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HAINES LAW GROUP, APC
Paul K. Haines (SBN 248226)
phaines@haineslawgroup.com
Tuvia Korobkin (SBN 268066)
tkorobkin@haineslawgroup.com
Diana M. Martinez (SBN 322654)
dmartinez@haineslawgroup.com
222 N. Sepulveda Blvd., Suite 1550
El Segundo, California 90245
Tel: (424) 292-2350
Fax: (424) 292-2355

Attorneys for Plaintiff
ANA ROMERO

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO**

ANA ROMERO, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

BISCOMERICA CORP., a California
Corporation; and DOES 1 through 100,

Defendants.

Case No.: CIVDS2005851

**FIRST AMENDED CLASS AND
REPRESENTATIVE ACTION
COMPLAINT:**

- (1) **FAILURE TO PAY ALL
OVERTIME WAGES OWED
(LABOR CODE §§ 204, 510, 558,
1194, 1198)**
- (2) **FAILURE TO PROVIDE
ACCURATE, ITEMIZED WAGE
STATEMENTS (LABOR CODE
§ 226 *ET SEQ.*; and**
- (3) **UNFAIR COMPETITION (BUS &
PROF CODE § 17200 *et seq.*)**
- (4) **CIVIL PENALTIES UNDER THE
PRIVATE ATTORNEYS GENERAL
ACT (LABOR CODE §§ 2698, *et seq.*)**

**DEMAND FOR JURY TRIAL
UNLIMITED CIVIL CASE**

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT
JUN 09 2020
BY Jovanna Leandro
JOVANNA LEANDRO, DEPUTY

1 Plaintiff Ana Romero ("Plaintiff"), on behalf of herself and all others similarly situated,
2 hereby brings this First Amended Class and Representative Action Complaint ("Complaint")
3 against Biscomerica Corp., a California Corporation, and DOES 1 to 100, inclusive (collectively
4 "Defendants"), and on information and belief alleges as follows:

5 **JURISDICTION**

6 1. Plaintiff, on behalf of herself and all others similarly situated, hereby brings this
7 Complaint for recovery of unpaid wages and penalties under California Business & Professions
8 Code § 17200 *et. seq.*, Labor Code §§ 204, 226, 510, 558, 1192, 1194, 1198, 2698, *et seq.* and
9 Industrial Welfare Commission Wage Order 1 ("Wage Order 1"), in addition to seeking
10 declaratory relief and restitution. This Complaint is brought pursuant to California Code of Civil
11 Procedure § 382. This Court has jurisdiction over Defendants' violations of the California Labor
12 Code because the amount in controversy exceeds this Court's jurisdictional minimum.

13 **VENUE**

14 2. Venue is proper in this judicial district pursuant to Cal. Code Civ. Proc. §§ 395(a)
15 and 395.5, as at least some of the acts and omissions complained of herein occurred in the County
16 of San Bernardino. Defendants own, maintain offices, transact business, have agent(s) within the
17 County of San Bernardino, and/or otherwise are found within the County of San Bernardino, and
18 Defendants are within the jurisdiction of this Court for purposes of service of process.

19 **PARTIES**

20 3. Plaintiff is an individual over the age of eighteen (18). At all relevant times herein,
21 Plaintiff was and currently is, a California resident. During the four years immediately preceding
22 the filing of this action and within the statute of limitations periods applicable to each cause of
23 action pled herein, Plaintiff was employed by Defendants as a non-exempt employee. Plaintiff
24 was, and is, a victim of Defendants' policies and/or practices complained of herein, lost money
25 and/or property, and has been deprived of the rights guaranteed by Labor Code §§ 204, 226, 510,
26 558, 1192, 1194, 1198, 2698, *et seq.* California Business & Professions Code § 17200 *et seq.*
27 ("Unfair Competition Law"); and Wage Order 1, which sets employment standards for the
28 manufacturing industry, which includes the industry in which Plaintiff worked for Defendants.

