

ENDORSED
FILED
Superior Court of California
County of San Francisco

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GORDON PARK-LI, Clerk
BY: MARY A. MORAN
Deputy Clerk

1 Scott Edward Cole, Esq. (S.B. #160744)
2 Molly A. Kuehn, Esq. (S.B. #230763)
3 SCOTT COLE & ASSOCIATES, APC
4 1970 Broadway, Ninth Floor
5 Oakland, California 94612
6 Telephone: (510) 891-9800
7 Facsimile: (510) 891-7030
8 Web: www.scalaw.com

6 Attorneys for Representative Plaintiff
7 Michael Kelly and the Plaintiff Class

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SAN FRANCISCO

11 MICHAEL KELLY, individually, and on)
12 behalf of all others similarly situated,)
13 Plaintiff,)
14 vs.)
15 WALGREEN CO., and DOES 1 through)
16 25, inclusive,)
17 Defendants.)

Case No.: CGC-07-464347

CLASS ACTION

SECOND AMENDED COMPLAINT FOR DAMAGES, INJUNCTIVE RELIEF AND RESTITUTION

17 The Representative Plaintiff alleges as follows:

PRELIMINARY STATEMENT

20 1. This is a class action, under Code of Civil Procedure § 382, brought on behalf of
21 Plaintiff and all other persons who are or have been employed in Assistant Manager positions by
22 defendant Walgreen Co. (hereinafter "Walgreen") in any of Walgreen's retail stores within the State
23 of California, at any time after the commencement of the pay period including June 15, 2003. The
24 Representative Plaintiff, individually, and on behalf of all other Class Members, seeks unpaid wages,
25 including unpaid overtime compensation and interest thereon, meal and rest period compensation,
26 "waiting time" and other penalties, injunctive and other equitable relief and reasonable attorneys'
27 fees and costs, under, *inter alia*, California Labor Code §§ 200-204, 218, 218.6, 226, 226.7, 510,
28 512, 558, 1174, 1194, 1197 and 2699, CCP § 1021.5 and various provisions (e.g., 29 U.S.C. §§ 206

SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

1 and 207) of the Fair Labor Standards Act ("FLSA"). The Representative Plaintiff also seeks
2 injunctive relief and restitution of all benefits Walgreen has enjoyed from its violations of Business
3 and Professions Code §§ 17200-17208.

4 2. The "California class period" is designated as June 15, 2003 through the conclusion
5 of trial on all issues presented in this action based upon the allegation that Walgreen's violations of
6 California wage and hour laws, as described more fully below, have been ongoing since at least this
7 date. The "FLSA class period" is designated as June 15, 2004 through the conclusion of trial on all
8 issues presented in this action, based upon the allegation that the violations of the FLSA, as
9 described more fully below, have been "willful" and ongoing throughout that time.

10 3. During the Class Periods, Walgreen has had a consistent policy of (1) requiring its
11 Assistant Managers, including Representative Plaintiff and Class Members, to remain at work, under
12 the control of Walgreen, after completion of these workers' ordinary duties, without paying those
13 employees' wages (including overtime wages) for all compensable time, (2) requiring its Assistant
14 Managers, including Representative Plaintiff and Class Members, to submit to mandatory security
15 checks of their persons and belongings without paying them regular and/or overtime compensation,
16 (3) willfully failing to pay compensation (including unpaid overtime and/or compensation for
17 working through paid and/or unpaid meal and/or rest periods) owing in a prompt and timely manner
18 to Representative Plaintiff and/or Class Members whose employment with Walgreen was terminated,
19 (4) willfully failing to provide Representative Plaintiff and Class Members with accurate
20 semimonthly itemized statements of the total number of hours each of them worked, the applicable
21 deductions and the applicable hourly rates in effect during the pay period, and (5) willfully failing
22 to provide meal periods and rest periods to the Representative Plaintiff and/or Class Members.

23
24 **INTRODUCTION**

25 4. Since its inception, Walgreen has offered a wide range of merchandise to its
26 customers, including food items, pharmaceuticals, appliances, electronics and media, automotive
27 supplies, toys, hardware, sporting goods, jewelry, watches, cameras, books, housewares, apparel,
28 health and beauty aids, tobacco, furniture, office supplies and office equipment. The Representative

1 Plaintiff is informed and believes and, based thereon, alleges that, within the Class Period, Walgreen
2 has operated numerous retail stores throughout California. In so doing, Walgreen has employed
3 hundreds, if not thousands, of individuals in recent years as Assistant Managers in California retail
4 stores who were not fully compensated for all labor performed and/or for working through
5 statutorily-mandated paid and/or unpaid meal and/or rest periods.

