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JOHN NOLAN, individually and in a
representative capacity on behalf of
other members of the general public
similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

JOHN NOLAN, individually and in a
representative capacity on behalf of other
members of the general public similarly situated,
Plaintiff,

v.

SWAMI'S 101 LLC, a California limited liability
company; and DOES 1 through 10, inclusive,
Defendant.

Case No: 37-2023-00045842-CU-OE-CTL

COMPLAINT FOR:

1. MINIMUM WAGE VIOLATIONS
PURSUANT TO LABOR CODE §
2698 *et seq.*;
2. OVERTIME VIOLATIONS
PURSUANT TO LABOR CODE §
2698 *et seq.*;
3. WAGE STATEMENT
VIOLATIONS PURSUANT TO
LABOR CODE § 2698 *et seq.*;
4. MEAL AND REST PERIOD
VIOLATIONS PURSUANT TO
LABOR CODE § 2698 *et seq.*;
5. FAILURE TO TIMELY PAY
WAGES PURSUANT TO LABOR
CODE § 2698 *et seq.*;
6. FAILURE TO PAY WAGES UPON
SEPARATION PURSUANT TO
LABOR CODE § 2698 *et seq.*;
7. FAILURE TO PAY WAGES UPON
SEPARATION PURSUANT TO
LABOR CODE § 2802.

[JURY TRIAL DEMANDED]

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COMES NOW Plaintiff JOHN NOLAN (“Plaintiff”) individually, and in a representative capacity on behalf of other members of the general public similarly situated, alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. This Court has jurisdiction over this matter in that all parties are residents of, or do business within, the State of California and the amount in controversy exceeds the statutory minimum limit of this Court. The monetary damages and restitution sought by Plaintiff exceed the minimal jurisdiction limits of the Superior Court and will be established according to proof at trial. Furthermore, there is no federal question at issue as Wage and Hour protections and remedies related thereto are based solely on California Law and Statutes, including the Labor Code, Civil Code, and IWC Wage Order(s). Also, the Ninth Circuit has recently held that, for purposes of establishing federal diversity jurisdiction, penalties pursuant to the Private Attorneys General Act of 2004 (“PAGA”) may not be aggregated. *Urbino v. Orkin Servs. of California, Inc.*, 726 F.3d 1118, 1122 (9th Cir. 2013).
2. Venue before this Court is proper in that certain wrongful acts which gave rise to Plaintiff injuries occurred in the County of San Diego, State of California.
3. Plaintiff is informed and believes and thereon alleges that at all relevant times mentioned herein, Defendant SWAMI’S 101, LLC (“SWAMI’S” or “Defendant” herein) was and is a California Limited Liability Company doing business throughout the state, including the County of San Diego, State of California.
4. Plaintiff is presently unaware of the true names, capacities and liability of Defendants named herein as DOES 1 through 10, inclusive. Accordingly, Plaintiff will seek leave of court to amend this complaint to allege their true names and capacities after the same have been ascertained.
5. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendant is responsible in some manner for the wrongs and damages as herein alleged, and in so acting was functioning as the agent, servant, partner, and employee of the co-Defendant, and in doing the actions mentioned below, was acting within the course and

1 scope of his or her authority as such agent, servant, partner, and employee with the
2 permission and consent of the co-Defendant. Plaintiff injuries as herein alleged were
3 proximately caused by said Defendant. Wherever it is alleged herein that any act or
4 omission was done or committed by any specially named Defendant or Defendants,
5 Plaintiff intends thereby to allege and does allege that the same act or omission was also
6 done and committed by each and every defendant named as a DOE, both separately and
7 in concert with the named Defendant or Defendants.

- 8 6. Plaintiff is informed and believes and thereon alleges that Defendant, and each of them,
9 including DOES 1 through 10, are and at all times herein mentioned were either
10 individuals, sole proprietorships, partnerships, registered professionals, corporations, alter
11 egos or other legal entities which were licensed to do and/or were doing business in the
12 County of San Diego, State of California at all times relevant to the subject matter of this
13 action.

