

PHILADELPHIA COURT OF COMMON PLEAS
PETITION/MOTION COVER SHEET

CONTROL NUMBER: <p style="text-align: center;">18063668</p> (RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)

FOR COURT USE ONLY	
ASSIGNED TO JUDGE:	ANSWER/RESPONSE DATE:
<i>Do not send Judge courtesy copy of Petition/Motion/Answer/Response. Status may be obtained online at http://courts.phila.gov</i>	

_____ January _____ Term, 2018
 Month Year
 No. _____ 03412 _____

DOWNEY VS MCCORMICK & SCHMICK
RESTAURANT CORP

Name of Filing Party:

INDICATE NATURE OF DOCUMENT FILED:

- Petition (*Attach Rule to Show Cause*) Motion
 Answer to Petition Response to Motion

Has another petition/motion been decided in this case? Yes No

Is another petition/motion pending? Yes No

If the answer to either question is yes, you must identify the judge(s):

TYPE OF PETITION/MOTION (see list on reverse side)		PETITION/MOTION CODE (see list on reverse side)	
PETITION TO INTERVENE		MTINV	
ANSWER / RESPONSE FILED TO (Please insert the title of the corresponding petition/motion to which you are responding):			
I. CASE PROGRAM OTHER PROGRAM Court Type: <u>CLASS ACTION</u> Case Type: <u>CLASS ACTION</u>		II. PARTIES (<i>required for proof of service</i>) (Name, address and telephone number of all counsel of record and unrepresented parties. Attach a stamped addressed envelope for each attorney of record and unrepresented party.) R. ANDREW SANTILLO WINEBRAKE & SANTILLO, LLC TWINING OFFICE CENTER 715 TWINING ROAD, SUITE 211 , DRESHER PA 19025 JACOB OSLICK SEYFARTH SHAW LLP 620 EIGHTH AVENUE , NEW YORK NY 10018 AMY MARIE KIRBY 1515 ARCH ST , PHILADELPHIA PA 19102	
III. OTHER			

By filing this document and signing below, the moving party certifies that this motion, petition, answer or response along with all documents filed, will be served upon all counsel and unrepresented parties as required by rules of Court (see PA. R.C.P. 206.6, Note to 208.2(a), and 440). Furthermore, moving party verifies that the answers made herein are true and correct and understands that sanctions may be imposed for inaccurate or incomplete answers.

_____ June 28, 2018 _____ AMY MARIE. KIRBY _____
 (Attorney Signature/Unrepresented Party) (Date) (Print Name) (Attorney I.D. No.)

The Petition, Motion and Answer or Response, if any, will be forwarded to the Court after the Answer/Response Date. No extension of the Answer/Response Date will be granted even if the parties so stipulate.

RYAN DOWNEY, on behalf of himself	:	PHILADELPHIA COUNTY
and others similarly situated,	:	COURT OF COMMON PLEAS
Plaintiff	:	
	:	JANUARY TERM, 2018
vs.	:	
	:	
MCCORMICK & SCHMICK	:	NO. 3412
RESTAURANT CORP,	:	
Defendant	:	

Order

AND NOW, this _____ day of _____, 2018, upon consideration of the Petition of the City of Philadelphia (the “City”) for Leave to Intervene as Plaintiff pursuant to Pa.R.Civ.P 2327 and 2328, any Answer thereto, and any argument or hearing held, it is hereby **ORDERED** and **DECREED** that said Petition is **GRANTED** in its entirety, and that the City is hereby permitted to intervene as plaintiff in the above-captioned action.

BY THE COURT:

J.