6 5. Despite actual knowledge of these facts and legal mandates, Walgreen has enjoyed
7 an advantage over its competition and a resultant disadvantage to its workers by electing not to
8 compensate its Assistant Managers for (1) time spent submitting to its security checks and/or
9 waiting, under the control of their employer, after the conclusion of their work shift and/or (2)
10 otherwise not providing them with full meal and/or rest periods.

11 6. Representative Plaintiff is informed and believes and, based thereon, alleges that
12 officers of Walgreen knew of these facts and legal mandates, yet, nonetheless, repeatedly authorized
13 and/or ratified the violation of the laws cited herein.

14 7. Despite Walgreen's knowledge of the Plaintiff Class' entitlement to full pay for all
15 hours worked, Walgreen failed to provide same to members of the Plaintiff Class, in violation of the
16 California Labor Code, Industrial Welfare Commission Orders and Title 8 of the California Code
17 of Regulations. This action is brought to redress and end this long-time pattern of unlawful conduct.

18
19 **JURISDICTION AND VENUE**

20 8. This Court has jurisdiction over Representative Plaintiff's and Class Members' claims
21 under California Labor Code §§ 201-203, 226, 510, 558, 1174, 1194, 1197, 2698 and 2699.

22 9. This Court also has jurisdiction over Representative Plaintiff's and Class Members'
23 claims for injunctive relief and restitution of ill-gotten benefits arising from defendant Walgreen's
24 unfair, unlawful and/or fraudulent business practices under Business & Professions Code §§ 17200,
25 *et seq.*

26 10. Venue as to Defendant is proper in this judicial district, pursuant to Code of Civil
27 Procedure § 395(a). Walgreen is a corporation, maintaining offices, operating retail stores and doing
28 business in San Francisco County, and is otherwise within this Court's jurisdiction for purposes of

SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
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1 service of process. The unlawful acts alleged herein have a direct effect on Representative Plaintiff
2 and those similarly situated within the State of California and within San Francisco County.
3 Defendant Walgreen employed Representative Plaintiff Michael Kelly and numerous Class Members
4 in San Francisco County during the Class Period.
5

6 PLAINTIFFS

7 11. The Representative Plaintiff is a natural person and was, during the relevant time
8 period identified herein, employed by defendant Walgreen as an Assistant Manager at one or more
9 of Defendant's California retail stores. Specifically, Representative Plaintiff Michael Kelly worked
10 as an Assistant Manager for defendant Walgreen from approximately July 2005 to March 2007, in
11 three separate retail locations in the State of California.

12 12. As used throughout this Complaint, the terms "Plaintiff" and/or "Class" refer to the
13 named Plaintiff herein, as well as each and every person eligible for membership in one or more of
14 the Plaintiff Class, as further described and defined below.

15 13. At all times herein relevant, the Representative Plaintiff was and now is a person
16 within the Class of persons further described and defined herein.

17 14. The Representative Plaintiff brings this action on behalf of himself and as a class
18 action on behalf of all persons similarly situated and proximately damaged by the unlawful conduct
19 described herein, pursuant to California Code of Civil Procedure § 382.
20

21 DEFENDANT

22 15. At all times herein relevant, defendant Walgreen Co. was and is a corporation and/or
23 other business entity, duly licensed, located and doing business in, but not limited to, the State of
24 California. Representative Plaintiff is informed and believes and, on that basis, alleges that, at all
25 relevant times herein mentioned, the Defendant and/or each person responsible for the acts alleged
26 herein was the agent and/or employee of Walgreen and, in doing the acts herein alleged, was acting
27 within the course and scope of such agency and/or employment.
28

CLASS ACTION ALLEGATIONS

1 16. The Representative Plaintiff brings this action on behalf of himself and as a class
2 action on behalf of all persons similarly situated and proximately damaged by Walgreen's conduct
3 as set forth herein, including, but not necessarily limited to the following Class:

4 All persons who are/were employed as non-exempt Assistant Managers by
5 Walgreen Co., in one or more of Walgreen's California retail stores between
6 June 15, 2003 and the present.

7 17. This action has been brought and may properly be maintained as a class/collective
8 action under Code of Civil Procedure § 382 and 29 U.S.C. § 216 because there is a well-defined
9 community of interest in the litigation and the proposed class members are easily ascertainable.

