provide premium wages for these meal and rest break
2 violations; if SABATINO'S did provide premium wages, they were not paid at the correct
3 rate, as explained above.

4 17. SABATINO'S failed to pay its employees all wages due to them within any
5 time period specified by California Labor Code section 204, including the minimum wages
6 and overtime as described above as well as meal/rest break premiums.

7 18. SABATINO'S did not provide Plaintiff and the other Aggrieved Employees
8 accurate, itemized wage statements. Wage statements must include all hours worked, overtime
9 hours worked, all applicable hourly rates, the correct legal name and correct address of
10 employer entity, gross wages earned, all deductions, net wages earned, reimbursement for
11 business expenses, the correct start and end of the applicable pay period, the employee ID
12 numbers or social security numbers, among other items. Labor Code § 226(a)(2).
13 SABATINO'S issued wage statements that inaccurately reflected total hours worked, gross
14 and net wages earned, and the number of hours worked at each hourly rate because of
15 SABATINO'S' failure to properly pay wages as explained herein. Labor Code §§ 226(a)(1),
16 (2), (5), (9). SABATINO'S' failure to maintain accurate records as to the hours worked daily
17 by employees also constitutes a violation of Labor Code section 1174(d).

18 19. Finally, because SABATINO'S did not properly pay all wages earned as
19 explained herein, SABATINO'S also failed to pay final wages owed to Plaintiff and the other
20 Aggrieved Employees in violation of Labor Code section 203. These earned but unpaid wages
21 include minimum wages and compensation for all hours worked, overtime compensation, and
22 premium pay for missed meal and rest breaks, among others.

23 20. SABATINO'S has also violated Labor Code section 558 and engaged in
24 business practices which violate Business and Professions Code Section 17200.

25 21. In addition, Plaintiff would also have individual claims against SABATINO'S
26 for racial harassment and constructive wrongful discharge. During his employment tenure,
27 Plaintiff's supervisor, chef "David" (last name unknown), an American male, would
28 consistently refer to Plaintiff (and his coworkers) as "fucking Mexicans and Salvadorians" on

1 a daily basis and would make comments such as “I bet they are in a gang”, among others. Chef
2 David also told Plaintiff and his coworkers that they didn’t have the right to eat if he didn’t see
3 what they were eating. In fact, Chef David forbid Plaintiff and his coworkers from eating
4 sausages and did not allow them to eat fresh pasta from the same day (they could only eat
5 pasta that was 1 or 2 days old). Moreover, there was a table set up at the back of the restaurant
6 that Chef David threw away to prevent Plaintiff and his coworkers from using it (often times
7 they would eat at that table after clocking out at the end of their shifts). Finally, Chef David
8 did not allow Plaintiff and his coworkers to listen to their music while working and told them
9 to shut it off. Chef David’s harassment created a work environment that was hostile and
10 offensive. Due to the above, along with the rampant labor code violations, Plaintiff’s work
11 environment became intolerable. Consequently, Plaintiff was forced to quit his employment on
12 or around May 17, 2023.

13 22. Pursuant to California Government Code § 12960, Plaintiff has exhausted his
14 administrative remedies. Plaintiff filed a complaint with the State of California Civil Rights
15 Department (“CRD”) (previously “DFEH”) for racial harassment and constructive wrongful
16 termination against SABATINO’S setting forth the particulars thereof and containing other
17 information as may be required by the CRD. On the same day, the CRD issued a notice of
18 right-to-sue to Plaintiff against the named Defendants.

19 **FIRST CAUSE OF ACTION**

20 **FAILURE TO PAY ALL WAGES EARNED FOR ALL HOURS WORKED**

21 **(Lab. Code §§ 510, 1194, 1197, and 1198)**

22 **(By Plaintiff against all Defendants)**

23 23. Plaintiff incorporates all paragraphs of the Complaint as if fully alleged herein.

24 24. At all relevant times, Plaintiff was a non-exempt employee of Defendants and
25 entitled to the benefits and protections of California Labor Code §§ 510, 1194, 1197, and
26 1198, and the Wage Order.

27 25. Section 2(K) of the Wage Order defines “hours worked” as “the time during
28 which an employee is subject to the control of an employer, and includes all the time the

1 employee is suffered or permitted to work, whether or not required to do so.”