14 **FACTUAL BACKGROUND**

- 15 7. On or around 2003, Plaintiff JOHN NOLAN commenced working for Defendant as a
16 non-exempt employee. Plaintiff's employment with Defendant lasted until July 2023.
17 Throughout his employment with Defendant, Plaintiff performed his job in a capable and
18 competent manner and was commended for doing so.
- 19 8. Throughout the term of his employment, Plaintiff was denied the benefits and protections
20 of the Labor Code due to Defendant institutionalized pay practices, standard as to all of
21 Defendant's California-based employees.
- 22 9. On August 16, 2023, counsel for Plaintiff prepared and electronically submitted a letter to
23 the Labor and Workforce Development Agency via the California Department of
24 Industrial Relations' "PAGA Filing" website. This letter concerned Defendant and its
25 Labor Code violations. A copy of this letter was also mailed to Defendant, via USPS
26 Certified Mail. The letter contained the specific provisions of the California Labor Code
27 violated by Defendant, as well as the facts and theories in support of Plaintiff's claims.
28 (Please see **Exhibit 1**, a true and correct copy of this letter.)

10. The statutory time period for the LWDA to investigate and/or respond, and for the employers to respond, has concluded. Throughout the operative limitations period, Plaintiff and all other aggrieved employees were denied the protections and benefits of the Labor Code and IWC Wage Order(s) due to Defendants' standard practices. Said violations are set forth below.

REPRESENTATIVE ALLEGATIONS

11. As more specifically set forth below, Plaintiff brings this action in a representative capacity on behalf of all current and former nonexempt employees of Defendant. Code Civ. Proc. § 2699; *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 980-981. Throughout the operative limitations period, Plaintiff and all other aggrieved employees were denied the protections and benefits of the Labor Code and Industrial Welfare Commission ("IWC") Wage Order(s) due to Defendant's standard practices. Throughout their employment, Plaintiff and all other aggrieved employees were and are denied full and accurate compensation, including overtime compensation, in violation of, inter alia, Labor Code §§ 510 and 1194. Plaintiff and the other aggrieved employees were and are denied meal and rest periods and meal and rest period payments, in violation of, inter alia, IWC Wage Order 5 (or any other applicable Wage Order) and Labor Code §§ 226.7 and 512. Defendant failed to furnish accurate itemized wage statements in violation of, inter alia, Labor Code § 226. Defendant failed to reimburse Plaintiff and other aggrieved employees for necessary business expenditures in violation of, inter alia, Labor Code § 2802. Defendant failed to provide all compensation due at termination of employment in violation of, inter alia, Labor Code §§ 201 through 203.

12. Plaintiff brings this action on the grounds that he and other similarly situated current and former employees of Defendant were and are improperly denied the mandated wages and reimbursements resulting from the above-referenced violations. Code Civ. Proc. § 2699; *Arias*, 46 Cal. 4th at 980-981. The number of current and former aggrieved employees is believed to exceed fifty (50) aggrieved employees.

- 1 13. The approximately fifty (50) aggrieved employees are comprised of all of Defendant's
2 current and former California-based employees, designated as "nonexempt" by
3 Defendant. Defendant's standard policies and practices which lead to Labor Code
4 violations, as alleged herein, applied to all California nonexempt employees.
- 5 14. There are questions of fact and law common to all aggrieved employees arising from
6 Defendant's actions include, among others, the following:
- 7 a. Whether Defendant failed to pay its employees the proper straight-time, overtime,
8 and double time wages due and owing to them;
 - 9 b. Whether Defendant failed to provide its employees with statutorily-compliant
10 Meal and/or Rest Periods, in violation of, inter alia, California Labor Code §§ 512
11 and 226.7, in that Defendant written policies are not compliant with California
12 law, Defendant do not allow its employees duty-free Meal and/or Rest Periods,
13 and Defendant improperly "round" employees recorded Meal Periods;
 - 14 c. Whether Defendant failed to properly provide Meal and Rest Period premiums in
15 accordance with law;
 - 16 d. Whether Defendant failed to properly calculate and pay its employees Overtime
17 compensation or Meal and Rest Period premiums in accordance with law by
18 failing to properly calculate, into the Regular Rate of Pay, the value of employee
19 benefits;
 - 20 e. Whether Defendant failed to properly reimburse its employees for necessary
21 business expenditures for, inter alia, cell phone costs and mileage, in violation of
22 Labor Code § 2802;
 - 23 f. Whether Defendant failed to provide all compensation upon termination of
24 employment in violation of Labor Code §§ 201-203, due, in part, to the fact that
25 Defendant failed to provide proper compensation for all hours worked, as
26 discussed above; and
 - 27 g. Whether Defendant failed to provide Plaintiff and all other aggrieved employees
28 with accurate itemized wage statements in violation of, among other statutes,
Labor Code § 266.

