

**ORIGINAL FILED**

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REC'D JAN 28 2009  
JAN 28 2009 LOS ANGELES  
FILING WINDOW SUPERIOR COURT

10  
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **FOR THE COUNTY OF LOS ANGELES**

13 ROSEMARY ANDERSON, on behalf  
14 of herself and others similarly situated,  
15  
16 Plaintiff,

17 v.

18 TOTAL RENAL CARE, INC.;  
19 and DOES 1 to 50, Inclusive,  
20  
21 Defendants.

CASE NO.: BC388335

**SECOND AMENDED CLASS ACTION COMPLAINT FOR:**

- 1. Failure to Provide Meal Breaks Under Labor Code §226.7
- 2. Violation of Labor Code §212
- 3. Penalties Pursuant to Labor Code §203
- 4. Penalties Pursuant to Labor Code §2699
- 5. Violation of Business & Professions Code §17200

22 Plaintiff ROSEMARY ANDERSON, on behalf of herself and all others similarly situated,  
23 complain of defendants, and each of them, as follows:

**I**

**INTRODUCTION**

24 1. This is a Class Action, pursuant to Code of Civil Procedure §382, on behalf of plaintiff  
25 and all individuals who are employed by, or formerly employed by TOTAL RENAL CARE, INC.  
26 and any subsidiaries or affiliated companies doing business as "DAVITA" (hereinafter referred to  
27 as "TOTAL RENAL" or "defendants"), with the State of California. Plaintiff intends to represent

1 two classes: (1) the meal break class; and (2) the 212 class.

2 2. For at least four (4) years prior to the filing of this action and continuing to the present  
3 ("meal break liability period"), defendants have had a consistent policy of requiring hourly  
4 employees within the State of California, including plaintiff, to work at least five (5) hours without  
5 an uninterrupted meal period and failing to pay such employees one (1) hour of pay at the  
6 employees' regular rate of compensation for each workday that the meal period is not provided or  
7 provided after five (5) hours, as required by California state wage and hour laws. This class is called  
8 the "meal break class."

9 3. Plaintiff, on behalf of herself and all Class Members, were subject to receiving wages  
10 from defendants in the form of checks issued by an out of state bank with no in state address for  
11 presentation and no provision for negotiating such paycheck in California at no costs and/or  
12 defendant's employees have been required to pay a fee to cash their paycheck and/or had a hold  
13 placed on their paycheck all in violation of California Labor Code §212. This is the other subclass  
14 referred to as the "212 class."

15 4. Plaintiff, on behalf of herself and all Class Members, bring this action pursuant to Labor  
16 Code §§201, 202, 203, 212, 226.7, 512, 2699, and California Code of Regulations, Title 8, Section  
17 11040 seeking, meal breaks, wages on demand, penalties, injunctive and other equitable relief, and  
18 reasonable attorneys' fees and costs.

19 5. Plaintiff was all times relevant herein, an employee of Defendants and brings this action  
20 as a class action on behalf of herself and others similarly situated.

21 6. Plaintiff, on behalf of herself and all proposed class members, pursuant to Labor Code  
22 §2699, seeks penalties for defendants' failure to provide overtime compensation, meal and rest  
23 breaks, and issuance of out-of-state checks.

24 7. Plaintiff, on behalf of herself and all Class Members, pursuant to Business & Professions  
25 Code §§17200-17208, also seeks injunctive relief, restitution, and disgorgement of all benefits  
26 defendants enjoyed from their failure to pay proper compensation.

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**II**

**PARTIES**

**A. Plaintiffs**

8. Venue as to each defendant is proper in this judicial district, pursuant to Code of Civil Procedure §395. The unlawful acts alleged herein have a direct effect on plaintiff and those similarly situated within the State of California.

9. **ROSEMARY ANDERSON** is a resident of California.

10. Plaintiff and the meal break class were regularly required to:

(1) Work in excess of five (5) hours per day without being provided a meal period and not being compensated one (1) hour of pay at the regular rate of compensation for each workday that a meal period was not provided or provided after five (5) hours, all in violation of California labor laws, regulations, and Industrial Welfare Commission Wage Orders.

11. Plaintiff and the 212 class:

(2) Receive out of state checks for wages earned with no in state address for presentation and no provision for negotiating such paycheck in California at no costs and/or being required to pay a fee to cash their paycheck and/or had a hold placed on their paycheck all in violation of California Labor Code §212.

