



Plaintiff Ryan Downey (“Plaintiff”), on behalf of himself and similarly situated individuals, brings this class action lawsuit against Defendant McCormick & Schmick Restaurant Corp (“Defendant”), seeking all available relief under the Pennsylvania Minimum Wage Act (“PMWA”), 43 P.S. §§ 333.101, *et seq.*, the Philadelphia Gratuity Protection Bill (“GPB”), Philadelphia Code § 9-614, and the Pennsylvania doctrine of unjust enrichment.

### **JURISDICTION AND VENUE**

1. This Court has personal jurisdiction over Defendant.
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”).

### **PARTIES**

3. Plaintiff is an individual residing in Philadelphia, PA.
4. Defendant a Delaware corporation registered to do business in Pennsylvania.

### **FACTS**

5. Defendant owns and operates the Restaurant.
6. Defendant employs servers at the Restaurant. The servers take customers’ orders, serve food and drinks to customers, and otherwise wait on customers.
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.

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

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

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.

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.

## CLASS ACTION ALLEGATIONS

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.

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

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

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

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

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

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.

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

**COUNT I**  
**(Alleging Violations of the PMWA)**

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

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

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.).

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.

**COUNT II**  
**(Alleging Violations of the GPB)**

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

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).

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).

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

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.

**COUNT III**  
**(Alleging Unjust Enrichment)**

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

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.

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

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

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff, on behalf of himself and other members of the class,

seeks the following relief:

- A. An order permitting this action to proceed as a class action;
- B. For violations of the PMWA, \$4.42 for every hour worked;
- C. For violations of the GPB and the unjust enrichment doctrine,

reimbursement by Defendant of all gratuities paid to other Restaurant employees who were not working at the time the tips were earned;

- D. Exemplary damages and penalties to the fullest extent permitted under the GPB;
- E. Reasonable attorney's fees, expenses, and court costs;
- F. Prejudgment and post-judgment interest; and
- G. Such other relief as this Court may deem appropriate.

**JURY DEMAND**

Plaintiff demands a jury trial as to all claims so triable.

Date: April 3, 2018



Peter Winebrake  
R. Andrew Santillo  
Mark J. Gottesfeld  
WINEBRAKE & SANTILLO, LLC  
715 Twining Road, Suite 211  
Dresher, PA 19025  
Phone: (215) 884-2491  
asantillo@winebrakelaw.com


*Attorneys for Plaintiff and the Putative Class*

**VERIFICATION**

I, RYAN DOWNEY, hereby state:

1. I am the plaintiff in this action;
2. I verify that the statements made in the First Amended Complaint are true and correct to the best of my knowledge information and belief; and
3. I understand that the statements in the Complaint are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 4/2/2018

DocuSigned by:  
  
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Signature



**CERTIFICATE OF SERVICE**

I, Peter Winebrake, hereby certify that, on April 3, 2018, the accompanying documents, were filed electronically and are available for viewing by all counsel of record. In addition, the accompanying documents were sent by regular mail to:

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

Handwritten signature of Peter Winebrake and the date 4/3/18.

Peter Winebrake  
WINEBRAKE & SANTILLO, LLC  
Twining Office Center, Suite 211  
715 Twining Road  
Dresher, PA 19025  
Ph: (215) 884-2491  
E-Mail: [pwinebrake@winebrakelaw.com](mailto:pwinebrake@winebrakelaw.com)