

RYAN DOWNEY, on behalf of himself and  
others similarly situated

Plaintiff,

v.

MCCORMICK & SCHMICK  
RESTAURANT CORP,

Defendant.

PHILADELPHIA COUNTY  
COURT OF COMMON PLEAS

Filed and Accepted by the  
PHILADELPHIA COUNTY  
COURT OF COMMON PLEAS  
JAN 11 2020 5:07 PM  
JUDICIAL DISTRICT OF PHILADELPHIA

CLASS ACTION 180103412  
Control No. 19030347

DOCKETED

FEB 11 2020

N. ERICKSON  
DAY FORWARD

**STIPULATION AND PROPOSED ORDER**

Plaintiff Ryan Downey (“Plaintiff”) and Defendant McCormick & Schmick Restaurant Corp (“Defendant”), by and through their undersigned counsel, hereby **STIPULATE** as follows:

1. Following the hearing held before the Court on January 10, 2020, the following class is certified, pursuant to Pennsylvania Rules of Civil Procedure 1702 and 1710:

**The thirty-eight (38) individuals who worked for Defendant as servers at the McCormick & Schmick Seafood and Steaks restaurant located at 1 South Broad Street in Philadelphia, PA (the “Restaurant”) from April 3, 2015 to November 21, 2017, for which Defendant does not possess executed written arbitration agreements.**

These Class Members are listed in Exhibit A.

2. By agreeing to stipulate to the definition of the class, Defendant does not waive and expressly preserves any and all defenses to the claims asserted in the Complaint. Defendant further retains the right to move to decertify the class after the conclusion of merits discovery.

3. Defendant also retains its right to later move to compel arbitration of two of the potential Class Members (Thomas Brennan and Leah Herrera) based on the argument that they purportedly agreed to arbitrate their claims by continuing to work for Defendant after September 1, 2018 even though Defendant does not possess executed written arbitration agreements for these individuals.

Downey Vs Mccormick & S-ORDER



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4. The law firm of Winebrake & Santillo, LLC shall serve as Class Counsel and, as such, shall represent the interests of the above-captioned Plaintiff and all Class Members pursuant to Pennsylvania Rule of Civil Procedure 1709(1).

5. Plaintiff Ryan Downey is appointed Class Representative of the Class defined in paragraph 1 above pursuant to Pennsylvania Rule of Civil Procedure 1709(2).

6. The “Notice of Class Action Lawsuit” (“Notice Form”) attached as Exhibit B is approved as to form and content.

7. Within seven (7) days of the date of this Order, Defendant shall provide to Class Counsel the last known address of all Class Members, as defined in paragraph 1 above.

8. Within fourteen (14) days of the date of this Order, Class Counsel shall mail the Notice Form to each of the thirty-eight (38) Class Members by first class mail. If the United States Postal Service returns any Notice Form to Class Counsel with a forwarding address, Class Counsel shall promptly re-mail the Notice Form to the forwarding address. If the United States Postal Service returns any Notice Form to Class Counsel without a forwarding address, Class Counsel shall make all reasonable and good faith efforts to obtain an updated address and promptly re-mail the Notice Form to any updated address.

9. Any Class Member wishing to exclude himself/herself from this class action lawsuit must do so by mailing to Class Counsel a letter indicating his/her desire to be excluded, as described in Section 6 of the Notice Form. Such exclusion letters must be postmarked within forty-nine (49) days of the original mailing of the Notice Form pursuant to paragraph 6 above. Class Counsel shall collect and serve any exclusion letters on Defense Counsel, within seven (7) days of receipt. Class Counsel shall file any exclusion letters with the Court in a single filing after the time to request exclusion has run.

10. A status conference is hereby scheduled on May 27, 2020 at 10:00 am/~~pm~~ in courtroom 630, City Hall, Philadelphia, PA.