1 4. Plaintiff is informed and believes, and based thereon alleges, that during the four
2 years preceding the filing of this action and continuing to the present, Defendants did (and
3 continue to do) business by owning and operating a 250,000 square foot facility manufacturing
4 cookies and candy items. Defendants employed Plaintiff and other, similarly-situated non-exempt
5 employees within, among other counties, San Bernardino County and the state of California and,
6 therefore, were (and are) doing business in San Bernardino County and the State of California.

7 5. Plaintiff does not know the true names or capacities, whether individual, partner,
8 or corporate, of the defendants sued herein as DOES 1 to 100, inclusive, and for that reason, said
9 defendants are sued under such fictitious names, and Plaintiff will seek leave from this Court to
10 amend this Complaint when such true names and capacities are discovered. Plaintiff is informed,
11 and believes, and based thereon alleges, that each of said fictitious defendants, whether individual,
12 partners, or corporate, were responsible in some manner for the acts and omissions alleged herein,
13 and proximately caused Plaintiff and the Classes (as defined in Paragraph 12) to be subject to the
14 unlawful employment practices, wrongs, injuries and damages complained of herein.

15 6. Plaintiff is informed, and believes, and thereon alleges, that at all times mentioned
16 herein, Defendants were and are the employers of Plaintiff and all members of the Classes.

17 7. At all times herein mentioned, each of said Defendants participated in the doing
18 of the acts hereinafter alleged to have been done by the named Defendants; and furthermore, the
19 Defendants, and each of them, were the agents, servants, and employees of each and every one of
20 the other Defendants, as well as the agents of all Defendants, and at all times herein mentioned
21 were acting within the course and scope of said agency and employment. Defendants, and each
22 of them, approved of, condoned, and/or otherwise ratified each and every one of the acts or
23 omissions complained of herein.

24 8. At all times mentioned herein, Defendants, and each of them, were members of
25 and engaged in a joint venture, partnership, and common enterprise, and acting within the course
26 and scope of and in pursuance of said joint venture, partnership, and common enterprise. Further,
27 Plaintiff alleges that all Defendants were joint employers for all purposes of Plaintiff and all
28 members of the Classes.

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10. Defendants' facility operates three separate shifts during the workday. Plaintiff and other non-exempt employees who worked on these shifts earned a base hourly rate of pay, plus shift differentials and other forms of pay that must be included in the regular rate of pay for purposes of calculating employee's overtime rates of pay (collectively referred to herein as "Incentive Pay"). For example, during the pay period beginning February 17, 2019 and ending March 2, 2019, Plaintiff worked 71.18 "regular hours" at a \$12.00 rate of pay, and 24.83 "overtime hours" at an \$18.00 rate of pay. Plaintiff also earned \$14.40 in shift differentials for working on the second shift during this same pay period. However, Defendants did not properly calculate the regular rate of pay, resulting in unpaid overtime wages, as a result of Plaintiff earning Incentive Pay during this pay period. Defendants' underpayment of overtime wages due to miscalculating the regular rate of pay when employees work overtime and earn Incentive Payment in a corresponding time period is systematic and has resulted in underpaid overtime wages to Plaintiff and other members of the putative class.

11. When Plaintiff and other non-exempt employees worked a shift entitling them to a shift differential payment, it was paid at an hourly rate of pay. However, the wage statements provided to Plaintiff and other non-exempt employees failed to list the hourly rate of pay or number of hours associated with the shift differential payment. By way of illustration, in the example provided in the immediately preceding paragraph, the wage statement provided to Plaintiff did not include the number of hours or rate of pay associated with the shift differential payment, in violation of Labor Code section 226(a)(9).

