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Civil Administration
E. MASCUILLI

PHILADELPHIA COURT OF COMMON PLEAS

PETITION/MOTION COVER SHEET

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

CONTROL NUMBER:

(RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)

January (Month) Term, 2018 (Year)

No. 180103412

Ryan Downey

vs.

McCormick & Schmick Restaurant Corp.

Name of Filing Party:

Defendant, McCormick & Schmick Restaurant Corp.

(Check one) ☐ Plaintiff ☑ Defendant

(Check one) ☑ Movant ☐ Respondent

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):

Hon. Abbe F. Fletman

TYPE OF PETITION/MOTION *(see list on reverse side)*

Motion to Certify Order for Interlocutory Appeal

PETITION/MOTION CODE *(see list on reverse side)*

MTCIA

ANSWER/RESPONSE FILED TO *(Please insert the title of the corresponding petition/motion to which you are responding):*

I. CASE PROGRAM

Is this case in the *(answer all questions)*:

A. COMMERCE PROGRAM

Name of Judicial Team Leader: _____

Applicable Petition/Motion Deadline: _____

Has deadline been previously extended by the Court?

☐ Yes ☐ No

B. DAY FORWARD/MAJOR JURY PROGRAM — Year _____

Name of Judicial Team Leader: _____

Applicable Petition/Motion Deadline: _____

Has deadline been previously extended by the Court?

☐ Yes ☐ No

C. NON JURY PROGRAM

Date Listed: _____

D. ARBITRATION PROGRAM

Arbitration Date: _____

E. ARBITRATION APPEAL PROGRAM

Date Listed: _____

F. OTHER PROGRAM: Class Action Program

Date Listed: N/A; Status conference scheduled for 8/7/2018

II. PARTIES ***(required for proof of service)***

(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.)

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

III. OTHER

Motion to amend 7/5/2018 Order overruling Preliminary Objections (Control #97-18042897), to certify an interlocutory appeal.

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.

/s/ Jacob Oslick	7/23/2018	Jacob Oslick	311028
(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.

30-1061B

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

PROPOSED ORDER

AND NOW, this _____ day of _____, 2018 upon consideration of Defendant's Motion to Amend and any response thereto, it is ORDERED and DECREED that said Motion is GRANTED as follows:

(1) The Court's July 5, 2018 Order denying Defendant's Preliminary Objections is AMENDED to read as follows:

"AND NOW, this 5th day of July 2018, upon consideration of the preliminary objections of defendant McCormick & Schmick Restaurant Corp., and the response, and the City of Philadelphia's Petition for Intervention, it is hereby ORDERED that the preliminary objections are OVERRULED. However, the Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter."

(2) Defendant is to file its Answer by July 26, 2018 (20 days after docketing of the original July 5, 2018 Order). After Defendant files its Answer to the Amended Complaint, this litigation is STAYED pending Defendant's petition for appeal by permission.

_____
Fletman, J.

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

DEFENDANT'S MOTION TO AMEND TO SEEK AN APPEAL BY PERMISSION

Defendant McCormick & Schmick Restaurant Corporation's motion to amend the Court's July 5, 2018 order, to certify the overruled Preliminary Objections for an interlocutory appeal by permission.

I. Facts

1. On April 3, 2018, Plaintiff Ryan Downey filed an Amended Complaint. In brief, the Amended Complaint asserts that Defendant McCormick & Schmick Restaurant Corporation ("M&S") violated the Pennsylvania Minimum Wage Act, the Philadelphia Gratuity Protection Ordinance, and the common law doctrine of unjust enrichment by: (1) including bussers in an employer-mandated tip pool; and (2) operating a tip pool that shared tips with employees who were not working when a specific tip was left.

2. On April 23, 2018, M&S filed preliminary objections. As pertinent here, M&S argued[1]:

[1] The preliminary objections raised other arguments, including arguments challenging the sufficiency of Plaintiff's pleading. Because these arguments do not raise pure questions of law that would necessarily be dispositive to this litigation, M&S does not address them here. M&S reserves the right, however, to vigorously raise them elsewhere as this litigation proceeds.

(1) The MWA claim must be dismissed because the MWA permits employers to include employees who "customarily and regularly receive tips" in a tip pool, and over 40 years of precedent has recognized bussers as employees who "customarily and regularly receive tips."

(2) The GPO claim must be dismissed because the GPO does not regulate tip pools. It only regulates when employers pay tips, and prohibits deducting credit card fees from tips.

(3) If the GPO does regulate tip pools, then the MWA preempts it.

(4) The unjust enrichment claim must be dismissed because Plaintiff pleads that the employer-mandated tip pools were a contractual term of his employment, and Plaintiff admits that he received exactly the compensation that M&S promised him.

3. On June 6, 2018, Plaintiff opposed the preliminary objections.

4. On June 28, 2018, the City of Philadelphia filed a petition to intervene. In brief, the City argued that the MWA did not preempt the GPO. But the City essentially agreed with M&S's position that the GPO does not prohibit the conduct that Plaintiff alleges. The City explained that the GPO's tip pooling language was merely "incidental," and not intended to impose substantive restrictions on tip pooling. (Phila. Pet. Br. 5.)