10 a. Numerosity: A class action is the only available method for the fair and
11 efficient adjudication of this controversy. The members of the Class are so
12 numerous that joinder of all members is impractical, if not impossible, insofar
13 as Representative Plaintiff is informed and believes and, on that basis, alleges
14 that the total number of Class Members is well in excess of 100 individuals.
15 Membership in the Plaintiff Class will be determined upon analysis of
16 employee and payroll, among other, records maintained by Walgreen.

17 b. Commonality: The Representative Plaintiff and the class members share a
18 community of interests in that there are numerous common questions and
19 issues of fact and law which predominate over any questions and issues solely
20 affecting individual members, including, but not necessarily limited to:

- 21 1. whether defendant Walgreen violated the FLSA and/or California
22 laws by failing to pay overtime compensation to class members who
23 worked in excess of 40 hours per week and/or 8 hours per day;
- 24 2. whether defendant Walgreen violated California Wage Order(s)
25 and/or Labor Code § 510 by failing to pay overtime compensation to
26 Class Members who worked in excess of 40 hours per week and/or
27 8 hours a day;
- 28 3. whether defendant Walgreen violated California Labor Code §§ 226.7
 and/or 512 by failing to consistently provide meal and/or rest periods
 to the Representative Plaintiff and the Class Members;
4. whether defendant Walgreen violated California Business and
 Professions Code § 17200 by failing to pay Class Members for all
 time worked;
5. whether defendant Walgreen violated California Labor Code § 1174
 by failing to keep accurate records of Class Members' hours of work;
6. whether defendant Walgreen violated California Labor Code §§ 200 -
 204 by failing to pay wages due and owing at the time that Class
 Members' employment with Defendant terminated;
7. whether Defendant Walgreen violated California Labor Code § 226
 by failing to provide the semimonthly itemized statements to Class

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Members of total hours worked by each, and all applicable hourly rates in effect during the pay period;

- 8. whether the Representative Plaintiff and Class Members are entitled to "waiting time" penalties/wages pursuant to California Labor Code § 203;
- 9. whether Defendant failed to post or keep posted a notice explaining the overtime pay rights provided by the FLSA in any area where the Representative Plaintiff and Class Members were employed, in violation of 29 C.F.R. § 516.4;
- 10. whether the Representative Plaintiff and Class Members are entitled to penalties under the Private Attorneys General Act of 2004, California Labor Code § 2699, for violations of California Labor Code §§ 226.7 and/or 512.

c. Typicality: The Representative Plaintiff's claims are typical of the claims of the Plaintiff Class. The Representative Plaintiff and all members of the Class sustained injuries and damages arising out of and caused by defendant Walgreen's common course of conduct in violation of California law, as alleged herein.

d. Superiority of Class Action: Since the damages suffered by individual Class Members, while not inconsequential, may be relatively small, the expense and burden of individual litigation by each member makes or may make it impracticable for members of the Class to seek redress individually for the wrongful conduct alleged herein. Should separate actions be brought or be required to be brought by each individual member of the Class, the resulting multiplicity of lawsuits would cause undue hardship and expense for the Court and the litigants. The prosecution of separate actions would also create a risk of inconsistent rulings, which might be dispositive of the interests of other Class Members who are not parties to the adjudications and/or may substantially impede their ability to adequately protect their interests.

e. Adequacy of Representation: The Representative Plaintiff in this class action is an adequate representative of the Class, in that the Representative Plaintiff's claims are typical of those of the Class' and the Representative Plaintiff has the same interests in the litigation of this case as the Class Members. Specifically, Representative Plaintiff Michael Kelly worked as an Assistant Manager for Defendant Walgreen from approximately July 2005 to March 2007, in three separate retail locations in the State of California. As a Manager and an Assistant Manager, he was, *inter alia*, often denied meal and/or rest breaks for which he was not compensated, subjected to uncompensated security checks, and was not paid all wages due upon termination of employment. The Representative Plaintiff is committed to vigorous prosecution of this case, and has retained competent counsel, experienced in litigation of this nature. The Representative Plaintiff is not subject to any individual defenses unique from those conceivably applicable to the Class. The Representative Plaintiff anticipates no management difficulties in this litigation.

COMMON FACTUAL ALLEGATIONS

1 18. As described herein, Walgreen has, for years, knowingly failed to adequately
2 compensate those employees within the class definitions identified above for all wages earned,
3 including premium (overtime and/or compensation for missed meal and/or rest periods) wages, and
4 due under the California Labor Code, the applicable California Wage Order(s) and under the FLSA
5 (29 U.S.C. §§ 206 and 207), thereby enjoying a significant competitive edge over other retail stores
6 and/or retail chains.

