

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action 1:16-cv-1080**

CYNTHIA ALLEN, individually and on
behalf of all similarly situated individuals,

Plaintiff,

v.

SSC LEXINGTON OPERATING
COMPANY LLC, a North Carolina
Limited Liability Company, d/b/a
BRIAN CENTER NURSING CARE/
LEXINGTON,

Defendant.

**CLASS ACTION AND
COLLECTIVE ACTION
COMPLAINT**

DEMAND FOR JURY TRIAL

CLASS AND COLLECTIVE ACTION COMPLAINT AND JURY TRIAL

DEMAND

Plaintiff, CYNTHIA ALLEN (“Plaintiff”), by and through the undersigned attorneys, brings this Complaint against Defendant, **SSC LEXINGTON OPERATING COMPANY LLC, a North Carolina Limited Liability Company, d/b/a BRIAN CENTER NURSING CARE/LEXINGTON** (“Defendant”), individually and on behalf of all similarly situated individuals and states as follows:

INTRODUCTION

1. This is a class and collective action brought by Plaintiff on her own behalf and on behalf of all similarly situated current and/or former employees of Defendant to

recover for Defendant's willful violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.*, the North Carolina Wage and Hour Act §§ 95, *et seq.* ("NCWHA"), 13 N.C.A.C §§ 12, *et seq.* ("NCAC"), and other appropriate rules, regulations, statutes, and ordinances.

2. Defendant employs individuals as nurses, therapists, admissions, liaisons, and administrators.¹ Through its employees, Defendant provides "short-term and long-term health care services" such as, skilled nursing care, physical therapy, occupational therapy, speech therapy, wound care, hospice care and respite care.²

3. The individuals Plaintiff seeks to represent in this action are current and former similarly situated employees of Defendant who were not properly compensated for "off-the-clock" worked performed, some of those "off-the-clock" hours in excess of forty (40) hours, during one or more workweeks. For the weeks in which those total workweek hours were forty (40) hours or less, Plaintiff and other similarly situated individuals did not receive pay at a rate of not less than \$7.25 per hour for "off-the-clock" hours worked as required under the FLSA and NCWHA. For the weeks in which those total workweek hours were in excess of forty (40) hours, Plaintiff and other similarly situated individuals did not receive premium overtime pay at a rate of not less than one and one-half times the regular rate of pay for "off-the-clock" hours worked as required under the FLSA and NCWHA.

4. The U.S. Department of Labor has recognized that employees engaged as

¹ <http://savacareers.com/> (last visited May 18, 2016).

² <http://www.savaseniorcare.com/CareServices/Default.aspx> (last visited May 18, 2016).

Licensed Practical Nurses (“LPNs”) and other similar health care employees “generally do not qualify as exempt learned professionals, regardless of work experience and training” and thus, are entitled to protection under the FLSA and must be paid at least one and one-half times the regular rate of pay for hours in excess of forty in a workweek. Further, Registered Nurses (“RNs”) who are paid hourly should also receive overtime pay. *See* DOL Fact Sheet #17N, at 1, attached hereto as Exhibit A.

5. Defendant knew or should have known that its employees must be paid at a rate of not less than \$7.25 per hour for all hours worked for workweeks totaling forty (40) hours or less.

6. Defendant knew or should have known that its employees are not exempt under the FLSA, and it could have properly compensated Plaintiff and the Class for the overtime work they performed, but it did not. On her own behalf and on behalf of the many other similarly situated employees of Defendant, Plaintiff seeks to recover the full measure of back-pay and damages allowed by law.

JURISDICTION AND VENUE

7. This Court has subject-matter jurisdiction over Plaintiff’s FLSA claim pursuant to 28 U.S.C. § 1331 because Plaintiff’s claims raise a federal question under 29 U.S.C. §§ 201, *et seq.*

8. This Court also has subject-matter jurisdiction over Plaintiff’s Collective Action FLSA claim pursuant to 29 U.S.C. § 216(b), which provides that suit under the

FLSA “may be maintained against any employer . . . in any Federal or State court of competent jurisdiction.”

9. This Court has personal jurisdiction over Defendant because its principal office is located in this District.

10. Upon information and belief, Defendant’s annual sales exceed \$500,000 and it has more than two employees, so the FLSA applies in this case on an enterprise basis.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because the actions and omissions giving rise to the claims pled in this Complaint substantially occurred in this District.

