

**UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

Civil Action No. _____

CLARA E. SALAZAR, and
JUANITA YBARRA, on behalf of themselves and
others similarly situated,

Plaintiffs and Proposed Collective and
Class Action Representatives,

v.

BUTTERBALL, LLC.,

Defendant.

COMPLAINT IN COLLECTIVE AND CLASS ACTION

Plaintiffs Clara E. Salazar and Juanita Ybarra, on behalf of themselves and others similarly situated, by and through their attorneys, state and allege as follows:

PRELIMINARY STATEMENT

1. Named Plaintiffs and proposed collective action and class action representatives Clara E. Salazar and Juanita Ybarra (hereinafter referred to as “Named Plaintiffs”) are current production workers employed by Defendant Butterball, LLC at its Longmont, Colorado processing plant. The Named Plaintiffs seek relief on a collective and a class-wide basis relating to Defendant’s practice and policy of not fully compensating employees for all the time they spend working at Defendant’s poultry processing plants. In particular, the Named Plaintiffs spend time donning, doffing, and sanitizing gear and equipment, and walking to and

from the production floor. These activities were necessary and indispensable to the Named Plaintiffs' principal work but were not compensated by Defendant.

2. The Named Plaintiffs bring this action on behalf of themselves and all persons who were, are or will be employed by Defendant as hourly production and support employees at Defendant's poultry processing plant in Longmont, Colorado, at any time within the three years prior to the filing of this Complaint through the date of the final disposition of this action (the "FLSA Period"), and who have not received full compensation for all hours worked under the Fair Labor Standards Act ("FLSA"). This group is hereinafter referred to as the "FLSA Class."

3. The Named Plaintiffs also bring this action on behalf of themselves and all persons who were, are or will be employed by Defendant as hourly production and support employees in Defendant's Colorado poultry processing plants, at any time within the two years prior to the filing of this Complaint through the date of the final disposition of this action (the "Colorado Class Period"), and who have not received full compensation for all hours worked. This group is hereinafter referred to as the "Colorado Class."

4. The Named Plaintiffs have provided their written consent to participate in this litigation as required by 29 U.S.C. § 216(b), copies of which are attached hereto as **Exhibit A**.

5. In addition to the Named Plaintiffs, additional employees have agreed to join this action as party plaintiffs under the FLSA. Their consents to join this action are attached hereto as **Exhibit B**, and have been filed with the Court in accordance with 29 U.S.C. § 216(b).

6. In addition to the Named Plaintiffs, all persons currently or formerly employed by Defendant in similar employment positions which are not exempt from the minimum wage and

overtime requirements of the FLSA, are entitled to collectively participate in this action by choosing to “opt in” and submit a written consent to join form. After the commencement of this action and in accordance with the Local Rules of the District of Colorado, the Named Plaintiffs shall file, pursuant to 29 U.S.C. § 216(b), a motion for certification of their FLSA claims as a collective action, to obtain discovery of potential class members necessary for notice, and for authorization to issue notice to the FLSA Class.

PARTIES

7. The Named Plaintiffs and all putative collective and class action members are nonexempt production workers employed by Defendant within 3 years of the filing of this Complaint.

8. Named Plaintiff Juanita Ybarra is a current production employee who is employed by Defendant at its Longmont, Colorado processing plant.

9. Named Plaintiff Clara Salazar is a current production employee who is employed by Defendant at its Longmont, Colorado processing plant.

10. Upon information and belief, Defendant is a North Carolina limited liability company with significant operations throughout the United States. Defendant is a poultry processor which supplies wholesale and retail customers with processed turkey.

11. Upon information and belief, prior to October 2006, ConAgra Foods Packaged Foods Company, Inc. (“ConAgra”) owned and operated the Colorado Butterball plant. Upon further information and belief, in or about 2006, Defendant acquired the Colorado Butterball plant in an asset purchase wherein it was assigned and/or assumed the wage and hour liabilities

of ConAgra's processing operations, including but not limited to the operations at the Colorado Butterball plant.

12. Upon information and belief, upon acquiring the Colorado Butterball plant from ConAgra, Defendant maintained identical processing locations, continued the business and processing operations previously employed by ConAgra, and maintained substantial employee, supervisory and managerial continuity and retention. Accordingly, upon further information and belief, Defendant is a bona fide successor-in-interest to ConAgra's Butterball turkey operations.