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1 **CLASS ACTION ALLEGATIONS**

2 12. **Class Definitions:** Plaintiff brings this action on behalf of herself and the
3 following Classes pursuant to § 382 of the Code of Civil Procedure:

4 a. The Overtime Class consists of all of Defendants' current and former non-exempt
5 employees in California who worked in excess of 8 hours in a work day and/or in
6 excess of 40 hours in a work week, and earned Incentive Pay during a
7 corresponding time period, during the four years preceding the filing of this
8 lawsuit through the present.

9 b. The Wage Statement Class consists of members of the: (i) Overtime Class; and (ii)
10 all non-exempt employees who earned a shift differential, and who also received
11 a wage statement during the one year preceding the filing of this lawsuit through
12 the present.

13 c. The UCL Class consists of members of the: (i) Overtime Class; and/or (ii) Wage
14 Statement Class, during the four years immediately preceding the filing of this
15 lawsuit through the present.

16 13. Plaintiff reserves the right under Rule 3.765(b) of the California Rules of Court,
17 to amend or modify the description of the various classes with greater specificity or further
18 division into subclasses or limitation to particular issues.

19 14. **Numerosity/Ascertainability:** The members of the Classes are so numerous that
20 joinder of all members would be unfeasible and not practicable. The membership of the Classes
21 is unknown to Plaintiff at this time; however, it is estimated that the members of the Classes
22 number greater than one hundred (100) individuals. The identity of such membership is readily
23 ascertainable via inspection of Defendants' employment records.

24 15. **Common Questions of Law and Fact Predominate/Well Defined Community**
25 **of Interest:** There are common questions of law and fact as to Plaintiff and all other similarly
26 situated employees, which predominate over questions affecting only individual members. Those
27 common questions include, without limitation:

28 ///

- i. Whether Defendants properly paid overtime wages to members of the Overtime Class;
- ii. Whether Defendants provided accurate, itemized wage statements to members of the Wage Statement Class; and
- iii. Whether Defendants engaged in unlawful, unfair, illegal, and/or deceptive business practices by and through the wage and hour policies and practices described above, and whether as a result Defendants owe the classes restitution.

16. **Predominance of Common Questions:** Common questions of law and fact predominate over questions that affect only individual members of the Classes. The common questions of law set forth above are numerous and substantial and stem from Defendants' policies and/or practices applicable to each individual class member, such as Defendants' overtime and wage statement. As such, the common questions predominate over individual questions concerning each individual class member's showing as to their eligibility for recovery or as to the amount of their damages.

17. **Typicality:** The claims of Plaintiff are typical of the claims of the Classes because Plaintiff was employed by Defendants as a non-exempt employee in California during the statute(s) of limitations period applicable to each cause of action pled in the Complaint. As alleged herein, Plaintiff, like the members of the Classes, was not provided all legally required overtime wages, and was not provided with accurate, itemized wage statements.

18. **Adequacy of Representation:** Plaintiff is fully prepared to take all necessary steps to represent fairly and adequately the interests of the members of the Classes. Moreover, Plaintiff's attorneys are ready, willing and able to fully and adequately represent the members of the Classes and Plaintiff. Plaintiff's attorneys have prosecuted and defended numerous wage-and-hour class actions in state and federal courts in the past and are committed to vigorously prosecuting this action on behalf of the members of the Classes.

19. **Superiority:** The California Labor Code is broadly remedial in nature and serves an important public interest in establishing minimum working conditions and standards in California. These laws and labor standards protect the average working employee from