CITY OF PHILADELPHIA LAW DEPARTMENT

AMY KIRBY, DEPUTY CITY SOLICITOR
ATTORNEY IDENTIFICATION NO. 323938
1515 ARCH STREET – 15TH FLOOR
PHILADELPHIA, PA 19102-1595
(215) 683-3566 - Telephone
(215) 683-5299 – Fax
Attorney for Intervenor Plaintiff, City of Philadelphia

RYAN DOWNEY, on behalf of himself	:	PHILADELPHIA COUNTY
and others similarly situated,	:	COURT OF COMMON PLEAS
Plaintiff	:	
	:	JANUARY TERM, 2018
vs.	:	
	:	
MCCORMICK & SCHMICK	:	NO. 3412
RESTAURANT CORP,	:	
Defendant	:	

PETITION FOR LEAVE TO INTERVENE AS PLAINTIFF

The City of Philadelphia (the “City” or “Petitioner”), by and through it undersigned attorney, hereby petitions the Court pursuant to Pa.R.Civ.P 2327 and 2328 to grant it permission to intervene in the above-captioned action as a Plaintiff. In support thereof, the City states the following:

1. Plaintiff, Ryan Downey (“Downey” or “Plaintiff”) initiated this action on January 22, 2018 by filing a Class Action Complaint.
2. The Complaint asserts, among other things, that Philadelphia’s Gratuity Protection Bill, Philadelphia Code §9-614 (“GPB”), is preempted by the Pennsylvania Minimum Wage Act, 43 P.S. §§333.101, *et seq.* (“PMWA” or the “Act”).
3. McCormick & Schmick Restaurant Corporation (“Defendant”) filed Preliminary Objections to Downey’s Complaint on March 14, 2018, and Downey filed an Amended Complaint (the “Amended Complaint”) on April 3, 2018.

4. On April 23, 2018, Defendant filed preliminary objections to the Amended Complaint in the nature of a demurrer.
5. The City drafted and passed the GPB legislation at issue in this lawsuit in order to protect tipped employees from having a portion of their tips withheld by employers in certain circumstances.
6. Pursuant to Pa.R.Civ.P 2327, this Court may permit the City to intervene because the determination of this action may affect the legally enforceable interests of the City.
7. Preemption of the GPB would affect the City's legally enforceable interest in enforcing the GPB and protecting tipped workers from having a portion of their tips taken by their employers.
8. As contemplated by Pa.R.Civ.P. 2328, attached as Exhibit "A" to this Petition is the City's proposed Memorandum of Law in Opposition to Defendant's Preliminary Objections, which the City seeks leave to file upon permission to intervene in this action.
9. Further, pursuant to Pa.R.Civ.P. 2328 the City adopts by reference, Section IV(B)(1) of Plaintiff's Memorandum of Law in Opposition to Defendant's Preliminary Objections to the Amended Complaint.

WHEREFORE, the City of Philadelphia respectfully requests that this Court grant this Petition to Intervene and provide the City with full party status.

Respectfully submitted,

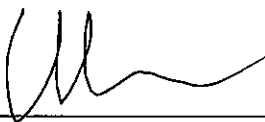
/s/ Amy M Kirby
Amy M Kirby (Pa. ID 323938)
Deputy City Solicitor, Law Department
City of Philadelphia
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
Phone: 215-683-3566
Fax: 215-683-5175

VERIFICATION

I, Lewis Rosman, hereby verify that:

1. I serve as a Senior Attorney in the Legislation Unit of the Philadelphia Law Department of the City of Philadelphia;
2. I am authorized to make this verification on behalf of the City of Philadelphia;
3. I hereby verify that the averments of fact and statements contained in the foregoing Petition for Leave to Intervene are true and correct to the best of my knowledge, information, and belief; and
4. I understand that I make the foregoing statements subject to the penalties of 18 PA. CONS. STAT. § 4904 (relating to unsworn falsification to authorities).

Dated: June 28, 2018



Lewis Rosman
Senior Attorney
Philadelphia Law Department

EXHIBIT “A”

CITY OF PHILADELPHIA LAW DEPARTMENT

AMY KIRBY, DEPUTY CITY SOLICITOR
ATTORNEY IDENTIFICATION NO. 323938
1515 ARCH STREET – 15TH FLOOR
PHILADELPHIA, PA 19102-1595
(215) 683-3566 - Telephone
(215) 683-5299 – Fax
Attorney for Intervenor Plaintiff, City of Philadelphia

