IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RYAN DOWNEY, on behalf of himself and others similarly situated, Plaintiff, v. MCCORMICK & SCHMICK RESTAURANT, CORP, Defendant.	PHILADELPHIA COUNTY COURT OF COMMON PLEAS CASE ID. 180103412 CLASS ACTION JURY TRIAL DEMANDED

DEFENDANT'S ANSWER TO AMENDED COMPLAINT WITH NEW MATTER

Defendant, MCCORMICK & SCHMICK RESTAURANT, CORP. ("McCormick & Schmick" or "M&S"), by and through its attorneys, Seyfarth Shaw LLP, and in answer to Plaintiff's First Amended Complaint, states as follows:

JURISDICTION AND VENUE

COMPLAINT ¶1:

This Court has personal jurisdiction over Defendant.

ANSWER:

Defendant admits that this Court has personal jurisdiction over Defendant, for purposes of this action only. Defendant denies that this Court can exercise general jurisdiction over Defendant.

COMPLAINT ¶2:

Venue in this Court is proper under Pennsylvania Rules of Civil Procedure 1006 and 2179 because, Defendant regularly conducts business within Philadelphia County including operating a McCormick & Schmick Seafood and Steaks restaurant located at 1 South Broad Street in Philadelphia, PA (the "Restaurant").

ANSWER:

Defendant admits that venue in this Court is proper for purposes of this action only. Defendant denies that venue is generally proper over Defendant in this Court.

PARTIES

COMPLAINT ¶3:

Plaintiff is an individual residing in Philadelphia, PA.

ANSWER:

After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth of Plaintiff's assertion that he currently resides in Philadelphia, Pennsylvania. Defendant admits that Defendant's records indicate that Plaintiff's last known address is located in Philadelphia, Pennsylvania.

COMPLAINT ¶4:

Defendant a Delaware corporation registered to do business in Pennsylvania.

ANSWER:

Admitted.

FACTS

COMPLAINT ¶5:

Defendant owns and operates the Restaurant.

ANSWER:

Admitted.

COMPLAINT ¶6:

Defendant employs servers at the Restaurant. The servers take customers' orders, serve food and drinks to customers, and otherwise wait on customers.

ANSWER:

Admitted.

COMPLAINT ¶7:

Defendant employs bussers at the Restaurant. The bussers do not directly interact with customers and do not directly provide service to customers. In fact, Restaurant management has specifically instructed that bussers should stay away from tables until *after* the customers have departed. Thus, while Defendant's Busser "Job Description" requires bussers to clean and reset tables, it explicitly instructs that such activities must take place "once Guests have left." Other specific busser responsibilities include: pre-bussing tables before customers arrive, ensuring that Restaurant tables are clean and orderly before customers arrive and after customers leave, removing trash and garbage to the dumpster area, cleaning and restocking restrooms, ensuring that the outside of the Restaurant is clean. None of these activities entail interacting with customers or directly providing service to customers.

ANSWER:

Admitted in part and denied in part. It is admitted that Defendant employs bussers at its Restaurant. It is denied that bussers do not directly interact with customers or directly provide service to customers. It is further denied that Defendant's management specifically instructed bussers to stay away from tables until after the customers have departed. In fact, bussers directly interact and directly provide service to customers in a number of ways, including by pre-bussing tables, refilling customers' water, tea, and coffee, and assisting servers as necessary.

Defendant further denies that this paragraph accurately quotes the busser job description, and refers Plaintiff to the job description attached to Defendant's preliminary objections for its true contents. Defendant admits that bussers perform certain duties after customers leave. Defendant further admits that busser duties include preparing tables for the next customer and cleaning restrooms. Defendant denies that taking trash and garbage to the dumpster area, restocking restrooms, and "ensuring that the outside of the Restaurant is clean" are specifically listed as busser job duties on the job description. Defendant admits, however, that bussers as well as other employees may, from time-to-time, be asked to perform such tasks.