1 exploitation by employers who have the responsibility to follow the laws and who may seek to
2 take advantage of superior economic and bargaining power in setting onerous terms and
3 conditions of employment. The nature of this action and the format of laws available to Plaintiff
4 and members of the Classes make the class action format a particularly efficient and appropriate
5 procedure to redress the violations alleged herein. If each employee were required to file an
6 individual lawsuit, Defendants would necessarily gain an unconscionable advantage since they
7 would be able to exploit and overwhelm the limited resources of each individual plaintiff with
8 their vastly superior financial and legal resources. Moreover, requiring each member of the
9 Classes to pursue an individual remedy would also discourage the assertion of lawful claims by
10 employees who would be disinclined to file an action against their former and/or current employer
11 for real and justifiable fear of retaliation and permanent damages to their careers at subsequent
12 employment. Further, the prosecution of separate actions by the individual class members, even
13 if possible, would create a substantial risk of inconsistent or varying verdicts or adjudications
14 with respect to the individual class members against Defendants herein; and which would
15 establish potentially incompatible standards of conduct for Defendants; and/or legal
16 determinations with respect to individual class members which would, as a practical matter, be
17 dispositive of the interest of the other class members not parties to adjudications or which would
18 substantially impair or impede the ability of the class members to protect their interests. Further,
19 the claims of the individual members of the Classes are not sufficiently large to warrant vigorous
20 individual prosecution considering all of the concomitant costs and expenses attending thereto.
21 As such, the Classes identified in Paragraph 12 are maintainable as a Class under § 382 of the
22 Code of Civil Procedure.

23 **FIRST CAUSE OF ACTION**

24 **FAILURE TO PAY ALL OVERTIME WAGES**

25 **(AGAINST ALL DEFENDANTS)**

26 20. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

27 21. This cause of action is brought pursuant to Labor Code §§ 204, 510, 558, 1194 and
28 1198 which provide that all non-exempt employees are entitled to all overtime wages for all

overtime worked (hours in excess of 8 in one day and/or 40 in one week), and provide a private right of action for the failure to pay all overtime compensation for overtime work performed.

22. At all times relevant herein, Defendants were required to properly compensate Plaintiff and the members of the Overtime Class for all overtime hours worked pursuant to California Labor Code §§ 510 and 1194, and Wage Order 1. Labor Code § 510 and Wage Order 1, Section 3 require an employer to pay an employee “one and one-half (1½) times the regular rate of pay” for work in excess of 8 hours per workday and/or in excess of 40 hours per workweek. Labor Code § 510 and Wage Order 1, Section 3 also require an employer to pay an employee double the employee’s regular rate for work in excess of 12 hours each workday and/or in excess of 8 hours on the seventh consecutive day of work in the workweek. Defendants caused Plaintiff and the members of the Overtime Class to work in excess of 8 hours in a workday and/or 40 hours in a workweek but did not properly compensate Plaintiff and the members of the Overtime Class at one and one-half their regular rate of pay for such hours. Defendants also caused Plaintiff and the members of the Overtime Class to work in excess of 12 hours in a workday but did not properly compensate Plaintiff and the members of the Overtime Class at double their regular rate of pay for such hours.

23. The foregoing practices and policies are unlawful and create entitlement to recovery by Plaintiff and the members of the Overtime Class in a civil action for the unpaid amount of overtime premium owing, including interest thereon, as well as statutory penalties, civil penalties, and attorneys’ fees and costs of suit, pursuant to Labor Code §§ 204, 218.5, 218.6, 510, 558, 1194 and 1198, Wage Order 1, California Code of Civil Procedure § 1021.5 California Code of Civil Procedure § 1021.5, and Civil Code §§ 3287(b) and 3289.

SECOND CAUSE OF ACTION

FAILURE TO PROVIDE ACCURATE, ITEMIZED WAGE STATEMENTS (AGAINST ALL DEFENDANTS)

24. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

25. Plaintiff is informed and believes, and based thereon alleges, that Defendants knowingly and intentionally, as a matter of uniform practice and policy, failed to furnish Plaintiff

1 and the Wage Statement Class members with accurate, itemized wage statements that included
2 among other requirements, all applicable hourly rates in effect during the pay period and the
3 corresponding number of hours worked at each hourly rate in violation of Lab. Code § 226 *et seq.*

4 26. Defendants' failure to furnish Plaintiff and the members of the Wage Statement
5 Class with complete and accurate, itemized wage statements resulted in actual injury, as said
6 failures led to, among other things, the non-payment of all of overtime wages earned, and deprived
7 them of the information necessary to identify discrepancies in Defendants' reported data.