5. On July 2, 2018, M&S filed a reply brief in further support of its preliminary objections.

6. On July 5, 2018, the Court denied M&S's preliminary objections.

II. Argument

A. Standard of Review

7. Trial courts may certify orders for an immediate interlocutory appeal. To authorize an interlocutory appeal, the trial court should state that its order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter." 42 Pa. Stat. § 702(b). If an order originally does not contain this language, the party aggrieved may move "for an amendment of an interlocutory order to set forth expressly the statement specified in" § 702(b). Pa. App. Proc. 1311(b). The trial court also has the discretion to stay the matter, pending an interlocutory appeal. *Id.* § 702(c). Once certified, the appellate court has the discretion regarding whether to accept the interlocutory appeal. *Id.* § 702(b).

B. The Preliminary Objections Posed Controlling Questions of Law For Which There is a Substantial Grounds For Difference of Opinion

8. It cannot be seriously disputed that M&S's preliminary objections raised controlling questions of law, for which there are substantial grounds for difference of opinion. As follows:

i. The Pennsylvania Minimum Wage Act

9. M&S's challenge to Plaintiff's MWA claim raises a pure question of statutory interpretation: are bussers tip-pool eligible employees under the MWA because they "customarily and regularly receive tips"? *See* 43 Pa. Stat. § 333.103(d).

10. Statutory interpretation questions are appropriate for interlocutory appeals.[2]

[2] *See generally Schappell v. Motorists Mutual Ins. Co.*, 934 A.2d 1184, 1186-1187 (Pa. 2007).

11. The pertinent MWA question here is "controlling." If M&S is right, then Plaintiff's MWA claim -- which depends upon a theory that M&S violated the MWA by sharing tips with bussers -- cannot survive.

12. M&S's preliminary objections also identified substantial grounds for a difference of opinion regarding this subject. As M&S explained, and Plaintiff did not dispute, for over forty years, Congress, the Department of Labor, and courts have recognized bussers as employers who "customarily and regularly" receive tips.[3]

13. Plaintiff's sole argument is that an unpublished trial court case, *Ford v. Lehigh County*, held that the level of "customer interaction" was a "relevant factor" to consider when analyzing whether employees "customarily and regularly receive tips." But *Ford* addressed the status of "expos," a new category of employee. *Ford* even recognized that, under applicable precedent, "busboys" (*i.e.* bussers) qualify as employees who "customarily and regularly receive tips." 2015 Pa. Dist. & Cnty. Dec. LEXIS 11 at *16-17.

14. Thus, it is substantially questionable whether *Ford* even supports Plaintiff's position. But if it does, *Ford*'s incongruity with forty years of precedent establishes that "substantial grounds for difference of opinion" exist as to whether Plaintiff states an MWA claim.

[3] (*Compare* Def. Br. 7-8 *with* Pl. Opp. Br.); *e.g.*, U.S. Dep't of Labor, Wage and Hour Division, Fact Sheet #15: Tipped Employees Under The Fair Labor Standards Act (FLSA); U.S. Dep't of Labor, Field Operations Handbook § 30d04(b)(4) ("bussers" qualify as employees who "customarily and regularly receive tips"); 29 C.F.R. § 531.54 ("busboys" included among tip pool eligible employees); *Barrera v. MTC, Inc.*, 2011 WL 3273196, at *6 (W.D. Tex. 2011) (citing 29 C.F.R. § 531.54); *Lentz v. Spanky's Rest. II, Inc.*, 491 F. Supp. 2d 663, 670 (N.D. Tex. 2007); S*ee Com., Dep't of Labor & Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003), aff'd sub nom. 580 Pa. 66 (2004) (the MWA "mirrors" the FLSA and, when their language "substantially parallels," Pennsylvania courts should defer to federal interpretations).

ii. The Philadelphia Gratuity Protection Ordinance

15. M&S's challenge to Plaintiff's GPO claim raised two controlling questions of law:

(1) As a matter of statutory interpretation, does the GPO regulate employer-mandated tip pools and preclude the conduct that Plaintiff complains about?

(2) If the GPO regulates employer-mandated tip pools, does the MWA preempt it?

16. The first of these questions poses a question of statutory interpretation.[4] The second addresses whether the ordinance is viable at all, another strong basis for an interlocutory appeal.[5]

17. Both of these questions pose questions of first impression, further warranting an interlocutory appeal.[6]

18. Both of these questions are "controlling": if M&S prevails on *either* challenge, Plaintiff's GPO claim cannot survive.

19. Substantial grounds for a difference of opinion exist regarding both questions.

20. Regarding the statutory interpretation issue, Plaintiff's GPO claim conflicts with the City of Philadelphia's interpretation of its own ordinance.