2 26. Section 3 of the Wage Order states:

3 (A) Daily Overtime - General Provisions

4 (1) The following overtime provisions are applicable to
5 employees 18 years of age or over and to employees 16 or
6 17 years of age who are not required by law to attend
7 school and are not otherwise prohibited by law from
8 engaging in the subject work. Such employees shall not
9 be employed more than eight (8) hours in any workday or
10 more than 40 hours in any workweek unless the employee
11 receives one and one-half (1 ½) times such employee's
12 regular rate of pay for all hours worked over 40 hours in
13 the workweek. Eight (8) hours of labor constitutes a day's
14 work. Employment beyond eight (8) hours in any
15 workday or more than six (6) days in any workweek is
16 permissible provided the employee is compensated for
17 such overtime at not less than:

13 (a) One and one-half (1 ½) times the employee's
14 regular rate of pay for all hours worked in excess
15 of eight (8) hours up to and including 12 hours in
16 any workday, and for the first eight (8) hours
17 worked on the seventh (7th) consecutive day of
18 work in a workweek.

17 (b) Double the employee's regular rate of pay for
18 all hours worked in excess of 12 hours in any
19 workday and for all hours worked in excess of
20 eight (8) hours on the seventh (7th) consecutive
21 day of work in a workweek.

21 (c) The overtime rate of compensation required to
22 be paid to a nonexempt full-time salaried
23 employee shall be computed by using the
24 employee's regular hourly salary as one-fortieth
25 (1/40) of the employee's weekly salary.

24 27. Section 4 of the Wage Order requires an employer to pay non-exempt
25 employees at least the minimum wage set forth therein for all hours worked, which consist of
26 all hours that an employer has actual or constructive knowledge that employees are working.

27 28. Labor Code section 510 states:

28 Eight hours of labor constitutes a day's work. Any work in excess

1 of eight hours in one workday and any work in excess of 40
2 hours in any one workweek and the first eight hours worked on
3 the seventh day of work in any one workweek shall be
4 compensated at the rate of no less than one and one-half times the
5 regular rate of pay for an employee. Any work in excess of 12
6 hours in one day shall be compensated at the rate of no less than
7 twice the regular rate of pay for an employee. In addition, any
8 work in excess of eight hours on any seventh day of a workweek
shall be compensated at the rate of no less than twice the regular
rate of pay of an employee. Nothing in this section requires an
employer to combine more than one rate of overtime
compensation in order to calculate the amount to be paid to an
employee for any hour of overtime work.

9 29. California Labor Code § 1194 invalidates any agreement between an employer
10 and an employee to work for less than the minimum wage required under the applicable Wage
11 Order.

12 30. California Labor Code § 1197 makes it unlawful for an employer to pay an
13 employee less than the minimum wage required under the applicable Wage Order for all hours
14 worked during a payroll period.

15 31. California Labor Code § 1198 makes it unlawful for an employer to employ an
16 employee under conditions that violate the Wage Order.

17 32. In conjunction, these provisions of the California Labor Code require
18 employers to pay non-exempt employees no less than their agreed-upon or statutorily
19 mandated wage rates for all hours worked, including unrecorded hours when the employer
20 knew or reasonably should have known that employees were working during those hours. (See
21 *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.)

22 33. Defendants required Plaintiff to work in excess of eight (8) hours in one
23 workday and forty (40) hours in one workweek without compensating him for such time
24 worked at the premium rates required by California law.

25 34. As described more fully above, Defendants failed to pay all minimum, regular,
26 overtime, and double time wages to Plaintiff because Defendants paid wages based on
27 rounded times, did not pay for off-the-clock work, and failed to pay overtime and double time
28 wages based on correct regular rates of pay.

35. As a result of Defendants' unlawful conduct, Plaintiff has suffered damages in an amount, subject to proof, to the extent that he was not paid the full amount of wages earned during each pay period during the applicable limitations period, including minimum, overtime, and double-time wages.

36. As a result of Defendants' conduct, Plaintiff seeks damages and/or restitution for unpaid wages which Defendants failed to pay him at the rates set forth herein, interest thereon, and costs of suit and reasonable attorney's fees pursuant to California Labor Code §§ 1194.

SECOND CAUSE OF ACTION

FAILURE TO PROVIDE REST BREAKS

(Lab. Code §§ 226.7 and 1198)

(By Plaintiff against all Defendants)

37. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

38. At all relevant times during the applicable limitations period, Plaintiff was a non-exempt employee of Defendants and entitled to the benefits and protections of California Labor Code §§ 226.7, 1198, and the Wage Order.

39. Labor Code § 1198 states,

“The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.”

40. In relevant part, Section 12 of the Wage Order states:

Rest Periods:

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

41. In addition, Labor Code Section 226.7 states

(b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

(c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

42. Pursuant to the Wage Order, Plaintiff was entitled to be provided with net rest breaks of at least ten minutes for each four-hour period of work, or major fraction thereof.