RYAN DOWNEY, on behalf of himself	:	PHILADELPHIA COUNTY
and others similarly situated,	:	COURT OF COMMON PLEAS
Plaintiff	:	
	:	JANUARY TERM, 2018
vs.	:	
	:	
MCCORMICK & SCHMICK	:	NO. 3412
RESTAURANT CORP,	:	
Defendant	:	

**INTERVENOR CITY OF PHILADELPHIA’S MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT’S PRELIMINARY OBJECTIONS TO THE
AMENDED COMPLAINT**

Intervenor Plaintiff, the City of Philadelphia (the “City”), by and through its undersigned counsel, hereby files this response in opposition to Defendant, McCormick & Schmick Restaurant Corp’s (“Defendant”) Preliminary Objections to Plaintiff, Ryan Downey’s (“Downey” or “Plaintiff”) Complaint.

I. Statement of Issues.

A. Is Plaintiff’s Claim under the Gratuity Protection Ordinance preempted by the Pennsylvania Minimum Wage Act when the subject matter of the Pennsylvania Minimum Wage Act is not the same as that of the Gratuity Protection Bill, and the two laws serve completely different purposes?

Suggested Answer: No.

II. Facts and Legal Claims

A. Background and procedural history

Downey worked as a server at Defendant’s restaurant from 2014 until about November

2017. As a server, Downey’s job duties included taking and serving food and drink orders to customers at Defendant’s restaurant. While employed by Defendant, Downey was paid an hourly wage of \$2.83 plus tips. (Amended Complaint ¶9, hereinafter “Amend. Compl.”) During his tenure, Defendant utilized a tip sharing program whereby Downey and other servers contributed a portion of their tips into a “tip pool”. (Amend. Compl. ¶10.) The proceeds of this tip pool were distributed to bartenders, bussers, and hosts. (*Id.*). Downey asserts that bussers do not directly interact with customers, and in fact, were instructed only to do their assigned tasks (cleaning and resetting tables) after customers had left. (Amend. Compl. ¶7.)

Downey filed a Class Action Complaint (the “Complaint”) against Defendant on January 22, 2018 asserting, among other claims, that Defendant was in violation of the Pennsylvania Minimum Wage Act (“PMWA” or the “Act”), 43 P.S. §§333.101, *et seq.*, and Philadelphia’s Gratuity Protection Bill (“GPB” or the “Ordinance”), Philadelphia Code §9-614 (hereinafter “Phila. Code.”) In response to the Complaint, Defendant filed Preliminary Objections to which Downey responded by filing an Amended Complaint (the “Amended Complaint”), on April 3, 2018. On April 23, 2018, Defendant again filed Preliminary Objections in the nature of a demurrer. In these Preliminary Objections Defendant asserts, among other arguments, that the GPB is preempted by the PMWA because the Act and the Ordinance concern the same subject matter. After learning of this defense, the City seeks to intervene in this case on behalf of Downey solely as to the issue of whether or not the GPB is preempted by the PMWA.¹

¹ The City does not take a position on any other legal or factual argument that arises out of the Amended Complaint or Preliminary Objections thereto.

B. Legal Argument

1. The City's Gratuity Protection Ordinance Is Not Preempted by the Minimum Wage Law.

Downey's Amended Complaint alleges that Defendant violated the PMWA and GPB. As to the PMWA, Downey alleges that the Act, which mandates minimum wage requirements for employees, can be satisfied by using "tip credits" for tipped employees. Tip credits allow employers of tipped employees to pay those employees wages less than those otherwise required by the PMWA, but to receive a "credit" for tips earned, thereby satisfying the Act's minimum wage. Within the confines of the provision explaining distribution of tips and tip credits, the PMWA states that tip pooling is not prohibited among employees who "customarily and regularly receive tips." 43 P.S. §333.103(d)(2). Downey argues that the tip credit is forfeited if employers require or permit employees to share tips with employees who do not regularly receive them. (Amend. Compl. ¶22.) In other words, Downey alleges that Defendant violated the PMWA tip credit guidelines by requiring Downey to participate in a tip pool that benefited employees who do not regularly receive tips, in this case bussers.