7 19. Even upon termination or resignation of the employment of numerous Class
8 Members, Walgreen has declined to pay these wages, in blatant violation of California Labor Code
9 §§ 201 and/or 202.

10 20. Moreover, California Labor Code §§ 201 and 202 require defendant Walgreen to pay
11 all Class Members all wages due immediately upon discharge. California Labor Code § 203 provides
12 that, if an employer willfully fails to timely pay such wages, the employer must, as a penalty,
13 continue to pay the subject employees' wages until the back wages are paid in full or an action is
14 commenced, for a period not to exceed 30 days of wages.

15 21. Furthermore, despite its knowledge of the Representative Plaintiff's and the Class
16 Members' entitlement to compensation for all hours worked, Walgreen violated California Labor
17 Code § 1174(d) by failing to provide or require the use, maintenance or submission of time records
18 by members of the Class. Walgreen also failed to provide Representative Plaintiff and Class
19 Members with accurate semimonthly itemized statements of the total number of hours worked by
20 each and all applicable hourly rates in effect during the pay period, in violation of California Labor
21 Code § 226. In so doing, Walgreen has not only failed to pay Class Members the full amount of
22 compensation due, it has, until now, effectively shielded itself from its employees' scrutiny for its
23 unlawful conduct by concealing the magnitude (the full number of hours worked) and financial
24 impact of its wrongdoing.

25 22. Representative Plaintiff and all persons similarly situated are entitled to unpaid
26 compensation, yet, to date, have not received such compensation despite the termination of their
27 employment with Walgreen.

28

1 23. More than thirty days have passed since the Representative Plaintiff and certain Class
2 Members have left defendant Walgreen's employ.

3 24. As a consequence of defendant Walgreen's willful conduct in not paying
4 compensation for all hours worked, certain Class Members are entitled to thirty days wages, as a
5 penalty under Labor Code § 203, together with interest thereon and attorneys' fees and costs.

6 25. As a consequence of defendant Walgreen's willful conduct in not providing an
7 uninterrupted thirty-minute meal period within the first five hours of Class Members' shifts as
8 required under Labor Code § 512 and section 11 of IWC Wage Order No. 7-2001, certain Class
9 Members are entitled to one hour of wages for each day that Class Members were denied at least one
10 meal period, as provided under Labor Code § 226.7, together with interest thereon and attorneys'
11 fees and costs.

12 26. As a consequence of defendant Walgreen's willful conduct in not providing a ten-
13 minute rest period once during each four hours of work as prescribed by section 12 of IWC Wage
14 Order No. 7, certain Class Members are entitled to one hour of wages for each day that Class
15 Members were denied at least one rest period, as provided under Labor Code § 226.7, together with
16 interest thereon and attorneys' fees and costs.

17 27. As a direct and proximate result of Walgreen's unlawful conduct, as set forth herein,
18 the Representative Plaintiff and Class Members have sustained damages, as described above,
19 including loss of earnings for hours worked on behalf of Defendant, in an amount to be established
20 at trial. As a further direct and proximate result of Defendant's unlawful conduct, as set forth herein,
21 the Representative Plaintiff and many Class Members herein are entitled to recover "waiting time"
22 penalties/wages (pursuant to California Labor Code § 203) and penalties for failure to provide
23 semimonthly statements of hours worked and all applicable hourly rates (pursuant to Labor Code §
24 226) in an amount to be established at trial. As a further direct and proximate result of Defendant's
25 unlawful conduct, as set forth herein, the Representative Plaintiff and Class Members are also
26 entitled to recover costs and attorneys' fees, pursuant to California Labor Code § 1194 and/or
27 California Civil Code § 1021.5, among other authorities.

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SCOTT COLE & ASSOCIATES, APC
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THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
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1 28. Plaintiff seeks injunctive relief prohibiting Defendant from engaging in the illegal
2 labor acts described herein. Plaintiff also seeks restitution of costs incurred by Plaintiff and Class
3 Members under California's Unfair Competition Law, and penalties under Private Attorneys General
4 Act of 2004. Unless enjoined, Defendant's unlawful conduct will continue unchecked, while Plaintiff
5 and members of the Class bear the financial brunt of Defendant's unlawful conduct. As a further
6 direct and proximate result of Defendant's unlawful conduct, as set forth herein, the Representative
7 Plaintiff and the Plaintiff Class are also entitled to recover costs and attorneys' fees, pursuant to
8 statute.