43. Defendants failed to authorize and permit Plaintiff to take compliant rest periods and failed to pay one hour of correctly-calculated premium pay for each day such a rest period was not provided.

44. As a result of Defendants' unlawful conduct, Plaintiff has suffered damages in an amount subject to proof to the extent he was not paid additional wages owed for all rest breaks not provided to him.

45. By reason of the above, Plaintiff is entitled to premium wages for workdays in which one or more rest breaks were not provided to him pursuant to California Labor Code § 226.7, plus interest and costs.

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employee's regular rate of compensation for each workday that the meal period is not provided.

51. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff was entitled to be provided with uninterrupted meal periods of at least 30 minutes for each day he worked five or more hours. Pursuant to California Labor Code § 512, Plaintiff was also entitled to a second 30-minute meal period when he worked more than ten (10) hours in a workday.

52. During the relevant time period, Defendants failed to provide Plaintiff with compliant meal periods before the fifth hour of work and failed to pay one hour of correctly-calculated premium pay for each day such a meal period was not provided.

53. As a result of Defendants' unlawful conduct, Plaintiff has suffered damages in an amount subject to proof to the extent he was not paid additional wages owed for all meal periods not provided to him.

54. By reason of the above, Plaintiff is entitled to premium wages for workdays in which one or more meal periods were not provided to him pursuant to California Labor Code § 226.7, plus interest and costs.

FOURTH CAUSE OF ACTION

FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS

(California Labor Code Section 226)

(By Plaintiff against all Defendants)

55. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

56. Pursuant to California Labor Code Section 226, every employer must furnish each employee an itemized statement of wages and deductions at the time of payment of wages.

57. Defendants knowingly and intentionally did not furnish Plaintiff with pay stubs that accurately reflected all information required by Labor Code Section 226, including but not limited to, all hours worked, gross wages earned, including overtime, minimum wages, and premium pay for missed meal and rest breaks, net wages earned, total hours worked by the employee, all deductions, and business expense reimbursement. Therefore, Defendants failed to maintain and provide accurate itemized wage statements to Plaintiff in accordance with

1 California Labor Code Section 226(a).

2 58. Pursuant to California Labor Code Section 226(e), Plaintiff is entitled to
3 recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in
4 which a violation occurs and one hundred dollars (\$100) per employee for each violation in a
5 subsequent pay period, not exceeding an aggregate amount of four thousand dollars (\$4,000),
6 plus costs and reasonable attorney's fees. Plaintiff only claims damages under this cause of
7 action pursuant to the 1-year period immediately preceding the date this lawsuit was filed.

8 59. As a direct and proximate result of Defendants' unlawful conduct, Plaintiff has
9 sustained damages, including loss of earnings, in an amount to be established at trial. As a
10 further direct and proximate result of Defendants' unlawful conduct, as set forth herein,
11 Plaintiff is entitled to recover penalties, in an amount to be established at trial, as well as costs
12 and attorney's fees pursuant to statute.

13 60. Under this cause of action, Plaintiff prays for penalties due under the statutes
14 alleged along with any allowable interest, penalties, attorney's fees, and costs according to
15 proof at trial.

16 **FIFTH CAUSE OF ACTION**

17 **FAILURE TO PAY WAGES WHEN EMPLOYMENT ENDS**

18 **(California Labor Code Sections 201-203)**

19 **(By Plaintiff against all Defendants)**

20 61. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

21 62. Pursuant to California Labor Code Section 201(a), an employer who discharges
22 an employee must immediately pay for all compensation due and owing.

23 63. Pursuant to California Labor Code Section 202, when an employee resigns, the
24 employer must pay all compensation due and owing within 72 hours of resignation, or on the
25 employee's last day of work, if the employee gives more than 72 hours notice of resignation.

26 64. Pursuant to California Labor Code Section 203, if an employer willfully fails to
27 pay, without abatement or reduction, any wages of an employee whose employment ends, the
28 wages of the employee shall continue as a penalty from the due date at the same rate until paid

1 or until an action is commenced; however, the wages shall not continue for more than 30 days
2 for failure to pay an employee owed wages.

3 65. After Plaintiff's employment with Defendants ended, Defendants willfully
4 refused and continue to refuse to pay him unpaid wages as required by Labor Code Section
5 203.

6 66. Under this cause of action, Plaintiff prays for penalties due under the statutes
7 alleged along with any allowable interest, penalties, attorney's fees, and costs according to
8 proof at trial. Moreover, Plaintiff prays for the above-mentioned money from 3 years
9 immediately preceding the filing of this lawsuit.