21. As the City of Philadelphia's Petition for Intervention explained, it interprets the GPO in essentially the same manner as M&S. The City agrees that the GPO's tip pooling

[4] *See Schappell*, 934 A.2d at 1186-1187.
[5] *Villani v. Seibert*, 159 A.3d 478 (Pa. 2017) (question regarding statute's constitutionality appropriate for interlocutory appeal); *Chestnut Hill College v. Pa. Human Rel. Comm'n*, 158 A.3d 251 (Pa. Commw. Ct. 2017) (same).
[6] *See Siciliano v. Mueller*, 149 A.3d 863, 864 (Pa. Super. Ct. 2016); *Patterson v. Lycoming Cty.*, 815 A.2d 659, 660 (Pa. Commw. Ct. 2002).

references are not functional restrictions. They are merely "incidental," and mentioned simply to clarify that the GPO does not "preclude[]" tip pooling. (Phila. Pet. Br. 5.) Indeed, the City references M&S's brief as "confirm[ing]" the City's own position that the GPO's function is to regulate when employers pay tips, and whether they can take deductions from tips for business expenses (such as credit card fees). (Phila. Pet. Br. 6 n. 4.)

22. The City of Philadelphia's interpretation of its own ordinance is required to deference. *Winslow-Quattlebaum v. Maryland Ins. Grp.*, 561 Pa. 629, 635 (Pa. 2000); *Mitman v. Police Pension Comm'n of City of Easton*, 972 A.2d 1276, 1282 (Pa. Commw. Ct. 2009).

23. Surely then, the City of Philadelphia's interpretation provides the basis for "substantial grounds for a difference of opinion" -- along with M&S's own arguments and reliance on the legislative history. (*See* Def. Br. 12-16, Phila. Pet. Br. 5-6.)

24. Substantial grounds for disagreement also exist regarding preemption.

25. The MWA "preempt[s] and supersede[s] any local ordinance or rule concerning the subject matter of this act." 43 Pa. Stat. § 333.114a.

26. As is pertinent here, both the MWA and the GPO set forth that tips are "property of the employee," prohibit employers from seizing tips, but permit employer-mandated tip pools. *Compare* 43 Pa. Stat. §333.103(d) *with* PAC § 9-614(2).

27. Plaintiff's attempt to state GPO claims based on subjects that the MWA covers, at a minimum, presents "substantial grounds for a difference of opinion" regarding whether Plaintiff's claims implicate the MWA's subject matter, thereby falling under the preemption provision.

iii. Unjust Enrichment

28. Plaintiff's unjust enrichment claim depends upon a theory that M&S was unjustly enriched by running its tip pool program. As Plaintiff cannot seriously dispute, this theory is not viable if M&S's tip pool practices are lawful under the MWA and GPO. Thus, the derivative question of whether one can state an unjust enrichment claim based on lawful payroll practices should also be certified for interlocutory appeal.

29. Separately, as M&S explains, Plaintiff's unjust enrichment claim derives from a contractual term and condition of his at will employment: contributing to the employer-mandated tip pool. (Am. Compl. ¶ 30; see also ¶¶ 10-11.) As M&S argued, Plaintiff accepted this contractual term "by continuing to perform the duties of his" job.[7]

30. Moreover, Plaintiff acknowledges receiving the exact compensation that his employer promised, further dooming any unjust enrichment theory.[8]

31. These issues pose controlling questions of law: if M&S is correct, Plaintiff's unjust enrichment claims are not viable.

32. Furthermore, substantial grounds for a difference of opinion exist. Indeed, Plaintiff did not identify *any* authority supporting that an employee can state an unjust enrichment claim based on his belief that an employer's pay practices are "unjust." (*See generally* Pl. Opp. Br.)

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[7] *Zandier v. Babcock & Wilcox Const. Co. Inc.*, 2015 WL 757480, at *10 (W.D. Pa. 2015) (quoting *Baron v. Quad Three Group, Inc.*, 2013 WL 3822134, at *6 (Pa. Super. Ct. 2013) (unpublished)); *Alexander v. Raymours Furniture Co.*, 2014 WL 3952944, at *5 (E.D. Pa. 2014) (employee accepted arbitration agreement by "continuing his employment after receiving notice of the program"); *Shaull Equip. & Supply Co. v. Rand*, 2004 WL 3406088, at *6 (M.D. Pa. 2004) ("continued performance" under an at will contract sufficient to establish acceptance and consideration).

[8] *See McGoldrick v. TruePosition, Inc.*, 623 F. Supp. 2d 619, 625 (E.D. Pa. 2009); *Mercante v. Preston Trucking Co.*, 1997 WL 288614, at *4 (E.D. Pa. 1997). "To the contrary, it may be more unjust to have an employer pay the employee the agreed wage and then pay more . . . under an unjust enrichment theory." *Bowden v. Schenker*, 2016 WL 3981354, at *5 (E.D. Pa. 2016), aff'd 693 F. App'x 157 (3d Cir. 2017).

C. An Immediate Appeal Would Materially Advance The Ultimate Termination Of This Litigation

33. The Court should also certify an immediate appeal because doing so would materially advance the ultimate termination of this litigation.

34. If M&S prevails on the appeal, this litigation would immediately "terminat[e]." M&S seeks to certify questions which challenge the basic viability of Plaintiff's legal theories.

35. Even if *Plaintiff* prevails on an interlocutory appeal, resolving these questions *now* will materially advance this litigation's conclusion. It would resolve the core *legal* disputes between the parties. This would give both parties far more clarity regarding the legal landscape underpinning Plaintiff's claims, significantly simplifying this matter and thereby promoting settlement. If, for instance, the appellate court concludes that the MWA or GPO prohibits sharing tips with bussers, then M&S would have a strong rationale for settling this matter quickly and revising its policies.