PARTIES

12. Plaintiff, CYTHNIA ALLEN, is an individual who resides in the County of Guilford, City of Greensboro, North Carolina. Plaintiff worked as an hourly employee for Defendant from February 2014 until September 2015 as a Licensed Vocational Nurse/Licensed Practical Nurse (“LVN/LPN”). Plaintiff brings this action on behalf of herself and all other similarly situated individuals pursuant to 29 U.S.C. § 216(b), and her Consent to Sue is attached hereto as Exhibit B.

13. Defendant is a North Carolina Limited Liability Company which provides “short-term and long-term health care services” such as, skilled nursing care, physical therapy, occupational therapy, speech therapy, wound care, hospice care and respite

care.³

14. Defendant is located with its principal office's street address at 279 Brian Center Drive, Lexington, North Carolina, 27292 and its principal office's mailing address at One Ravinia Drive, Suite 1400, Atlanta, Georgia, 30346.

15. The tasks Defendant charges its Nurses to perform include: assessment of patients by physical examination; administer medications and treatments; participates in the care planning process; supervises LPNs and certified nursing assistants *See* SavaSeniorCare Job Post, at 1, attached hereto as Exhibit C.

16. Defendant is registered to do business in North Carolina and can be served through its registered agent C T Corporation System, located at 150 Fayetteville St., Box 1011 Raleigh, North Carolina, 27601.

GENERAL ALLEGATIONS

17. Plaintiff and the other similarly situated individuals were, or are, employed by Defendant as Nurses or other job titles performing similar job duties.

18. Plaintiff's primary job duties as a Nurse are non-exempt work including, but not limited to, assessment of patients by physical examination; administering medications and treatments; and participating in the care planning process.

19. Plaintiff's most recent hourly rate was \$24.25, and her rate when she started working for Defendant was \$23.30 per hour.

20. Plaintiff regularly worked over forty (40) hours per week while employed

³ <http://www.savaseniorcare.com/CareServices/Default.aspx> (last visited May 18, 2016).

by Defendant. *See, e.g.*, Plaintiff's paystubs for the pay period 09/25/2014 through 10/08/2014, 03/12/2015 through 03/25/2015, and 09/10/2015 through 09/23/2015, attached hereto as Exhibit D.

21. Plaintiff and other similarly situated individuals were required to clock out for thirty (30) minute unpaid breaks during shifts of eight (8) hours or more; however, Plaintiff and other similarly situated individuals were required to continue to work on the nursing floor and care for the patients while being clocked out. If Plaintiff and other similarly situated individuals did not clock out, Defendant would deduct thirty (30) minutes from the "Hours Worked" section of their timesheets. *See, e.g.*, Plaintiff's timesheet for the pay period 09/25/2014 through 10/08/2014, 03/12/2015 through 03/25/2015, and 09/10/2015 through 09/23/2015, attached hereto as Exhibit D.

22. Plaintiff and other similarly situated individuals were not compensated for their "off-the-clock" work performed, either because the "off-the-clock" hours were not captured in the Defendant's time-keeping system or because the Defendant removed the hours from the Plaintiff's timesheet.

23. At all times relevant to this Complaint, Defendant suffered or permitted Plaintiff and other similarly situated individuals to routinely perform "off-the-clock" work. Further, Defendant maintained a policy and practice of not paying Plaintiff and other similarly situated individuals for "off-the-clock" work at a rate of not less than \$7.25 per hour for workweeks totaling forty (40) hours or less. For the weeks in which those hours were in excess of forty (40) hours, Plaintiff and other similarly situated

individuals did not receive premium overtime pay for “off-the-clock” work at a rate of not less than one and one-half times the regular rate of pay.

24. Defendant’s history of violating the law shows a pattern of Defendant’s willingness to disregard the law. On or around Oct. 26, 2015, the United States Department of Justice (“DOJ”) intervened in three False Claim Act lawsuits alleging healthcare fraud. The DOJ filed a consolidated complaint in intervention, alleging Defendant “knowingly and routinely submitted false claims to Medicare for rehabilitation therapy services that were not medically reasonable and necessary.”⁴

25. In the instant case, Defendant knew or should have known that, under the FLSA, Plaintiff should have been paid for all “off-the-clock” time worked at a rate of not less than \$7.25 per hour for workweeks totaling forty (40) hours or less. Further, Defendant knew or should have known that, under the FLSA, Plaintiff should have been paid for all “off-the-clock” hours in excess of forty (40) hours “at a rate not less than one and one-half times the regular rate” at which she was employed. 28 U.S.C. § 207(a)(1).