10 67. Under this cause of action, Plaintiff also prays for attorney's fees and costs
11 under California Labor Code Section 218.5 for time spent pursuing the non-payment of wages
12 as set forth herein. Plaintiff also prays for interest under California Labor Code Section 218.6.

13 68. Under this cause of action, Plaintiff prays for penalties due under the statutes
14 alleged along with any allowable interest, penalties, attorney's fees, and costs according to
15 proof at trial.

16 **SIXTH CAUSE OF ACTION**

17 **FAILURE TO PAY WAGES OWED EVERY PAY PERIOD**

18 **(California Labor Code Section 204)**

19 **(By Plaintiff against all Defendants)**

20 69. Plaintiff incorporates all paragraphs of this complaint as if fully alleged herein.

21 70. California Labor Code Section 204 establishes the fundamental right of all
22 employees in the State of California to be paid wages in a timely fashion for their work.

23 71. At all times relevant during the liability period, Defendants failed to pay
24 Plaintiff the full amount of all owed wages when due as required by California Labor Code
25 Section 204.

26 72. Defendants failed to pay Plaintiff all wages earned each pay period. Plaintiff is
27 informed, believes, and thereon alleges, that all times relevant during the applicable limitations
28 period, Defendants maintained a policy or practice of not paying Plaintiff wages for all hours

1 worked, including the minimum wage, overtime hours, double time hours, and premium pay
2 for missed meal and rest breaks.

3 73. As a result of Defendants' unlawful conduct, Plaintiff has suffered damages in
4 an amount, subject to proof, to the extent he was not paid all wages each pay period. The
5 precise amount of unpaid wages is not presently known to Plaintiff but can be determined
6 directly from Defendants' records or indirectly based on information from Defendants' records.

7 74. Under this cause of action, Plaintiff prays for penalties due under the statutes
8 alleged along with any allowable interest, penalties, attorney's fees, and costs according to
9 proof at trial.

10 **SEVENTH CAUSE OF ACTION**

11 **FAILURE TO PROVIDE PERSONNEL RECORDS**

12 **(By Plaintiff against all Defendants)**

13 75. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

14 76. Labor Code section 1198.5 dictates "every current and former employee, or his
15 or her representative, has the right to inspect and receive a copy of the personnel records that
16 the employer maintains relating to the employee's performance or to any grievance concerning
17 the employee."

18 77. Moreover, pursuant to sub-part (b)(1) of Labor Code section 1198.5, "the
19 employer shall make the contents of those personnel records available for inspection to the
20 current or former employee, or his or her representative, at reasonable intervals and at
21 reasonable times..." On information and belief, Defendants intentionally failed to provide
22 Plaintiff with personnel records when requested by Plaintiff via letter on June 2, 2023, as
23 required by law. Plaintiff requested his personnel records in accordance with California Labor
24 Code section 1198.5(k) on June 2, 2023 via certified U.S. mail.

25 78. Defendants failed to provide Plaintiff with an opportunity to inspect or copy his
26 records within 30 days. As a direct result of Defendants' violations alleged herein, Plaintiff has
27 suffered and continues to suffer substantial losses related to Defendants' failure to provide
28 personnel records.

79. Plaintiff seeks all available remedies for Defendants' violations including, but not limited to penalties, and costs to the extent permitted by law and according to proof at trial. Pursuant to Labor Code section 1198.5, Plaintiff prays for judgment against Defendants in the amount of \$750.00, along with costs and attorney's fees.

EIGHTH CAUSE OF ACTION

FAILURE TO PROVIDE PAY RECORDS

(By Plaintiff against all Defendants)

80. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

81. Labor Code section 226 sub-section (b) dictates “an employer...shall afford current and former employees the right to inspect or copy records pertaining to their employment, upon reasonable request to the employer...”

82. Moreover, pursuant to sub-section (c) of Labor Code section 226, “an employer who receives a written or oral request to inspect or copy records pursuant to subdivision (b) pertaining to a current or former employee shall comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request.” On information and belief, Defendants intentionally failed to provide Plaintiff with pay records when requested by Plaintiff via letter, on June 2, 2023, and as required by law. Plaintiff requested his pay records in accordance with California Labor Code section 226 on June 2, 2023, via U.S. certified mail. Defendants failed to provide Plaintiff with an opportunity to inspect or copy his pay records within 21 days.

83. As a direct result of Defendants' violations alleged herein, Plaintiff has suffered and continues to suffer substantial losses related to Defendants' failure to provide pay records. Pursuant to Labor Code section 226, Plaintiff prays for judgment against Defendants in the amount of \$750.00, along with costs and attorney's fees.