12. Defendants willfully failed to provide all wages at the termination of their employment with defendants.

**B. Defendants**

13. Defendant **TOTAL RENAL CARE, INC.** is a Delaware Limited Liability Corporation. Defendants employed plaintiff and similarly situated persons within California, whose corporate mailing address is 601 Hawaii St., El Segundo, CA 90245.

14. The true names and capacities, whether individual, corporate, associate, or otherwise, of defendants sued herein as DOES 1 to 50, inclusive, are currently unknown to plaintiff, who therefore sues defendants by such fictitious names under Code of Civil Procedure §474. Plaintiff is informed and believes, and based thereon alleges, that each of the defendants designated herein as a DOE is

1 legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave  
2 of court to amend this Complaint to reflect the true names and capacities of the defendants  
3 designated hereinafter as DOES when such identities become known.

4 15. Plaintiff is informed and believes, and based thereon alleges, that each defendant acted  
5 in all respects pertinent to this action as the agent of the other defendants, carried out a joint scheme,  
6 business plan or policy in all respects pertinent hereto, and the acts of each defendant are legally  
7 attributable to the other defendants. Furthermore, defendants in all respects acted as the employer  
8 and/or joint employer of plaintiff and the Class.

9 **III**

10 **FACTUAL BACKGROUND**

11 16. Plaintiff and the Class are, and at all times pertinent hereto, have been non-exempt  
12 employees within the meaning of the California Labor Code, and the implementing rules and  
13 regulations of the IWC California Wage Orders. Defendants hire employees who work in the  
14 position of "hourly employees." These employees work on a regular basis without receiving  
15 compensation for all hours worked.

16 17. During the meal period liability period, plaintiff and the members of the proposed meal  
17 period class were regularly required to work in excess of five (5) hours per day without being  
18 provided a meal period.

19 18. Defendants did not fully compensate the proposed class for defendants' failure to provide  
20 meal periods during the meal period liability period.

21 19. Defendants' requirement that plaintiff and the proposed class work through meal periods  
22 without paying legal compensation for failure to provide meal periods during the liability periods  
23 was willful and deliberate.

24 20. Defendants have issued plaintiff and the 212 Class paychecks issued from an out of state  
25 bank that plaintiff and the Class are unable to negotiate without paying a fee and/or being subjected  
26 to a waiting period at a place within the State of California designated in writing on the face of the  
27 check or on a notice contained within the pay envelope.



1           **A.    Numerosity**

2           26.    The potential members of the two Classes as defined are so numerous that joinder of all  
3 the members of the Classes is impracticable. While the precise number of Class Members has not  
4 been determined at this time, plaintiff is informed and believes that defendants currently employ, and  
5 during the relevant time periods employed, over several thousand employees between the two  
6 classes.

7           27.    Accounting for employee turnover during the relevant periods necessarily increases this  
8 number substantially. Plaintiff alleges defendants' employment records would provide information  
9 as to the number and location of all Class Members. Joinder of all members of the proposed Class  
10 is not practicable.

11           **B.    Commonality**

12           28.    There are questions of law and fact common to the Class that predominate over any  
13 questions affecting only individual Class Members. These common questions of law and fact  
14 include, without limitation:

15               (1)    Whether defendants violated Labor Code §§226.7 and 512, IWC Wage Order 4-  
16 2001, or other applicable IWC Wage Orders by failing to provide meal periods on days they worked  
17 in excess of five (5) hours and failing to compensate said employees one (1) hours wages in lieu of  
18 meal periods;

19               (2)    Whether defendants violated §212 by failing to provide an order, check, draft,  
20 note, memorandum, or other acknowledgment of indebtedness, that is negotiable and payable in  
21 cash, on demand, without discount, at some established place of business in the state;

22               (3)    Whether defendants violated §§201-203 of the Labor Code by failing to pay  
23 compensation due and owing at the time that any Class member's employment with defendants  
24 terminated;

25               (4)    Whether defendant's violated §2699 et. Seq. Of the Labor Code by engaging in  
26 the acts previously alleged;

27               (5)    Whether defendants violated §17200 et seq. of the Business & Professions Code  
28

1 by engaging in the acts previously alleged; and

2 (6) Whether plaintiff and the members of the class are entitled to equitable relief  
3 pursuant to Business & Professions Code §17200, et. seq.

4 **C. Typicality**

5 29. The claims of the named plaintiff are typical of the claims of the class. Plaintiff and all  
6 members of the class sustained injuries and damages arising out of and caused by defendants'  
7 common course of conduct in violation of laws, regulations that have the force and effect of law and  
8 statutes as alleged herein.