- 1 15. At all times mentioned herein, Defendant were subject to the Labor Code and Industrial
2 Welfare Commission Wage Orders of the State of California, including, but not limited
3 to, California Labor Code § 2698 et seq.
- 4 16. At all times mentioned herein, Defendant are and were “employers” as that term is used
5 within the relevant sections of the California Labor Code and the applicable wage order.
6 An employer-employee relationship existed between Plaintiff and Defendant.
- 7 17. Plaintiff has exhausted his administrative remedies and pre-filing requirements California
8 Labor Code § 2699.3, and has also fulfilled all notice requirements under the statute. On
9 August 16, 2023, counsel for Plaintiff prepared and electronically submitted a letter to the
10 Labor and Workforce Development Agency via the California Department of Industrial
11 Relations’ “PAGA Filing” website. This letter concerned Defendant and its Labor Code
12 violations. A copy of this letter was also mailed to Defendant, via USPS Certified Mail.
13 The letter contained the specific provisions of the California Labor Code violated by
14 Defendant, as well as the facts and theories in support of Plaintiff claims. (Please see
15 **Exhibit 1**, a true and correct copy of this letter.)
- 16 18. The statutory time period for the LWDA to investigate and/or respond, and for the
17 employers to respond, has concluded.
- 18 19. Throughout the operative limitations period, Plaintiff and all other aggrieved employees
19 were denied the protections and benefits of the Labor Code and IWC Wage Order(s) due
20 to Defendant's standard practices. Said violations are set forth below.

21 **FIRST CAUSE OF ACTION**

22 **Minimum Wage Violations Pursuant to Labor Code § 2698 et seq.**

23 **Individual and Representative Action**

24 **(By Plaintiff against Defendant and DOES 1 through 10)**

- 25 20. Plaintiff hereby incorporates by reference each and every allegation contained in the
26 preceding paragraphs as though fully set forth herein.
- 27 21. Defendant failed to pay its employees all compensation due in violation of, among other
28 statutes, Labor Code § 1197. California law holds that the failure to pay for any work

1 time constitutes a violation of minimum wage laws. *Armenta v. Osmose, Inc.* (2005) 135
2 Cal.App.4th 314, 323. These violations were caused by and through Defendant's failure
3 to maintain accurate Time Records (as required by California law), to the detriment of the
4 employees. Specifically, Defendant only recorded Plaintiff's, and other employees',
5 scheduled work time as opposed to their actual work time. Plaintiff, and other employees,
6 were paid a flat rate each month. As such, Plaintiff and other aggrieved employees did
7 not receive compensation for working beyond their scheduled work hours, resulting in a
8 loss of compensation. Defendant would often require employees to work beyond their
9 forty scheduled hours without compensation. Additionally, the right to receive the proper
10 minimum wage compensation was impacted by Defendant knowingly failing to consider
11 other work performed by Plaintiff, and other employees, including all time employees
12 were under Defendant's control.

13 22. As a direct result of Defendant's failure to comply with the foregoing provisions of the
14 Labor Code, Plaintiff and all other aggrieved employees have been damaged in an
15 amount to be proven at trial.

16 23. As California Labor Code § 2699 provides for civil penalties recoverable by Plaintiff on
17 behalf of himself and all other aggrieved employees by and through Labor Code §
18 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may
19 recover these penalties pursuant to Labor Code § 2699, as more specifically set forth in
20 the below Prayer For Relief.

21 24. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of
22 Defendant pursuant to Labor Code § 2699(a) for each of these employees.

23 25. Plaintiff also seek an award of reasonable attorney's fees and costs pursuant to Labor
24 Code § 2699(g)(1), and interest, pursuant to Labor Code § 218.6.

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SECOND CAUSE OF ACTION

Overtime Violations Pursuant to Labor Code §§ 510, 1194, and 1198

Individual and Representative Action

(By Plaintiff against Defendant and DOES 1 through 10)

26. Plaintiff hereby incorporates by reference each and every allegation contained in the preceding paragraphs as though fully set forth herein.

27. Defendant willfully failed to pay Plaintiff and all other aggrieved employees all compensation, including Overtime Compensation, due in violation of, among other statutes, Labor Code § 510. These violations occurred due to Defendant's illegal policies, referenced above, whereby employees experienced monetary under-compensation.

Given the length of Plaintiff's, and other employees, shifts the unpaid work time often would have been owed at the overtime rate of pay. These systematic failures to provide proper overtime compensation are in violation of California law.