26. Defendant knew or should have known that, under the NCWHA, Plaintiff should have been paid for all “off-the-clock” time worked at a rate of not less than \$7.25 per hour for workweeks totaling forty (40) hours or less. Further, Defendant knew or should have known that, under the NCWHA, Plaintiff should have been paid for all “off-the-clock” hours in excess of forty (40) hours “at a rate not less than one and one-half

⁴ <https://www.justice.gov/opa/pr/government-intervenes-lawsuits-alleging-skilled-nursing-chain-savaseniorcare-provided> (last visited May 19, 2016). See also, *United States of America ex rel. Hayward, et al. v. SavaSeniorCare, LLC, et al.*, No. 3:11-cv-0821 (M.D. Tenn.)

times the regular rate” at which she was employed. *See* N.C. Gen. Stat. Ann. § 95-25.3-4.

27. Despite this, Defendant does not pay overtime at one and one-half times the regular rate.

28. Defendant knew or should have known that, every employer subject to any provision of the FLSA must maintain accurate timesheet and payroll records. *See* 29 C.F.R § 516.1.

29. Defendant knew or should have known that, under the NCWHA and the NCAC, every employer is required to “make, keep” and “maintain complete and accurate records . . . for each employee in each workweek”. *See* N.C. Gen. Stat. Ann. § 95-25.15, § 95-25.23A, and 13 N.C.A.C §§ 12.0801.

30. Despite this, Defendant did not keep an accurate record of all of Plaintiff’s hours worked.

31. In reckless disregard of the FLSA, the NCWHA, and the NCAC protections afforded to Plaintiff and similarly situated individuals, Defendant adopted and then adhered to its policy and plan that denied Plaintiff compensation for “off-the-clock” hours worked, failed to pay a rate of at least \$7.25 for each hour of “off-the-clock” hours worked in workweeks totaling less than forty (40) hours, failed to pay overtime premiums at one-and-one half times the regular rate for “off-the-clock” hours worked in workweeks totaling in excess of forty (40) hours, and failed to maintain true and accurate payroll records.

COLLECTIVE ACTION ALLEGATIONS

32. Plaintiff brings this action pursuant to 29 U.S.C. § 216(b) of the FLSA individually and on behalf of:

All current and former Nurses or other job titles performing similar job duties employed by BRIAN CENTER NURSING CARE/LEXINGTON at any time during the last three years.

33. Plaintiff does not bring this action on behalf of any employees exempt from coverage under the FLSA pursuant to the executive, administrative, or professional exemptions, or for those who were paid the proper legal rate for each hour worked.

34. *29 U.S.C. § 216(b) Conditional Certification “Similarly Situated” Standard:* With respect to the claims set forth in the FLSA action, conditional certification under the FLSA is appropriate because the employees described above are “similarly situated” to Plaintiff under 29 U.S.C. § 216(b). The class of employees on behalf of whom Plaintiff brings this collective action are similarly situated because: (a) they have been or are employed in the same or similar positions; (b) they were or are subject to the same or similar unlawful practices, policy, or plan (namely, Defendant’s policy of not paying their Nurse employees for “off-the-clock” hours at least minimum wage rate for workweeks totaling forty (40) hours or less or overtime at a rate of one-and-one-half times their regular rate for workweeks totaling above forty (40) hours); (c) their claims are based upon the same factual and legal theories; and (d) the employment relationship between Defendant and every putative Class member is exactly the same and differs only by name, location, and rate of pay.

35. Plaintiff shares the same interests as the putative conditional class and will be entitled to unpaid compensation at a rate of at least minimum wage, overtime compensation, interest, attorneys' fees, and costs owed under the FLSA.

36. Plaintiff's entitlement to compensation at a rate of at least \$7.25 for "off-the-clock" hours for workweeks of forty (40) hours or less and Plaintiff's entitlement to premium overtime pay for workweeks in excess of forty (40) hours would be similar, except for amount, to entitlement of individuals similarly situated to her and depends on an identical factual question: whether Plaintiff and the putative conditional class were required by Defendant to take unpaid breaks and cease their nursing duties; or instead, whether they were required to take unpaid breaks and continue to work "off-the-clock" on the nursing floor and caring for patients.