36. Conversely, absent an interlocutory appeal, both parties would be forced to incur enormous costs (potentially costing millions in attorneys' fees) litigating an extremely complex putative class action -- potentially including: (1) pre-certification discovery; (2) briefing on class certification; (3) a motion to compel arbitration (for the putative class members who signed arbitration agreements); (4) class-wide merits discovery, including dozens of depositions; (5) summary judgment; and (6) a class action trial. Then, if Plaintiff prevails in whole or in part, the parties will ultimately need to address the *same* underlying legal issues on an appeal after judgment. And throughout this process, the prospects of settlement will be dim: M&S cannot settle a case which would force it to change its perfectly lawful pay practices (and force it to adopt pay practices that would render it uncompetitive in the industry). For instance, M&S cannot voluntarily agree to stop including bussers in a tip pool, because doing so would deprive

many of its valuable employees of a significant source of income, and would likely encourage them to seek employment in a restaurant that would continue to offer them a share of tips.[9] Nor can M&S agree to pay money without changing its policies, as doing so would risk a "me too" suit challenging the same practices.

D. Public Policy Warrants An Immediate Interlocutory Appeal

37. An additional consideration favors an interlocutory appeal here: the certified questions do not *solely* involve a dispute between the parties.

38. Instead, they affect how restaurants throughout Philadelphia and Pennsylvania pay their employees.

39. Indeed, Plaintiff's legal theories, if viable, would deprive *thousands or tens of thousands* of bussers throughout Pennsylvania of a significant source of compensation.

40. Moreover, the overruling of the preliminary objections may encourage dozens of "copycat" suits targeting restaurants which lack the financial ability to defend themselves from an aggressive class action.

41. When a litigation involves legal or public policy questions which affect far more than the litigants involved, petitions for review have been granted even in the absence of certified interlocutory questions. *See, e.g. Haun v. Community Health Systems, Inc.*, 14 A.3d 120 (Pa. Super. 2011); *Donegal Mut. Ins. Co. v. Ferrara*, 552 A.2d 699 (Pa. Super. 1989). This further warrants certifying an interlocutory appeal.

[9] Plaintiff may contend that M&S could simply increase bussers' wages. But many restaurant employees prefer receiving tips, as they earn substantially more from tips than they would under higher-wage but "no tipping" arrangements. *See generally* http://www.philly.com/philly/opinion/commentary/philadelphia-restaurants-raising-tipped-minimum-wage-servers-perspective-20180321.html.

E. The Court Should Stay This Matter Pending An Interlocutory Appeal

42. Finally, the Court should stay this matter pending an immediate interlocutory appeal. It makes no sense to force Plaintiff and M&S to incur enormous costs when an interlocutory appeal could quickly and efficiently resolve this litigation: either by dismissing Plaintiff's claims, or by fostering an atmosphere that will promote quick settlement. 42 Pa. Stat. § 702(c). No one will be prejudiced by such a stay. Quite the opposite, an interlocutory appeal will likely *expedite* this litigation's conclusion, by either dismissing Plaintiff's Complaint or fostering settlement (by resolving disputed legal questions). But even if it doesn't, the MWA authorizes prejudgment interest awards sufficient to compensate Plaintiff for the time spent litigating an appeal now.

III. Relief

43. For all the foregoing reasons, the Court should:

(1) Amend its July 5, 2018 Order overruling M&S preliminary objections to certify an immediate interlocutory appeal, by adding that "the Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter"; and

(2) Stay this matter pending an interlocutory appeal.

Dated: July 23, 2018

By: */s/ Jacob Oslick*

Jacob Oslick (Pa. Bar No. 311028)
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Attorneys for Defendant

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

DEFENDANT'S BRIEF IN SUPPORT
OF ITS MOTION TO AMEND TO SEEK AN APPEAL BY PERMISSION

MATTER BEFORE THE COURT:

Defendant McCormick & Schmick Restaurant Corporation's motion to amend the Court's July 5, 2018 order, to certify the overruled Preliminary Objections for an interlocutory appeal by permission.

I. Statement of the Questions Involved

1. Did the overruled preliminary objections involve controlling questions of law as to which there is a substantial ground for difference of opinion?

Suggested Answer: *Yes. They posed the following pure legal questions, dispositive to this litigation, that addressed issues of statutory interpretation, preemption, and application of common law unjust enrichment:*

(i) *Does the Pennsylvania Minimum Wage Act ("MWA") only permit restaurants to include bussers in a tip pool if they interact with patrons, even though forty years of precedent have consistently recognized bussers as employees who "customarily and regularly" receive tips?*

(ii) *Does the Philadelphia Gratuity Protection Ordinance ("GPO") regulate who can be included in tip pools, despite the City of Philadelphia's position that it does not?*

(iii) *If the GPO regulates tip pools, does the MWA preempt it?*

(iv) *Can an employee state an unjust enrichment claim based on pay practices permitted by law?*

(v) *Can an employee state an unjust enrichment claim based on the terms and conditions of his at-will employment?*

2. Would an immediate appeal from the Court's July 6, 2018 order materially advance the ultimate termination of the matter?