28. As a direct result of Defendant's failure to comply with the foregoing provisions of the Labor Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be proven at trial.

29. As California Labor Code § 2699 provides for civil penalties recoverable by Plaintiff on behalf of himself and all other aggrieved employees by and through Labor Code § 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover these penalties pursuant to Labor Code § 2699, as more specifically set forth in the below Prayer For Relief.

30. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendant pursuant to Labor Code § 2699(a) for each of these employees.

31. Plaintiff also seek an award of reasonable attorney's fees and costs pursuant to Labor Code § 2699(g)(1), and interest, pursuant to Labor Code § 218.6.

THIRD CAUSE OF ACTION

Wage Statement Violations Pursuant to Labor Code § 226

Individual and Representative Action

(By Plaintiff against Defendant and DOES 1 through 10)

32. Plaintiff hereby incorporates by reference each and every allegation contained in the preceding paragraphs as though fully set forth herein.
33. Defendant willfully failed to provide Plaintiff and all other aggrieved employees with accurate itemized wage statements in violation of, among other statutes, Labor Code § 226. These violations include, but are not limited to, Defendant's failure to accurately identify all applicable regular and overtime rates of pay in violation of section 226(a)(9) and providing inaccurate representations of both "gross" and "net wages." Defendants wage statements do not list the hourly rate for either Regular or Overtime Rates of pay, for any pay period. Since Defendant did not state the hourly rates for any work, Defendant also failed to provide an accurate showing of the "total hours worked," in violation of Labor Code § 226(a)(2).
34. For example, Defendant would not provide compensation for all hours and minutes worked, would use an improper Overtime Rate of Pay, and would fail to pay Meal and/or Rest Period Penalties when due.
35. As a direct result of Defendant's failure to comply with the foregoing provisions of the Labor Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be proven at trial.
36. As California Labor Code § 2699 provides for civil penalties recoverable by Plaintiff on behalf of himself and all other aggrieved employees by and through Labor Code § 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover these penalties pursuant to Labor Code § 2699, as more specifically set forth in the below Prayer For Relief.
37. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendant pursuant to Labor Code § 2699(a) for each of these employees.
38. Plaintiff also seek an award of reasonable attorney's fees and costs pursuant to Labor Code § 2699(g)(1), and interest, pursuant to Labor Code § 218.6.

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FOURTH CAUSE OF ACTION

Meal and Rest Period Violations Pursuant to Labor Code §§ 226.7 and 512

Individual and Representative Action

(By Plaintiff against Defendant and DOES 1 through 10)

39. Plaintiff hereby incorporates by reference each and every allegation contained in the preceding paragraphs as though fully set forth herein.

40. 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.

Defendant violated this section by establishing working conditions below the standard of the applicable Wage Order.

41. Under applicable California law, “An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a Meal Period of not less than 30 minutes [...] An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second Meal Period of not less than 30 minutes” Lab. Code § 512(a); see also 8 Cal. Code Regs. § 11050 (11)(A).

42. Unless the employee is relieved of all duty during a thirty (30) minute Meal Period, the Meal Period shall be considered an “on duty” Meal Period and counted as time worked. 8 Cal. Code Regs. § 11050 (11)(A).

43. California law requires employers to provide nonexempt employees with a 10-minute Rest Period for every four hours worked, or “major fraction thereof.” 8 Cal. Code Regs. § 11050 (12).

44. An employer who fails to provide Meal or Rest Periods as required by an applicable Wage Order must pay the employee one additional hour of pay at the employee’s regular rate of pay for each workday that the Meal or Rest Period was not provided. Lab. Code § 226.7(b); 8 Cal. Code Regs. § 11050 (11), (12).