13. Defendant regularly engages in interstate commerce and is an employer within the meaning of the FLSA.

JURISDICTION AND VENUE

14. Jurisdiction over the Named Plaintiffs' federal claims is based upon Section 16(b) of the Fair Labor Standards Act of 1938, as amended ("FLSA"), 29 U.S.C. § 216(b), and 28 U.S.C. §§ 1331 and 1337.

15. In addition, jurisdiction over the Plaintiffs' claims under Colorado law is based upon this Court's power to exercise supplemental jurisdiction over these claims under 28 U.S.C. § 1367.

16. The District of Colorado has personal jurisdiction over Defendant because Defendant (a) does business in Colorado, (b) operates a processing plant in Colorado, (c) employs hundreds of workers in Colorado, and in the District, and (d) because many of the acts complained of and giving rise to the claims alleged in Colorado occurred or are occurring in the

District. Defendant has purposefully availed itself of the privilege of conducting activities within the State of Colorado, thus invoking the benefits and protections of its laws.

17. Venue is proper because Defendant resides in this District, a substantial part of the events or omissions giving rise to the claims alleged occurred in this District, and/or Defendants contacts within this District are sufficient to subject it to personal jurisdiction in this District. 28 U.S.C. § 1391(b), (c).

FACTUAL ALLEGATIONS

18. Upon information and belief, Defendant operates a poultry processing plant in Longmont, Colorado.

19. Upon information and belief, production and support employees at Defendant's processing plant are nonexempt hourly employees, and the work performed by these employees is nonexempt work.

20. Defendant has not compensated its nonexempt employees for all hours worked as required by federal and state law.

A. Defendant has not paid its nonexempt employees full overtime compensation for the hours worked as required by the FLSA and applicable state law.

B. Defendant refuses to fully compensate its hourly production and support employees for the time spent at the beginning of shifts donning and doffing and sanitizing required gear and equipment, including but not limited to, boots, hair nets, ear plugs, smocks, safety glasses, liners, gloves, bump caps, and hard hats, and at the end of shifts for removing and cleaning these same items.

C. Similarly, Defendant does not compensate its hourly production and support employees for time spent donning and doffing before and after their unpaid lunch breaks and their paid rest breaks.

D. Additionally, Defendant does not compensate its nonexempt workers for time spent walking to and from changing areas and the production floor.

E. Failing to pay these employees overtime pay for walking time and time spent donning, doffing and sanitizing at the plants violates the FLSA and Colorado wage and hour laws.

21. Defendant did not exercise good faith in willfully failing to fully compensate its employees under the FLSA. Defendant consciously excluded from “hours worked” the time spent by hourly production and support employees donning, doffing, sanitizing, and walking to and from the production lines at its processing plants.

22. At the same time, and for further proof of its failure to exercise good faith, the poultry industry as a whole has continuously been found to violate federal and state wage and hour laws. Despite repeated admonitions by the U.S. Department of Labor that the industry-wide practice of not compensating workers for time spent donning, doffing, and sanitizing at poultry plants violates federal and state law, to date, Defendant adheres to this unlawful practice.

23. Defendant’s practices violate, among other things, the FLSA and the Colorado laws pled herein. The Named Plaintiffs seek injunctive and declaratory relief, overtime compensation for all overtime work required, suffered or permitted by Defendant, liquidated or other damages and penalties permitted by applicable law, interest, and attorneys’ fees and costs.

COLLECTIVE ACTION ALLEGATIONS

24. The Named Plaintiffs' first cause of action is brought under Section 16(b) of the FLSA, 29 U.S.C. § 216(b), as a collective action on behalf of the FLSA Class.

25. The Named Plaintiffs and members of the FLSA Class are similarly situated in that they have substantially similar job requirements and pay provisions, are subject to Defendant's common practice, policy, or plan of unlawfully failing to pay for all hours worked, including pay at overtime rates.

26. The names and addresses of the members of the FLSA Class are available from Defendant's records. Notice should be provided to the FLSA Class via both first class mail and by posting in Defendant's processing plant.

COLORADO CLASS ACTION ALLEGATIONS

27. The Named Plaintiffs bring their second cause of action for violation of Colorado's statutes as a class action under Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure.

28. Members of the putative class are so numerous that joinder of all such members is impracticable. The exact size of the putative class is unknown, but may be determined from records maintained by Defendant. It is believed and alleged that the number of persons currently employed by Defendant at its Longmont, Colorado plant collectively is more than 700 persons. Former employees are also included as class members.