Downey further argues that Defendant violated the GPB. The GPB is a City Ordinance intended to protect tipped employees. In pertinent part it requires that all tips paid to an employee be regarded as that employee's sole property, free from interference or deduction by employers. It also provides that the Ordinance does not prohibit tip pooling among employees who "directly provide service to patrons." Phila. Code. §9-614(2)(c). Downey claims that Defendant violated the GPB by requiring him to share tips with bussers who do not regularly interact with customers, as well as certain other employees.

Defendant argues that the GPB is preempted by the PMWA because the PMWA specifically preempts local ordinances that concern the same subject matter. Defendant contends

that the GPB concerns the same subject matter as the PMWA because both the GPB and the PMWA refer to tips and tip pooling. (Defendant’s Preliminary Objections at 11, hereinafter “Def. PO’s”). As discussed in detail below, the GPB does not cover the same subject matter as the PMWA, and therefore is not preempted by the Act.

The PMWA specifically states that “...this act shall preempt and supersede any local ordinance or rule concerning the *subject matter* of this act.” 43 P.S. §333.114a. (Emphasis added.) Defendant argues that the Act and the Ordinance both cover the same subject matter because they both “(1) [prohibit] employers from taking their employees’ tips; and (2) [permit] employers to operate tip pooling programs among employees who customarily and regularly receive tips.” (Def. PO’s at 11). Further, Defendant asserts that “if the [GPB] regulates tip pooling arrangements, the [GPB] and the [PMWA] cover the exact same subject matter.” (*Id.*).

The City disagrees. Although the Act and the Ordinance both may refer to tips and tip pooling, they do not cover the same *subject matter*. The PMWA’s purpose and subject matter is to establish standards for minimum wages and to regulate overtime pay for employees in Pennsylvania. 43 P.S. §333.101 *et. seq.* Within that subject matter, among many other provisions, the PMWA articulates how tips, and tip pooling, can be used to meet minimum wage requirements.

The provision regarding employees’ tips and tip pooling in the PMWA is contained solely in the subsection of the PMWA that explains how to pay a tipped employee a minimum wage, and simply provides that the PMWA “...shall not be construed to prohibit the pooling of tips among employe[e]s who customarily and regularly receive tips.” 43 P.S. §333.103(d)(2). Therefore, this discussion of tip pooling is strictly within the confines of setting minimum wage requirements for tipped employees under the PMWA.

In contrast, the GPB has nothing to do with minimum wage requirements. Instead, it is solely directed toward protecting the ownership of gratuities left to tipped employees. The GPB requires that any gratuity or tip given to an employee “shall be the sole property of the employee or employees to whom it was paid...[and an]...employer that permits patrons to pay gratuities by credit card shall pay employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deduction for any credit card payment processing fees or costs that may be charged to the employer by the credit card company.” §9-614(2)(a)-(b). The reference to tip pooling is merely incidental to that purpose, clarifying that the practice is not precluded by the property right. Tip pooling policies are not the subject matter of the Ordinance.² §9-614(2)(c).

The legislative history of the GPB confirms this. City Council explained the GPB as “regulating an employer’s treatment of gratuities left by patrons for employees, including, but not limited to, a requirement that all gratuities be paid over the employees without deduction, including, in the case of a gratuity paid by credit card, any deduction for credit card processing fees...” (Council of the City of Philadelphia Committee on Rules, Nov. 1, 2011, 2:17-24, attached hereto as Attachment 1³). This bill was never intended to address minimum wage issues but merely to safeguard employees’ tips. Then Councilperson Kenney summed up the City’s reason for enacting the Ordinance, “...[restaurants] can’t pay somebody under \$3 an hour and then take their tip money or a portion of it to pay [their] bills.” (*Id.* at 20:16-19). Simply

² While tip pooling was mentioned in the GPB, there is no legislative history that discusses its inclusion in the GPB. This lack of legislative guidance contrasts with the extensive legislative discussion about employees’ property rights in their tips and further supports that tip pooling was not the subject matter of the Ordinance.