84. Plaintiff seeks all available remedies for Defendants' violations including, but not limited to, penalties and costs to the extent permitted by law and according to proof at trial.

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1 **NINTH CAUSE OF ACTION**

2 **CIVIL PENALTIES**

3 **(Lab. Code §§ 2698, et seq.)**

4 **(By Plaintiff against all Defendants)**

5 85. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

6 86. Plaintiff is an Aggrieved Employee under the Private Attorneys General Act of
7 2004 (“PAGA”) because he was employed by Defendants during the applicable statutory
8 period and suffered one or more of the violations of the Labor Code set forth in this Complaint.
9 Plaintiff seeks to recover on his own behalf, on behalf of the State of California, and on behalf
10 of all current and former Aggrieved Employees of Defendants, the civil penalties provided by
11 PAGA, plus reasonable attorney’s fees and costs.

12 87. During the applicable time period, Defendants violated California Labor Code
13 §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 558, 558.1, 1174, 1194, 1197, and 1198.

14 88. California Labor Code §§ 2699(a) and (g) authorize an aggrieved employee, on
15 behalf of themselves and other current or former employees, to bring a civil action to recover
16 civil penalties pursuant to the procedures specified in California Labor Code § 2699.3.

17 89. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the
18 Aggrieved Employees are entitled to recover civil penalties for each of the Defendants’
19 violations of California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 558, 558.1,
20 1174, 1194, 1197, and 1198 during the applicable limitations period in the following amounts:

21 A. For violations of California Labor Code § 204, one hundred dollars
22 (\$100.00) for each Aggrieved Employee for each initial violation and two hundred dollars
23 (\$200.00) for each Aggrieved Employee for each subsequent violation (penalty amounts
24 established by California Labor Code § 210).

25 B. For violations of California Labor Code § 226(a), two hundred fifty
26 dollars (\$250.00) for each Aggrieved Employee for initial violation and one thousand dollars
27 (\$1,000.00) for each Aggrieved Employee for each subsequent violation (penalty amounts
28 established by California Labor Code § 226.3).

1 C. For violations of California Labor Code §§ 510, 512, and 558.1, fifty
2 dollars (\$50.00) for each Aggrieved Employee for initial violation and one hundred dollars
3 (\$100.00) for each Aggrieved Employee for each subsequent violation (penalty amounts
4 established by California Labor Code § 558).

5 D. For violations of California Labor Code § 1174, five hundred dollars
6 (\$500.00) for each Aggrieved Employee for each violation (penalty amounts established by
7 California Labor Code § 1174.5).

8 E. For violations of California Labor Code § 1197, one hundred dollars
9 (\$100.00) for each Aggrieved Employee for each initial and intentional violation and two
10 hundred fifty dollars (\$250.00) for each Aggrieved Employee for each subsequent violation,
11 per pay period (regardless of whether the initial violations were intentionally committed)
12 (penalty amounts established by California Labor Code § 1197.1).

13 F. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1194,
14 and 1198, one hundred dollars (\$100.00) for each Aggrieved Employee per pay period for each
15 initial violation and two hundred dollars (\$200.00) for each Aggrieved Employee per pay
16 period for each subsequent violation (penalty amounts established by California Labor Code §
17 2699(f)(2)).

18 G. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff individually
19 is entitled to recover civil penalties for each of the Defendants' violations of California Labor
20 Code § 1102.5 during the applicable limitations period in the following: an amount not to
21 exceed \$10,000 for each violation by Defendants of California Labor Code § 1102.5(c), as well
22 as attorney's fees and costs under Labor Code § 2699(g) (penalty amounts established by
23 California Labor Code § 1102.5(f)).

24 90. Plaintiff has complied with the procedures for bringing suit specified in
25 California Labor Code § 2699.3. By letter dated June 2, 2023, Plaintiff filed written notice
26 online with the Labor and Workforce Development Agency ("LWDA") and gave written notice
27 by certified mail to Defendants of the specific provisions of the California Labor Code alleged
28 to have been violated, including the facts and theories to support the alleged violations. Plaintiff

1 accompanied his LWDA notice with a fee in the amount of \$75.00. The LWDA has failed to
2 take action in response within 65 calendar days of the date of Plaintiff's notice, but Plaintiff
3 anticipates that the LWDA will provide written notice to Plaintiff informing him that it does
4 not intend to investigate these allegations.

5 91. Pursuant to California Labor Code § 2699(g), Plaintiff and the Aggrieved
6 Employees are entitled to an award of civil penalties and reasonable attorney's fees and costs in
7 connection with their claims for civil penalties.