8 27. Defendants' failures created an entitlement to Plaintiff and members of the Wage
9 Statement Class in a civil action for damages and/or penalties pursuant to Labor Code § 226,
10 including statutory penalties civil penalties, reasonable attorneys' fees, and costs according to suit
11 pursuant to Labor Code § 226 *et seq.*

12 **THIRD CAUSE OF ACTION**

13 **UNFAIR COMPETITION**

14 **(AGAINST ALL DEFENDANTS)**

15 28. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

16 29. Defendants have engaged and continue to engage in unfair and/or unlawful
17 business practices in California in violation of California Business & Professions Code § 17200
18 *et seq.*, by failing to pay all overtime wages and failing to provide employees with accurate and
19 itemized wage statements.

20 30. Defendants' utilization of these unfair and/or unlawful business practices deprived
21 Plaintiff and continues to deprive members of the Classes of compensation to which they are
22 legally entitled, constitutes unfair and/or unlawful competition, and provides an unfair advantage
23 over Defendants' competitors who have been and/or are currently employing workers and
24 attempting to do so in honest compliance with applicable wage and hour laws.

25 31. Because Plaintiff is a victim of Defendants' unfair and/or unlawful conduct alleged
26 herein, Plaintiff for herself and on behalf of the members of the Classes, seeks full restitution of
27 monies, as necessary and according to proof, to restore any and all monies withheld, acquired
28 and/or converted by Defendants pursuant to Business and Professions Code §§ 17203 and 17208.

32. The acts complained of herein occurred within the last four years immediately preceding the filing of the Complaint in this action.

33. Plaintiff was compelled to retain the services of counsel to file this court action to protect her interests and those of the Classes, to obtain restitution and injunctive relief on behalf of Defendants' current non-exempt employees, and to enforce important rights affecting the public interest. Plaintiff has thereby incurred the financial burden of attorneys' fees and costs, which she is entitled to recover under Code of Civil Procedure § 1021.5.

FOURTH CAUSE OF ACTION

PRIVATE ATTORNEYS GENERAL ACT

(AGAINST ALL DEFENDANTS)

34. Plaintiff re-alleges and incorporates by reference all prior paragraphs as though fully set forth herein.

35. Defendants have committed several Labor Code violations against Plaintiff, members of the Classes, and other aggrieved employees. Plaintiff, an "aggrieved employee" within the meaning of Labor Code § 2698 *et seq.* ("PAGA"), acting on behalf of herself and other aggrieved employees, brings this representative action against Defendants to recover the civil penalties due to Plaintiff, other aggrieved employees, and the State of California according to proof, pursuant to Labor Code § 558 and § 2699 (a) and (f) including, but not limited to: (1) \$100.00 for each initial violation for each failure to pay each employee and \$200 for each subsequent violation or willful or intentional violation pursuant to Labor Code § 210 for each failure to pay each employee, plus 25% of the amount unlawfully withheld; (2) \$50.00 for each initial violation and \$100 for each subsequent violation pursuant to Labor Code § 558 per employee per pay period; (3) \$100.00 for each initial violation and \$250.00 for each subsequent violation pursuant to Labor Code § 1197.1 per employee per pay period; (4) \$250.00 for each initial violation and \$1,000.00 for each subsequent violation of Lab. Code § 226 pursuant to Labor Code § 226.3 per employee per pay period; and/or (5) \$100.00 for each initial violation and \$200 for each subsequent violation per employee per pay period for those violations of the Labor Code for which no civil penalty is specifically provided, based on the following Labor Code violations:

- a. Failing to compensate Plaintiff and other aggrieved employees all overtime wages earned in violation of Labor Code §§ 204, 510, 558, 1194, and 1198;
- b. Failing to furnish Plaintiff and other aggrieved employees with complete and accurate itemized wage statements in violation of Labor Code § 226;
- c. Failing to pay Plaintiff and other aggrieved employees all wages earned at least twice each calendar month in violation of Labor Code § 204; and
- d. Failing to maintain accurate records on behalf of Plaintiff and other aggrieved employees in violation of Labor Code §§ 1174 and 1198.