³ The entire transcript from the hearing can be found here: <http://legislation.phila.gov/transcripts/Public%20Hearings/rules/2011/ru110111.pdf>

put, protecting employees from having their hard-earned tips taken by their employers was the sole subject matter of the GPB.

And to the extent that both the PMWA and the GPB discuss tip pooling, those discussions are in very different contexts. The GPB was enacted to ensure that tips left for employees are given to those employees without interference or deduction by employers.⁴ On the other hand, the PMWA was enacted to define minimum wages for all employees and to determine how those are calculated. Defendant cannot simply pull similar words from the two laws and argue that they are the same subject matter. While tips and tip pooling may be references in each of the two laws, the subject matter of the Act and the Ordinance are wholly different and therefore, the GPB is not preempted by the PMWA.

III. Requested Relief

For these reasons, the GPB does not concern the subject matter of the PMWA, and Defendant's Preliminary Objection asserting the contrary should be dismissed as legally insufficient.

CITY OF PHILADELPHIA
LAW DEPARTMENT

BY: /s/ Amy Kirby
Deputy City Solicitor
Attorney I.D. No. 323938
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
Phone: (215) 683-3566
Fax: (215) 683-5299
Amy.Kirby@phila.gov

⁴In fact, Defendant confirms this point in its Brief in Support of Preliminary Objections. After reviewing the legislative history, Defendant confirms, "...the GP[B] was understood to regulate only when employers paid tips, and whether employers could deduct credit card processing fees." (Defendant Memorandum at 14.)

ATTACHMENT 1

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COUNCILMAN KENNEY: Can we have your attention, ladies and gentlemen. We now have a quorum so we can begin the Rules Committee hearing.

Please take a seat and refrain from your conversation.

We have a quorum today for the Rules Committee with Councilmembers Rizzo, Greenlee, Goode, Councilwoman Miller and Councilman DiCicco.

The first bill for today is Bill No. 110341, an ordinance amending Chapter 9-600 of The Philadelphia Code, entitled "Service and Other Businesses," by adding a new Section regulating an employer's treatment of gratuities left by patrons for employees, including, but not limited to, a requirement that all gratuities be paid over to employees without deduction, including, in the case of a gratuity paid by credit card, any deduction for credit card processing fees; providing penalties for violations; and providing for a private right of

1 11/1/11 - RULES - BILL 110341, ETC.
2 that when I learned about this 3 percent,
3 1 to 3 percent withholding, I also
4 learned that some of these restaurants
5 will hold the tips for an entire month;
6 therefore, having their bank account get
7 the interest on it as opposed to in that
8 person's hand.

9 So that's part of this bill
10 also, is that they have to pay the tips
11 out no later than the next payday. I
12 would like they would do it that night
13 would be nice, but if they don't do it
14 that night, at least by the next payday.
15 And, again, the reason why this is so
16 outrageous is, you can't pay somebody
17 under \$3 an hour and then take their tip
18 money or a portion of it to pay your
19 bills. So, again, if they paid the
20 federal minimum wage, we wouldn't be
21 sitting here talking about this. They
22 could take whatever they want.

23 So I'd just like to ask if
24 anyone here has any questions for these
25 witnesses.

CERTIFICATE OF SERVICE

I hereby certify that I am serving a true and correct copy of the foregoing document this day by first-class mail, postage-prepaid, and/or by electronic mail, on the parties listed below, addressed as follows:

Peter Winebrake, Esq.
Andrew Sattilo, Esq.
Mark Gottesfeld, Esq.
Winebrake & Santillo, LLC
Twining Office Center
715 Twining Road, Suite 211
Dresher PA 19025
(215) 884-2491
Attorney for Plaintiffs

Jacob Oslick, Esq.
Seyfarth Shaw LLP
620 Eighth Avenue
New York, NY 10018
(212) 218-5500
Attorney for Defendant

/s/ Amy M Kirby _____
Amy M Kirby, Esq.
Deputy City Solicitor
City of Philadelphia, Law Department
1515 Arch Street, 15th Floor
Philadelphia, PA 19102

Dated: June 28, 2018