

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

DEIDRA SAREGO, on behalf of herself
and all others similarly situated,

Plaintiff,

vs.

SAGE CLIENT 258 LLC,

Defendant.

CIVIL ACTION NO.: 2:16-CV-06636-JD

CLASS/COLLECTIVE ACTION NON-

JURY TRIAL

**DEFENDANT SAGE CLIENT 258 LLC'S ANSWER TO PLAINTIFF'S
COMPLAINT AND NOTICE OF AFFIRMATIVE DEFENSES**

Defendant Sage Client 258 LLC ("Defendant"), by and through the undersigned attorneys of Fisher & Phillips LLP, hereby respectfully submits its Answers and Affirmative Defenses to Plaintiff Deidra Sarego's ("Plaintiff") Complaint as follows:

JURISDICTION AND VENUE

1. Jurisdiction over the FLSA claim is proper under 29 U.S.C. §216(b) and 28 U.S.C. § 1331.

ANSWER: For jurisdictional purposes only, Defendant admits that this Court has subject matter jurisdiction over Plaintiff's purported FLSA claim. Defendant denies any remaining allegations as set forth in Paragraph 1.

2. Jurisdiction over the PMWA claim is proper under 28 U.S.C. § 1367.

ANSWER: Defendant admits that this Court has the authority to exercise supplemental jurisdiction over certain claims pursuant to 28 U.S.C. § 1367. Defendant denies any remaining allegations as set forth in Paragraph 2.

3. Venue is proper under 28 U.S.C. § 1391.

ANSWER: Defendant admits that venue is proper in the United States District Court for the Eastern District of Pennsylvania.

PARTIES

4. Plaintiff is an individual residing in Doylestown, PA (Bucks County).

ANSWER: Defendant is without sufficient information or knowledge to form a belief as to the truth of whether Plaintiff is an individual residing in Doylestown, PA (Bucks County), and therefore denies same. Defendant denies any remaining allegations as set forth in Paragraph 4.

5. Defendant is a corporate entity registered to do business in Pennsylvania and maintaining a corporate headquarters in Philadelphia, PA (Philadelphia County).

ANSWER: Defendant admits the allegations in Paragraph 5.

6. Defendant is an employer covered by the FLSA and PMWA.

ANSWER: Defendant states that the allegations in Paragraph 6 contain legal conclusions to which no response is required.

FACTS

7. Defendant operates a restaurant in Philadelphia, PA called Urban Farmer Philadelphia (“Urban Farmer”).

ANSWER: Defendant admits the allegations in Paragraph 7.

8. Defendant employs Servers at Urban Farmer.

ANSWER: Defendant admits the allegations in Paragraph 8.

9. Plaintiff was employed by Defendant as a Server at Urban Farmer from approximately December 2015 until approximately November 2016.

ANSWER: Defendant admits it employed Plaintiff as a server at Urban Farmer from approximately December 2015 until approximately late October 2016. Defendant denies any remaining allegations as set forth in Paragraph 9.

10. Defendant pays Plaintiff and other Servers an hourly wage of only \$2.83. In seeking to comply with the FLSA and PMWA mandate that employees receive a minimum wage of \$7.25/hour, Defendant purports to utilize a “tip-credit” in the amount of \$4.42 (\$7.25 - \$2.83) for each hour worked by Plaintiff and other Servers.

ANSWER: Defendant admits that it has paid Plaintiff and other servers an hourly wage in accordance with applicable minimum wage law under the FLSA and PMWA. Defendant further admits that it has utilized a tip credit for Plaintiff and other servers for hours worked in accordance with applicable minimum wage law under the FLSA and PMWA. Defendant further admits that employers are required to pay certain employees a minimum wage in accordance with applicable minimum wage law under the FLSA and the PMWA. Defendant denies that it has failed to compensate Plaintiff or other employees in accordance with applicable minimum wage law or that it violated the FLSA or the PMWA. Defendant denies any remaining allegations as set forth in Paragraph 10.

11. Defendant requires Plaintiff and other Servers to spend more than 20% of their time performing non-tipped work which consists of, *inter alia*, (i) performing side-work (as briefly described in ¶¶ 14-15); (ii) attending daily meetings; and (iii) attending weekly wine trainings. These activities are collectively referred to as “non-tipped” work.