37. Defendant's conduct constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).

38. Defendant willfully engaged in a pattern of violating the FLSA, as described in this Complaint in ways including, but not limited to, by routinely suffering or permitting Plaintiff and the FLSA Collective to work "off-the-clock" without receiving compensation for all hours worked.

39. Defendant is liable under the FLSA for failing to properly compensate Plaintiff and members of the FLSA Collectives, and as such, notice should be sent to the FLSA Collectives.

40. Upon information and belief, there are numerous other similarly situated current and former Nurses or other job titles performing similar job duties, who performed uncompensated “off-the-clock” work in violation of FLSA and would benefit from the issuance of a court-supervised notice of this action and the opportunity to join it. The precise number of collective Class members should be readily available from a review of Defendant’s personnel, scheduling, time and payroll records, and from input received from the collective class members as part of the notice and “opt-in” process provided by 29 U.S.C. § 216(b).

CLASS ACTION ALLEGATIONS

41. Plaintiff brings the action pursuant to Federal Rule of Civil Procedure 23(b)(3) and (c)(4) on behalf of a putative Class defined to include:

42. All current and former Nurses or other job titles performing similar job duties employed by BRIAN CENTER NURSING CARE/LEXINGTON at any time during the last three years.

Plaintiff reserves the right to amend the putative class definition as necessary.

43. *Numerosity:* The members of the North Carolina Class are so numerous that joinder of all members in the case would be impracticable, and the disposition of their claims as a Class will benefit the parties and the Court. The precise number of Class members should be readily available from a review of Defendant’s personnel and payroll records.

44. *Commonality/Predominance:* There is a well-defined community of interest among North Carolina Class members and common questions of *both* law and

fact predominate in the action over any questions affecting individual members. These common legal and factual questions include, but are not limited to, the following:

- a. whether Defendant maintained common policies or practices that required its employees working eight (8) hours or more in a workday to clock out, or have “Hours Worked” section on timesheet reduced manually by Defendant, for thirty (30) minute unpaid breaks, yet, Defendant suffered its employees to continue to work “off-the-clock”;
- b. whether the NCWHA requires Defendant to pay minimum wages and overtime wages to Plaintiff and the putative class members for requiring them to perform work “off-the-clock”;
- c. whether Defendant violated the NCWHA through its pay practices;
- d. whether Defendant violated the NCWHA and the NCAC by failing make, keep, and preserve true and accurate payroll records;
- e. whether Defendant should be required to pay compensatory damages, attorneys’ fees, costs, and interest for violating the NCWHA; and
- f. whether Defendant’s violations were willful.

45. *Typicality:* Plaintiff’s claims are typical of those of the North Carolina Class in that Plaintiff and all other members suffered damages as a direct and proximate result of Defendant’s common and systemic payroll policies and practices. Plaintiff’s claims arise from the same Defendant policies, practices, and course of conduct as all other North Carolina Class members’ claims and Plaintiff’s legal theories are based on the same legal theories as all other North Carolina Class members: whether all Class members were employed by Defendant on an hourly basis without receiving

compensation for “off-the-clock” minimum wages and overtime wages owed for that work.

46. *Adequacy*: Plaintiff will fully and adequately protect the interests of the North Carolina Class and Plaintiff retained national counsel who are qualified and experienced in the prosecution of nationwide wage-and-hour class actions. Neither Plaintiff nor her counsel has interests that are contrary to, or conflicting with, the interests of the North Carolina Class.

47. *Superiority*: A class action is superior to other available methods for the fair and efficient adjudication of the controversy, because, *inter alia*, it is economically infeasible for North Carolina Class members to prosecute individual actions of their own given the relatively small amount of damages at stake for each individual along with the fear of reprisal by their employer.

48. The case will be manageable as a class action. Plaintiff and their counsel know of no unusual difficulties in the case and Defendant has payroll systems that will allow the class, wage, and damages issues in the case to be resolved with relative ease. Because the elements of Rule 23(b)(3), or in the alternative (c)(4), are satisfied in the case, class certification is appropriate. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (“[b]y its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue her claim as a class action”).