Defendant denies that "pre-bussing" occurs "before customers arrive and after customers leave." The phrase "pre-busing" means the removal of items that are no longer needed (such as removing a customer's dirty dish before serving dessert).

Defendants allegations about what duties involve "interacting with customers" or "directly providing service" to customers assert legal conclusions that do not need to be admitted or denied. Notwithstanding that, Defendant denies that "ensuring that Restaurant tables are clean and orderly before customers arrive and after customers leave" does not involve directly providing service to customers.

Defendant specifically denies each and every remaining allegation contained in Paragraph 7 of Plaintiff's Complaint.

COMPLAINT ¶8:

Plaintiff was employed by Defendant as a server at the Restaurant from 2014 until around November 2017.

ANSWER:

Denied. Plaintiff began his employment on or about January 6, 2015.

COMPLAINT ¶9:

Defendant paid Plaintiff and other servers an hourly wage of $2.83 plus tips.

ANSWER:

It is admitted, that Defendant sometimes paid Plaintiff and other servers an hourly wage of $2.83 plus tips, plus overtime if appropriate. It is denied that Defendant always did so. At times, Defendant paid Plaintiff and other servers a cash wage which exceeded $2.83 an hour.

COMPLAINT ¶10:

Defendant has implemented a tip-sharing program under which Plaintiff and the other servers contribute some of their tips to a "tip pool." In particular, at the end of a shift, each server contributes 3.5% of his/her total customer sales to the tip pool. These tip-pool proceeds are then paid to other restaurant staff as follows: 1.0% of total customer sales are paid to

bartenders; 1.5% of total customer sales are paid to bussers; and 1.0% of total customer sales are paid to hosts.

ANSWER:

It is admitted that Defendant maintained a tip pool, whereby Plaintiff and other servers contributed a certain percentage of their tips. It is further admitted that tip pool proceeds may be distributed to bartenders, bussers, and hosts. It is denied that the tip pool program has always distributed 3.5% of customer sales by paying 1.0% to bartenders, 1.5% to bussers, and 1.0% to hosts. For instance, at certain times, the tip share program paid 1.5% to bartenders, 1.5% to bussers and 0.5% to hosts.

COMPLAINT ¶11:

The above tip-pool proceeds are distributed to bartenders, bussers, and hosts regardless of whether or how much they worked during the shift. For example, on September 5, 2017, Plaintiff contributed $13.29 to the tip pool based on his total customer sales during the shift. A portion of this tip pool contribution was paid to a restaurant host who did not even work during the particular shift.

ANSWER:

It is admitted that tip pool proceeds are generally distributed to bartenders, bussers, and hosts, and generally have been distributed on a "day basis" rather than a "shift basis." It is further admitted that not all servers, bartenders, bussers, and hosts have entirely overlapping shifts, and that different employees may work different shifts in a day. It is denied that tip pool proceeds are distributed to employees "regardless of whether or how much they worked." For instance, employees who do no work during a day do not receive any amounts from that day's tip share.

Defendant's allegations regarding September 5, 2017 are denied. Plaintiff contributed $30.13 to the tip share program that day, none of which was distributed to a host who did not work, as no host worked that day.

CLASS ACTION ALLEGATIONS

COMPLAINT ¶12:

Plaintiff brings this lawsuit as a class action on behalf of himself and others who have been employed by Defendant as servers at the Restaurant. The PMWA carries a mandatory three-year limitations period, *see Cerutti v. Frito Lay, Inc.*, 777 F. Supp. 2d 920, 925 n. 4 (W.D. Pa. 2011), and, therefore, covers a class period from April 3, 2015 to the present. The unjust enrichment claim carries a four-year limitations period, *see Sevast v. Kakouras*, 915 A.2d 1147, 1153 (Pa. 2007), and, therefore, covers a class period from January 22, 2014 to the present. The GPB claim does not explicitly reference any applicable limitations period, *see* Philadelphia Code § 9-614, and, therefore, Plaintiff will ask the Court to determine the proper temporal scope of the GPB class at the class certification phase of this litigation.