ANSWER: Defendant denies the allegations as set forth in Paragraph 11.

12. Plaintiff estimates that she spent an average of 2 to 3 hours performing non-tipped work each shift. Because Plaintiff generally worked shifts that lasted between approximately 5 to 8 hours, Plaintiff routinely spent more than 20% of her time performing non-tipped work.

ANSWER: Defendant denies the allegations as set forth in Paragraph 12.

13. Defendant pays Plaintiff and other Servers \$2.83 per hour for time spent performing non-tipped work.

ANSWER: Defendant admits that it has paid Plaintiff and other servers an hourly wage in accordance with applicable minimum wage law under the FLSA and PMWA. Defendant further states that it has utilized a tip credit for Plaintiff and other servers in accordance with applicable minimum wage law under the FLSA and PMWA. Defendant denies that it pays Plaintiff and other servers \$2.83 per hour for time spent performing non-tipped work or that it has violated the FLSA or the PMWA. Defendant denies any remaining allegations as set forth in Paragraph 13.

14. Defendant requires Plaintiff and other Servers to perform “opening side-work” such as, among other things: maintaining stock of coffee, tea, and coffee filters; brewing coffee and iced tea; stocking dairy products; stocking plates, spoons, lemons, and napkins at tea station in kitchen; folding napkins; folding crumbers; stocking plates; stocking POS stations; cutting lemons; stocking straws; polishing silverware and glassware; replacing trays and liners; requisitioning wine; cleaning and filling salt and pepper shakers; and rolling silverware.

ANSWER: Defendant admits that Plaintiff and other servers perform certain duties relating to their work as servers, and that these duties depend on the particular shift and the employee assigned to perform the duties. Defendant denies that Plaintiff or other servers are required to perform all of the duties listed in Paragraph 14 during any specific shift. Defendant further denies that Plaintiff or other servers spend more than 20% of their time performing these duties, or otherwise

performing non-tipped work. Defendant denies any remaining allegations as set forth in Paragraph 14.

15. Defendant requires Plaintiff and other Servers to perform “closing side-work” such as, among other things: cleaning and organizing back server station; polishing silverware and glassware; refilling salt and pepper shakers; writing temperature logs on coolers; checking dates on dairy in fridge; stocking printer paper; wiping down POS; dumping coffee urns; dumping iced tea in kitchen; breaking down wine bar; wiping down trays; and filling out temperature logs on all fridges.

ANSWER: Defendant admits that Plaintiff and other servers perform duties relating to their work as servers, and that these duties depend on the particular shift and the employee assigned to perform the duties. Defendant denies that Plaintiff or other servers are required to perform all of the duties listed in Paragraph 15 during any specific shift. Defendant further denies that Plaintiff or other servers spend more than 20% of their time performing these duties, or otherwise performing non-tipped work. Defendant denies any remaining allegations as set forth in Paragraph 15.

16. Defendant requires Plaintiff and other Servers to attend daily meetings that occur prior to when Plaintiff and other Servers begin to interact with restaurant patrons for each shift.

ANSWER: Defendant admits that Plaintiff and other servers have attended some meetings relating to their duties as servers, and that such meetings have occurred when servers begin their shifts. Defendant denies any remaining allegations as set forth in Paragraph 16.

17. Defendant also requires Plaintiff and other Servers to attend weekly wine training sessions on Saturdays that typically last for approximately 1 hour and that occur prior to when Plaintiff and other Servers begin to interact with restaurant patrons for that Saturday shift.

ANSWER: Defendant denies the allegations as set forth in Paragraph 17.

CLASS/COLLECTIVE ALLEGATIONS

18. Plaintiff brings her FLSA claim on behalf of herself and all individuals who, during any time within the past three years, worked as Servers at Defendant's Urban Farmer Philadelphia restaurant. Such individuals are "similarly situated," as that term is defined in 29 U.S.C. § 216(b), because they were subject to Defendant's mandatory companywide non-tipped work policies as described herein.