29. There are common questions of law and fact applicable to the putative class with respect to the liability issues, relief issues and anticipated affirmative defenses. For example, common questions of fact and law include but are not limited to the compensability of time

spent donning and doffing; whether injunctive relief is available to force Defendant into compliance; whether Defendant has acted willfully or in good faith; whether the Named Plaintiffs and members of the Colorado Class are entitled to liquidated damages, penalties and attorneys' fees and costs; and whether Defendant has complied with record-keeping obligations under state and federal law.

30. The Named Plaintiffs' claims are typical of the Colorado Class. The Named Plaintiffs, like the other Colorado Class members, were subjected to Defendant's common practice and policy of not paying its hourly production and support employees for all compensable work to which they were entitled under Colorado law.

31. The Named Plaintiffs will fairly and adequately protect the interests of the putative class. The Named Plaintiffs have no conflicts with the putative class members. Counsel for the Named Plaintiffs possess the requisite resources and are experienced in class action litigation.

32. Defendant has acted or refused to act on grounds generally applicable to the Colorado Class, making appropriate declaratory and injunctive relief with respect to the Named Plaintiff and the Colorado Class as a whole. The Named Plaintiffs and the Colorado Class are entitled to injunctive relief to end Defendant's common and uniform practice of failing to properly compensate the Named Plaintiff and the putative Class for all hours worked for the benefit of Defendant. Fed. R. Civ. P. 23(b)(2).

33. The questions of law and fact common to the putative class members predominate over any questions affecting only individual class members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

FIRST CAUSE OF ACTION
VIOLATION OF THE FAIR LABOR STANDARDS ACT OF 1938

34. The Named Plaintiffs re-allege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

35. The FLSA regulates, among other things, the payment of all hours worked, including overtime pay by employers whose employees are engaged in commerce, or engaged in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C. § 207(a)(1). Defendant is, and was, subject to the pay requirements of the FLSA, because it is an enterprise engaged in commerce and its employees are engaged in commerce.

36. FLSA requires employers to pay employees for all hours in which the employee is suffered or permitted to work, including preparatory and concluding time. Hours worked includes time spent preparing for and concluding shifts, *i.e.*, donning and doffing and sanitizing required equipment, as well as donning and doffing and sanitizing equipment before and after meals and other breaks. These types of activities are integral and indispensable parts of Defendant's employees' jobs.

37. Section 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1), requires employers to pay non-exempt employees who work longer than 40 hours in a workweek 1 ½ times the employee's regular rate of pay for the hours worked in excess of 40 hours. Defendant has at all times been subject to this requirement to pay its hourly production and support employees one and one-half times its employees' regular rate of pay for all hours worked in a workweek in excess of 40 hours. Defendant's employees, including the Named Plaintiff, regularly worked more than 40 hours per week. Defendant violated the FLSA by requiring hourly production

and support employees to perform compensable work in excess of 40 hours without proper compensation.

38. By failing to keep, record, report or preserve records of hours worked by the Named Plaintiff and members of the FLSA Class, Defendant has failed to make, keep, and preserve records with respect to each of its employees sufficient to determine their wages, hours, and other conditions and practices of employment, in violation of 29 U.S.C. § 201 et seq.

39. Members of the FLSA Class are entitled to damages equal to the amount of all uncompensated time, including overtime premium pay within the three years preceding the filing of this Complaint, plus periods of equitable tolling. Defendant's failure to pay overtime to members of the FLSA Class was "willful" within the meaning of Section 6(a) of the Portal-to-Portal Pay Act, as amended, 29 U.S.C. § 255(a), because Defendant did not act in good faith in failing to pay proper overtime pay, and had reason to believe that its failure to do so was a violation of the FLSA, within the meaning of Section 11 of the Portal-to-Portal Pay Act, as amended, 29 U.S.C. § 260. Accordingly, the FLSA Class is entitled to an award of liquidated damages in an amount equal to the amount of unpaid overtime pay described above, pursuant to Section 16(b) of the FLSA. Alternatively, should the Court find that Defendant did not act willfully in failing to pay overtime pay, the FLSA Class is entitled to an award of prejudgment interest at the applicable legal rate.