36. On or around February 28, 2020 Plaintiff notified Defendant BiscoAmerica Corp, via certified mail, and the California Labor and Workforce Development Agency (“LWDA”) via its website, of Defendants’ violations of the California Labor Code and Plaintiff’s intent to bring a claim for civil penalties under the PAGA with respect to violations of the California Labor Code identified herein. Now that sixty-five days have passed from Plaintiff’s notifying Defendants and the LWDA of these violations, Plaintiff has exhausted her administrative requirements for bringing a claim under the PAGA with respect to these violations.

37. Plaintiff was compelled to retain the services of counsel to file this court action to protect her interests and the interests of other similarly aggrieved employees, and to assess and collect the civil penalties owed by Defendants. Plaintiff has thereby incurred attorneys’ fees and costs, which she is entitled to recover under California Labor Code § 2699(g).

PRAYER

WHEREFORE, Plaintiff prays for judgment for herself and for all others on whose behalf this suit is brought against Defendants, as follows:

1. For an order certifying the proposed Classes;
2. For an order appointing Plaintiff as representative of the Classes;
3. For an order appointing Counsel for Plaintiff as Counsel for the Classes;
4. Upon the First Cause of Action, for compensatory, consequential, general and special damages according to proof pursuant to Labor Code §§ 204, 510, 558, 1194 and 1198.
5. Upon the Second Cause of Action, for penalties pursuant to Labor § 226;

6. Upon the Third Cause of Action, for restitution to Plaintiff and members of the Classes of all money and/or property unlawfully acquired by Defendants by means of any acts or practices declared by this Court to be in violation of Business and Professions Code § 17200 *et seq.*;

7. Upon the Fourth Cause of Action, for civil penalties due to Plaintiff, other aggrieved employees, and the State of California according to proof pursuant to Labor Code §§ 558 and 2699(a) and (f) including, but not limited to: 1) \$100.00 for each initial violation for each failure to pay each employee and \$200.00 for each subsequent violation or willful or intentional violation pursuant to Labor Code § 210 for each failure to pay each employee, plus 25% of the amount unlawfully withheld; (2) \$50.00 for each initial violation and \$100.00 for each subsequent violation pursuant to Labor Code § 558 per employee per pay period; (3) \$100.00 for each initial violation and \$250.00 for each subsequent violation pursuant to Labor Code § 1197.1 per employee per pay period; (4) \$250.00 for each initial violation and \$1,000.00 for each subsequent violation of Labor Code § 226 pursuant to Labor Code § 226.3 per employee per pay period; and/or (5) \$100.00 for each initial violation and \$200.00 for each subsequent violation per employee per pay period for those violations of the Labor Code for which no civil penalty is specifically provided, based on the violations of Labor Code sections cited in Paragraph 35 (a)-(d)

8. Prejudgment interest on all due and unpaid wages pursuant to California Labor Code § 218.6 and Civil Code §§ 3287 and 3289;

9. On all causes of action, for attorneys' fees and costs as provided by Labor Code §§ 226, 1194 *et seq.*, 2699(g), and Code of Civil Procedure § 1021.5; and

10. For such other and further relief, the Court may deem just and proper.

Dated: May 5, 2020

Respectfully submitted,
HAINES LAW GROUP, APC

By:

Paul K. Haines
Attorneys for Plaintiff ANA ROMERO

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Dated: May 5, 2020

By:

Paul K. Haines
Attorneys for Plaintiff
ANA ROMERO