ANSWER: Defendant admits that Plaintiff purports to bring her claim under the FLSA as a collective action pursuant to 29 U.S.C. § 216(b). Defendant denies that Plaintiff is similarly situated to other servers and that this action is properly brought as a collective action under the FLSA. Defendant further denies that it failed to compensate Plaintiff or other servers in accordance with applicable federal minimum wage law and that it violated the FLSA. Defendant further denies that it has a companywide policy that resulted in the failure to compensate Plaintiff and other servers in accordance with the FLSA. Defendant denies any remaining allegations as set forth in Paragraph 18.

19. Plaintiff brings her PMWA claim as a class action on behalf of herself and all individuals who, during any time since December 21, 2013, worked as Servers at Defendant's Urban Farmer Philadelphia restaurant.

ANSWER: Defendant admits that Plaintiff purports to bring her claim under the PMWA as a class action. Defendant denies that Plaintiff's claim under the PMWA is properly brought as a class action. Defendant denies any remaining allegations as set forth in Paragraph 19.

20. Class action treatment of Plaintiff's PMWA claim is appropriate because, as alleged herein, all of Federal Rule of Civil Procedure 23's class action requisites are satisfied.

ANSWER: Defendant denies the allegations as set forth in Paragraph 20.

21. The class, upon information and belief, includes over 50 individuals, all of whom are readily ascertainable based on Defendant's timekeeping and payroll, and, as such, are so numerous that joinder of all class members is impracticable.

ANSWER: Defendant denies that Plaintiff can satisfy the prerequisites for class action treatment under Federal Rule of Civil Procedure 23, and that her claims are suitable for class action treatment. Defendant denies any remaining allegations as set forth in Paragraph 21.

22. Plaintiff is a class member, her claims are typical of the claims of other class members, and she has no interests that are antagonistic to or in conflict with the interests of other class members.

ANSWER: Defendant denies that Plaintiff can satisfy the prerequisites for class action treatment under Federal Rule of Civil Procedure 23, and that her claims are suitable for class action treatment. Defendant denies any remaining allegations as set forth in Paragraph 22.

23. Plaintiff will fairly and adequately represent the class members and their interests, and she has retained competent and experienced counsel who will effectively represent the class members' interests.

ANSWER: Defendant denies that Plaintiff can satisfy the prerequisites for class action treatment under Federal Rule of Civil Procedure 23, and that her claims are suitable for class action treatment. Defendant denies any remaining allegations as set forth in Paragraph 23.

24. Questions of law and fact are common to all class members, because, *inter alia*, this action concerns Defendant's uniform pay policies, including Defendant's practice of using the tip credit to satisfy its minimum wage obligations and requiring class members to perform non-

tipped work. The legality of these policies will be determined through the resolution of generally applicable legal principles to a common set of facts.

ANSWER: Defendant denies that there are questions of law or fact that are common to all purported class members. Defendant further denies that Plaintiff can satisfy the prerequisites for class action treatment under Federal Rule of Civil Procedure 23, and that her claims are suitable for class action treatment. Defendant denies any remaining allegations as set forth in Paragraph 24.

25. Class certification is appropriate under Federal Rule of Civil Procedure 23(b)(3) because common questions of law and fact predominate over questions affecting only individual class members and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

ANSWER: Defendant denies that there are questions of law or fact that are common to all purported class members, or that predominate over questions affecting individual class members. Defendant further denies that Plaintiff can satisfy the prerequisites for class action treatment under Federal Rule of Civil Procedure 23, and that her claims are suitable for class action treatment. Defendant denies any remaining allegations as set forth in Paragraph 25.

COUNT I

(Alleging Violations of the FLSA)

26. All previous paragraphs are incorporated as though fully set forth herein.

ANSWER: Defendant incorporates its responses to Paragraphs 1 through 25 of Plaintiff's Complaint as if fully set forth herein.

27. Plaintiff and the Collective Action Members are employees entitled to the FLSA's protections.

ANSWER: Defendant states that the allegations in Paragraph 27 contain legal conclusions to which no response is required. To the extent that a response is required, Defendant admits that certain employees are covered by the FLSA. Defendant denies that it violated the FLSA with respect to Plaintiff or any purported member of a collective action. Defendant further denies that this action is properly brought as a collective action under the FLSA. Defendant denies any remaining allegations as set forth in Paragraph 27.