Suggested Answer: *Yes. If the appellate court agrees with Defendant's position, this matter will conclude without enormously burdensome discovery, motion practice, and trial on a putative class action.*

Conversely, if the appellate court agrees with Plaintiff's position, clarity on these pure legal questions may materially advance settlement.

3. Does public policy favor a prompt resolution of these questions now, by the Superior Court?

Suggested Answer: *Yes. Plaintiff's claims effect how thousands of restaurants throughout Pennsylvania pay their employees. If valid, Plaintiff's claims could potentially deprive hard-working bussers of a significant source of income.*

4. Should this case be stayed, pending an interlocutory appeal by permission?

Suggested Answer: *Yes.*

II. Facts

On April 3, 2018, Plaintiff Ryan Downey filed an Amended Complaint. In brief, the Amended Complaint asserts that Defendant McCormick & Schmick Restaurant Corporation ("M&S") violated the Pennsylvania Minimum Wage Act, the Philadelphia Gratuity Protection Ordinance, and the common law doctrine of unjust enrichment by: (1) including bussers in an employer-mandated tip pool; and (2) operating a tip pool that shared tips with employees who were not working when a specific tip was left.

On April 23, 2018, M&S filed preliminary objections. As pertinent here, M&S argued[1]:

[1] The preliminary objections raised other arguments, including arguments challenging the sufficiency of Plaintiff's pleading. Because these arguments do not raise pure questions of law that would necessarily be dispositive to this litigation, M&S does not address them here. M&S reserves the right, however, to vigorously raise them elsewhere as this litigation proceeds.

1. The MWA claim must be dismissed because the MWA permits employers to include employees who "customarily and regularly receive tips" in a tip pool, and over 40 years of precedent has recognized bussers as employees who "customarily and regularly receive tips."

2. The GPO claim must be dismissed because the GPO does not regulate tip pools. It only regulates when employers pay tips, and prohibits deducting credit card fees from tips.

3. If the GPO does regulate tip pools, then the MWA preempts it.

4. The unjust enrichment claim must be dismissed because Plaintiff pleads that the employer-mandated tip pools were a contractual term of his employment, and Plaintiff admits that he received exactly the compensation that M&S promised him.

On June 6, 2018, Plaintiff opposed the preliminary objections.

On June 28, 2018, the City of Philadelphia filed a petition to intervene. In brief, the City argued that the MWA did not preempt the GPO. But the City essentially agreed with M&S's position that the GPO does not prohibit the conduct that Plaintiff alleges. The City explained that the GPO's tip pooling language was merely "incidental," and not intended to impose substantive restrictions on tip pooling. (Phila. Pet. Br. 5.)

On July 2, 2018, M&S filed a reply brief in further support of its preliminary objections.

On July 5, 2018, the Court denied M&S's preliminary objections.

III. Argument

A. Standard of Review

Trial courts may certify orders for an immediate interlocutory appeal. To authorize an interlocutory appeal, the trial court should state that its order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter." 42 Pa. Stat. § 702(b). If an order originally does not contain this language, the party aggrieved may

move "for an amendment of an interlocutory order to set forth expressly the statement specified in" § 702(b). Pa. App. Proc. 1311(b). The trial court also has the discretion to stay the matter, pending an interlocutory appeal. *Id.* § 702(c). Once certified, the appellate court has the discretion regarding whether to accept the interlocutory appeal. *Id.* § 702(b).

B. The Preliminary Objections Posed Controlling Questions of Law For Which There is a Substantial Grounds For Difference of Opinion

It cannot be seriously disputed that M&S's preliminary objections raised controlling questions of law, for which there are substantial grounds for difference of opinion. As follows:

i. The Pennsylvania Minimum Wage Act

M&S's challenge to Plaintiff's MWA claim raises a pure question of statutory interpretation: are bussers tip-pool eligible employees under the MWA because they "customarily and regularly receive tips"? *See* 43 Pa. Stat. § 333.103(d). Statutory interpretation questions are appropriate for interlocutory appeals.[2] And the pertinent MWA question here is "controlling." If M&S is right, then Plaintiff's MWA claim -- which depends upon a theory that M&S violated the MWA by sharing tips with bussers -- cannot survive.

M&S's preliminary objections also identified substantial grounds for a difference of opinion regarding this subject. As M&S explained, and Plaintiff did not dispute, for over forty years, Congress, the Department of Labor, and courts have recognized bussers as employers who "customarily and regularly" receive tips.[3] Plaintiff's sole argument is that an unpublished trial court case, *Ford v. Lehigh County*, held that the level of "customer interaction" was a "relevant

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[2] *See generally Schappell v. Motorists Mutual Ins. Co.*, 934 A.2d 1184, 1186-1187 (Pa. 2007).

