

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

MICHEL THOMPSON and GEORGE	:	
HIGGINS, on behalf of themselves and those	:	
similarly situated,	:	
	:	Civil Action No. 2:22-cv-01244
Plaintiffs	:	
	:	The Honorable John M. Younge
v.	:	
	:	[Electronically Filed]
RHOMBUS SERVICES, LLC (d/b/a	:	
BrandPoint Services) and DOLGENCORP OF	:	
TEXAS, INC. (d/b/a Dollar General),	:	
	:	
Defendant	:	
	:	

**DEFENDANT RHOMBUS SERVICES, LLC’S ANSWER AND AFFIRMATIVE  
DEFENSES TO PLAINTIFFS’ COMPLAINT**

Defendant Rhombus Services, LLC d/b/a BrandPoint Services (hereinafter “Defendant BrandPoint”), by and through its undersigned counsel, hereby files its Answer and Affirmative Defenses to the Complaint filed by Michel Thompson and George Higgins (hereinafter “Plaintiffs”) and avers as follows:

**JURISDICTION AND VENUE**

1. Denied. By way of further answer, the allegations in this Paragraph constitute a conclusion of law to which no responsive pleading is required.
  
2. Denied. By way of further answer, the allegations in this Paragraph constitute a conclusion of law to which no responsive pleading is required.
  
3. Denied. By way of further answer, the allegations in this Paragraph constitute a conclusion of law to which no responsive pleading is required.

4. Denied. After reasonable investigation, Defendant BrandPoint is without knowledge or information sufficient to form a belief as to the truth of the averment that named Defendant Dolgencorp of Texas, Inc. (hereinafter “Defendant Dolgencorp”) is registered to do business in Pennsylvania and regularly conducts business in Pennsylvania.

5. Denied. By way of further answer, the allegations in this Paragraph constitute a conclusion of law to which no responsive pleading is required.

### **PARTIES**

6. Denied. After reasonable investigation, Defendant BrandPoint is without knowledge or information sufficient to form a belief as to the truth of the averment that Thompson is an individual residing in Texas.

7. Denied. After reasonable investigation, Defendant BrandPoint is without knowledge or information sufficient to form a belief as to the truth of the averment that Higgins is an individual residing in Texas.

8. Admitted.

9. Admitted.

10. Denied. After reasonable investigation, Defendant BrandPoint is without knowledge or information sufficient to form a belief as to the truth of the averment that named Defendant Dolgencorp is a corporate entity registered to do business in Pennsylvania and headquartered in Goodlettsville, TN.

11. Admitted in part and denied in part. By way of further answer, Defendant BrandPoint admits that Plaintiffs refer to BrandPoint and Dolgencorp collectively as “Defendants.” After reasonable investigation, Defendant BrandPoint is without knowledge or

information sufficient to form a belief as to the truth of the averment that Defendant Dolgencorp of Texas, Inc. is the same entity as “Dollar General,” and as such, the allegation is denied.

12. Denied. By way of further answer, Defendant BrandPoint does not employ Plaintiffs.

13. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

### **FACTS**

14. Denied. By way of further answer, Plaintiffs misrepresent to the Court and misquote Defendant BrandPoint’s website. Specifically, Defendant BrandPoint makes no mention on its website that it “hires” “Traveling Merchandisers.” Defendant BrandPoint’s website states in relevant part:

“We are a growing National Merchandising Company seeking dependable reliable and well-groomed merchandisers that are willing to travel to various retail locations and work in a fast-paced environment. Must be willing to travel 100% of the time.”

<https://brandpointservices.com/vendor-network/traveling-merchandiser/>

Further, Defendant does not employ Traveling Merchandisers, but is rather a General Contractor.

“BrandPoint Services is a licensed general contractor that acts as a single-point of contact, providing facility services and solutions supporting spaces for multi-site commercial clients across the United States and Canada.”

<https://brandpointservices.com/who-we-are/>

15. Denied. After reasonable investigation, Defendant BrandPoint is without knowledge or information sufficient to form a belief as to the truth of the averments in this Paragraph.

16. Denied. Defendant BrandPoint is not a partner of Defendant Dolgencorp.

17. Admitted in part and denied in part. Defendant BrandPoint admits that Plaintiffs were contracted to perform the duties set forth on the second sentence of this Paragraph. Defendant BrandPoint denies the remaining allegations of this Paragraph.

18. Denied. After reasonable investigation, Defendant BrandPoint is without knowledge or information sufficient to form a belief as to what constitutes a “typical remodel.” By way of further answer, Plaintiffs’ allegations in this Paragraph regarding joint supervision and the “right to control” constitute conclusions of law to which no responsive pleading is required. Defendant BrandPoint denies any remaining allegations of this Paragraph.