28. Defendant is an employer covered by the FLSA.

ANSWER: Defendant states that the allegations contained in Paragraph 28 are legal conclusions to which no response is required.

29. The FLSA entitles employees to minimum hourly compensation of \$7.25 for hours worked under 40 in a week, *see* 29 U.S.C. §206(b), and \$10.875 for hours worked over 40 in a week, *see id.* at § 207(a)(1).

ANSWER: Defendant admits that certain employees are entitled to receive a minimum wage for hours worked in accordance with the FLSA. Defendant further admits that certain employees are entitled to receive overtime compensation for hours worked in excess of forty hours in a workweek. Defendant denies that it violated the FLSA with respect to Plaintiff or any purported member of a collective action. Defendant further denies that this action is properly brought as a collective action under the FLSA. Defendant denies any remaining allegations as set forth in Paragraph 29.

30. Restaurants may use a tip credit to satisfy their minimum wage obligations to an employee. *See* 29 U.S.C. § 203(m). However, the FLSA prohibits an employer from utilizing a tip credit to satisfy its minimum wage obligations to an employee where such employee is spending more than 20% of the time performing non-tip producing work. *See* 29 C.F.R. §

531.56(e); *Fast v. Applebee's Intl., Inc.*, 638 F.3d 872, 879-82 (8th Cir. 2011); U.S. Dept. of Labor, Field Operations Handbook Ch. 30d00(e) (Dec. 9, 1988) (available at <http://www.dol.gov/whd/foh/FOH-Ch30.pdf>).

ANSWER: Defendant admits that employers may use a tip credit to satisfy their minimum wage obligations to an employee in accordance with 29 U.S.C. § 203(m). Defendant denies any remaining allegations as set forth in Paragraph 30.

31. Having required Plaintiff and other Servers to spend more than 20% of the time performing non-tipped work, as described in ¶¶ 11-17, Defendant may not utilize a tip credit to satisfy its minimum wage obligations to Plaintiff and the Collective Action Members. As such, Defendant violated the FLSA's minimum wage and overtime pay mandates by failing to pay Plaintiff and other Servers the full minimum wage and all overtime premium compensation.

ANSWER: Defendant incorporates its responses to Paragraphs 11-17 of Plaintiff's Complaint as if fully set forth herein. Defendant denies that Plaintiff or other servers spend more than 20% of their time performing non-tipped work. Defendant further denies that it violated the FLSA with respect to Plaintiff or any purported member of a collective action. Defendant denies any remaining allegations as set forth in Paragraph 31.

32. In violating the FLSA, Defendant acted willfully and with reckless disregard of clearly applicable FLSA provisions.

ANSWER: Defendant denies the allegations as set forth in Paragraph 32.

COUNT II
(Alleging Violations of the PMWA)

33. All previous paragraphs are incorporated as though fully set forth herein.

ANSWER: Defendant incorporates its responses to Paragraphs 1 through 32 of Plaintiff's Complaint as if fully set forth herein.

34. Plaintiff and the Class Members are employees entitled to the PMWA's protections.

ANSWER: Defendant states that the allegations in Paragraph 34 contain legal conclusions to which no response is required. To the extent that a response is required, Defendant admits that certain employees are covered by the PMWA. Defendant denies any remaining allegations as set forth in Paragraph 34.

35. Defendant is an employer covered by the PMWA.

ANSWER: Defendant states that the allegations contained in Paragraph 35 are legal conclusions to which no response is required.

36. The PMWA entitles employees to a minimum wage of \$7.25/hour for hours worked under 40 in a week, *see* 43 P. S. § 333.104(a.1); 34 Pa. Code § 231.21, and \$10.875/hour for hours worked over 40 in a week, *see* 43 P.S. § 333.104(c).

ANSWER: Defendant admits that certain employees are entitled to receive a minimum wage for hours worked in accordance with the PMWA. Defendant further admits that certain employees are entitled to receive overtime compensation for hours worked in excess of forty hours in a workweek in accordance with the PMWA. Defendant denies that it violated the PMWA with respect to Plaintiff or any purported member of a class action. Defendant denies any remaining allegations as set forth in Paragraph 36.