ANSWER:

Admitted in part and denied in part.

It is admitted that the Pennsylvania Minimum Wage Act carries a three-year statute of limitations period.

It is denied that Plaintiff brings this lawsuit as a class action on behalf of himself and others who have been employed by Defendant as servers at the Restaurant, because no class has been certified.

It is denied that the unjust enrichment claim, as applied to this action, carries a four-year limitations period. As explained in Defendant's preliminary objections, the statute of limitations period for unjust enrichment is two years in this action.

It is admitted that the Gratuity Protection Ordinance (mislabeled as the "GPB" in the Amended Complaint) does not explicitly reference an applicable statute of limitations period. Defendant avers that the appropriate GPO limitations period is two years. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to what Plaintiff will ask the Court to do.

Defendant specifically denies the remaining allegations in this paragraph.

COMPLAINT ¶13:

This action is properly maintained as a class action pursuant to Pennsylvania Rules of Civil Procedure 1702, 1708, and 1709.

ANSWER:

Denied. A class action is the improper vehicle for this litigation.

COMPLAINT ¶14:

The class is so numerous that joinder of all individual members is impracticable.

ANSWER:

Denied. Among other things, there is no "class" nor any other individual plaintiffs to join. Furthermore, the vast majority of the putative class cannot proceed in this forum, and the remaining putative class members are not numerous.

COMPLAINT ¶15:

Defendant's conduct with respect to Plaintiff and the class raises questions of law and fact that are common to the entire class.

ANSWER:

Admitted in part and denied in part.

It is admitted that Plaintiff's allegations may raise certain common questions of law and fact, such as whether the MWA preempts Plaintiff's claims, and whether the GPO regulates the alleged conduct.

It is denied that Plaintiff's allegations exclusively raise common questions of fact, or that common questions predominate over individual ones. Individual inquiries with respect to the claims of each purported class member are necessary.

COMPLAINT ¶16:

Plaintiff's claims and Defendant's anticipated defenses are typical of the claims or defenses applicable to the entire class.

ANSWER:

Admitted in part and denied in part.

The allegation that Plaintiff's claims are "typical" of the "entire class" is denied. Among other things, there is no "class." And, upon information and belief, the vast majority of the putative class does not assert Plaintiff's purported claims. Moreover, the vast majority of the putative class has agreed to arbitrate their claims on an individual basis, and thus cannot assert such claims in this forum.

After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to what defenses Plaintiff "anticipates." Thus, this allegation is denied. Defendant admits that it may assert certain defenses that are common to the putative class (such as whether the MWA preempts Plaintiff's claims, and whether the GPO regulates the alleged conduct). Defendant denies that all of its defenses as to Plaintiff will be "typical" of the entire putative class. Individual inquiries with respect to the claims of each purported class member are necessary.

COMPLAINT ¶17:

Plaintiff's interests in pursuing this lawsuit are aligned with the interests of the entire class.

ANSWER:

Upon information and belief, denied. Upon information and belief, the vast majority of the putative class has no interest in pursuing Plaintiff's purported claims, and thus Plaintiff's interests are not aligned with those of the putative class. Moreover, the vast majority of the putative class has agreed to arbitrate their claims on an individual basis.

COMPLAINT ¶18:

Plaintiff will fairly and adequately protect class members' interests because he and his experienced and well-financed counsel are free of any conflicts of interest and are prepared to vigorously litigate this action on behalf of the entire class.

ANSWER:

After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth of Plaintiff's ability to protect the purported class members' interests nor the rationale associated therewith. Additionally, after reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the experience, or financial ability of Plaintiff's counsel, nor of such counsel's conflicts of interests or preparedness to vigorously litigation this action on behalf of a purported class.

COMPLAINT ¶19:

A class action provides the fairest and most efficient method for adjudicating the legal claims of all class members.