8 **TENTH CAUSE OF ACTION**

9 **HARASSMENT IN VIOLATION OF FEHA**

10 **(Gov. Code § 12940(j))**

11 **(By Plaintiff against all Defendants except JAMES SABATINO OGNIBENE)**

12 92. Plaintiff incorporates by reference each and every paragraph of this Complaint
13 as if fully alleged herein.

14 93. Plaintiff was and is at all times relevant hereto an employee covered by
15 Government Code section 12926(c).

16 94. Defendants were at all times relevant hereto employers within the meaning of
17 Government Code section 12926(d) and, as such, required by FEHA to take all reasonable
18 steps to prevent harassment and discrimination from occurring and to ensure a workplace free
19 from racial harassment.

20 95. Chef "David", was at all times relevant hereto a "supervisor" within the
21 meaning of Government Code section 12926(t).

22 96. As described above, Chef "David" consistently and repeatedly harassed
23 Plaintiff, based on his race, by inappropriately making racist comments towards him and
24 mistreating him. Chef David's harassing behavior was severe and pervasive and turned
25 Plaintiff's work environment into a hostile one. Chef "David" was a supervisor and/or an
26 agent of the other Defendants. Therefore, the other Defendants are strictly liable for Chef
27 "David's" harassment.

28 97. Plaintiff is informed and believes and thereupon alleges that Defendants knew

1 or reasonably should have known of Chef David's consistent harassment against Plaintiff and
2 failed to take immediate and appropriate corrective action.

3 98. A reasonable person in Plaintiff's circumstances would have considered the
4 work environment to be hostile, intimidating, offensive, oppressive, or abusive.

5 99. Plaintiff was harmed.

6 100. Chef David's harassing conduct was a substantial factor in causing Plaintiff's
7 harm.

8 101. The acts taken toward Plaintiff were carried out by and/or ratified by
9 Defendants and/or managing agent employees of Defendants, acting in a despicable,
10 oppressive, fraudulent, malicious, deliberate, egregious, and inexcusable manner in order to
11 injure and damage Plaintiff, thereby justifying an award to him of punitive damages in a sum
12 appropriate to punish and make an example of Defendants.

13 102. As a proximate result of the wrongful acts of Defendants, Plaintiff has suffered
14 and continues to suffer anxiety, worry, embarrassment, humiliation, mental anguish, and
15 emotional distress. Plaintiff is informed and believes and thereon alleges that he will continue
16 to experience said emotional suffering for a period in the future he cannot presently ascertain,
17 all in an amount subject to proof at the time of trial.

18 **ELEVENTH CAUSE OF ACTION**

19 **FAILURE TO PREVENT, INVESTIGATE, AND REMEDY HARASSMENT**

20 **IN VIOLATION OF THE FEHA**

21 **(Gov. Code, §§ 12940(j)(1) & (k))**

22 **(By Plaintiff against all Defendants except JAMES SABATINO OGNIBENE)**

23 103. Plaintiff incorporates by reference each and every paragraph of this Complaint
24 as if fully alleged herein.

25 104. Plaintiff was and is at all times relevant hereto an employee covered by
26 Government Code § 12926(c).

27 105. Defendants were at all times relevant hereto employers who employed five or
28 more persons within the meaning of Government Code § 12926(d), and California

1 Government Code §§ 12940, et seq., was in full force and effect and was binding on
2 Defendants.

3 106. It is unlawful for an employer to not take immediate and appropriate corrective
4 action against harassment of an employee that the employer knows or should have known
5 about. (Gov. Code, § 12940(j)(1).) It is also unlawful for an employer to not take all reasonable
6 steps necessary to prevent discrimination and harassment from occurring. (Id. § 12940(k).) If
7 an employer has failed to take such preventative measures, that employer can be held liable for
8 the harassment. (Cal. Code. Regs., tit. 2, § 7287.6(b)(3).)

9 107. As described above, Defendants subjected Plaintiff to unlawful racial
10 harassment in violation of Cal. Gov. Code § 12940 (j).

11 108. Plaintiff is informed and believes and thereupon alleges that Defendants knew or
12 reasonably should have known of Chef David's consistent harassment against Plaintiff.

13 109. Plaintiff is informed and believes and thereupon alleges that Defendants failed
14 to provide adequate training to its executives, supervisors, and managers. Defendants should
15 have provided training and instruction to Chef David on the laws pertaining to discrimination,
16 harassment, and retaliation. Defendants failed to do so. Instead, Defendants engaged in a
17 pattern or practice of harassing Plaintiff based on his race. As a result, Defendants failed to take
18 all reasonable steps necessary to prevent or stop the harassment from occurring.

