

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JENNY SHIPTOSKI, <i>et al.</i>, on behalf of herself and similarly situated employees,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Case No. 3:16-cv-01216-RDM
	:	(Judge Robert D. Mariani)
SMG GROUP, LLC.,	:	
	:	
Defendant.	:	
	:	

**DEFENDANT SMG GROUP, LLC’s AMENDED ANSWER TO PLAINTIFF’S
CLASS/COLLECTIVE ACTION COMPLAINT**

Defendant SMG Group, LLC, (hereafter referred to as “Defendant”) hereby submits the following Amended Answer to the Complaint in the instant action filed by Plaintiff Jenny Shiptoski with the following responses numbered to correspond with the numbered paragraphs of the complaint. Defendant denies each and every allegation of the complaint not expressly admitted below.

JURISDICTION AND VENUE

1. Defendant admits that this Court has jurisdiction over Plaintiff’s claim under the federal Fair Labor Standards Act (hereafter “FLSA”).
2. Defendant admits that this Court has jurisdiction over Plaintiff’s claim under the Pennsylvania Minimum Wage Act (hereafter “PMWA”).
3. Defendant admits that venue is proper in this Court.

PARTIES

4. Defendant admits the facts stated pertaining to the Plaintiff’s residence.

5. Defendant denies that Plaintiff is an employee covered by the FLSA or the PMWA. To the contrary, Plaintiff is exempt from the minimum wage and overtime provisions of the FLSA because she is an “executive” pursuant to Section 13(a)(1) of the FLSA, 29 U.S.C. § 213(a)(1). Moreover, Plaintiff is exempt from the minimum wage and overtime provisions of the PMWA because she is a “bona fide executive” pursuant to 43 P.S. § 333.105(5).

6. Defendant admits that it is headquartered in Allentown, Pennsylvania.

7. Defendant admits that it is an employer covered by the FLSA and PWMA.

FACTS

8. Defendant admits the allegations in paragraph 8.

9. Defendant admits the allegations in paragraph 9.

10. Defendant admits the allegations in paragraph 10.

11. Defendant denies the allegations in paragraph 11. As Store Manager, Plaintiff’s job responsibilities involved supervising several store personnel who performed the types of “non-managerial duties” listed in Paragraph 11 of Plaintiff’s Complaint. Conversely, as Store Manager, Plaintiff was tasked, according to her company job description with, inter alia: “[being] responsible for establishing and maintaining Guest Services, oversees and is accountable for the operation of a store ensuring maximum sales and profitability through merchandise, inventory, expense control, human resources management, and managing operating costs and shrinkage.” Plaintiff’s job duties included: (a) develop and implement plans to maximize sales and meet or exceed goals and objectives; (b) control expenses and payroll; (c) control merchandise stock levels, product placement and presentation and accompanying signs directing customers to merchandise; (d) review

store trends and recommend and initiate changes to maximize goals and objectives; (e) ensure store personnel compliance with all store policies and procedures through regular store management and staff meetings when necessary, store walk throughs and audits; (f) evaluate and react to employee performance issues and actively recruit management candidates; and (g) train and develop store management in all aspects of the business as well as direct and monitor training and development for all store personnel.

12. Defendant admits only that Plaintiff sometimes worked over 40 hours per week as a Store Manager. There were many weeks during the relevant time period in this case, however, that Plaintiff worked less than 40 hours per week as a Store Manager.

Defendant denies Plaintiff's statement in paragraph 12 that she "regularly worked between 50 and 70 hours during a typical week." To the contrary, company records establish that Plaintiff worked on average less than 45 hours per week during the relevant time period in this case.

13. Defendant admits that it properly paid Plaintiff as a salaried employee during the relevant time period in this case because she was an "executive" exempt from overtime under both federal and Pennsylvania law.

14. Defendant admits the allegations in paragraph 14.

15. Defendant admits only that it paid Store Managers a salary during the relevant time period when those Store Managers were "executives" exempt from overtime under both federal and Pennsylvania law. Some store managers in smaller stores are paid on an hourly basis and are classified as non-exempt.

16. Defendant admits only that it classified Store Managers as exempt from receiving overtime pay during the relevant time period when those Store Managers were

“executives” exempt from overtime under both federal and Pennsylvania law. Some store managers in smaller stores are paid on an hourly basis and are classified as non-exempt.