19. Admitted.

20. Admitted.

21. Defendant BrandPoint denies the allegations as to Defendant BrandPoint.

22. Denied. After reasonable investigation, Defendant BrandPoint is without knowledge or information sufficient to form a belief as to the definition of “integral part of the businesses,” and, as such, Defendant BrandPoint denies the allegation.

23. Admitted in part and denied in part. Defendant BrandPoint admits that managerial skill is not a prerequisite for the traveling merchandiser position. Defendant BrandPoint denies that traveling merchandisers have no meaningful opportunity for profit or loss.

24. Admitted in part and denied in part. It is admitted only that traveling merchandisers are required to sign an independent contractor agreement. By way of further answer, Plaintiffs’ Exhibit A is a writing that speaks for itself, and any characterization thereof is denied. The remaining allegations of this Paragraph are denied as conclusions of law to which no responsive pleading is required.

25. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

26. Denied. Plaintiffs' Exhibit A is a writing that speaks for itself, and any characterization thereof is denied.

27. Admitted in part and denied in part. It is admitted that traveling merchandisers do not receive a separately classified overtime premium pay for hours worked in excess of 40 per week. Defendant BrandPoint denies any implication that traveling merchandisers are entitled to overtime premium pay for hours worked in excess of 40 per week inasmuch as they are independent contractors.

28. Denied in part and admitted in part. By way of further answer, the phrase "worked for Defendants" and the characterization that Thompson was subject to "terms and conditions of employment" are conclusions of law to which no responsive pleading is required, and, as such are denied. Defendant BrandPoint admits that Thompson provided contractual services from approximately June 2021 until November 2021.

29. Denied in part and admitted in part. After reasonable investigation, Defendant BrandPoint is without knowledge or information sufficient to form a belief as to the truth of the averment that Thompson "regularly" worked over 60 hours per week, and, as such that allegation is denied. Defendant BrandPoint admits that Thompson was not paid a separate amount for overtime "wages" for hours worked over 40, but specifically denies that Thompson was entitled to "wages" at all, or that he was entitled to overtime.

30. Denied in part and admitted in part. By way of further answer, the phrase "worked for Defendants" and the characterization that Higgins was subject to "terms and conditions of employment" are conclusions of law to which no responsive pleading is required, and, as such are

denied. Defendant BrandPoint admits that Higgins provided contractual services from approximately February 2020 until November 2020.

31. Denied in part and admitted in part. After reasonable investigation, Defendant BrandPoint is without knowledge or information sufficient to form a belief as to the truth of the averment that Thompson “regularly” worked over 60 hours per week, and, as such that allegation is denied. Defendant BrandPoint admits that Thompson was not paid a separate amount for overtime “wages” for hours worked over 40, but specifically denies that Thompson was entitled to “wages” at all, or that he was entitled to overtime.

32. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

**CLASS AND COLLECTIVE ALLEGATIONS**

33. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

34. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

35. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

36. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

37. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

38. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

39. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

40. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

41. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

**COUNT I - FLSA**

42. Admitted.

43. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

44. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

**COUNT II - PMWA<sup>1</sup>**

45. Admitted.

46. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

47. Denied. By way of further answer, the allegations of this Paragraph constitute conclusions of law to which no responsive pleading is required.

**JURY DEMAND**

Defendant BrandPoint admits that Plaintiffs have demanded a jury trial.

**PRAYER FOR RELIEF**

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<sup>1</sup> Defendant denies Plaintiffs' allegation in Footnote 2 as a conclusion of law to which no responsive pleading is required. Further, Plaintiffs' Exhibit A is a writing that speaks for itself, and any characterization thereof is denied.

**WHEREFORE**, Defendant BrandPoint requests that Plaintiffs be denied any and all relief requested in their Complaint. Defendant BrandPoint respectfully requests that the claims alleged in the Complaint be dismissed in their entirety with prejudice, and that it be awarded costs of defense, including reasonable attorneys' fees.

- A. Denied;
- B. Denied;
- C. Denied;
- D. Denied;
- E. Denied;
- F. Denied; and
- G. Denied.

ALL ALLEGATIONS OF THE COMPLAINT NOT SPECIFICALLY ADMITTED ARE DENIED AND DEFENDANT BRANDPOINT DEMANDS STRICT PROOF THEREOF.

**AFFIRMATIVE DEFENSES**

Without assuming the burden of proof on any such defenses which would otherwise rest on Plaintiffs, and with the reservation of its rights to amend or supplement its responses, Defendant BrandPoint asserts the following as defenses to Plaintiffs' Complaint:

**FIRST AFFIRMATIVE DEFENSE**

Plaintiffs fail to state a claim, in whole or in part, against Defendant BrandPoint, upon which relief can be granted, either on their own behalf or on behalf of those persons they contend to represent or to whom they allege to be similarly situated.



