

SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WORLD SAVINGS TOWER
1970 BROADWAY, SUITE 950
OAKLAND, CA 94612
TEL: (510) 891-9800

1 Scott Edward Cole, Esq. (S.B. #160744)
2 Clyde H. Charlton, Esq. (S.B. #127541)
3 Matthew R. Bainer, Esq. (S.B. #220972)
4 **SCOTT COLE & ASSOCIATES, APC**
5 1970 Broadway, Suite 950
6 Oakland, California 94612
7 Telephone: (510) 891-9800
8 Facsimile: (510) 891-7030
9 web: www.scalaw.com

10 Attorneys for Representative Plaintiff
11 and the Plaintiff Class

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MAY 16 2005

ALAN SLATER, Clerk of the Court
Alan Slater
COPY

12 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF ORANGE, CIVIL COMPLEX CENTER**

14 BEVERLY D. GINTZ, individually, and
15 on behalf of all others similarly situated,

16 Plaintiffs,

17 vs.

18 JACK IN THE BOX, INC., and DOES 1
19 through 100, inclusive,

20 Defendants.

Case No.: 04CC00204

CLASS ACTION

**SECOND AMENDED COMPLAINT FOR
DAMAGES, INJUNCTIVE RELIEF AND
RESTITUTION**

21 Representative Plaintiff alleges as follows:

22 **PRELIMINARY STATEMENT**

23 1. This is a class action, under Code of Civil Procedure § 382, seeking restitution of all
24 monies due to Representative Plaintiff and Class Members, penalties, injunctive and other equitable
25 relief and reasonable attorneys' fees and costs, under, *inter alia*, Industrial Welfare Commission
26 Wage Order(s), Labor Code §§ 200-203, inclusive, 218.5, 218.6, 226.7, 512 and 1194; Business &
27 Professions Code § 17200, et seq. and Code of Civil Procedure § 1021.5. The Representative
28 Plaintiff brings this action, on behalf of herself and all other persons similarly situated (hereinafter
referred to as the "Class Members" and/or the "Plaintiff Class") who are or have been employed by
defendants JACK IN THE BOX, INC. and Does 1 through 100, inclusive, collectively "JACK IN

COPY

1 THE BOX” and/or “Defendant[s]”) in any non-exempt position who work(ed) on the night shift in
2 any of JACK IN THE BOX’s fast food restaurants within the State of California, at any time between
3 January 1, 2001 and the present. The Representative Plaintiff, on behalf of herself and the Class
4 Members, also seeks injunctive relief and restitution of all benefits JACK IN THE BOX has enjoyed
5 from its failure to provide meal and/or rest periods to Plaintiff and the Plaintiff Class under Business
6 and Professions Code §§ 17200-17208.

7 2. The “Class Period” is designated as the time from January 1, 2001 through the trial
8 date, based upon the allegation that the violations of California’s wage and hour laws, as described
9 more fully below, have been ongoing since that time. During the Class Period, JACK IN THE BOX
10 has had a consistent policy toward its California non-exempt night-shift employees of (1) permitting,
11 encouraging, and/or requiring the Representative Plaintiff and Class Members to work, oftentimes
12 in excess of eight (8) hours per day, without providing meal and/or rest periods due, as required by
13 California state wage and hour laws.

14 **INTRODUCTION**

15 3. The Representative Plaintiff is informed and believes and, based thereon, alleges that,
16 within the Class Period, defendant JACK IN-THE-BOX has operated a large number of fast food
17 restaurants within the State of California. In so doing, JACK IN THE BOX has employed thousands
18 of individuals in non-exempt, night-shift positions in recent years alone at these facilities/locations
19 within the State of California.
20

21 4. During the class period referenced herein, JACK IN THE BOX has enjoyed an
22 advantage over its competition and a resultant disadvantage to its workers by electing not to provide
23 meal and/or rest periods to its non-exempt night-shift restaurant employees.

24 5. Despite JACK IN THE BOX’s knowledge of the Plaintiff Class’ entitlement to meal
25 and/or rest periods for all applicable work periods, JACK IN THE BOX failed to provide same to
26 members of the Plaintiff Class, in violation of the California Labor Code, Industrial Welfare
27 Commission Wage Orders and Title 8 of the California Code of Regulations. This action is brought
28 to redress and end this long-time pattern of unlawful conduct.

SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WORLD SAVINGS TOWER
1970 BROADWAY, SUITE 950
OAKLAND, CA 94612
TEL: (510) 891-9800

JURISDICTION AND VENUE

6. This Court has jurisdiction over the Representative Plaintiff's and the Class Members' claims for unpaid wages and/or penalties under, *inter alia*, Industrial Welfare Commission Wage Order(s), Labor Code §§ 200-203, inclusive, 218.5, 218.6, 226.7, 512 and 1194; Business & Professions Code § 17200, et seq. and Code of Civil Procedure §1021.5.

7. This Court has further jurisdiction over the Representative Plaintiff's and the Class Members' claims for injunctive relief, and restitution of ill-gotten benefits arising from defendant JACK IN THE BOX's unlawful business practices under Business & Professions Code §§ 17203 and 17204.

8. Venue as to Defendant(s) is proper in this judicial district, pursuant to Code of Civil Procedure § 395(a). Defendant JACK IN THE BOX maintains facilities and offices in the County of Orange, and transacts business, has agents, and is otherwise within this Court's jurisdiction for purposes of service of process. The unlawful acts alleged herein have a direct effect on the Representative Plaintiff and those similarly situated within the State of California and within Orange County. Defendant JACK IN THE BOX operates said facilities and has employed numerous Class Members in Orange County as well as in other counties within the State of California.

PLAINTIFFS

9. Plaintiff Beverly D. Gintz (the "Representative Plaintiff") is a natural person, and was, during a portion of the relevant time period identified herein, employed by defendant JACK IN THE BOX as a non-exempt, night-shift employee, an employment position which was entitled and continues to enjoy an entitlement to various conditions of employment such as meal and/or rest periods.

10. In said position, the Representative Plaintiff was permitted to work and did work, during the Class Period, shifts exceeding five hours without being afforded an opportunity to take an uninterrupted, unrestricted meal period of not less than thirty (30) minutes and was frequently permitted to work and did work four hours or a "major fraction" thereof, without being afforded the opportunity to enjoy net ten minute rest periods. Specifically, JACK IN THE BOX engaged in the

1 systematic denial of meal and rest periods to Representative Plaintiff and Class Members whereby
2 Representative Plaintiff and Class Members, without waiver on their part, were consistently required
3 to work without such meal and rest breaks as a result of JACK IN THE BOX's corporate policies
4 of under-staffing each of its fast-food restaurants and restricting Class Members to the premises.

5 11. Representative Plaintiff is informed and believes and, on that basis, alleges that JACK
6 IN THE BOX's policy of denying rest and meal periods is/was enforced at every facility owned
7 and/or operated thereby in which night-shift employees worked.

8 12. As used throughout this Complaint, the terms "Class Members" and/or the "Plaintiff
9 Class" refer to the named plaintiff herein as well as each and every person eligible for membership
10 in the Plaintiff Class, as further described and defined below.

11 13. At all times herein relevant, the Representative Plaintiff was and now is a person
12 within the class of persons further described and defined herein.

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

16
17 **DEFENDANTS**

18 15. At all times herein relevant, defendants JACK IN THE BOX, INC. and Does 1
19 through 100, inclusive (collectively referred to as "JACK IN THE BOX" and/or "Defendant[s]")
20 were business entities, duly licensed and located and doing business in, but not limited to, the County
21 of Orange, in the State of California.

22 16. The Representative Plaintiff is informed and believes and, based thereon, alleges that
23 defendant JACK IN THE BOX directly or indirectly employs and, since January 1, 2001, has
24 employed and/or exercised control over the wages, hours and/or working conditions of the
25 Representative Plaintiff and Class Members at JACK IN THE BOX's fast food restaurants in various
26 California counties, including, but not necessarily limited to, Orange County.