9 **D. Adequacy of Representation**

10 30. Plaintiff will fairly and adequately represent and protect the interests of the members of  
11 the class. Counsel who represents plaintiff is competent and experienced in litigating large  
12 employment class actions.

13 **E. Superiority of Class Action**

14 31. A class action is superior to other available means for the fair and efficient adjudication  
15 of this controversy. Individual joinder of all Class Members is not practicable, and questions of law  
16 and fact common to the Class predominate over any questions affecting only individual members  
17 of the Class. Each member of the class has been damaged and is entitled to recovery by reason of  
18 defendants' illegal policy and/or practice of denying class members meal periods and paying wages  
19 with out of state paychecks.

20 32. Class action treatment will allow those similarly situated persons to litigate their claims  
21 in the manner that is most efficient and economical for the parties and the judicial system. Plaintiffs  
22 are unaware of any difficulties that are likely to be encountered in the management of this action that  
23 would preclude its maintenance as a class action.

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V

**FIRST CAUSE OF ACTION**

**FAILURE TO PROVIDE MEAL BREAKS**

**PURSUANT TO LABOR CODE §226.7**

33. Plaintiff incorporates paragraphs 1 through 32 as though fully set forth herein.

34. Labor Code §226.7 requires an employer to pay an additional hour of compensation for each meal period the employer fails to provide. Employees are entitled to a meal period of a least thirty (30) minutes per five (5) hour work period. Plaintiff and the Class consistently worked over five (5) hour shifts. Pursuant to the Code, plaintiff and the Class are entitled to a meal period of not less than thirty (30) minutes prior to exceeding five (5) hours of employment.

35. Defendants failed to provide plaintiff and other acute nurses with timely meal breaks of not less than thirty (30) minutes as required by the Labor Code during the relevant class period.

36. Pursuant to Labor Code §226.7, plaintiff is entitled to damages in an amount equal to one (1) hour of wages per missed meal break, as well as attorneys' fees and costs in a sum to be proven at trial.

VI

**SECOND CAUSE OF ACTION**

**VIOLATION OF LABOR CODE §212**

37. Plaintiff incorporates paragraphs 1 through 36 as though fully set forth herein.

38. Labor Code §212 states that any order, check, draft, note, memorandum, or other acknowledgment of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the state.

39. Defendants failed to provide their employees with an order, check, draft, note, memorandum, or other acknowledgment of indebtedness that was payable on demand, without discount at some established place of business in the state. Defendant's bank is outside of the State of California, and therefore plaintiff and others were delayed in getting the checks cashed after the disbursement of paychecks by Defendant. As a result, defendant's checks were not payable on

1 demand without discount.

2 VII

3 THIRD CAUSE OF ACTION

4 WAITING TIME PENALTIES UNDER LABOR CODE §203

5 40. Plaintiff incorporates paragraphs 1 through 39 as though fully set forth herein.

6 41. Numerous members of the class including the plaintiff are no longer employed by  
7 defendants. They were either fired or quit defendants employ.

8 42. The defendant's failure to pay wages, as alleged above was willful in that defendants and  
9 each of them knew wages to be due but failed to pay them, thus entitling plaintiff and the class to  
10 penalties under Labor Code §203, which provides that an employee's wages shall continue as a  
11 penalty until paid for a period of up to thirty (30) days from the time they were due.

12 43. Defendants have failed to pay plaintiff and others a sum certain at the time of termination  
13 or within seventy-two (72) hours of their resignation, and have failed to pay those sums for thirty  
14 (30) days thereafter. Pursuant to the provisions of Labor Code §203, plaintiff is entitled to a penalty  
15 in the amount of plaintiff's and others daily wage multiplied by thirty (30) days.

16 VIII

17 FOURTH CAUSE OF ACTION

18 PENALTIES PURSUANT TO LABOR CODE §2699

19 44. Plaintiff incorporates paragraphs 1 through 43 as fully set forth herein.

20 45. As a result of the acts alleged above, plaintiff seeks penalties under Labor Code §§2698 and  
21 2699 because of defendants' violation of Labor Code §§203, 212, 510, 1194, and 1199 which call  
22 for civil penalties.