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**FIRST CAUSE OF ACTION
UNLAWFUL FAILURE TO PAY WAGES DUE
(Violation of California Wage Order(s) and Labor Code)**

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29. The Representative Plaintiff incorporates in this cause of action each and every
allegation of the preceding paragraphs, with the same force and effect as though fully set forth
herein.

30. During the time period beginning June 15, 2003 and continuing through the present,
the Representative Plaintiff and the Class Members were employed by and did perform work for
Walgreen, often times in excess of eight hours in a workday and/or forty hours in a workweek. The
precise number of hours will be proven at trial.

31. During said time period, Walgreen refused to compensate the Representative Plaintiff
and Class Members for some and/or all of the wages, including overtime wages and compensation
for missed meal and/or rest periods, in violation of the applicable California Wage Order(s) and/or
the California Labor Code.

32. Moreover, during said time period, many of the Class Members herein were employed
by and were thereafter terminated or resigned from their positions with Walgreen, yet were not paid
all wages due upon said termination or within seventy-two hours of said resignation of employment
therefrom. Said non-payment of all wages due was the direct and proximate result of a willful refusal
to do so by Defendant.

1 33. At all relevant times, Defendant was aware of and was under a duty to comply with
2 various provisions of the applicable California Wage Order(s) issued by the Industrial Welfare
3 Commission as well as California Labor Code §§ 200-204, 510, 1198 and 1199.

4 34. By refusing to compensate Representative Plaintiff and Class Members for all wages
5 earned, Defendant violated those California Labor Code and IWC Wage Order provisions cited
6 herein.

7 35. As a direct and proximate result of Defendant's unlawful conduct, as set forth herein,
8 Representative Plaintiff and Class Members have sustained damages, including loss of earnings for
9 hours of overtime worked on behalf of Defendant, in an amount to be established at trial. As a
10 further direct and proximate result of Defendant's unlawful conduct, as set forth herein,
11 Representative Plaintiff and Class Members are entitled to recover "waiting time" penalties/wages,
12 in an amount to be established at trial, costs and attorneys' fees, pursuant to statute.

13
14 **SECOND CAUSE OF ACTION**
15 **UNLAWFUL FAILURE TO PAY ALL WAGES DUE**
16 **(Violation of FLSA)**

17 36. Representative Plaintiff incorporates in this cause of action each and every allegation
18 of the preceding paragraphs, with the same force and effect as though fully set forth herein.

19 37. At all relevant times hereto, Defendant has been, and is, an employer engaged in
20 commerce, as defined under 29 U.S.C. § 203(b) and (d). As such, Defendant employed class
21 members within the FLSA class period as Assistant Managers (as defined above), employment
22 positions which engaged the employees in commerce, as defined under 29 U.S.C. §§ 203(b), (e), (g)
23 and 29 U.S.C. § 207(a)(1).

24 38. Moreover, at all times relevant hereto, Defendant has been an "enterprise engaged in
25 commerce or in the production of goods for commerce," as defined under 29 U.S.C. §203(s)(1).

26 39. The Representative Plaintiff is informed and believes and, based thereon, alleges that
27 Defendant has required or requires Class Members employed within the FLSA class period, as part
28 of their employment, to work without additional compensation, such as overtime, in excess of the
forty hours per week maximum under 29 U.S.C. § 207(a)(1). That Section provides the following:

1 Except as otherwise provided in this section, no employer shall
2 employ any of his employees...for a workweek longer than forty hours
3 unless such employee receives compensation for his employment in
excess of the hours above specified at a rate which is not less than
one and one-half times the regular rate at which he is employed.

4 40. Indeed, in the performance of their duties for Defendant, Class Members within the
5 FLSA class period often did work well over forty hours per week, yet did not receive overtime
6 compensation for the work, labor and services they provided to Defendant, as required by the FLSA,
7 29 U.S.C. §§ 206 and 207. The precise number of unpaid overtime hours will be established, in a
8 formulaic manner, at trial.

9 41. Defendant's violations of the FLSA were "willful" within the meaning of 29 U.S.C.
10 § 255(a).