27 17. Those defendants identified as Does 1 through 100, inclusive, are and were, at all
28 relevant times herein-mentioned, officers, directors, partners, and/or managing agents of some/each

1 of the remaining defendants. The Representative Plaintiff is informed and believes and on that basis,
2 alleges that, at all relevant times herein mentioned, each of the defendants identified as Does 1
3 through 100, inclusive, employed and/or exercised control over the wages, hours and/or working
4 conditions of the Representative Plaintiff and Class Members at various California locations, as
5 identified in the preceding paragraph.

6 18. The Representative Plaintiff is unaware of the true names and capacities of those
7 defendants sued herein as Does 1 through 100, inclusive and, therefore, sues these defendants by
8 such fictitious names. The Representative Plaintiff will seek leave of court to amend this Complaint
9 when same are ascertained. The Representative Plaintiff is informed and believes and, on that basis,
10 alleges that each of the fictitiously-named defendants is responsible in some manner for, gave
11 consent to, ratified and/or authorized the conduct herein alleged and that the Representative
12 Plaintiff's and Class Members' damages, as herein alleged, were proximately caused thereby.

13 19. The Representative Plaintiff is informed and believes and on that basis alleges that,
14 at all relevant times herein mentioned, each of the defendants was the agent and/or employee of each
15 of the remaining defendants and, in doing the acts herein alleged, was acting within the course and
16 scope of such agency and/or employment.

17 20. There is no preemption of the claims brought in this Complaint because these claims
18 are based upon State law. There is no dispute over the terms of any collective bargaining agreement
19 ("CBA") and there is no need to interpret the terms of any CBA.

20
21 **CLASS ACTION ALLEGATIONS**

22 21. The Representative Plaintiff brings this action on behalf of herself and as a class
23 action on behalf of all persons or entities proximately damaged by Defendants' conduct, including,
24 but not necessarily limited to, the following Plaintiff Class:

25 All persons who are/were employed by JACK IN THE BOX as non-
26 exempt employees and who worked the night-shift at any California
27 JACK IN THE BOX, INC. fast food restaurant(s), at any time since
28 January 1, 2001.

///

///

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

22. Defendants, their officers and directors are excluded from the Plaintiff Class.

23. This action has been brought and may properly be maintained as a class action under Code of Civil Procedure § 382 because there is a well-defined community of interest in the litigation and the proposed Class is easily ascertainable.

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

- 1) whether defendant JACK IN THE BOX engaged in a systematic under-staffing of its fast-food restaurants which resulted in a denial of meal and rest periods to the Class Members.
- 2) whether defendant JACK IN THE BOX categorically prevented the Class Members from leaving the premises, thereby denying them unrestricted meal periods.
- 3) whether defendant JACK IN THE BOX violated Labor Code §§ 226.7 and/or 512 by failing to provide meal and rest periods to the Class Members.
- 4) whether defendant JACK IN THE BOX violated Labor Code §§ 201-203 by failing to pay all "wages" and/or penalties due and owing at the time that certain Class Members' employment with Defendant terminated.
- 5) whether defendant JACK IN THE BOX violated Business and Professions Code § 17200 by failing to consistently provide meal and/or rest periods to the Class Members.

B. Typicality: The Representative Plaintiff's claims are typical of the claims of the Plaintiff Class. The Representative Plaintiff and all members of the Plaintiff Class sustained damages arising out of and caused by defendant JACK IN THE BOX's common course of conduct in violation of law, as alleged herein.

C. Numerosity: A class action is the only available method for the fair and efficient adjudication of this controversy. The members of the Plaintiff Class are so numerous that joinder of all members is impractical, if not impossible, insofar as the Representative Plaintiff is informed and believes and, on that basis, alleges that the total number of class members is, at least, in the thousands of individuals. Membership in the Class will be determined upon analysis of employee and payroll, among other, records maintained by JACK IN THE BOX.

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 impractical for members of the Plaintiff 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 Plaintiff Class,

1 the resulting multiplicity of lawsuits would cause undue hardship and
2 expense for the Court and the litigants. The prosecution of separate actions
3 would also create a risk of inconsistent rulings, which might be dispositive
4 of the interests of other Class Members who are not parties to the
5 adjudications and/or may substantially impede their ability to adequately
6 protect their interests.

