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**ENDORSED
FILED
ALAMEDA COUNTY**

APR 01 2005

CLERK OF THE SUPERIOR COURT
By Alphonse Gales, Deputy

6 Attorneys for Representative Plaintiff
7 and the Plaintiff Class

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF ALAMEDA**

11 KEN FAROTTE, individually, and on
12 behalf of all others similarly situated,
13 Plaintiffs,
14 vs.
15 SAFEWAY, INC., and DOES 1 through
16 25, inclusive,
17 Defendants.

Case No.: ^a **RG05205815**
CLASS ACTION
**COMPLAINT FOR DAMAGES,
INJUNCTIVE RELIEF AND RESTITUTION**

18 Representative Plaintiff alleges as follows:

20 **PRELIMINARY STATEMENT**

21 1. This is a class action, under Code of Civil Procedure § 382, seeking unpaid wages,
22 including unpaid overtime compensation and interest thereon, rest and meal period penalties, waiting
23 time penalties, injunctive and other equitable relief and reasonable attorneys' fees and costs, under,
24 *inter alia*, California Code of Civil Procedure § 382, Labor Code §§ 201, 202, 203, 218.5, 226,
25 226.7, 512, 1174 and 1194, and CCP § 1021.5, on behalf of Plaintiff and all other persons who are
26 or have been employed by defendant SAFEWAY, INC. and DOES 1 through 25, inclusive
27 (collectively "SAFEWAY") in any of SAFEWAY's retail grocery markets in the State of California
28 at any time after the commencement of the pay period including April 1, 2001 in any allegedly-

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DEFENDANTS

1
2 17. At all times herein relevant, defendants SAFEWAY, INC. and Does 1 through 25,
3 inclusive (collectively referred to as "SAFEWAY" and/or "Defendant") were corporations, duly
4 licensed and located and doing business in, but not limited to, the County of Alameda, in the State
5 of California.

6 18. Those defendants identified as Does 1 through 25, inclusive, are and were, at all
7 relevant times herein-mentioned, officers, directors and/or managing agents of some/each of the
8 remaining defendants.

9 19. Representative Plaintiff is unaware of the true names and capacities of those
10 defendants sued herein as Does 1 through 25, inclusive and, therefore, sues these defendants by such
11 fictitious names. Representative Plaintiff will seek leave of court to amend this Complaint when
12 same are ascertained. Representative Plaintiff is informed and believes and, on that basis, alleges
13 that each of the fictitiously-named defendants is responsible in some manner for, gave consent to,
14 ratified and/or authorized the conduct herein alleged and that Representative Plaintiff's and Class
15 Members' damages, as herein alleged, were proximately caused thereby.

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

CLASS ACTION ALLEGATIONS

20
21
22 21. Representative Plaintiff KEN FAROTTE brings this action on behalf of himself and
23 as a class action on behalf of all persons or entities similarly situated and proximately damaged by
24 SAFEWAY's conduct as set forth herein, including, but not necessarily limited to the following
25 Class:

26 All persons who are/were employed in an assistant manager position
27 by Safeway, Inc., in one or more of Safeway, Inc.'s California retail
28 grocery markets and who were classified as overtime-exempt
employees at any time between April 1, 2001 and the present.

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

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

5 a. Numerosity: A class action is the only available method for the fair and
6 efficient adjudication of this controversy. The members of the class are so
7 numerous that joinder of all members is impractical, if not impossible, insofar
8 as Representative Plaintiff is informed and believes and, on that basis, alleges
9 that the total membership in the class is in the thousands of individuals.
10 Membership in the Class will be determined upon analysis of employee and
11 payroll, among other, records maintained by SAFEWAY.

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

16 i. whether defendant SAFEWAY violated IWC Wage Orders and/or
17 Labor Code § 510 by failing to pay overtime compensation to Assistant
18 Managers who worked in excess of forty hours per week
19 and/or eight hours per day.

20 ii. whether defendant SAFEWAY violated Business and Professions
21 Code § 17200 by failing to pay overtime compensation to Assistant
22 Managers who worked in excess of forty hours per week and/or eight
23 hours per day.

24 iii. whether defendant SAFEWAY violated Labor Code §§ 226.7 and/or
25 512 by failing to consistently provide meal and rest periods to its
26 Assistant Managers.