[3] (*Compare* Def. Br. 7-8 *with* Pl. Opp. Br.); *e.g.*, U.S. Dep't of Labor, Wage and Hour Division, Fact Sheet #15: Tipped Employees Under The Fair Labor Standards Act (FLSA); U.S. Dep't of Labor, Field Operations Handbook § 30d04(b)(4) ("bussers" qualify as employees who "customarily and regularly receive tips"); 29 C.F.R. § 531.54 ("busboys" included among tip pool eligible employees); *Barrera v. MTC, Inc.*, 2011 WL 3273196, at *6 (W.D. Tex. 2011) (citing 29 C.F.R. § 531.54); *Lentz v. Spanky's Rest. II, Inc.*, 491 F. Supp. 2d 663, 670 (N.D. Tex. 2007); S*ee Com., Dep't of Labor & Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003), aff'd sub nom. 580 Pa. 66 (2004) (the MWA "mirrors" the FLSA and, when their language "substantially parallels," Pennsylvania courts should defer to federal interpretations).

factor" to consider when analyzing whether employees "customarily and regularly receive tips." But *Ford* addressed the status of "expos," a new category of employee. *Ford* even recognized that, under applicable precedent, "busboys" (*i.e.* bussers) qualify as employees who "customarily and regularly receive tips." 2015 Pa. Dist. & Cnty. Dec. LEXIS 11 at *16-17. Thus, it is substantially questionable whether *Ford* even supports Plaintiff's position. But if it does, *Ford*'s incongruity with forty years of precedent establishes that "substantial grounds for difference of opinion" exist as to whether Plaintiff states an MWA claim.

ii. The Philadelphia Gratuity Protection Ordinance

M&S's challenge to Plaintiff's GPO claim raised two controlling questions of law:

(1) As a matter of statutory interpretation, does the GPO regulate employer-mandated tip pools and preclude the conduct that Plaintiff complains about?

(2) If the GPO regulates employer-mandated tip pools, does the MWA preempt it?

The first of these questions poses a question of statutory interpretation.[4] The second addresses whether the ordinance is viable at all, another strong basis for an interlocutory appeal.[5] Both of these questions pose questions of first impression, further warranting an interlocutory appeal.[6] And both of these questions are "controlling": if M&S prevails on *either* challenge, Plaintiff's GPO claim cannot survive.

Substantial grounds for a difference of opinion exist regarding both questions. Regarding the statutory interpretation issue, Plaintiff's GPO claim conflicts with the City of Philadelphia's interpretation of its own ordinance. As the City of Philadelphia's Petition for Intervention explained, it interprets the GPO in essentially the same manner as M&S. The City agrees that

[4] *See Schappell*, 934 A.2d at 1186-1187.
[5] *Villani v. Seibert*, 159 A.3d 478 (Pa. 2017) (question regarding statute's constitutionality appropriate for interlocutory appeal); *Chestnut Hill College v. Pa. Human Rel. Comm'n*, 158 A.3d 251 (Pa. Commw. Ct. 2017) (same).
[6] *See Siciliano v. Mueller*, 149 A.3d 863, 864 (Pa. Super. Ct. 2016); *Patterson v. Lycoming Cty.*, 815 A.2d 659, 660 (Pa. Commw. Ct. 2002).

the GPO's tip pooling references are not functional restrictions. They are merely "incidental," and mentioned simply to clarify that the GPO does not "preclude[]" tip pooling. (Phila. Pet. Br. 5.) Indeed, the City references M&S's brief as "confirm[ing]" the City's own position that the GPO's function is to regulate when employers pay tips, and whether they can take deductions from tips for business expenses (such as credit card fees). (Phila. Pet. Br. 6 n. 4.) The City of Philadelphia's interpretation of its own ordinance is required to deference. *Winslow-Quattlebaum v. Maryland Ins. Grp.*, 561 Pa. 629, 635 (Pa. 2000); *Mitman v. Police Pension Comm'n of City of Easton*, 972 A.2d 1276, 1282 (Pa. Commw. Ct. 2009). Surely then, it provides the basis for "substantial grounds for a difference of opinion" -- along with M&S's own arguments and reliance on the legislative history. (*See* Def. Br. 12-16, Phila. Pet. Br. 5-6.)

Substantial grounds for disagreement also exist regarding preemption. The MWA "preempt[s] and supersede[s] any local ordinance or rule concerning the subject matter of this act." 43 Pa. Stat. § 333.114a. As is pertinent here, both the MWA and the GPO set forth that tips are "property of the employee," prohibit employers from seizing tips, but permit employer-mandated tip pools. *Compare* 43 Pa. Stat. §333.103(d) *with* PAC § 9-614(2). Plaintiff's attempt to state GPO claims based on subjects that the MWA covers, at a minimum, presents "substantial grounds for a difference of opinion" regarding whether Plaintiff's claims implicate the MWA's subject matter, thereby falling under the preemption provision.

iii. Unjust Enrichment

Plaintiff's unjust enrichment claim depends upon a theory that M&S was unjustly enriched by running its tip pool program. As Plaintiff cannot seriously dispute, this theory is not viable if M&S's tip pool practices are lawful under the MWA and GPO. Thus, the derivative

question of whether one can state an unjust enrichment claim based on lawful payroll practices should also be certified for interlocutory appeal.

Separately, as M&S explains, Plaintiff's unjust enrichment claim derives from a contractual term and condition of his at will employment: contributing to the employer-mandated tip pool. (Am. Compl. ¶ 30; see also ¶¶ 10-11.) As M&S argued, Plaintiff accepted this contractual term "by continuing to perform the duties of his" job.[7] Moreover, Plaintiff acknowledges receiving the exact compensation that his employer promised, further dooming any unjust enrichment theory.[8] These issues pose controlling questions of law: if M&S is correct, Plaintiff's unjust enrichment claims are not viable. Furthermore, substantial grounds for a difference of opinion exist. Indeed, Plaintiff did not identify *any* authority supporting that an employee can state an unjust enrichment claim based on his belief that an employer's pay practices are "unjust." (*See generally* Pl. Opp. Br.)