19 110. As a proximate result of the wrongful acts of Defendants, Plaintiff has been
20 harmed in that Plaintiff has suffered actual, consequential and incidental financial losses,
21 including without limitation, loss of salary and benefits, and the intangible loss of
22 employment-related opportunities and damage to his professional reputation, all in an amount
23 subject to proof at the time of trial. Plaintiff claims such amounts as damages together with
24 prejudgment interest pursuant to Civil Code Sections 3287 and/or § 3288 and/or any other
25 provision of law providing for prejudgment interest.

26 111. As a proximate result of the wrongful acts of Defendants, Plaintiff has suffered
27 and continues to suffer anxiety, worry, embarrassment, humiliation, mental anguish, and
28 emotional distress. Plaintiff is informed and believes and thereon alleges that he will continue

1 to experience said emotional suffering for a period in the future he cannot presently ascertain,
2 all in an amount subject to proof at the time of trial.

3 112. The acts taken toward Plaintiff were carried out by and/or ratified by
4 Defendants and/or managing agent employees of Defendants acting in a despicable, oppressive,
5 fraudulent, malicious, deliberate, egregious, and inexcusable manner in order to injure and
6 damage Plaintiff, thereby justifying an award to him of punitive damages in a sum appropriate
7 to punish and make an example of Defendants.

8 **TWELFTH CAUSE OF ACTION**

9 **NEGLIGENT HIRING, RETENTION, SUPERVISION, AND TRAINING**

10 **(By Plaintiff against all Defendants except JAMES SABATINO OGNIBENE)**

11 113. Plaintiff incorporates by reference each and every paragraph of this Complaint
12 as if fully alleged herein.

13 114. Defendants owed a duty of care to Plaintiff to appoint, hire, retain, supervise,
14 and train persons who would not engage in harassing or discriminatory conduct. Defendants
15 owed a duty of care to Plaintiff not to retain managers or employees who would discriminate
16 against, harass, or retaliate against employees for engaging in protected activities. Defendants
17 owed a duty of care to Plaintiff to supervise their managers and employees closely to ensure
18 that they would refrain from harassing Plaintiff. Defendants owed a duty of care to Plaintiff to
19 train their managers and employees not to engage in discrimination, harassment, or retaliation.

20 115. As described above, Defendants breached these duties. Chef David consistently
21 and repeatedly harassed Plaintiff based on his race. As a result, Defendants caused damages to
22 Plaintiff.

23 116. As a proximate cause of Defendants' negligent hiring, retention, supervision,
24 and training of their managers and employees, Plaintiff has suffered and continues to suffer
25 damages, including losses of earnings and benefits, according to proof.

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THIRTEENTH CAUSE OF ACTION
WRONGFUL CONSTRUCTIVE DISCHARGE IN VIOLATION OF PUBLIC POLICY
(By Plaintiff against all Defendants except JAMES SABATINO OGNIBENE)

117. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

118. At all times during his employment with Defendants, Plaintiff performed his duties with the utmost diligence and competence.

119. Defendants intentionally created an illegal work environment and atmosphere by harassing Plaintiff based on his race and subjecting him to a hostile work environment, thereby not giving Plaintiff an opportunity to work in an environment free of harassment and labor code violations. This situation became intolerable for Plaintiff and Plaintiff had no alternative but to quit his job.

120. The employment of Plaintiff was constructively wrongfully terminated on or around May 17, 2023 in violation of the fundamental public policy of the State of California with respect to harassing an employee based on his race and subjecting him to a hostile work environment. Moreover, Plaintiff was forced to hire an attorney to assist him to end these illegal activities. Said conduct violated statutory and constitutional expressions of public policy, the California Labor Code and the California Constitution, Article 1 section 8.

121. As set forth above, said actions by Defendants were wrongful and in violation of the fundamental principles of the public policy of the State of California as reflected in its laws, objectives and policies. Said statutes and constitutional expressions of public policy include, but are not limited to, the FEHA and the California Labor Code. These laws inure to the benefit of the public at large, and not just the private interests of the employers and employees whom they govern or protect.

122. As a direct and proximate result of the aforementioned acts and omissions of Defendants, Plaintiff suffered general and compensatory damages, including but not limited to, loss of income (past and future), loss of employment benefits (past and future), general and compensatory damages (past and future), mental pain and anguish and emotional distress (past and future), and will continue to suffer in the future, in an amount to be proved at trial.

1 123. The foregoing conduct engaged in by Defendants and each of their directors,
2 officers and/or managing agents, constitutes malice, fraud, and oppression and was authorized,
3 ratified, and carried on with a conscious and willful disregard of their workers' right to work
4 in an environment free of harassment, so as to justify the imposition of punitive damages to
5 punish and set an example of said Defendants.