27 iv. whether defendant SAFEWAY violated Labor Code § 1174 by failing
28 to keep accurate records of employees' hours of work.

v. whether defendant SAFEWAY violated Labor Code §§ 201-203 by
failing to pay overtime wages due and owing at the time that certain
Class Members' employment with Defendant terminated.

vi. whether defendant SAFEWAY violated Labor Code § 226 by failing
to provide the semimonthly itemized statements to Class Members of
total hours worked by each and all applicable hourly rates in effect
during the pay period.

vii. whether Representative Plaintiff and the Class are entitled to "waiting
time" penalties, pursuant to Labor Code § 203.

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

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- 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 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. 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 as a whole. The Representative Plaintiff anticipates no management difficulties in this litigation.

COMMON FACTUAL ALLEGATIONS

24. As described herein, SAFEWAY has, for years, knowingly failed to adequately compensate Assistant Managers within the class definition identified above for premium (overtime) wages due, thereby enjoying a significant competitive edge over other retail grocery market chains. Even upon termination or resignation of the employment of numerous class members, SAFEWAY has declined to pay these wages, in blatant violation of California Labor Code §§ 201 and/or 202.

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

1 26. California Labor Code §§ 201 and 202 require defendant SAFEWAY to pay its
2 employees all wages due immediately upon discharge. California Labor Code § 203 provides that,
3 if an employer willfully fails to timely pay such wages, the employer must, as a penalty, continue to
4 pay the subject employees' wages until the back wages are paid in full or until an action is
5 commenced. The penalty cannot exceed 30 days of wages.

6 27. Representative Plaintiff and all persons similarly situated are entitled to unpaid
7 compensation, yet, to date, have not received such compensation. More than 30 days have passed
8 since certain class members have left defendant SAFEWAY's employ.

9 28. As a consequence of defendant SAFEWAY's willful conduct in not paying
10 compensation for all hours worked and not paying for denied meal and rest periods, certain class
11 members are entitled to 30 days wages as a penalty under Labor Code section 203, together with
12 interest thereon and attorneys' fees and costs.

13 29. As a direct and proximate result of SAFEWAY's unlawful conduct, as set forth
14 herein, Representative Plaintiff and particular Class Members have sustained damages, as described
15 above, including, but not limited to a loss of earnings for hours of overtime worked on behalf of
16 Defendants, in an amount to be established at trial. As a further direct and proximate result of
17 Defendant's unlawful conduct, as set forth herein, certain Class Members herein are entitled to
18 recover "waiting time" penalties/wages (pursuant to California Labor Code § 203) and penalties for
19 failure to provide semimonthly statements of actual hours worked and all applicable hourly rates
20 (pursuant to Labor Code § 226) in an amount to be established at trial. As a further direct and
21 proximate result of Defendant's unlawful conduct, as set forth herein, Representative Plaintiff and
22 the Class are also entitled to recover costs and attorneys' fees, pursuant to statute.

23
24 **FIRST CAUSE OF ACTION**
25 **UNLAWFUL FAILURE TO PAY REQUIRED OVERTIME**
26 **(California Labor Code § 510)**

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

///

1 31. During the time period beginning as of the commencement of the pay period
2 including April 1, 2001 and continuing through the present, Representative Plaintiff and the Class
3 Members worked in excess of eight hours in a workday and/or forty hours in a workweek. The
4 precise number of hours will be proven at trial.

5 32. During said time period, defendant SAFEWAY refused to compensate Representative
6 Plaintiff and the Class Members for some and/or all of the overtime wages earned in violation of
7 applicable Wage Order(s) and the California Labor Code.

8 33. During said time period, particular Class Members herein were employed by and were
9 thereafter terminated or resigned from their positions with SAFEWAY, yet were not paid all
10 premium (overtime) and/or other wages due upon said termination or within seventy-two hours of
11 said resignation of employment therefrom. Said non-payment was the direct and proximate result
12 of a willful refusal to do so by Defendant.