ANSWER:

Denied. A class action will be exorbitantly costly, burdensome, and inefficient, and will enable Plaintiff to substitute his own interests for those of the putative class. Moreover, the Court will be forced to determine individual questions as to each individual class member that will slow the litigation process and render in inefficient resolution to Plaintiff's claims.

COUNT I
(Alleging Violations of the PMWA)

COMPLAINT ¶20:

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

ANSWER:

Defendant incorporates its prior responses in the preceding paragraphs as if the same were fully set forth herein.

COMPLAINT ¶21:

The PMWA entitles employees to a minimum hourly wage of $7.25.

ANSWER:

Denied. The Pennsylvania Minimum Wage Act entitles non-exempt employees to a minimum hourly wage of $7.25 an hour.

COMPLAINT ¶22:

While restaurants may utilize a tip credit to satisfy their minimum wage obligations to servers, they forfeit the right to do so when they require or permit servers to share tips with other restaurant employees who do not "customarily and regularly receive tips." *See* 43 P.S. § 333.103(d)(2). Thus, restaurants lose their right to utilize a tip credit when tips are shared with employees – such as Defendant's bussers – who rarely or never interact with customers. *See Ford v. Lehigh Valley Restaurant Group, Inc.*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 11 (P.C.C.P., Lackawanna Cty. Apr. 24, 2015) (Nealon, J.).

ANSWER:

Admitted in part and denied in part. It is denied that "restaurants lose their right to utilize a tip credit when tips are shared with employees – such as Defendant's bussers – who rarely or never interact with customers." The MWA neither authorizes nor forbids employers from including employees in a tip pool based on how often they "interact with customers," nor does it prohibit sharing tips with bussers.

It is admitted that, under the MWA, restaurants can claim the tip credit only if tips are shared with employees who "customarily and regularly receive tips." 43 Pa. Stat. § 333.103(d). It is denied that bussers do not "customarily and regularly receive tips." Roughly 40 years of precedent, and even the *Ford* decision cited above, confirms that bussers "customarily and regularly receive tips," and thus are eligible to participate in tip pools.

COMPLAINT ¶23:

By paying Plaintiff and other servers an hourly wage of only $2.83 and implementing a tip-pooling program under which server's tips are shared with bussers, Defendant has forfeited its right to utilize the tip credit in satisfying its minimum wage obligations to Plaintiff and other

servers. As such, Defendant has violated the PMWA's minimum wage mandate by paying Plaintiff and other servers an hourly wage of $2.83 rather than $7.25.

ANSWER:

Denied. Bussers are employees who "customarily and regularly receive tips."

Accordingly, Defendant can include them in its tip pool program while claiming the tip credit.

COUNT II
(Alleging Violations of the GPB)

COMPLAINT ¶24:

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

ANSWER:

Defendant incorporates its prior responses in the preceding paragraphs as if the same were fully set forth herein.

COMPLAINT ¶25:

The GPB requires that "[e]very gratuity shall be the sole property of the employee or employees to whom it was paid, given or left for, and shall be paid over in full to such employee or employees." Phila. Code § 9-614(2)(a).

ANSWER:

Denied. This paragraph quotes portions of the GPO. But the quoted portions have no operative effect. The legislative history confirms that they do not. And, if they did, the MWA would preempt the GPO. Furthermore, deductions from tips are permissible or even required for numerous purposes, including employer-mandated tip pools, compliance with tax laws, and compliance with child support orders.

COMPLAINT ¶26:

Under the GPB, gratuities may only be "pooled and distributed among all employees who directly provide service to patrons." Phila. Code § 9-614(2)(c).

ANSWER:

Denied. This paragraph quotes portions of the GPO. But the quoted portions have no operative effect. The City of Philadelphia has opined that they do not. The legislative history confirms that they do not. And, if they did, the MWA would preempt the GPO.

COMPLAINT ¶27:

Defendant has violated the GPB by implementing a tip-pooling program under which server's tips are shared with bussers.