6 **FOURTEENTH CAUSE OF ACTION**

7 **UNFAIR COMPETITION**

8 **(Bus. & Prof. Code §§ 17200, *et seq.*)**

9 **(By Plaintiff against all Defendants except JAMES SABATINO OGNIBENE)**

10 124. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

11 125. At all relevant times during the applicable limitations period, Plaintiff has been
12 an employee of Defendants and entitled to the benefits and protections of the Business and
13 Professions Code §§ 17200, *et seq.*

14 126. The unlawful conduct of Defendants alleged herein amounts to and constitutes
15 unfair competition within the meaning of California Business & Professions Code §§ 17200,
16 *et seq.* Due to their unfair and unlawful business practices alleged herein, Defendants have
17 unfairly gained a competitive advantage over other comparable companies doing business in
18 California that comply with their legal obligations to, among other things, refrain from
19 harassment and prevent harassment, pay their employees premium wages for workdays in
20 which they did not provide employees with one or more meal and rest periods, indemnify
21 them for all business expenses incurred during the course of performing their duties, and pay
22 them all wages earned.

23 127. As a result of Defendants' unfair competition as alleged herein, Plaintiff has
24 suffered injuries in fact and lost money or property. Defendants failed to pay Plaintiff for all
25 hours worked, failed to provide him with premium wages for missed meal and rest periods,
26 and failed to reimburse Plaintiff for all expenses he incurred in the course of performing his
27 duties.

28 128. Pursuant to California Business & Professions Code § 17203, Plaintiff is

1 entitled to restitution of all monies rightfully belonging to him that Defendants did not pay him
2 or otherwise retained by means of their unlawful and unfair business practices.

3 129. Plaintiff is entitled to reasonable attorneys' fees in connection with his unfair
4 competition claims pursuant to California Code of Civil Procedure § 1021.5, the substantial
5 benefit doctrine and/or the common fund doctrine.

6 130. Accordingly, with respect to this cause of action, Plaintiff prays for the herein
7 stated relief, and an award of all reasonable costs and attorneys' fees, including interest
8 thereon, as permitted by law, all in amounts subject to proof.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff prays for relief and judgment against Defendants as follows:

- 11 1. For compensatory damages including lost past and future wages, commissions, and all
12 other sums of money, including employment benefits, together with interest on said
13 amounts, and any other economic injury to Plaintiff, according to proof;
- 14 2. For general damages according to proof;
- 15 3. For special and consequential damages to the extent allowed by law;
- 16 4. For punitive and exemplary damages against Defendant LIDO SHIPYARD SAUSAGE,
17 CO. in an amount subject to proof;
- 18 5. For damages and penalties under Labor Code Section 226 for Plaintiff in an amount
19 subject to proof at trial;
- 20 6. For damages and penalties pursuant to Labor Code Section 203 in an amount subject to
21 7. proof at trial;
- 22 8. For one hour of wages due to Plaintiff for each work period of more than five (5) hours
23 when Plaintiff did not receive an uninterrupted thirty (30) minute meal period;
- 24 9. For one hour of wages due to Plaintiff for each work period of four (4) hours or major
25 fraction thereof when Plaintiff did not receive a ten (10) minute rest break;
- 26 10. For maximum civil penalties available under the Labor Code and applicable Wage
27 Order against Defendants as described more particularly in the Complaint;
- 28 11. For restitution and disgorgement for all unfair business practices by Defendant LIDO

- SHIPYARD SAUSAGE, CO. against Plaintiff in an amount according to proof;
12. For an order enjoining Defendant LIDO SHIPYARD SAUSAGE, CO. from further unfair and unlawful business practices in violation of Business and Professions Code Sections 17200, et seq.;
13. For all remedies available to Plaintiff under the applicable Wage Order and the Labor Code including an award of unpaid wages, attorney's fees, costs, interest, liquidated damages, damages, penalties, and waiting time penalties according to proof to the extent permitted by law;
14. For the imposition of civil penalties and/or statutory penalties;
15. For all interest as allowed by law;
16. For all costs and disbursements incurred in this suit;
17. Reasonable attorney's fees where available by law, including but not limited to, pursuant to, Code of Civil Procedure section 1021.5, Labor Code section 1102.5(j), and/or other applicable laws; and
18. For such other and further relief as this Court may deem proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands, as a matter of right, a trial by jury in this case.

Dated: September 7, 2023

MM LAW, APC

By Maralle Messrelan
Maralle Messrelan, Esq.
Attorney for Plaintiff,
JOSE FABIAN