13 34. At all relevant times, Defendant was aware of and was under a duty to comply with
14 various provisions of the California Labor Code. Some of these Labor Code provisions include(d):

- 15 a. Labor Code §203: "If an employer willfully fails to pay, without
16 abatement or reduction, in accordance with Sections 201, 201.5, 202, and
17 205.5, any wages of an employee who is discharged or who quits, the wages
18 of the employee shall continue as a penalty from the due date thereof at the
19 same rate until paid or until an action therefor is commenced; but the wages
20 shall not continue for more than 30 days."
- 21 b. Labor Code § 226: "Every employer shall semimonthly or at the time of
22 each payment of wages, furnish each of his or her employees, either as a
23 detachable part of the check, draft, or voucher paying the employee's wages,
24 or separately when wages are paid by personal check or cash, an itemized
25 statement in writing showing . . . (2) total hours worked by the employee . .
26 . and (9) all applicable hourly rates in effect during the pay period and the
27 corresponding number of hours worked at each hourly rate by the employee."
- 28 c. Labor Code §510: "Any work in excess of eight hours in one workday
and any work in excess of 40 hours in any one workweek and the first eight
hours worked on the seventh day or work in any one workweek shall be
compensated at the rate of no less than one and one-half times the regular rate
of pay for an employee . . ."
- d. Labor Code § 1194: "Notwithstanding any agreement to work for a lesser
wage, any employee receiving less than the legal minimum wage or the legal
overtime compensation applicable to the employee is entitled to recover in
a civil action the unpaid balance of the full amount of this minimum wage or
overtime compensation, including interest thereon, reasonable attorney's fees,
and costs of suit.

1 e. Labor Code §1198: “[t]he maximum hours of work and the standard
2 conditions of labor fixed by the commission shall be the maximum hours of
3 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.”

4 f. Labor Code §1199: “Every employer or other person acting either
5 individually or as an officer, agent, or employee of another person is guilty
6 of a misdemeanor and is punishable by a fine of not less than one hundred
7 dollars (\$100) or by imprisonment for not less than 30 days, or by both, who
8 . . . (a) Requires or causes any employee to work for longer hours than those
fixed, or under conditions of labor prohibited by an order of the commission,
9 . . . [or] (c) Violates or refuses or neglects to comply with any provision of
10 this chapter or any order or ruling of the commission.”

11 35. By refusing to compensate Representative Plaintiff and the Class Members for
12 overtime wages earned, Defendant violated those California Labor Code provisions cited herein, as
13 well as various IWC Wage Order provisions.

14 36. As a direct and proximate result of Defendant’s unlawful conduct, as set forth herein,
15 Representative Plaintiff and the Class Members have sustained damages, including loss of earnings
16 for hours of overtime worked on behalf of Defendant, in an amount to be established at trial. As a
17 further direct and proximate result of Defendant’s unlawful conduct, as set forth herein, some Class
18 Members are entitled to recover “waiting time” penalties/wages, in an amount to be established at
19 trial, as well as costs and attorneys’ fees, pursuant to statute.

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

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

25 38. Representative Plaintiff further brings this cause of action on behalf of the general
26 public, seeking equitable and statutory relief to stop the misconduct of Defendant, as complained of
27 herein, and to seek restitution from Defendant through the unfair, unlawful and fraudulent business
28 practices described herein.

39. The knowing conduct of Defendant, as alleged herein, constitutes an unlawful and/or
fraudulent business practice, as set forth in California Business & Professions Code §§ 17200-17208.

1 Specifically, Defendant conducted business activities while failing to comply with the legal mandates
2 cited herein.

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

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

12
13 **THIRD CAUSE OF ACTION**
14 **FAILURE TO PROVIDE MEAL AND REST PERIODS**
15 **(California Labor Code §§ 226.7 and § 512)**

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

18 43. California Labor Code § 512 provides:

19 An employer may not employ an employee for a work period of more
20 than five hours per day without providing the employee with a meal
21 period of not less than 30 minutes, except that if the total work period
22 per day of the employee is no more than six hours, the meal period
23 may be waived by mutual consent of both the employer and
24 employee. An employer may not employ an employee for a work
25 period of more than 10 hours per day without providing the employee
26 with a second meal period of not less than 30 minutes, except that if
27 the total hours worked is no more than 12 hours, the second meal
28 period may be waived by mutual consent of the employer and the
employee only if the first meal period was not waived.

44. At all relevant times, Defendant was aware of and was under a duty to comply with
California Labor Code § 512 as well as California Labor Code § 226.7.

45. Specifically, California Labor Code § 226.7 provides:

(a) No employer shall require any employee to work during any meal
or rest period mandated by an applicable order of the Industrial
Welfare Commission.

1 (b) If an employer fails to provide an employee a meal period or rest
2 period in accordance with an applicable order of the Industrial
3 Welfare Commission, the employer shall pay the employee one
4 additional hour of pay at the employee's regular rate of compensation
5 for each work day that the meal or rest period is not provided.