11 42. As a result of the foregoing, the Representative Plaintiff seeks judgment against
12 Defendant on his own behalf, and on behalf of those Class Members similarly situated who file
13 written consents of joinder in this action, for all unpaid wages, including overtime wages owed by
14 Defendant to the Representative Plaintiff and the class, pursuant to 29 U.S.C. §§ 206 and 207,
15 together with an award of an additional equal amount as liquidated damages and costs, interest, and
16 reasonable attorneys' fees, as provided for under 29 U.S.C. § 216(b).

17
18 **THIRD CAUSE OF ACTION**
19 **FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS**
20 **(California Labor Code §§ 226 and 1174)**

21 43. Representative Plaintiff incorporates in this cause of action each and every allegation
22 of the preceding paragraphs, with the same force and effect as though fully set forth herein.

23 44. California Labor Code § 226(a) provides:
24 Each employer shall semimonthly, or at the time of each payment of
25 wages, furnish each of his or her employees either as a detachable
26 part of the check, draft or voucher paying the employee's wages, or
27 separately when wages are paid by personal check or cash, an
28 itemized wage statement in writing showing: (1) gross wages earned;
(2) total number of hours worked by each employee whose
compensation is based on an hourly wage; (3) all deductions;
provided, that all deductions made on written orders of the employee
may be aggregated and shown as one item; (4) net wages earned; (5)
the inclusive date of the period for which the employee is paid; (6)
the name of the employee and his or her social security number; and

1 (7) the name and address of the legal entity which is the employer.

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3 45. Moreover, California Labor Code § 226(e) provides:

4 An employee suffering injury as a result of a knowing and intentional
5 failure by an employer to comply with subdivision (a) is entitled to
6 recover the greater of all actual damages or fifty dollars (\$50) for the
7 initial pay period in which a violation occurs and one hundred dollars
8 (\$100) per employee for each violation in a subsequent pay period,
9 not exceeding an aggregate penalty of four thousand dollars (\$4,000),
10 and is entitled to an award of costs and reasonable attorney's fees.

11
12 46. Finally, California Labor Code § 1174 provides:

13 Every person employing labor in this state shall: (d) Keep, at a central
14 location in the state... payroll records showing the hours worked daily
15 by and the wages paid to ... employees These records shall be kept
16 in accordance with rules established for this purpose by the
17 commission, but in any case shall be kept on file for not less than two
18 years.

19
20 47. Representative Plaintiff seeks to recover actual damages, costs and attorneys' fees
21 under this section on behalf of himself and the Class Members.

22 48. Defendant Walgreen failed to provide timely, accurate itemized wage statements to
23 Representative Plaintiff and the Class Members in accordance with Labor Code § 226(a) and the
24 applicable California Wage Order(s). None of the statements provided by Defendant has accurately
25 reflected actual gross wages earned, net wages earned, or the appropriate deductions of such Class
26 Members.

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28
FOURTH CAUSE OF ACTION
UNFAIR BUSINESS PRACTICES UNDER THE UNFAIR COMPETITION ACT
(California Business & Professions Code §§ 17200-17208)

49. Representative Plaintiff incorporates in this cause of action each and every allegation
of the preceding paragraphs, with the same force and effect as though fully set forth herein.

50. Representative Plaintiff further brings this cause of action, seeking equitable and
statutory relief to stop the misconduct of Defendant, as complained of herein, and seeking restitution
from Defendant through the unfair, unlawful and fraudulent business practices described herein.

51. The knowing conduct of Defendant, as alleged herein, constitutes unlawful, unfair

SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WACHOVIA TOWER
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OAKLAND, CA 94612
TEL: (510) 891-9800

1 and/or fraudulent business practices, as set forth in California Business & Professions Code §§
2 17200-17208. Specifically, Defendant conducted business activities while failing to comply with the
3 legal mandates cited herein.

4 52. Defendant's knowing failure to adopt policies in accordance with and/or adhere to
5 these laws, all of which are binding upon and burdensome to Defendant's competitors, engenders
6 an unfair competitive advantage for Defendant, thereby constituting an unfair business practice, as
7 set forth in California Business & Professions Code §§ 17200-17208.

8 53. Defendant has clearly established a policy of accepting a certain amount of collateral
9 damage, as represented by the damages to Representative Plaintiff and the Plaintiff Class herein
10 alleged, as incidental to its business operations, rather than accept the alternative costs of full
11 compliance with fair, lawful and honest business practices ordinarily borne by responsible
12 competitors of Defendant and as set forth in legislation and the judicial record.

13
14 **FIFTH CAUSE OF ACTION**
15 **FAILURE TO PROVIDE MEAL AND REST PERIODS**
16 **(California Labor Code §§ 226.7 and 512)**

17 54. Representative Plaintiff incorporates in this cause of action each and every allegation
18 of the preceding paragraphs, with the same force and effect as though fully set forth herein.