17. Defendant admits only that Store Managers, regardless of location, sometimes work or worked over 40 hours per week as a Store Manager, but there were many weeks during the relevant time period in this case, however, that Store Managers in various locations work less than 40 hours per week as a Store Manager.

18. Defendant admits only that it paid Store Managers as salaried employees during the relevant time period in this case when those Store Managers were “executives” exempt from overtime under both federal and Pennsylvania law. Some store managers in smaller stores are paid on an hourly basis and are classified as non-exempt.

19. The allegations in paragraph 19 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 19 and states that it properly paid all Store Managers in accordance with federal and state wage and overtime laws.

CLASS/COLLECTIVE ACTION ALLEGATIONS

20. The allegations in paragraph 20 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 20 and asserts that this Court should not permit this action to proceed as a collective action pursuant to 29 U.S.C. § 216(b).

21. Defendant denies that Plaintiff’s FLSA claim should proceed as a collective action. Defendant denies that Plaintiff and other potential FLSA class members are “similarly situated” to each other or governed by “common policies.” The remaining

allegations in Paragraph 21 contain legal conclusions to which no response is required, and to the extent a response is required, Defendant denies the remaining allegations in Paragraph 21.

22. The allegations in paragraph 22 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 22 and asserts that this Court should not permit this action to proceed as a class action pursuant to Federal Rule of Civil Procedure 23.

23. The allegations in paragraph 23 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 23 and asserts that this Court should not permit this action to proceed as a class action pursuant to Federal Rule of Civil Procedure 23 because Plaintiff cannot satisfy its prerequisites.

24. The allegations in paragraph 24 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 24 and asserts that the class is neither necessarily readily ascertainable from Defendant's standard payroll records nor so numerous that joinder of all class members is impracticable. This Court should not permit this action to proceed as a class action pursuant to Federal Rule of Civil Procedure 23 because Plaintiff cannot satisfy the "numerosity" prerequisites.

25. The allegations in paragraph 25 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 25 and asserts that Plaintiff's claims are not typical of the claims of other potential class members. This Court should not permit this action to proceed as a class

action pursuant to Federal Rule of Civil Procedure 23 because Plaintiff cannot satisfy the “typicality” prerequisites.

26. The allegations in paragraph 26 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 26 and asserts that Plaintiff is not an adequate class member who could fairly and vigorously represent the interests of other potential class members. This Court should not permit this action to proceed as a class action pursuant to Federal Rule of Civil Procedure 23 because Plaintiff cannot satisfy the “adequate representation” prerequisites.

27. The allegations in paragraph 27 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 27 and asserts that there are not common questions of law and fact common to all class members. This Court should not permit this action to proceed as a class action pursuant to Federal Rule of Civil Procedure 23 because Plaintiff cannot satisfy the “commonality” prerequisites.

28. The allegations in paragraph 28 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 28 and asserts both that there are not common questions of law and fact that predominate over questions affecting only individual class members nor would a class action be superior to other available methods of adjudicating this lawsuit. This Court should not permit this action to proceed as a class action pursuant to Federal Rule of Civil Procedure 23 because Plaintiff cannot satisfy either the “predominance” or “superiority” prerequisites.

COUNT I-Alleging FLSA Violations

29. Defendant incorporates by reference its responses to all preceding paragraphs.

30. Defendant denies that Plaintiff or other potential FLSA collective class members are employees covered by the FLSA. To the contrary, Plaintiff and other Store Managers are exempt from the minimum wage and overtime provisions of the FLSA because they are “executive[s]” pursuant to Section 13(a)(1) of the FLSA, 29 U.S.C. § 213(a)(1).

31. Defendant admits the allegations in paragraph 31.

32. The allegations in paragraph 32 state legal conclusions to which no response is required. To the extent a response is required, Defendant admits the allegations in paragraph 32 only to the extent they refer to “non-exempt” employees. Defendant denies that Plaintiff or other potential FLSA collective class members are non-exempt employees covered by the wage and overtime provisions of the FLSA.

33. The allegations in paragraph 33 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 33 and asserts that Defendant did not violate the FLSA and to the contrary it properly paid Plaintiff and all other Store Managers in compliance with federal and Pennsylvania wage and overtime laws.

34. The allegations in paragraph 34 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 34 and asserts that Defendant did not violate the FLSA and to the contrary it properly paid Plaintiff and all other Store Managers in compliance with federal and Pennsylvania wage and overtime laws.