6 46. One or more Industrial Welfare Commission Wage Orders mandates that Defendant
7 authorize and permit ten minutes of "net rest time" for every four hours of work "or major fraction
8 thereof" for non-exempt employees such as Representative Plaintiff and members of the Plaintiff
9 Classes.

10 47. By failing to consistently provide meal and rest periods to Representative Plaintiff
11 and Class Members, Defendant violated these California Labor Code provisions.

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

18 **FOURTH CAUSE OF ACTION**
FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS
(California Labor Code § 226)

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

21 50. California Labor Code § 226(a) provides:

22 Each employer shall semimonthly, or at the time of each payment of
23 wages, furnish each of his or her employees either as a detachable
24 part of the check, draft or voucher paying the employee's wages, or
25 separately when wages are paid by personal check or cash, an
26 itemized wage statement in writing showing: (1) gross wages earned;
27 (2) total number of hours worked by each employee whose
28 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
(7) the name and address of the legal entity which is the employer.

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51. California Labor Code § 226(e) provides:

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

52. Representative Plaintiff seeks to recover actual damages (including prospective damages associated with filing restatements of earnings with taxing and/or other authorities), costs and attorneys' fees under this section on behalf of himself and the Plaintiff Class.

53. Defendant SAFEWAY failed to provide timely, accurate and complete itemized wage statements to Representative Plaintiff and the Plaintiff Class in accordance with Labor Code § 226(a). Plaintiffs have suffered injuries due to this unlawful conduct insofar as they have lost use of the compensation due, were forced to bring this action to redress these violations, were forced to file inaccurate wage information with government agencies and, should this action be successful, may be required to restate earnings for prior years and/or incur time and costs in so doing.

54. None of the statements provided by Defendant has accurately reflected total number of hours worked, actual gross wages earned, net wages earned, or the appropriate deductions.

RELIEF SOUGHT

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

1. For an Order certifying the proposed Class and/or any other appropriate subclasses under Code of Civil Procedure § 382;
2. That defendant SAFEWAY is found to have violated the overtime provisions of the Labor Code as to the Representative Plaintiff and the Class;
3. That defendant SAFEWAY is found to have violated Labor Code §§ 226.7 and 512 for willful failure to provide meal periods, including second meal periods, and rest periods;
4. That defendant SAFEWAY is found to have violated the record keeping provisions

1 of Labor Code §§ 226(a) and 1174(d) as to Representative Plaintiff and the Class and for willful
2 failure to provide accurate semimonthly itemized statements thereto;

3 5. That defendant SAFEWAY is found to have violated Labor Code §§ 201 and 202 for
4 willful failure to pay all compensation owed at the time of termination of employment to particular
5 members of the Plaintiff Class;

6 6. That defendant SAFEWAY is found to have violated Business and Professions Code
7 § 17200 by failing to pay Representative Plaintiff and Class Members overtime compensation,
8 "waiting time" penalties and/or by failing to provide accurate and complete itemized wage
9 statements;

10 7. An award to Representative Plaintiff and the Plaintiff Class of damages for the
11 amount of unpaid overtime compensation, the amount of wage due as a result of Defendant's failure
12 to provide meal and rest periods, the amount of prospective damages associated with filing
13 restatements of earnings with taxing and/or other authorities, and related damages, including interest
14 thereon, and penalties in an amount to be proven at trial;

15 8. That defendant SAFEWAY be ordered to pay restitution to Representative Plaintiff
16 and the Plaintiff Class due to defendant SAFEWAY's unlawful activities, pursuant to Business and
17 Professions Code §§ 17200-08;

18 9. That defendant SAFEWAY further be enjoined to cease and desist from unlawful
19 activities in violation of Business and Professions Code § 17200;

20 10. For all other Orders, findings and determinations identified and sought in this
21 Complaint;

22 11. For Interest on the amount of any and all economic losses, at the prevailing legal rate;

23 12. For reasonable Attorneys' Fees, pursuant to California Labor Code §§218.5 and 1194
24 and/or California Civil Code §1021.5; and

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

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Dated: April 1, 2005

SCOTT COLE & ASSOCIATES, APC

By: 
Matthew R. Bainer, Esq.

Attorneys for the Representative Plaintiff
and the Plaintiff Class