ANSWER:

Denied. The GPO does not regulate tip-pooling arrangements, and thus does not prohibit including bussers in a tip pool. If it purports to, the MWA preempts it. Moreover, bussers "directly provide service to patrons."

COMPLAINT ¶28:

Also, Defendant has violated the GPB by implementing a tip-pooling program under which server's tips are shared with other restaurant employees (regardless of job title) who were not working at the restaurant at the time the tips were earned.

ANSWER:

Denied. The GPO does not regulate tip-pooling arrangements, and does not prohibit tip pools which share tips across different shifts or days. If it purports to, the MWA preempts it.

COUNT III
(Alleging Unjust Enrichment)

COMPLAINT ¶29:

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

ANSWER:

Defendant incorporates its prior responses in the preceding paragraphs as if the same were fully set forth herein.

COMPLAINT ¶30:

Defendant has received a monetary benefit from Plaintiff and other Restaurant servers by making them subsidize the pay of other Restaurant employees by (i) sharing tips with bussers who do not directly interact with customers and do not directly provide service to customers and (ii) sharing tips with other Restaurant employees (regardless of job title) who were not working at the time the tips were earned.

ANSWER:

Denied. Defendant's tip pool is a mandatory, contractual term of employment that servers agree to, and which is customary in the restaurant industry. Accordingly, servers do not "subsidize" the pay of other restaurant employees, nor has Defendant "received a monetary benefit" by Defendant operating a tip pool instead of paying its employees in a different contractual manner; the parties received precisely what they contractually agreed to. Moreover, in this context, the terms "subsidize" and "monetary benefit" are pejoratives, not factual allegations.

COMPLAINT ¶31:

The above practices have resulted in Defendant realized significant profits to its own benefit and to the detriment of Plaintiff and other servers.

ANSWER:

Denied. Defendant's tip pool is a mandatory, contractual term of employment that servers agree to, and which is customary in the restaurant industry. Accordingly, servers do not suffer a "detriment" nor has Defendant "realized significant profits" by Defendant operating a tip pool instead of paying its employees in a different contractual manner; the parties received precisely what they contractually agreed to. Moreover, in this context, the terms "detriment" and "significant profit" are pejoratives, not factual allegations.

COMPLAINT ¶32:

Defendant's acceptance and retention of such profits is inequitable and contrary to fundamental principles of justice, equity, and good conscience.

ANSWER:

Denied. Defendant has not accepted nor retained profits that are inequitable or contrary to fundamental principles of justice, equity, or good conscience.

NEW MATTER

1. The Amended Complaint, and each cause of action alleged therein, fails to state facts sufficient to constitute claims upon which relief can be granted.

2. The Pennsylvania Minimum Wage Act ("MWA") does not prohibit employers from including bussers in a tip pool. It expressly permits restaurants to pay the tipped minimum wage while including in the tip pool "employees who customarily and regularly receive tips," irrespective of whether these employees directly provide service to patrons. Bussers are employees who "customarily and regularly receive tips."

3. The Gratuity Protection Ordinance's ("GPO") does not regulate tip pools at all.

4. The GPO does not prohibit including bussers in a tip pool.

5. Bussers directly provide service to patrons.

6. Employees need not directly interact with customers in order to "directly provide service." The phrase "directly provide service" does not require customer interaction.

7. The GPO places no temporal limitations on tip pools. Therefore, employers are not prohibited from pooling and distributing tips among tip-eligible employees who worked different hours, shifts, or days within a pay period.

8. The City of Philadelphia's opinion that the GPO's tip pooling language is merely incidental, and thus was not intended to impose substantive restrictions, should be entitled to deference.

9. If the GPO regulates tip pools, the MWA preempts it.

10. Defendant required servers to participate in the tip pools as a mandatory term and condition of their at-will employment. This contractual arrangement precludes recovery in unjust enrichment.

11. The unjust enrichment claim fails because servers received the exact compensation that Defendant promised and that servers expected to receive.