37. Restaurants may use a tip credit to satisfy their minimum wage obligations to an employee. *See* 43. P.S. § 333.103(d). However, the FLSA's limitations on the tip credit generally apply to the PMWA. *See generally Ford v. Lehigh Restaurant Group, Inc.*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 11 (Lackawanna Cty. April 14, 2015); *see also Zellaugi v. MCD Pizza, Inc.*, 59 F. Stipp. 3(1712, 715 (E.D. Pa. 2014).

ANSWER: Defendant states that the allegations in Paragraph 37 are legal conclusions to which no response is required. To the extent that a response is required, Defendant admits that the PMWA contemplates that employers may use a tip credit to satisfy their minimum wage obligations to an employee. Defendant denies any remaining allegations as set forth in Paragraph 37.

38. Having required Plaintiff and other Servers to spend more than 20% of the time performing non-tipped work, as described in ¶¶ 11-17, Defendant may not utilize a tip credit to satisfy its minimum wage obligations to Plaintiff and the Class Action Members. As such, Defendant violated the PMWA's minimum wage and overtime pay mandates by failing to pay Plaintiff and other Servers the full minimum wage and all overtime premium compensation.

ANSWER: Defendant denies the allegations as set forth in Paragraph 38.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and other Collective Action/Class Members, seeks the following relief:

- A. All unpaid minimum wages and overtime wages;
- B. Prejudgment interest;
- C. Liquidated damages;
- D. Litigation costs, expenses, and attorneys' fees; and
- E. Such other and further relief as this Court deems just and proper.

ANSWER: Answering the unnumbered Prayer for Relief, Defendant denies each and every allegation and denies that Plaintiff or other servers are entitled to any relief whatsoever.

Each allegation in Plaintiff's Complaint not specifically admitted or denied is hereby denied.

NOTICE OF AFFIRMATIVE DEFENSES

1. Plaintiff's claims for liquidated damages are barred because Defendant at all times had a good faith, reasonable belief that all servers were paid for all hours worked in accordance with applicable federal and state wage laws.

2. Some or all of Plaintiff's claims fail because Plaintiff was a tipped employee and Defendant is entitled to apply tips received from customers towards minimum wage requirements and complied with the provisions of federal and state law applicable to such tip credits.

3. Plaintiff's claims are barred by the provisions of Section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254, as to all hours during which Plaintiff was engaged in activities which were preliminary or postliminary to her principal activities.

4. Plaintiff's claims are barred by the provision of Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, because actions taken in connection with Plaintiff's compensation were done in good faith in conformity with and reliance upon written administrative regulations, orders, rulings, approvals, interpretations, and written and unwritten administrative practices or enforcement policies of the Administrator of the Wage and Hour Division of the United States Department of Labor and/or an administrative practice or enforcement policy of such agency with respect to the class of employees to which Plaintiff belonged.

5. Some or all of Plaintiff's claims are barred because the FLSA and related state law does not provide that Defendant cannot apply a tip credit towards minimum wage requirements where Plaintiff performs more than 20% of work related or unrelated to her tipped work during a shift.

6. Some or all of Plaintiff's claims are barred because the Department of Labor's interpretation of the FLSA and its regulations relating to Plaintiff's claims and, specifically, the

purported 20% rule, is not a reasonable interpretation of the FLSA or its regulations, has been erroneously and inconsistently applied, and/or is not otherwise entitled to deference by the Court.

7. Plaintiff's claims are barred, in whole or in part, by the doctrine of *de minimis non curat lex*.

8. Some or all of Plaintiff's claims may be barred by the doctrine of laches, waiver, estoppel, or other equitable considerations.

9. Some or all of Plaintiff's claims may be barred by the applicable statute of limitations.

Defendant reserves the right to plead additional Affirmative Defenses as they become known or available during the pendency of this litigation.

Dated: February 2, 2017

Respectfully submitted
FISHER & PHILLIPS LLP

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CERTIFICATE OF SERVICE

I certify that the foregoing **DEFENDANT SAGE CLIENT 258 LLC's ANSWER TO PLAINTIFF'S COMPLAINT AND NOTICE OF AFFIRMATIVE DEFENSES** was electronically filed with the Clerk of the Court using the CM/ECF system on February 2, 2017, sending notification to the following counsel of record:

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