23 46. For each such violation, plaintiff and the proposed class are entitled to penalties in an amount  
24 to be shown at the time of trial subject to the following formula:

- 25 a. For \$100 for the initial violation per employee per pay period.  
26 b. For \$200 for each subsequent violation per employee per pay period

27 47. These penalties shall be allocated 75% to the Labor and Workforce Development Agency  
28 and 25% to the affected employees. 48. Plaintiff sent a certified letter to the LWDA and defendants

1 as prescribed by the Code on April 1, 2008. On April 23, 2008, plaintiff received a letter from the  
2 LWDA indicating that it does not intend to investigate the alleged Labor Code violations. Therefore,  
3 under Labor Code §2699.3(a)(2)(A), plaintiff may proceed and file a complaint for penalties  
4 pursuant to Labor Code §2699.

5 IX

6 **FIFTH CAUSE OF ACTION**

7 **UNFAIR COMPETITION PURSUANT TO**

8 **BUSINESS & PROFESSIONS CODE §17200**

9 49. Plaintiff incorporates paragraphs 1 through 48 as though fully set forth herein.

10 50. This is a Representative Private Attorney General Action and Class Action for Unfair  
11 Business Practices. **ROSEMARY ANDERSON** on her own behalf and on behalf of the general  
12 public, and on behalf of others similarly situated, bring this claim pursuant to Business & Professions  
13 Code §17200, et seq. The conduct of all defendants as alleged in this Complaint has been and  
14 continues to be unfair, unlawful, and harmful to plaintiff, the general public, and the class. Plaintiff  
15 seeks to enforce important rights affecting the public interest within the meaning of Code of Civil  
16 Procedure §1021.5.

17 51. Plaintiff is a "person" within the meaning of Business & Professions Code §17204, and  
18 therefore has standing to bring this cause of action for injunctive relief, restitution, and other  
19 appropriate equitable relief.

20 52. Business & Profession Code §17200, et seq. prohibits unlawful and unfair business  
21 practices.

22 53. Wage and hour laws express fundamental public policies. Providing employees with  
23 proper compensation is a fundamental public policy of this State and of the United States. Labor  
24 Code §90.5(a) articulates the public policies of this State to enforce vigorously minimum labor  
25 standards, to ensure that employees are not required or permitted to work under substandard and  
26 unlawful conditions, and to protect law-abiding employers and their employees from competitors  
27 who lower their costs by failing to comply with minimum labor standards.



1 in cash, on demand, without discount, at some established place of business in the state;

2 3. For penalties pursuant to Labor Code §203 for all employees who were terminated or  
3 resigned equal to their daily wage times thirty (30) days;

4 4. An award of prejudgment and post judgment interest;

5 5. An order enjoining defendant and its agents, servants, and employees, and all persons  
6 acting under, in concert with, or for it from providing plaintiffs with proper breaks pursuant to Labor  
7 Code §§226.7, 512, and IWC 4-2001;

8 6. For penalties and to other relief pursuant to Labor Code §2699;

9 7. For restitution for unfair competition pursuant to Business & Professions Code §17200,  
10 including disgorgement or profits, in an amount as may be proven;

11 8. An award providing for payment of costs of suit;

12 9. An award of attorneys' fees; and

13 10. Such other and further relief as this Court may deem proper and just.

14 **DEMAND FOR JURY TRIAL**

15 Plaintiff hereby demands trial of her claims by jury to the extent authorized by law.

16  
17 Dated: ~~October~~ 27, 2008  
18 January

KINGSLEY & KINGSLEY, APC

19 By:   
20 BRIAN LEVINE  
21 ATTORNEY FOR PLAINTIFFS

1 (PROOF OF SERVICE)  
2 [CCP 1013(a)(3)]

3 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and  
5 not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino,  
6 California 91436.

7 On January 28, 2009, I served all interested parties in this action the following documents described  
8 as **SECOND AMENDED CLASS ACTION COMPLAINT** by placing a true copy thereof enclosed in a  
9 sealed envelope addressed as follows:

10 Tae Kim  
11 EPSTEIN BECKER & GREEN, P.C.  
12 1925 Century Park East, Suite 500  
13 Los Angeles, CA 90067-2506

14  (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing  
15 correspondence for mailing. Under that practice it would be deposited with U.S. postal service on  
16 that same day with postage fully prepaid at Encino, California in the ordinary course of business.  
17 I am aware that on motion of the party served, service is presumed invalid if postal cancellation  
18 date or postage meter date is more than one day after date of deposit for mailing in affidavit.

19  (STATE) I declare under penalty of perjury under the laws of the State of California that the  
20 above is true and correct.

21 Executed on January 28, 2009, at Encino, California.

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23 \_\_\_\_\_  
24 Michelle A. Tanzer  
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