11. Plaintiff's pending Motion for Class Certification is denied as moot.

**FOR PLAINTIFF:**

/s/ R. Andrew Santillo  
Peter Winebrake  
R. Andrew Santillo, Esq.  
Mark J. Gottesfeld, Esq.  
Winebrake & Santillo, LLC  
715 Twining Road, Suite 211  
Dresher, PA 19025  
(215) 884-2491

**FOR DEFENDANT:**

Jacob Oslick (with permission)  
Jacob Oslick (Pa. Bar No. 311028)  
Seyfarth Shaw LLP  
620 Eighth Avenue  
New York, NY 10018  
(212) 218-6480

**SO ORDERED** this 10th day of February, 2020.

BY THE COURT

  
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NINA W. PADILLA, J.

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RYAN DOWNEY, on behalf of himself and  
others similarly situated

Plaintiff,

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RESTAURANT CORP,

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: PHILADELPHIA COUNTY  
: COURT OF COMMON PLEAS

: CLASS ACTION 180103412  
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:  
:  
:  
:

**EXHIBIT A: NAMES OF CLASS MEMBERS**

1. Angelina, Vance J
2. Arnao, Kiley
3. Brennan, Thomas
4. Brister, Eric
5. Carrington, Trevor Orion
6. Charlton, Leesa Nicole
7. Clark, Anthony
8. Copeland, Brendan
9. Culyba, Alexander
10. Derstine, Brandan
11. Donnellon, Patrick
12. Downey, Ryan Edward
13. Ferrara, Christina
14. Fuselli, Olivia
15. Harvey, Ciara
16. Herrera, Leah
17. Johnson, Shana
18. Jones, Henry
19. Kennedy, Danny
20. Lewis, Bridget
21. Miller, Jason
22. Mitchell, Morgan
23. Nguyen, Khann
24. Potter, Moultrie
25. Price, Colleen Susan
26. Rorick, Carol
27. Salim, Muhammad
28. Sambuco, Frank
29. Schmanek, Chris
30. Sherwin, Nicholas
31. Teixeira, Jeff
32. Thomas, Danielle

33. Tobin, Katelyn
34. Tocco, Mark
35. Toledo, Shera
36. Veneri, Richard A
37. Zapparcosta, Rachael Louise
38. Marc Livingood



## EXHIBIT B

### 2. What is the Lawsuit about?

The lawsuit alleges that McCormick & Schmick's tip-sharing policies at the Restaurant violated Pennsylvania and Philadelphia law in two ways. First, Plaintiff alleges that he and other servers at the Restaurant were required to share their tips with bussers who did not possess the requisite direct customer interaction to receive money from the servers' tip-pool. Second, Plaintiff alleges that McCormick & Schmick's practice of pooling servers' tips on a "day basis" (rather than a "shift basis") improperly required servers to share their tips with other Restaurant employees who were not working at the time the tips were earned.

As a result of these alleged violations, Plaintiff asserts that McCormick & Schmick was not allowed to count servers' tips towards its obligation to pay servers \$7.25/hour. Thus, Plaintiff seeks to recover the difference between \$7.25/hour and the wage that McCormick & Schmick actually paid servers at the Restaurant (which generally was \$2.83/hr.), in addition to the tips that he alleges were improperly shared.

McCormick & Schmick denies that it violated the law and asserts that its tip-sharing practices at the Restaurant were proper. In brief, McCormick & Schmick asserts that Pennsylvania and Philadelphia law permit restaurants to include bussers in tip pools, whether or not bussers directly interact with customers and that, in any event, bussers did directly interact with customers. McCormick & Schmick further asserts that Pennsylvania and Philadelphia law do not prohibit restaurants from pooling tips on a "day basis" instead of a "shift basis."

### 3. Have Plaintiff and the Class Members Already Won this Lawsuit?

*No.* So far, the Court only has decided that the Lawsuit can proceed as a class action on behalf of Plaintiff and the Class Members. The Court has not ruled on the underlying merits of Plaintiff's legal claims.