- 1 45. Within the operative time period, Defendant failed to possess compliant Meal and Rest
2 Period policies and practices.
- 3 46. For example, Plaintiff and other aggrieved employees were often not able to take rest or
4 meal breaks due to the demanding nature food service operations. The food service
5 industry is known for its unpredictability, marked by sudden rushes, and emergencies.
6 Plaintiff, and other aggrieved employees, often needed to remain readily available to
7 address these situations promptly to ensure the restaurant ran smoothly. Defendant's
8 Meal and Rest Period policy also assumes that employees have "waived" the right to a
9 legally-compliant Meal or Rest Period, or a Meal or Rest Period penalty payment, unless
10 the employees complete a very specific process of formal notification to the Defendant.
11 For example, Defendant's Meal Period Policy states that an employee must immediately
12 notify an Operations Manager, who will then undertake an investigation. Moreover,
13 Defendant policies and practices preclude "duty-free" Meal and Rest Periods. These
14 institutional and established practices of Defendant are illegal, in that Plaintiff and all
15 other employees were denied proper and/or timely Meal and Rest Periods. These
16 violations are due, in part, to the fact that Defendant does not possess a legal Rest Period
17 practice, and does not enforce their own Rest Period policy, resulting in Plaintiff and
18 other aggrieved employees failing to receive all Rest Periods legally due. Defendant does
19 not provide Rest Periods, as defined by California law.
- 20 47. Defendant made no attempt to ensure that Plaintiff's Meal Periods were either timely or
21 wholly provided. Plaintiff, and other aggrieved employees, would often either miss a
22 Meal Period entirely, be provided a short or late Meal Period. Additionally, Defendant
23 failed to accurately record Plaintiff's, and other aggrieved employees', actual start and
24 stop times of Meal Periods, in violation of the IWC Wage Orders. 8 Cal. Code Regs. §
25 11050 (7)(A)(3).
- 26 48. Moreover, Defendant policies and practices preclude "duty-free" Meal and Rest Periods,
27 in that Plaintiff and other aggrieved employees were required to remain "On Call" at all
28 times, including during the Meal and Rest Periods, in order to (among other reasons)

1 address these situations with staff and customers promptly. These institutional and
2 established practices of Defendant are illegal, in that Plaintiff and other aggrieved
3 employees were denied proper and/or timely Meal and Rest Periods.

4 49. Defendant willfully failed and refused to pay Plaintiff and other aggrieved employees one
5 additional hour of pay at their regular rate of pay for all workdays that a Meal or Rest
6 Period was not provided, as required by Labor Code § 226.7 and IWC Wage Order 5
7 (11), (12).

8 50. As a direct result of Defendant's failure to comply with the foregoing provisions of the
9 Labor Code, Plaintiff and all other aggrieved employees have been damaged in an
10 amount to be proven at trial.

11 51. As California Labor Code § 2699 provides for civil penalties recoverable by Plaintiff on
12 behalf of himself and all other aggrieved employees by and through Labor Code §
13 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may
14 recover these penalties pursuant to Labor Code § 2699, as more specifically set forth in
15 the below Prayer For Relief.

16 52. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of
17 Defendant pursuant to Labor Code § 2699(a) for each of these employees.

18 53. Plaintiff also seek an award of reasonable attorney's fees and costs pursuant to Labor
19 Code § 2699(g)(1), and interest, pursuant to Labor Code § 218.6.

20 **FIFTH CAUSE OF ACTION**

21 **Failure to Timely Pay Wages Pursuant to Labor Code § 2698 et seq.**

22 **Individual and Representative Action**

23 **(By Plaintiff against Defendant and DOES 1 through 10)**

24 54. Plaintiff hereby incorporates by reference each and every allegation contained in the
25 preceding paragraphs as though fully set forth herein.

26 55. Plaintiff and all other aggrieved employees performed work for Defendant, as employees
27 of Defendant, as stated herein. Throughout Plaintiff's and all other aggrieved employees'
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1 employment, they earned wages that were not paid to them, as stated herein, in an amount
2 according to proof at trial.

3 56. California Labor Code § 204, applicable at all times relevant herein, provides that all
4 wages earned by any person in any employment are due and payable twice during each
5 calendar month. Defendant failed to pay Plaintiff and other aggrieved employees all the
6 wages they were entitled to under the Code.

7 57. Due, in part, to Defendant's miscalculation of Plaintiff's and other aggrieved employees'
8 appropriate wages, employees were denied the proper wages owed to them during their
9 employment. Defendant failed to provide all wages owed when Plaintiff's and other
10 aggrieved employees' income did not equal double the minimum wage, and their
11 positions met no other requirements for the exemption test(s) codified in IWC Wage
12 Order 5; Cal. Code Regs. Tit. § 11050 (1).

13 58. As a direct result of Defendant's failure to comply with the foregoing provisions of the
14 Labor Code, Plaintiff and all other aggrieved employees have been damaged in an
15 amount to be proven at trial.

16 59. As a result of Defendant's willful failure to pay wages, in addition to such other damages
17 and penalties as may properly be recovered herein, Plaintiff is entitled to back pay,
18 waiting time penalties, interest, costs, and attorneys' fees pursuant to Labor Code §§
19 218.5, 218.6, 558, and 1194.2.