12. The unjust enrichment claim is barred because, under Pennsylvania law, Plaintiff cannot dress-up statutory claims in the garb of unjust enrichment.

13. The unjust enrichment claim is barred because Defendant operated a lawful tip pool.

14. The Amended Complaint is partially time-barred. A two-year limitations period applies to the GPO and unjust enrichment claims. A three-year limitations period applies to the MWA claims.

15. On information and belief, the Amended Complaint's claims are barred, in whole or in part, by the doctrine of unclean hands because Plaintiff and/or other purportedly similarly situated persons sometimes under-reported and/or under-declared the income they received from tips and other compensation.

16. The claims of certain purportedly similarly situated persons cannot be litigated in this forum, because such persons have entered into agreements which require these claims to only be asserted in arbitration.

17. Upon information and belief, the claims of certain purportedly similarly situated persons may be barred due to discharge in bankruptcy, and/or through the doctrines of accord and satisfaction.

18. Upon information and belief, the claims of Plaintiff and certain purportedly similarly situated persons are subject to set-off.

19. Plaintiff and certain purportedly similarly situated persons were not always paid as tipped employees.

20. Any demand for liquidated, punitive, or exemplary damages is barred, in whole or in part, because good faith disputes exist regarding the claims asserted.

21. The Amended Complaint, essentially, seeks to overturn the public policy of the Commonwealth of Pennsylvania by prohibiting the sharing of tips with bussers, or prohibiting the pooling of tips across shifts. In so doing, it seeks to significantly prejudice the interests of numerous non-parties, including: (a) Defendant's bussers; (b) Defendant's servers and other employees who prefer to have tips pools across shifts and to fairly compensate bussers for assisting them; and (c) other hospitality employers and employees. These public policy issues should be resolved by the Pennsylvania legislature, not by a lawsuit. Alternatively, fact discovery should be stayed pending a definitive ruling on the underlying legal theories by the appropriate appellate court.

DATED: July 26, 2018

Respectfully submitted,

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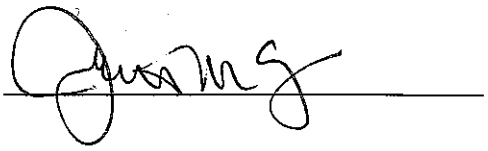
VERIFICATION

I, Jeanette McKay, am the Director of Legal Affairs-HR. I verify that the statements made in Defendants' Answer to Amended Complaint With New Matter are true and as pertaining to best of my knowledge, information, and belief. I understand that false statements made herein are subject to the penalties of 18 Pa, C.S., Subsection 4904, relating to unsworn falsification to authorities.

Dated: July 26, 2018



RYAN DOWNEY, on behalf of himself and others similarly situated

Plaintiff

vs.

MCCORMICK & SCHMICK RESTAURANT CORP.

Defendant

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
CASE NO. 180103412

Certificate of Service

The undersigned hereby certifies that, pursuant to Philadelphia Local Rule 205.4(f)(4), he electronically filed the foregoing Answer With New Matter, and all supporting papers, through the Court's Electronic Filing System on July 26, 2018. Upon approval by the Office of Judicial Records, such filing constitutes service pursuant to Pa. R. Civ. P. 205.4(g)(1)(ii) and 205.4(g)(2)(ii).

Additionally, on July 26, 2018, the undersigned effected service on Plaintiff's counsel, R. Anthony Santillo, Esq. and Plaintiff- Intervener, Amy Kirby, Esq. pursuant to Pa. R. Civ. P. 205.4(g)(1)(ii) and 205.4(g)(2)(ii), by emailing Mr. Santillo and Ms. Kirby a copy of all of the foregoing Answer with New Matter and supporting papers at asantillo@winebrakelaw.com, an address that Mr. Santillo included on a prior legal paper filed with the court in this action, and amy.kirby@phila.gov, an address that Ms. Kirby included on a prior legal paper filed with the court in this action.

Dated: July 26, 2018

By: _____/s/ Jacob Oslick_____

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