### 4. Who will serve as the Class Members' lawyer?

The Court has designated the law firm of Winebrake & Santillo, LLC to serve as "Class Counsel" and to represent the interests of Plaintiff and the Class Members in this case. The contact information for this firm is: Winebrake & Santillo, LLC, 715 Twining Road, Suite 211, Dresher, PA 19025 (Phone: 215-884-2491; Website: [www.winebrakelaw.com](http://www.winebrakelaw.com)).

The lawyers at this firm represent your legal interests and are available to answer your questions in strict confidence. If you call, please identify yourself as a "Class Member" in the "McCormick & Schmick Server Lawsuit" and ask to speak with one of the attorneys working on the Lawsuit.

### 5. How can I participate in the Lawsuit?

If you received this notice in an envelope addressed to you, then you are a Class Member. If you have any questions about your status as a Class Member, please call the law firm identified in Section 4.

*You do not need to do anything to remain a Class Member.*

## EXHIBIT B

If you do nothing, you will remain a Class Member. Your potential right to obtain an award from McCormick & Schmick will be determined by the outcome of the Lawsuit (whether favorable or unfavorable) or by any settlement of the Lawsuit. Depending on future rulings by the Court, you may potentially be required to participate in discovery in this case.

Whether you choose to participate in this lawsuit is your decision. Please do not ask your supervisors, managers, or human resources representatives at McCormick and Schmick any questions about either this lawsuit, or your potential participation in it.

### 6. How do I exclude myself from the Lawsuit?

You are not required to remain a Class Member. If you do not want to participate in the Lawsuit, you must prepare a letter simply stating that you want to be “excluded from the *Downey v. McCormick & Schmick* Class Action Lawsuit.” Please send this letter to:

McCormick & Schmick Server Lawsuit  
Winebrake & Santillo, LLC  
715 Twining Road, Suite 211  
Dresher, PA 19025

Your letter must include your name, address, and phone number. Be sure to write clearly, and be sure to sign the letter.

***In order to be valid, your exclusion letter must be postmarked on or before [49 DAYS FROM MAILING].***

Class Counsel will ensure that all exclusion letters are properly filed with the Court.

If you exclude yourself from the Lawsuit, you will not be bound by the outcome of the Lawsuit (whether favorable or unfavorable) or any settlement of the Lawsuit.

If you exclude yourself from the Lawsuit, you will be free to retain your own lawyer and, if you choose, bring your own individual lawsuit against McCormick & Schmick.

### 7. How do the lawyers representing Plaintiff and the Class Members get paid?

You are ***not*** personally responsible for paying any fees to the lawyers representing Plaintiff and the Class Members.

If Plaintiff and the Class Members win or settle the Lawsuit, the lawyers identified in Section 4 will ask the Court either to require McCormick & Schmick to pay their legal fees/expenses or to allow them to recover their legal fees/expenses as a percentage of the Class Members’ total recovery. Any payments to the lawyers must be approved by the Court as fair and reasonable.

If Plaintiff and the Class Members lose the Lawsuit, the lawyers will not be paid any fees or expenses.



## EXHIBIT B

**8. How do I obtain more information?**

You can obtain more information by calling or writing the law firm identified in Section 4.

Date: Feb. 10, 2020

Approved as to Form: Hon. Nina W. Padilla  
Philadelphia County Court of Common Pleas

**DECLARATION OF SERVICE:** I, the undersigned attorney, declare, subject to penalty of perjury, that, on the date indicated below, I sent this document to the following lawyers through the Court's electronic filing system:

Jacob Oslick, Esq.  
Seyfarth Shaw LLP  
620 Eighth Avenue  
New York, NY 10018  
*Defendant*

Amy Kirby, Esq.  
City of Philadelphia Law Department  
1515 Arch Street, 17th Floor  
Philadelphia, PA 19102  
*Intervenor*

Date: February 4, 2020

/s/ R. Andrew Santillo  
WINEBRAKE & SANTILLO, LLC  
715 Twining Road, Suite 211  
Dresher, PA 19025  
Ph: (215) 884-2491