COUNT II-Alleging PMWA Violations

35. Defendant incorporates by reference its responses to all preceding paragraphs.

36. Defendant denies that Plaintiff or other potential Rule 23 class members are employees covered by the PMWA. To the contrary, Plaintiff and other Store Managers are exempt from the minimum wage and overtime provisions of the PMWA because they are “bona fide executives” pursuant to 43 P.S. § 333.105(5).

37. Defendant admits the allegations in paragraph 37.

38. The allegations in paragraph 38 state legal conclusions to which no response is required. To the extent a response is required, Defendant admits the allegations in paragraph 38 only to the extent they refer to “non-exempt” employees. Defendant denies that Plaintiff or other potential Rule 23 class members are “non-exempt” employees covered by wage and overtime provisions of the PMWA.

39. The allegations in paragraph 39 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 39 and asserts that Defendant did not violate the PMWA and to the contrary it properly paid Plaintiff and all other Store Managers in compliance with federal and Pennsylvania wage and overtime laws.

PRAYER FOR RELIEF

Defendant denies that Plaintiff (or any potential class members) are entitled to any of the relief they seek in Paragraphs A through D of their Prayer For Relief.

DEFENSES

40. The complaint fails to state a claim upon which relief can be granted.

41. Plaintiff cannot satisfy the requirements for a class action under Federal Rule of Civil Procedure 23, thus barring class-action treatment.

42. Defendant did not willfully deprive any person of any wages to which they may have been entitled.

43. Plaintiff and other proposed class members are not entitled to recover liquidated damages because Defendant at all times acted in good faith and with reasonable grounds for believing that it had not violated the FLSA or state law.

44. Plaintiff and other proposed class members are not entitled to recovery because any alleged acts or omissions were made by Defendant in good faith in conformity with and reliance upon applicable administrative regulation, order, ruling, approval or administrative practice or enforcement policy with respect to the class of employers to which Defendant belongs.

45. Some of the Plaintiff's claims and the claims of other proposed class members are barred by the applicable statute of limitations.

46. All or part of the time for which Plaintiff or any proposed class members seek compensation does not constitute compensable time for purposes of the FLSA and Pennsylvania state law.

47. All or part of Plaintiff's claim and the claims of any proposed class members are barred under the de minimis doctrine.

48. If any of the work activities claimed by Plaintiff or other potential class members are determined to be compensable, Defendant's liability to any particular employee has been fully or partially satisfied by Defendant's payments of bonuses or other compensation for such activities.

49. The complaint fails to state a claim against Defendant upon which liquidated damages can be awarded.

50. The complaint fails to state a claim against Defendant upon which costs or attorneys' fees can be awarded.
51. All or part of Plaintiff's claim and the claims of any proposed class members are barred to the extent they did not work more than forty (40) hours in a workweek.
52. Plaintiff is exempt from the minimum wage and overtime provisions of the FLSA because she is an "executive" pursuant to Section 13(a)(1) of the FLSA, 29 U.S.C. § 213(a)(1).
53. Plaintiff is exempt from the minimum wage and overtime provisions of the PMWA because she is an "bona fide executive" pursuant to 43 P.S. § 333.105(5).
54. Defendant reserves the right to assert additional defenses or affirmative defenses of which it becomes aware during the course of discovery.

Respectfully Submitted,

KENNEY & McCAFFERTY, PC

/s/ **Brian P. McCafferty**

BRIAN P. KENNEY, ESQUIRE
BRIAN P. MCCAFFERTY, ESQUIRE
PA Bar No. 66257
1787 Sentry Parkway West
Building 18, Suite 410
Blue Bell, PA 19422
Telephone: 215-367-4333
Facsimile: 215-367-4335
E-Mail: cafstar@aol.com

Attorneys for Defendant SMG Group, LLC

Dated: August 10, 2016

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that a true and correct copy of the foregoing Amended Answer to Plaintiff's Class/Collective Action Complaint has been filed and served upon the following counsel:

Peter Winebrake, Esq.
R. Andrew Santillo, Esq.
Mark J. Gottesfeld, Esq.
WINEBRAKE & SANTILLO, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
Counsel for Plaintiff Jenny Shiptoski

via the Court's electronic filing CM/ECF system this 10th day of August, 2016.

/s/ Brian P. McCafferty