20 60. As California Labor Code § 2699 provides for civil penalties recoverable by Plaintiff on
21 behalf of himself and all other aggrieved employees by and through Labor Code §
22 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may
23 recover these penalties pursuant to Labor Code § 2699, as more specifically set forth in
24 the below Prayer For Relief.

25 61. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of
26 Defendant pursuant to Labor Code § 2699(a) for each of these employees.

27 62. Plaintiff also seek an award of reasonable attorney's fees and costs pursuant to Labor
28 Code § 2699(g)(1), and interest, pursuant to Labor Code § 218.6.

SIXTH CAUSE OF ACTION

Failure to Pay Wages Upon Separation Pursuant to Labor Code § 2698 *et seq.*

Individual and Representative Action

(By Plaintiff against Defendant and DOES 1 through 10)

63. Plaintiff hereby incorporates by reference each and every allegation contained in the preceding paragraphs as though fully set forth herein.
64. Defendant willfully failed to provide Plaintiff, and other aggrieved employees, with all wages earned and unpaid at termination in violation of, among other statutes, Labor Code §§ 201 through 203. These violations resulted from, among other unlawful actions, Defendant willful failure to provide accurate and complete compensation to aggrieved employees under Labor Code §§ 226.7, 510, 512, and 1197.
65. Defendant failed to provide all compensation upon termination of employment in violation of Labor Code §§ 201-203 due, in part, to the fact that Defendant failed to provide proper compensation for all hours worked, failed to pay meal and/or rest period penalties, and miscalculated Plaintiff's and other aggrieved employees' appropriate wages.
66. As a direct result of Defendant's failure to comply with the foregoing provisions of the Labor Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be proven at trial.
67. As California Labor Code § 2699 provides for civil penalties recoverable by Plaintiff on behalf of himself and all other aggrieved employees by and through Labor Code § 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover these penalties pursuant to Labor Code § 2699, as more specifically set forth in the below Prayer For Relief.
68. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendant pursuant to Labor Code § 2699(a) for each of these employees.
69. Plaintiff also seek an award of reasonable attorney's fees and costs pursuant to Labor Code § 2699(g)(1), and interest, pursuant to Labor Code § 218.6.

SEVENTH CAUSE OF ACTION
Failure to Reimburse Pursuant to Labor Code § 2802
Individual Action
(By Plaintiff against Defendant and DOES 1 through 10)

70. Plaintiff hereby incorporates by reference each and every allegation contained in the preceding paragraphs as though fully set forth herein.

71. Defendant failed to reimburse Plaintiff for all necessary business expenditures incurred in direct consequence of the discharge of his duties in violation of, among other statutes, Labor Code § 2802. These expenditures are the result of, *inter alia*, Defendant's instructions to Plaintiff to use his personal cell phone, make trips using his personal vehicle to the bank, which required Plaintiff to incur cell phone and mileage costs without reimbursement.

72. As a direct result of Defendant's failure to comply with the foregoing provisions of the Labor Code, Plaintiff has been damaged in an amount to be proven at trial.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. For compensatory damages according to proof, as set forth under Labor Code §§ 510, 1194, and 2802, among other statutes;
2. For penalties and restitution of wages according to proof, as set forth under Labor Code §§ 221, 226, 226.7, and 1197.1, among other statutes;
3. For penalties pursuant to Title 8, California Code of Regulations, Wage Order 5 (or any applicable Wage Order);
4. For lost back pay in an amount to be proven;
5. Where available, for liquidated damages pursuant to Labor Code § 1194.2;
6. Where available, for an award of interest, including prejudgment interest, pursuant to Labor Code § 218.6;
7. For an award of attorneys' fees and costs of suit herein pursuant to Labor Code §§ 218.5, 226, 1194, 2802 and Code of Civil Procedure § 1021.5; and
8. For such other relief as the Court deems just and proper.

DATED: October 20, 2023

GRUENBERG LAW

JOSHUA D. GRUENBERG, ESQ.

KATHERINE KREBS, ESQ.

DANIELLA DOERN, ESQ.