C. An Immediate Appeal Would Materially Advance The Ultimate Termination Of This Litigation

The Court should also certify an immediate appeal because doing so would materially advance the ultimate termination of this litigation.

If M&S prevails on the appeal, this litigation would immediately "terminat[e]." M&S seeks to certify questions which challenge the basic viability of Plaintiff's legal theories.

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[7] *Zandier v. Babcock & Wilcox Const. Co. Inc.*, 2015 WL 757480, at *10 (W.D. Pa. 2015) (quoting *Baron v. Quad Three Group, Inc.*, 2013 WL 3822134, at *6 (Pa. Super. Ct. 2013) (unpublished)); *Alexander v. Raymours Furniture Co.*, 2014 WL 3952944, at *5 (E.D. Pa. 2014) (employee accepted arbitration agreement by "continuing his employment after receiving notice of the program"); *Shaull Equip. & Supply Co. v. Rand*, 2004 WL 3406088, at *6 (M.D. Pa. 2004) ("continued performance" under an at will contract sufficient to establish acceptance and consideration).

[8] *See McGoldrick v. TruePosition, Inc.*, 623 F. Supp. 2d 619, 625 (E.D. Pa. 2009); *Mercante v. Preston Trucking Co.*, 1997 WL 288614, at *4 (E.D. Pa. 1997). "To the contrary, it may be more unjust to have an employer pay the employee the agreed wage and then pay more . . . under an unjust enrichment theory." *Bowden v. Schenker*, 2016 WL 3981354, at *5 (E.D. Pa. 2016), aff'd 693 F. App'x 157 (3d Cir. 2017).

Even if *Plaintiff* prevails on an interlocutory appeal, resolving these questions *now* will materially advance this litigation's conclusion. It would resolve the core *legal* disputes between the parties. This would give both parties far more clarity regarding the legal landscape underpinning Plaintiff's claims, significantly simplifying this matter and thereby promoting settlement. If, for instance, the appellate court concludes that the MWA or GPO prohibits sharing tips with bussers, then M&S would have a strong rationale for settling this matter quickly and revising its policies.

Conversely, absent an interlocutory appeal, both parties would be forced to incur enormous costs (potentially costing millions in attorneys' fees) litigating an extremely complex putative class action -- potentially including: (1) pre-certification discovery; (2) briefing on class certification; (3) a motion to compel arbitration (for the putative class members who signed arbitration agreements); (4) class-wide merits discovery, including dozens of depositions; (5) summary judgment; and (6) a class action trial. Then, if Plaintiff prevails in whole or in part, the parties will ultimately need to address the *same* underlying legal issues on an appeal after judgment. And throughout this process, the prospects of settlement will be dim: M&S cannot settle a case which would force it to change its perfectly lawful pay practices (and force it to adopt pay practices that would render it uncompetitive in the industry). For instance, M&S cannot voluntarily agree to stop including bussers in a tip pool, because doing so would deprive many of its valuable employees of a significant source of income, and would likely encourage them to seek employment in a restaurant that would continue to offer them a share of tips.[9] Nor

[9] Plaintiff may contend that M&S could simply increase bussers' wages. But many restaurant employees prefer receiving tips, as they earn substantially more from tips than they would under higher-wage but "no tipping" arrangements. *See generally* http://www.philly.com/philly/opinion/commentary/philadelphia-restaurants-raising-tipped-minimum-wage-servers-perspective-20180321.html.

can M&S agree to pay money without changing its policies, as doing so would risk a "me too" suit challenging the same practices.

D. Public Policy Warrants An Immediate Interlocutory Appeal

An additional consideration favors an interlocutory appeal here: the certified questions do not *solely* involve a dispute between the parties. Instead, they affect how restaurants throughout Philadelphia and Pennsylvania pay their employees. Indeed, Plaintiff's legal theories, if viable, would deprive *thousands or tens of thousands* of bussers throughout Pennsylvania of a significant source of compensation. Moreover, the overruling of the preliminary objections may encourage dozens of "copycat" suits targeting restaurants which lack the financial ability to defend themselves from an aggressive class action. When a litigation involves legal or public policy questions which affect far more than the litigants involved, petitions for review have been granted even in the absence of certified interlocutory questions. *See, e.g. Haun v. Community Health Systems, Inc.*, 14 A.3d 120 (Pa. Super. 2011); *Donegal Mut. Ins. Co. v. Ferrara*, 552 A.2d 699 (Pa. Super. 1989). This further warrants certifying an interlocutory appeal.

E. The Court Should Stay This Matter Pending An Interlocutory Appeal

Finally, the Court should stay this matter pending an immediate interlocutory appeal. It makes no sense to force Plaintiff and M&S to incur enormous costs when an interlocutory appeal could quickly and efficiently resolve this litigation: either by dismissing Plaintiff's claims, or by fostering an atmosphere that will promote quick settlement. 42 Pa. Stat. § 702(c). No one will be prejudiced by such a stay. Quite the opposite, an interlocutory appeal will likely *expedite* this litigation's conclusion, by either dismissing Plaintiff's Complaint or fostering settlement (by resolving disputed legal questions). But even if it doesn't, the MWA authorizes prejudgment interest awards sufficient to compensate Plaintiff for the time spent litigating an appeal now.