**SECOND AFFIRMATIVE DEFENSE**

Plaintiffs' allegations fail to state a claim for violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* Specifically, Plaintiffs premise their FLSA claim on the false allegation that they were required to, or did regularly, work in excess of 40 hours per workweek.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiffs' allegations fail to state a claim for violation of the Pennsylvania Minimum Wage Act ("PMWA"), 43 P.S. §§ 333.101, *et seq.* Specifically, Plaintiffs premise their PMWA claim on the false allegation that they were required to, or did, work in excess of 40 hours per workweek.

**FOURTH AFFIRMATIVE DEFENSE**

The Court lacks subject matter jurisdiction over Plaintiffs' PMWA claims inasmuch as neither Plaintiff provided any services to Defendant BrandPoint in the Commonwealth of Pennsylvania.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiffs lack standing to bring their claims.

**SIXTH AFFIRMATIVE DEFENSE**

Venue is improper inasmuch as the events that gave rise to Plaintiffs' cause of action did not occur in the Commonwealth of Pennsylvania.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs' collective/class action allegations lack sufficient factual basis and particularity to maintain a claim against Defendant BrandPoint in Pennsylvania inasmuch as neither Plaintiff provided any services to Defendant BrandPoint in the Commonwealth of Pennsylvania.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs' claimed damages would constitute a windfall inasmuch as Plaintiffs received the statutory minimum wage for all hours worked as required by both the FLSA and PMWA.

**NINTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred, in whole or in part, by the applicable statute of limitations.

**TENTH AFFIRMATIVE DEFENSE**

Subject to further proof through discovery, Plaintiffs' claims are barred, in whole or in part, by the doctrines of estoppel, offset, setoff, unclean hands, and laches.

**ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs' allegations are barred in whole or in part because their claims are not representative of the proposed class, nor are Plaintiffs "similarly situated" as to other putative class members.

**TWELFTH AFFIRMATIVE DEFENSE**

Plaintiffs' allegations are barred in whole or in part because joinder of putative class members is impracticable.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' allegations are barred in whole or in part because their claims are not typical of the putative class members.

**FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' allegations are barred in whole or in part because questions of law and fact are not common to all putative class members.

**FIFTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' allegations are barred in whole or in part because a class and collective action would not be a fair and efficient adjudication of this litigation.

**SIXTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs and the putative class members Plaintiffs purport to represent were properly classified as independent contractors, and therefore not entitled to overtime pay.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred, in whole or in part, as to all hours they allegedly worked that Defendant BrandPoint did not suffer or permit them to work and/or which Defendant BrandPoint lacked actual or constructive knowledge.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

If Defendant BrandPoint was obligated but failed to pay Plaintiffs and the putative class members for work in excess of 40 in a workweek, the uncompensated time is *de minimus*.

**NINETEENTH AFFIRMATIVE DEFENSE**

Defendant BrandPoint is not a proper party to this matter as it is not Plaintiffs' "employer" as that term is defined and construed under the FLSA and PWMA.

**TWENTIETH AFFIRMATIVE DEFENSE**

Defendant BrandPoint and Defendant Dolgencorp are neither employers nor joint employers of Plaintiff or any putative class member.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

Plaintiffs' allegations are barred in whole or in part because Defendant BrandPoint undertook its challenged acts or omissions in good faith and in conformity with orders, rulings,

regulations, or interpretations from the Wage and Hour Division of the Department of Labor (DOL).

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

Plaintiffs' allegations are barred in whole or in part because Defendant BrandPoint subjectively acted in good faith and had reasonable grounds to believe it was not violating the FLSA and PMWA.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

Plaintiffs' claims for relief are barred, in whole or in part, to the extent that they have failed to mitigate their alleged damages.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred, in whole or in part, by the doctrine of waiver.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

Subject to crossclaims and counterclaims by Defendant BrandPoint against Defendant Dolgencorp, it is separately and/or jointly liable to Defendant BrandPoint for contractual, common law, and/or statutory indemnification to the extent any unpaid wages, overtime, liquidated damages, attorneys' fees, costs, and expenses, or any other costs or expenses, may become due and owing on account of any demand, judgment, settlement or otherwise.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

Defendant BrandPoint reserves the right to assert any additional defense allowed by the Federal Rules of Civil Procedure upon receipt or disclosure of any evidence discovered in defense of this matter.

Dated: June 16, 2022

Respectfully submitted,

**SAXTON & STUMP, LLC**

*/s/ Richard L. Hackman*

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*Counsel for Defendant Rhombus Services,  
LLC d/b/a BrandPoint Services*

**CERTIFICATE OF SERVICE**

I, Richard L. Hackman, Esquire, hereby certify that on June 16, 2022 I caused a true and correct copy of the foregoing Answer and Affirmative Defenses to Plaintiffs' Complaint to be served via the Court's electronic filing system, upon the following counsel of record:

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/s/ Richard L. Hackman  
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