Attorneys for Plaintiff

**JOHN NOLAN in an individual and
representative capacity, and on behalf of other
members of the general public similarly situated**

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EXHIBIT 1

(1) PLAINTIFF’S LETTER FILED WITH THE LABOR AND WORKFORCE
DEVELOPMENT AGENCY

August 16, 2023

Labor and Workforce Development Agency
Attn. PAGA Administrator

Re: John Nolan v. Swami's 101 LLC d.b.a. Swami's Café

Dear Administrator:

Please allow this correspondence to serve as "written notice," as required by California Labor Code section 2699.3(a)(1), of the specific provisions of the California Labor Code believed to have been violated by Swami's 101 d.b.a. Swami's Café (hereinafter "Swami's"), in the above-referenced matter.

This "written notice" is filed on behalf of John Nolan and all current and former non-exempt employees employed by Swami's. Thank you for your assistance and instruction on this issue.

The specific provisions alleged to have been violated by Swami's are as follows:

CALIFORNIA LABOR CODE SECTIONS 201-204, 223, 226, 226.7, 510, 512, and 1194 as well as IWC Wage Order 5, and any other applicable wage orders, codified as Title 8, California Code of Regulations, section 11050 et seq.

Facts and theories supporting the allegations: Our client, John Nolan, worked as a non-exempt employee employed by Swami's 101 d.b.a. Swami's Café from approximately 2003 until approximately July 2023. John Nolan was a manager for Swami's.

Throughout the term of Mr. Nolan's employment, Swami's required Mr. Nolan and all other non-exempt employees to experience actions illegal under the California Labor Code, including the following:

Minimum Wage and Overtime Violations

Swami's failed to provide all compensation, including Minimum Wage and Overtime compensation, as well as compensation for work performed inside of Meal and Rest Periods, to its employees in violation of, inter alia, Labor Code sections 223, 1194, 510, IWC Wage Order 5, and any other applicable wage orders. This illegal action is due, in part, to Swami's policies of (1) failing to properly retain

accurate Time Records, in violation of California law, and **(2)** failing to provide compensation (including both Minimum and Overtime compensation) for all time worked by the employees, or in control of the employer. For instance, as Mr. Nolan was paid a flat rate each month, he did not receive compensation for working beyond his scheduled (as opposed to *actual*) work hours, resulting in a loss of compensation. Moreover, Swami's would often require Mr. Nolan to work extended hours (beyond his scheduled hours) without compensation.

Additionally, among other issues, Swami's had notice of Mr. Nolan, and others, working outside of their scheduled and/or reported hours, as well as *within* Meal and Rest Period, but failed to provide any compensation for this work time.

Finally, because Mr. Nolan, and other non-exempt employees, were paid a flat rate, Swami's failed to properly calculate the legal Overtime Rate of Pay (or pay Overtime Pay, at all), as Swami's ignores certain compensation when calculating the Regular Rate of Pay.

Failure to Provide Compliant Meal Periods

Swami's failed to provide compliant Meal Periods in violation of, *inter alia*, Labor Code sections 226.7, 512, and IWC Wage Order 5, or any other applicable wage orders. For example, Swami's does not possess a legal Meal Period policy and makes no attempt to ensure its employees are either timely or wholly provided Meal Periods. The employees would often either miss a Meal Period entirely or be provided a short or untimely Meal Period. Over the course of his employment, Mr. Nolan was instructed on numerous occasions to remain available during his Meal Periods.

Swami's would pressure its employees to either skip or cut short a Meal Period as employees were expected to respond to supervisors at all times. On the rare occasions when employees *were* paid Meal Period penalties (i.e. California Meal Period Premiums), such payments do not "cure" the stated Labor Code violation under section 226.7. The California Supreme Court held that "An employer's failure to provide an additional hour of pay does not form part of a section 226.7 violation, and an employer's provision of an additional hour of pay does not excuse a section 226.7 violation. The failure to provide required meal and rest breaks is what triggers a violation of 226.7." (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1256.) Even more recently, a 2020 California Supreme Court ruling stated that "The remedy for a Labor Code violation, through settlement or other means, is distinct from the fact of the violation itself. For example, employers can pay an additional hour of wages as a remedy for failing to provide meal and rest breaks (§ 226.7, subd. (c).) But we have held that payment of this statutory remedy

‘does not excuse a 226.7 violation.’” (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73.) To be clear, payment of a Meal Period penalty to employees does not rectify the violation, it is in fact an admission of a Labor Code violation. Swami’s failed to pay Meal Period Premiums at the proper rate, as Swami’s fails to either **(1)** pay a full hour’s worth of pay, or **(2)** properly calculate the Regular Rate of Pay for purposes of determining the premium rate owed. (*Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 864.)