7 E. Adequacy of Representation: The Representative Plaintiff in this class action
8 is an adequate representative of the Plaintiff Class, in that the Representative
9 Plaintiff's claims are typical of those of the Plaintiff Class and the
10 Representative Plaintiff has the same interests in the litigation of this case as
11 the Class Members. The Representative Plaintiff is committed to vigorous
12 prosecution of this case and has retained competent counsel, experienced in
13 conducting litigation of this nature. The Representative Plaintiff is not
14 subject to any individual defenses unique from those conceivably applicable
15 to the Plaintiff Class as a whole. The Representative Plaintiff anticipates no
16 management difficulties in this litigation.

17 COMMON FACTUAL ALLEGATIONS

18 24. As described herein, JACK IN THE BOX has, for years, knowingly failed to provide
19 net ten minute rest periods for work shifts exceeding four hours or a major fraction thereof (and at
20 least three and one-half hours) and/or uninterrupted, unrestricted meal periods of not less than thirty
21 minutes for work shifts exceeding five hours to those non-exempt restaurant employees within the
22 class definition identified above, thereby enjoying a significant competitive edge over other
23 corporations within its industry. Even upon termination or resignation of the employment of
24 numerous Class Members, JACK IN THE BOX has declined to compensate these employees
25 therefor, in blatant violation of California Labor Code §§ 201 and or 202.

26 25. In so doing, JACK IN THE BOX has not only failed to pay its workers the full
27 amount of compensation due, it has, until now, effectively shielded itself from its employees'
28 scrutiny for its unlawful conduct by concealing the magnitude and financial impact of its
wrongdoing.

29 26. Moreover, California Labor Code §§ 201 and 202 require defendant JACK IN THE
30 BOX to pay its employees all wages due immediately upon discharge. California Labor Code § 203
31 provides that, if an employer willfully fails to timely pay such wages, the employer must, as a
32 penalty, continue to pay the subject employees' wages until the back wages are paid in full or an
33 action is commenced. The penalty cannot exceed 30 days of wages.

1 27. The Representative Plaintiff is informed and believes and, on that basis, alleges that
2 many members of the Plaintiff Class are entitled to unpaid compensation, yet, to date and despite
3 the termination of their employment with JACK IN THE BOX, have not received such
4 compensation.

5 28. More than 30 days have passed since certain Class Members have left defendant
6 JACK IN THE BOX's employ.

7 29. As a consequence of defendant JACK IN THE BOX's willful conduct in not paying
8 full compensation to these terminated Class Members, these particular Class Members are entitled
9 to 30 days wages as a penalty under Labor Code § 203, together with interest thereon and attorneys'
10 fees and costs.

11 30. As a direct and proximate result of Defendant's unlawful conduct, as set forth herein,
12 the Representative Plaintiff and members of the Plaintiff Class have sustained damages, as described
13 above, including a loss of compensation, in amounts to be established at trial. As a further direct and
14 proximate result of Defendant's unlawful conduct, as set forth herein, many Class Members herein
15 are entitled to recover "waiting time" penalties/wages (pursuant to California Labor Code § 203),
16 in an amount to be established at trial. As a further direct and proximate result of Defendant's
17 unlawful conduct, as set forth herein, the Representative Plaintiff and Class Members are entitled
18 to recover costs and attorneys' fees, pursuant to statute.

19
20 **FIRST CAUSE OF ACTION**
21 **FAILURE TO PROVIDE MEAL AND/OR REST PERIODS**
22 **(California Labor Code §§ 226.7 and 512)**

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

26 32. At all relevant times, Defendant was aware of and was under a duty to comply with
27 California Labor Code §§ 226.7 and 512.

28 33. California Labor Code § 226.7 provides:

(a) No employer shall require any employee to work during any meal

SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WORLD SAVINGS TOWER
1970 BROADWAY, SUITE 950
OAKLAND, CA 94612
TEL: (510) 891-9800

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

or rest period mandated by an applicable order of the Industrial Welfare Commission.

(b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the 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.

34. Moreover, California Labor Code § 512 provides, in part:

(a) 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, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. 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, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

35. By failing to consistently provide uninterrupted and unrestricted meal periods and to provide uninterrupted rest periods to its non-exempt restaurant employees, Defendant violated California Labor Code §§ 226.7 and/or 512.