COUNT I

**VIOLATION OF THE FAIR LABOR STANDARDS ACT,
29 U.S.C. §§ 201, et seq., FAILURE TO PAY MINIMUM WAGES**

49. Plaintiff re-alleges and incorporates all previous paragraphs herein

50. At all times relevant to this action, Defendant was an “employer” under the FLSA, 29 U.S.C. § 203(d), subject to the provisions of 29 U.S.C. §§ 201, *et seq.*

51. Defendant is engaged in interstate commerce or in the production of goods for commerce, as defined by the FLSA.

52. At all times relevant to this action, Plaintiff was an “employee” of Defendant within the meaning of the FLSA, 29 U.S.C. § 203(e)(1).

53. Plaintiff either (1) engaged in commerce; or (2) engaged in the production of goods for commerce; or (3) employed in an enterprise engaged in commerce or in the production of goods for commerce.

54. The position of an hourly-paid Nurse is not exempt from the FLSA.

55. Defendant’s other job titles performing similar job duties are not exempt from the FLSA.

56. At all times relevant to this action, Defendant “suffered or permitted” Plaintiff to work and thus “employed” her within the meaning of the FLSA, 29 U.S.C. § 203(g).

57. The FLSA requires an employer to pay employees the federally mandated minimum wages for all compensable hours worked. 29 U.S.C. § 206.

58. Defendant violated the FLSA by failing to pay Plaintiff the federally

mandated minimum wage for all compensable hours worked in per workweek.

59. Plaintiff regularly worked “off-the-clock” during her thirty (30) minute unpaid break, but was not compensated for the “off-the-clock” hours for workweeks totaling forty (40) hours or less hours. *See, e.g.*, Exhibit D.

60. Upon information and belief, Defendant has corporate policies and practices of evading pay for its hourly workers for “off-the-clock” work.

61. Defendant’s violations of the FLSA were knowing and willful.

62. By failing to compensate its hourly workers at a rate of at least \$7.25 for all “off-the-clock” hours worked in a workweek totaling forty (40) hours or less, Defendant has violated the FLSA, 29 U.S.C. §§ 201, *et seq.*, including 29 U.S.C. §§ 206(a)(1) and 215(a). All similarly situated employees are victims of a uniform and company-wide policy which operates to knowing and willfully not compensate employees for all hours worked at the federally mandated minimum wage rate. This uniform policy, in violation of the FLSA, has been, and continues to be, applied to all employees who have worked or are working for Defendant in the same or similar position as Plaintiff.

63. The FLSA, 29 U.S.C. § 216(b), provides that as a remedy for a violation of the Act, an employee is entitled to his or her unpaid overtime wages plus an additional equal amount in liquidated damages, costs, and reasonable attorneys’ fees.

COUNT II

VIOLATION OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C. §§ 201, *et seq.*, FAILURE TO PAY OVERTIME WAGES

64. Plaintiff re-alleges and incorporates all previous paragraphs herein.

65. At all times relevant to this action, Defendant was an “employer” under the FLSA, 29 U.S.C. § 203(d), subject to the provisions of 29 U.S.C. §§ 201, *et seq.*

66. Defendant is engaged in interstate commerce or in the production of goods for commerce, as defined by the FLSA.

67. At all times relevant to this action, Plaintiff was an “employee” of Defendant within the meaning of the FLSA, 29 U.S.C. § 203(e)(1).

68. Plaintiff either (1) engaged in commerce; or (2) engaged in the production of goods for commerce; or (3) employed in an enterprise engaged in commerce or in the production of goods for commerce.

69. The position of hourly-paid Nurse is not exempt from the FLSA.

70. Defendant’s other job titles performing similar job duties are not exempt from the FLSA.

71. At all times relevant to this action, Defendant “suffered or permitted” Plaintiff to work and thus “employed” her within the meaning of the FLSA, 29 U.S.C. § 203(g).

72. The FLSA requires an employer to pay employees the federally mandated overtime premium rate of one and a half times their regular rate of pay for every hour worked in excess of forty (40) hours per workweek. 29 U.S.C. § 207.

73. Defendant violated the FLSA by failing to pay Plaintiff the federally mandated overtime premium for all hours worked in excess of forty (40) hours per workweek.