Finally, Swami’s illegally retained control over its employees during Meal Periods. For example, Swami’s required its employees to “remain on the premises” (i.e. remain at the restaurant) and to remain “on call” (i.e. monitor their telephones) at all times, including during Meal Periods.

Failure to Provide Compliant Rest Periods

Swami’s failed to provide compliant Rest Periods or requisite Rest Period Penalty Payments, in violation of, *inter alia*, Labor Code sections 226.7, 512, IWC Wage Order 5, and any other applicable wage orders. For example, Swami’s does not possess a legal Rest Period policy, as its Rest Period policy lacks required language under California law. Swami’s makes no attempt to ensure that its employees are either timely or wholly provided Rest Periods. The employees would often either miss a Rest Period entirely, be provided a short or untimely Rest Period, or be provided only one Rest Period, even when they were working in excess of 6.5 hours a day. Swami’s would pressure its employees to either skip or cut short a Rest Period as employees were expected to respond to customers at all times. Swami’s has never provided a compliant Rest Period Penalty Payment to any employee as to the above-referenced issues. Finally, on the rare occasions in which Swami’s would provide a Rest Period penalty, it would pay said penalty at an improper (and *lesser*) rate, due to the failure to properly calculate the Regular Rate of Pay.

Finally, Swami’s illegally retained control over its employees during Rest Periods. For example, Swami’s required its employees to “remain on the premises,” (i.e. remain at the restaurant) and to remain “on call” (i.e. monitor their telephones) at all times, including during Rest Periods.

Wage Statement Violations

Swami’s violated Labor Code section 226(a)(1) by failing to furnish an accurate showing of the gross wages earned by its employees. For example, Swami’s **(a)** would not provide compensation for all hours and minutes worked, **(b)** would use an improper (and *lesser*) Overtime Rate of Pay, and **(c)** would fail to pay Meal and/or Rest Period Penalties when due.

Swami's violated Labor Code section 226(a)(2) by failing to furnish an accurate showing of all hours worked at each hourly rate by the employee. The wage statements do not list the hours worked at any rate, for any pay period. Additionally, Mr. Nolan and other employees were not compensated for all hours worked (due in part to Swami's requirement that employees list only *scheduled* work times, not actual work times, and paying only a flat rate). Furthermore, Swami's failed to state the Overtime Rate of Pay on its earning records.

Swami's violated Labor Code section 226(a)(3) by failing to furnish an accurate showing of the number of piece-rate units earned and/or any applicable piece rate. The wage statements do not list the rates worked, for any pay period. The wage statements fail to list any rate at all.

Swami's violated Labor Code section 226(a)(5) by failing to furnish an accurate showing of the net wages earned by its employees. For example, Swami's **(a)** would not provide compensation for all hours and minutes worked, **(b)** would use an improper (and lesser) Overtime Rate of Pay, and **(c)** would fail to pay Meal and/or Rest Period penalties when due. Further, on the rare occasions in which Swami's would provide a Meal or Rest Period penalty, it would pay said penalty at an improper (and lesser) rate, due to the failure to properly calculate the Regular Rate of Pay.

Swami's violated Labor Code section 226 (a)(9) by failing to furnish an accurate showing of all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. Swami's wage statements do not list the hourly rate for either Regular or Overtime Rates of pay, for any Pay Period. Additionally, Mr. Nolan, and the other employees, were not compensated for all hours worked (due in part to Swami's requiring employees to list only *Scheduled* work time, not actual work time to include "on-call" hours, and paying only a flat rate). The Wage Statements do not state the hourly rates for any work. Therefore, Swami's failed to provide a showing of the "total hours worked" by its employees pursuant to section 226(a)(2).

Willful Failure to Provide All Compensation to Ex-Employees

Swami's failed to provide all compensation during and upon termination of employment in violation of Labor Code sections 201-204, due in part, to the fact that Swami's failed to provide proper compensation for all hours worked, and failed to pay full Rest Period penalties, as discussed above. Mr. Nolan ceased employment

with Swami's in or around July 2023 and did not receive all wages due and owed to him.

To confirm, Swami's is a "person" as defined within California Labor Code section 18.

Again, thank you for your assistance and instruction with this matter. Should you have any questions or comments, please do not hesitate to contact the undersigned.

Very Truly Yours,



Katherine A Dishongh

Cc: Via Certified U.S. Mail

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