36. As a direct and proximate result of Defendant's unlawful conduct, as set forth herein, the Representative Plaintiff and the Class Members have sustained damages, including loss of compensation/wages, in an amount to be established at trial. As a further direct and proximate result of Defendant's unlawful conduct, as set forth herein, the Representative Plaintiff and the Class Members are entitled to recover various penalties, in an amount to be established at trial, as well as costs and attorneys' fees, pursuant to statute.

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

37. 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.

///

1 38. The Representative Plaintiff further brings this cause of action on behalf of the
2 general public, seeking equitable and statutory relief to stop the misconduct of Defendant, as
3 complained of herein, and to compel the payment of restitution by Defendant as a result of the unfair,
4 unlawful and fraudulent business practices described herein.

5 39. The knowing conduct of Defendant, as alleged herein, constitutes an unlawful and/or
6 fraudulent business practice, as set forth in California Business & Professions Code §§ 17200-17208.
7 Specifically, Defendant conducted business activities while failing to comply with the legal mandates
8 cited herein.

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

13 41. Defendant JACK IN THE BOX has clearly established a policy of accepting a certain
14 amount of collateral damage, as represented by the damages to the Representative Plaintiff and the
15 Plaintiff Class herein alleged, as incidental to its business operations, rather than accept the
16 alternative costs of full compliance with fair, lawful and honest business practices ordinarily borne
17 by responsible competitors of Defendant and as set forth in legislation and the judicial record.

18 42. As a direct and proximate result of Defendant's unlawful conduct, as set forth herein,
19 the Representative Plaintiff and the Class Members have sustained damages, including loss of
20 earnings/wages, in an amount to be established at trial, and are entitled to restitution in such amount.

21 RELIEF SOUGHT

22 **WHEREFORE, the Representative Plaintiff, on behalf of herself and the proposed**
23 **Plaintiff Class, prays for judgment and the following specific relief against Defendants, and each**
24 **of them, jointly and separately, as follows:**

25 a. For an Order certifying the proposed Plaintiff Class and/or any other appropriate
26 subclass(es) under Code of Civil Procedure § 382;

27 b. That defendants are found to have violated Labor Code § 512 for willful failure to
28 provide meal periods;

SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WORLD SAVINGS TOWER
1970 BROADWAY, SUITE 950
OAKLAND, CA 94612
TEL: (510) 891-9800

1 c. That defendants are found to have violated Labor Code § 226.7 for willful failure to
2 provide meal and rest periods;

3 d. That defendants are found to have violated California Labor Code §§ 201 and 202
4 for willful failure to pay all compensation owed at the time of termination or within 72 hours of
5 resignation of employment to particular Class Members;

6 e. That defendants are found to have violated Business & Professions Code § 17200 by
7 failing to pay the Representative Plaintiff and Class Members all compensation for meal and/or rest
8 periods denied, and by failing to pay "waiting time" penalties to particular Class Members;

9 f. An award to the Representative Plaintiff and the Plaintiff Class of damages for the
10 amount of unpaid compensation, including interest thereon, and penalties, in an amount to be proven
11 at trial;

12 g. That defendants be ordered and enjoined to pay restitution to the Representative
13 Plaintiff and the Plaintiff Class due to Defendants' unlawful activities, pursuant to Business &
14 Professions Code §§ 17200-08, et seq.;

15 h. That defendants further be enjoined to cease and desist from its unlawful activities
16 in violation of Business & Professions Code § 17200;

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

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

20 k. For reasonable attorneys' fees, pursuant to California Labor Code §§ 218.5 and/or
21 California Civil Code § 1021.5; and

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

23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

1 Dated: May 10, 2005

2
3 SCOTT COLE & ASSOCIATES, APC

4 By:

Clyde H. Charlton

5 Scott Edward Cole, Esq.
6 Clyde H. Charlton, Esq.
7 Matthew R. Bainer, Esq.
8 Attorneys for the Representative Plaintiff
9 and the Plaintiff Class
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WORLD SAVINGS TOWER
1970 BROADWAY, SUITE 950
OAKLAND, CA 94612
TEL: (510) 891-9800

CONFIDENTIAL