74. Plaintiff regularly worked “off-the-clock” during on her thirty (30) minute unpaid break, but was not compensated at a rate of one and one-half times her regular rate for workweeks worked in excess of forty (40) total hours. *See, e.g.*, Exhibit D.

75. Upon information and belief, Defendant has corporate policies and practices of evading premium overtime pay for its hourly workers for “off-the-clock” work.

76. Defendant’s violations of the FLSA were knowing and willful.

77. By failing to compensate its hourly workers at a rate not less than one and one-half times their regular rate of pay for “off-the-clock” work performed in excess of forty (40) hours in a workweek, Defendant has violated the FLSA, 29 U.S.C. §§ 201, *et seq.*, including 29 U.S.C. §§ 207(a)(1) and 215(a). All similarly situated employees are victims of a uniform and company-wide policy which operates to compensate employees at a rate less than the federally mandated overtime wage rate. This uniform policy, in violation of the FLSA, has been, and continues to be, applied to all employees who have worked or are working for Defendant in the same or similar position as Plaintiff.

78. The FLSA, 29 U.S.C. § 216(b), provides that as a remedy for a violation of the Act, an employee is entitled to his or her unpaid overtime wages plus an additional equal amount in liquidated damages, costs, and reasonable attorneys’ fees.

COUNT III

VIOLATION OF 29 C.F.R § 516, *et seq.*, FAILURE TO KEEP RECORDS

79. Plaintiff re-alleges and incorporates all previous paragraphs herein and

further alleges as follows.

80. 29 C.F.R § 516.1 subjects “every employer subject to any provisions of the Fair Labor Standards Act” to maintain employee records.

81. At all times relevant to this action, Defendant was an “employer” under the FLSA, 29 U.S.C. § 203(d), subject to the provisions of 29 U.S.C. §§ 201, *et seq.*

82. At all times relevant to this action, Plaintiff was an “employee” of Defendant within the meaning of the FLSA, 29 U.S.C. § 203(e)(1).

83. Plaintiff either (1) engaged in commerce; or (2) engaged in the production of goods for commerce; or (3) employed in an enterprise engaged in commerce or in the production of goods for commerce.

84. The position of hourly-paid Nurse is not exempt from the FLSA.

85. Defendant’s other job titles performing similar job duties are not exempt from the FLSA.

86. At all times relevant to this action, Defendant “suffered or permitted” Plaintiff to work and thus “employed” her within the meaning of the FLSA, 29 U.S.C. § 203(g).

87. Thus, Defendant is subject to 29 C.F.R § 516, *et seq.*

88. The employer is mandated to maintain and preserve payroll or other records containing, without limitation, the total hours worked by each employee each workday and total hours worked by each employee each workweek. 29 C.F.R § 516.2.

89. Upon information and belief, Defendant has corporate policies and

practices of evading pay for its hourly workers by deducting time off of Plaintiff and other similarly situated individuals' timesheets even though said employees were required to work "off-the-clock" during that deducted time.

90. Defendant failed to maintain and preserve accurate timesheet and payroll records as required by 29 C.F.R § 516.2.

91. When the employer fails to keep accurate records of the hours worked by its employees, the rule in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 66 S. Ct. 1187, 1192 (1946) is controlling. That rule states:

[w]here the employer's records are inaccurate or inadequate . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

92. The Supreme Court set forth this test to avoid placing a premium on an employer's failure to keep proper records in conformity with its statutory duty, thereby allowing the employer to reap the benefits of the employees' labors without proper compensation as required by the FLSA. Where damages are awarded pursuant to this test, "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with . . . the Act." *Id.*

93. The FLSA, 29 U.S.C. § 216(b), provides that as a remedy for a violation of

the Act, an employee is entitled to his or her unpaid overtime wages plus an additional equal amount in liquidated damages, costs, and reasonable attorneys' fees.

COUNT IV

(Class Action)

VIOLATION OF THE NCWHA AND NCAC

94. Plaintiff re-alleges and incorporates all previous paragraphs herein and further alleges as follows.

95. At all times relevant to the action, Defendant was an employer covered by the overtime mandates of the NCWHA and the NCAC, Plaintiff and the North Carolina Class are employees entitled to the NCWHA's and the NCAC's protections.