40. The Named Plaintiff also seeks reasonable attorneys' fees and costs, to be paid by Defendant, as provided by Section 16(b) of the FLSA, 29 U.S.C. § 216(b).

SECOND CAUSE OF ACTION
VIOLATION OF COLORADO MINIMUM WAGE ACT AND COLORADO MINIMUM
WAGE ORDER 24

41. The Named Plaintiffs re-allege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

42. Throughout the relevant time period, Defendant was subject to the requirements of the Colorado Minimum Wage Act, Colo. Rev. Stat. §§ 8-6-101 et seq., and Colorado Minimum Wage Order 24 (“Order 24”), Colo. Code Regs. § 1103-1.

43. Defendant is a private sector employer belonging to the food and beverage industry and so is a covered employer under Order 24.

44. The Named Plaintiffs and members the Colorado Class are employees within the meaning of Order 24, and are entitled to the protections of the Minimum Wage Act and the overtime provisions of Order 24.

45. When walking, donning and doffing time, and sanitation time is included as compensable work during a regular work week, such compensable work time is in addition to the more than 40 hours of already compensated work the Named Plaintiffs and each member of the Colorado Class Member engaged in each work week. As such, the uncompensated walking, donning and doffing time, and sanitation time should have been compensated at an overtime rate of pay under Order 24. Defendant has willfully violated Order 24 by excluding these hours worked and not paying 1 ½ times the rate of hourly pay for compensable work in excess of 40 hours.

46. When walking, donning and doffing time, and sanitation time is included as compensable work during a regular work week, such compensable work time interrupts the

employee meal periods. Defendant has willfully violated Order 24 by not allowing employees uninterrupted and “duty free” meal periods, in which the employees are completely relieved from work.

47. By failing to keep, record, report or preserve accurate records of hours worked by the Named Plaintiffs and members of the Colorado Class, Defendant has failed to make, keep, and preserve records with respect to each of its employees sufficient to determine their wages, hours, and other conditions and practices of employment, in violation of Order 24.

48. Defendant is liable to the Named Plaintiffs and the Colorado Class for compensatory and liquidated damages, plus costs, disbursements, witness and attorneys’ fees, pursuant to the Colorado Minimum Wage Act and Order 24.

DEMAND FOR JURY

49. The Named Plaintiffs hereby demand a trial by jury for all issues in this case.

PRAYER FOR RELIEF

WHEREFORE, Named Plaintiffs Clara E. Salazar and Juanita Ybarra, on behalf of themselves and all members of the FLSA Class, pray for relief as follows:

1. Designation of this action as a collective action on behalf of the proposed FLSA Class and prompt issuance of notice to all similarly situated members, apprising them of the pendency of this action, and permitting them to assert timely FLSA claims by filing individual Consents to Sue;

2. Designation of the Named Plaintiffs as Representatives of the FLSA Class;

3. A declaratory judgment that the practices complained of herein are unlawful under the FLSA;

4. An award of damages, according to proof, including liquidated damages, to be paid by Defendant;

5. Costs of the action incurred herein, including expert fees;

6. Attorneys' fees, including fees pursuant to 29 U.S.C. § 216;

7. Pre- and post-judgment interest, as provided by law; and

8. For any other and further relief the Court may deem just or equitable.

WHEREFORE, Named Plaintiffs Clara E. Salazar and Juanita Ybarra, on behalf of themselves and all members of the Colorado Class, pray for relief as follows:

9. Certification of this action as a class action on behalf of the proposed Colorado Class pursuant to Fed. R. Civ. P. 23;

10. Designation of the Named Plaintiffs as Representatives of the Colorado Class;

11. A declaratory judgment that the practices complained of herein are unlawful under Colorado law;

12. Appropriate equitable and injunctive relief to remedy Defendant's violations of Colorado law, including but not necessarily limited to an order enjoining Defendant from continuing its unlawful practices;

13. Appropriate statutory penalties;

14. An award of damages and restitution, including civil penalties, meal and rest break violation payments; recordkeeping penalties, and overtime wages to be paid by Defendant according to proof;

15. Costs of the action incurred herein, including expert fees;

16. Attorneys' fees and costs of suit, including expert fees;

17. Pre and post-judgment interest, as provided by law; and
18. For any other and further relief the Court may deem just or equitable.

Plaintiffs demand a trial by jury.

Dated: September 25, 2008

Respectfully Submitted,

Named Plaintiffs' Addresses:

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