19 55. At all relevant times, Defendant was aware of and was under a duty to comply with
20 California Labor Code §§ 226.7 and 512.

21 56. Specifically, California Labor Code § 226.7 provides:

- 22 (a) No employer shall require any employee to work during any
23 meal or rest period mandated by an applicable order of the
24 Industrial Welfare Commission.
25 (b) If an employer fails to provide an employee a meal period or
26 rest period in accordance with an applicable order of the
27 Industrial Welfare Commission, the employer shall pay the
28 employee one additional hour of pay at the employee's regular
rate of compensation for each work day that the meal or rest
period is not provided.

29 57. California Labor Code § 512 provides:

An employer may not employ an employee for a work period of more

1 than five hours per day without providing the employee with a meal
2 period of not less than 30 minutes, except that if the total work period
3 per day of the employee is no more than six hours, the meal period
4 may be waived by mutual consent of both the employer and
5 employee. An employer may not employ an employee for a work
6 period of more than 10 hours per day without providing the employee
7 with a second meal period of not less than 30 minutes, except that if
8 the total hours worked is no more than 12 hours, the second meal
9 period may be waived by mutual consent of the employer and the
10 employee only if the first meal period was not waived.

11 58. Sections 11 and 12, respectively, of IWC Wage Order No. 7 mandate that employers
12 provide all applicable meal and/or rest periods to non-exempt employees.

13 59. Section 11 of the IWC Wage Order provides:

14 (A) No employer shall employ any person for a work period of more
15 than five (5) hours without a meal period of not less than 30 minutes
16 (B) An employer may not employ an employee for a work period
17 of more than ten (10) hours per day without providing the employee
18 with a second meal period of not less than 30 minutes (C) If an
19 employer fails to provide an employee a meal period in accordance
20 with the applicable provisions of this order, the employer shall pay
21 the employee one (1) hour of pay at the employee's regular rate of
22 compensation for each workday that the meal period is not provided

23 60. Moreover, Section 12 of the IWC Wage Order provides:

24 (A) Every employer shall authorize and permit all employees to take
25 rest periods, which insofar as practicable shall be in the middle of
26 each work period. The authorized rest period time shall be based on
27 the total hours worked daily at the rate of ten (10) minutes net rest
28 time per four (4) hours or major fraction thereof (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 workday that the rest period is not provided.

29 61. By failing to consistently provide (1) meal breaks within the first five hours of a work
30 shift, (2) uninterrupted thirty-minute meal periods, and/or (3) ten-minute rest periods to Class
31 Members, Defendant violated California Labor Code and IWC Wage Order provisions.

32 62. Even where Defendant's records specifically illustrate that no meal and/or rest periods
33 were provided to Plaintiff and Class Members, Walgreen refuses to properly compensate these
34 employees with one hour of compensation for these respective violations as mandated by California
35 law.

36 63. As a direct and proximate result of Defendant's unlawful conduct, as set forth herein,

1 Class Members have sustained damages, including loss of earnings, in an amount to be established
2 at trial. As a further direct and proximate result of Defendant's unlawful conduct, as set forth herein,
3 Class Members are entitled to recover various penalties, in an amount to be established at trial, as
4 well as costs and attorneys' fees, pursuant to statute.

5
6 **SIXTH CAUSE OF ACTION**
7 **PRIVATE ATTORNEYS GENERAL ACT CLAIM**
8 **(California Labor Code §§ 226.7 and 512)**

9 64. Representative Plaintiff incorporates in this cause of action each and every allegation
10 of the preceding paragraphs, with the same force and effect as though fully set forth herein.

11 65. The Private Attorneys General Act of 2004, California Labor Code § 2699(a), states:

12 Notwithstanding any other provision of the law, any provision of this
13 code that provides for a civil penalty to be assessed and collected by
14 the Labor and Workforce Development Agency or any of its
15 departments, divisions, commissions, boards, agencies, or employees,
16 for a violation of this code, may, as an alternative, be recovered
17 through a civil action brought by an aggrieved employee on behalf of
18 himself or herself and other current or former employees...

19 66. Representative Plaintiff is an "aggrieved employee" as defined by California Labor
20 Code § 2699(c) because he was employed by Defendant and was one of many employees against
21 whom violations of the law were committed.