96. The NCWHA entitles employees to certain hourly minimum wages, overtime wages, and other wages. *See* NCWHA §§ 95, *et. seq.*

97. The NCWHA entitles employees to compensation of "the minimum wage set forth in paragraph 1 of section 6(a) of the Fair Labor Standards Act, 29 U.S.C. 206(a)(1)". *See* N.C. Gen. Stat. Ann. § 95-25.3(a).

98. The NCWHA entitles employees to overtime compensation "at not less than one and one-half times the regular rate" of pay of the employee for those hours in excess of 40 hours per week." *See* N.C. Gen. Stat. Ann. § 95-25.4(a).

99. Defendant, Plaintiff, and North Carolina Class members are "employer" and "employees" for the purposes of NCWHA.

100. Defendant violated the NCWHA by regularly and repeatedly failing to compensate Plaintiff and the North Carolina Class for "off-the-clock" work performed

described in this Complaint.

101. The NCWHA entitles employees to bring an action against an employer to recover “unpaid minimum wages”, “unpaid overtime compensation”, and “liquidated damages” in the General Court of Justice “by any one or more employees”. *See* N.C. Gen. Stat. Ann. § 95-25.22(a)(b). The NCWHA entitles employees to bring an action “within two years”. *Id.* at (f).

102. The NCWHA and the NCAC requires employers to make, keep, and preserve true and accurate payroll records. *See* N.C. Gen. Stat. Ann § 95-25.15, § 95-25.23A, and 13 N.C.A.C §§ 12.0801.

103. Defendant violated the NCWHA and the NCAC by regularly and repeatedly failing to make, keep, and preserve true and accurate payroll records by regularly and routinely deducting thirty (30) minutes from Plaintiff and the North Carolina Class’ timesheets even though Plaintiff and the Class were required to continue to work “off-the-clock” during the deducted time.

104. As a result, Plaintiff and the North Carolina Class have and will continue to suffer loss of income and other damages. Accordingly, Plaintiff and the North Carolina Class are entitled to recover unpaid wages owed, plus costs, attorneys’ fees, and other appropriate relief under the NCWHA at an amount to be proven at trial.

WHEREFORE, Plaintiff requests the following relief:

- a. Certifying this case as a collective action in accordance with 29 U.S.C. § 216(b) with respect to the FLSA claims set forth above;
- b. Certifying the North Carolina class in accordance with Fed. R. Civ. P.

23(b)(3) or (c)(4) with respect to the claims set forth above;

- c. Designating Named Plaintiff as the Class Representative;
- d. Appointing Johnson Becker, PLLC as Interim Co-Lead Class Counsel with respect to Plaintiff's Rule 23 claims and FLSA claims;
- e. Declaring that Defendant willfully violated the Fair Labor Standards Act and its attendant regulations as set forth above;
- f. Declaring that Defendant violated its obligations under the FLSA;
- g. Declaring that Defendant willfully violated the NCWHA;
- h. Granting judgment in favor of Plaintiff and against Defendant and awarding the amount of unpaid "off-the-clock" wages calculated at the rate of not less than the Plaintiff's regular rate multiplied by all hours that Plaintiff worked "off-the-clock", but under 40 hours total;
- i. Granting judgment in favor of Plaintiff and against Defendant and awarding the amount of unpaid "off-the-clock" overtime wages calculated at the rate of one and one-half (1.5) times the Plaintiff's regular rate multiplied by all hours that Plaintiff worked in excess of the prescribed number of hours per week for the past three years for the FLSA Class and 2 years for the State Class;
- j. Awarding liquidated damages to Plaintiff, in an amount equal to the amount of unpaid "off-the-clock" wages found owing to Plaintiff and awarding Plaintiff and the class members all other available compensatory damages, including, *inter alia*, all unpaid wages, lost interest owed, and liquidated damages, in an amount equal to the amount of unpaid "off-the-clock" wages found owing to the Plaintiff, by Defendant under the NCWHA;
- k. Awarding reasonable attorneys' fees and costs incurred by Plaintiff in filing this action;
- l. Awarding pre- and post-judgment interest to Plaintiff on these damages;
and
- m. Such further relief as this court deems appropriate.

JURY DEMAND

Plaintiff demands a trial by jury of all claims asserted in this Complaint.

Dated August 24, 2016.

/s/ Benjamin P. Winikoff
Benjamin P. Winikoff (49625)
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