22 67. Representative Plaintiff has met all of the requirements set forth in Labor Code §
23 2699.3 necessary to commence a civil action against Defendants for violations of Labor Code §§
24 226.7 and 512.

25 68. Plaintiff brings this action on behalf of himself and all class members who have not
26 received meal and rest periods as they are entitled under California Labor Code §§ 226.7 and 512.

27 69. As a direct and proximate result of Defendant's unlawful conduct, as set forth herein,
28 Class Members have sustained damages, including loss of earnings, in an amount to be established
at trial. As a further direct and proximate result of Defendant's unlawful conduct, as set forth herein,
Class Members are entitled to recover various penalties as provided by California Labor Code §
2699, in an amount to be established at trial, as well as costs and attorneys' fees, pursuant to statute.

RELIEF SOUGHT

WHEREFORE, the Representative Plaintiff, on behalf of himself and the proposed **Plaintiff Class**, prays for judgment and the following specific relief against **Defendant**, jointly and separately, as follows:

1. That the Court declare, adjudge and decree that this action is a proper class/collective action and certify the proposed class and/or any other appropriate subclasses under CCP § 382 and/or 29 U.S.C. § 216;

2. For a finding that Walgreen violated the provisions of California Labor Code § 201 and Title 8 California Code of Regulations § 11070(9)(A) as to the Representative Plaintiff and the Plaintiff Class;

3. That the Court declare, adjudge and decree that Walgreen violated the overtime provisions of the FLSA, the California Labor Code and the applicable Industrial Wage Commission California Wage Order(s) as to the Representative Plaintiff and the Plaintiff Class;

4. That the Court declare, adjudge and decree that Walgreen willfully violated its legal duties under the California Labor Code and the IWC Wage Orders to pay overtime;

5. That the Court declare, adjudge and decree that defendant Walgreen willfully violated its legal duties under the California Labor Code §§ 226.7 and/or 512 and the IWC Wage Orders to pay wages for missed meal and/or rest periods;

6. That the Court declare, adjudge and decree that Walgreen violated the record keeping provisions of 29 U.S.C. § 211(c), California Labor Code §§ 226(a) and 1174(d) and the relevant Wage Order(s) as to Representative Plaintiff and the Class Members, and for willful failure to provide accurate semimonthly itemized statements thereto;

7. That the Court declare, adjudge and decree that Walgreen violated California Labor Code §§ 200-204 for willful failure to pay all compensation owed at the time of termination of employment to Representative Plaintiff and some Class Members;

8. That the Court declare, adjudge and decree that Walgreen violated California Business and Professions Code § 17200, *et. seq.* by failing to pay Representative Plaintiff and Class

SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

1 Members overtime compensation, "waiting time" penalties and/or by failing to provide accurate
2 itemized statements;

3 9. That the Court declare, adjudge and decree that the amounts to which the
4 Representative Plaintiff and those Class Members within the FLSA class period are entitled under
5 the FLSA is to be doubled as liquidated damages and awarded thereto;

6 10. That the Court make an award to the Representative Plaintiff and Plaintiff Class of
7 damages for the amount of unpaid compensation, including interest thereon, and penalties in an
8 amount to be proven at trial;

9 11. That the Court make an award to the Representative Plaintiff and Plaintiff Class of
10 civil penalties specified in Labor Code § 2699 for each violation of Labor Code §§ 226.7 and/or 512.

11 12. For an Order requiring Walgreen to pay restitution to Representative Plaintiff and the
12 Plaintiff Class of all profits and gains resulting from defendant Walgreen's unfair, unlawful and/or
13 fraudulent activities, pursuant to Business and Professions Code §§ 17200-08;

14 13. For an injunction, enjoining defendant Walgreen to cease and desist from unfair,
15 unlawful and/or fraudulent activities in violation of Business and Professions Code § 17200;

16 14. For punitive/exemplary damages in an amount appropriate and sufficient to punish
17 Defendant, and to deter others from engaging in similar misconduct in the future;

18 15. For all other Orders, findings, and determinations identified and sought in this
19 Complaint;

20 16. For interest on the amount of any and all economic losses, at the prevailing legal rate;

21 17. For reasonable attorneys' fees, pursuant to state and federal statute; and

22 18. For costs of suit and any and all such other relief as the Court deems just and proper.

23
24 Dated: September 14, 2009

SCOTT COLE & ASSOCIATES, APC

25
26 By:



Molly A. Kuehn, Esq.
Attorneys for the Representative Plaintiff
Michael Kelly and the Plaintiff Class