IV. Relief

For all the foregoing reasons, the Court should:

(1) Amend its July 5, 2018 Order overruling M&S preliminary objections to certify an immediate interlocutory appeal, by adding "the Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter"; and

(2) Stay this matter pending an interlocutory appeal.

Dated: July 23, 2018

By: */s/ Jacob Oslick*

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EXHIBIT 1

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Attorneys for Plaintiff and the Putative Class

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

FIRST AMENDED COMPLAINT -- CLASS ACTION

1O — Contract: Other

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after the complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

PHILADELPHIA BAR ASSOCIATION
Lawyer Referral and Information Service
1101 Market Street, 11th Floor
Philadelphia, Pennsylvania 19107
(215) 238-1701

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notification. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defenses o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demandaen contra suya sin previo aviso o notificacion. Ademas, la corte puede decidira favor del demandante y require que usted cumplacon todas las provisiones de esta demanda. Usted puede perder dinero o sus propriedades u otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABOGADO INMEDIATA-MENTE SI NO TIENEABOGADO O SI NO TIENE EL DINERO SUFFICIENTE DE PAGAR TAL SERVICIO, VAYA EN PERSONA O LLAME POR TELEFONOA LA OFFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

ASSOCIACION DE LICENCIADOS DE FILADELFIA
Servicio De Referencia E Informacion Legal
1101 Market Street, 11th Floor
Filadelfia, Pennsylvania 19107
(215) 238-1701

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

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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:
Ryan Downey
1CD758175A184C4...
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

(4/3/18)

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EXHIBIT 2

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

DEFENDANT'S BRIEF IN SUPPORT OF ITS PRELIMINARY OBJECTIONS

MATTER BEFORE THE COURT:

Defendant McCormick & Schmick Restaurant Corporation's preliminary objections.

I. Statement of the Questions Involved

1. Does the Pennsylvania Minimum Wage Act prohibit employers from paying the tipped minimum wage while including bussers in a tip pool?

Suggested Answer: *No. To the contrary, it has been well-established for over 40 years that employers may pay the tipped minimum wage while including bussers in tip pools, because bussers are among the types of employees who "customarily and regularly receive tips."*

2. If the Philadelphia Gratuity Protection Ordinance restricts the kinds of employees who can participate in a restaurant "tip pool," does the Pennsylvania Minimum Wage Act preempt those restrictions?

Suggested Answer: *Yes. The Pennsylvania Minimum Wage Act preempts "any local ordinance or rule concerning the same subject matter." 43 Pa. Stat. § 333.114a. Because the Minimum Wage Act expressly regulates tip pooling (43 Pa. Stat. § 333.103(d)), it preempts any Philadelphia ordinance concerning tip pooling. Accordingly, Plaintiff's Gratuity Protection Ordinance claim must be dismissed.*

3. Does the Philadelphia Gratuity Protection Ordinance, in fact, impose any tip pooling restrictions?

Suggested Answer: *No. The Philadelphia Gratuity Protection Ordinance simply requires employers to pay tips promptly and prohibits them from deducting credit card processing fees from tips. It was not intended to regulate activity already covered by the Pennsylvania*

Minimum Wage Act, and there is no support for such a reading of the law. Plaintiff's Gratuity Protection Ordinance claim fails for this additional reason.

4. Does the Philadelphia Gratuity Protection Ordinance prohibit employers from pooling together tips left by customers over different shifts or multiple days?

Suggested Answer: *No. The Philadelphia Gratuity Protection Ordinance contains no such restriction, so long as employers pay tips by an employee's regular payday. Thus, Plaintiff cannot maintain a Gratuity Protection Ordinance claim predicated upon Defendant sharing tips with "employees who were not working" at the time a particular tip was earned.*

5. Does the Philadelphia Gratuity Protection Ordinance prohibit employers from including bussers in a tip pool?

Suggested Answer: *No. The Philadelphia Gratuity Protection Ordinance contains no such restriction. Thus, Plaintiff also cannot maintain a Gratuity Protection Ordinance claim predicated upon Defendant including bussers in a tip pool.*

6. In the alternative, has Plaintiff sufficient facts to support his claim that Defendant's bussers cannot participate in a tip pool because they do not "directly provide service" to customers?

Suggested Answer: *No. To the contrary, the Amended Complaint's allegations establish that bussers do "directly provide service" to customers. This is an additional reason why Plaintiff's Gratuity Protection Ordinance claim must be dismissed.*

7. Is Plaintiff's Philadelphia Gratuity Protection Ordinance claim subject to a two-year statute of limitations?

Suggested Answer: *Yes. The Philadelphia Gratuity Protection Ordinance provides a statutory remedy for common law conversion. Thus, the two year limitation period set forth in 42 Pa. Stat. §§ 5524(3), 5524(7) applies.*

7. Does an express contract bar Plaintiff's unjust enrichment claim?

Suggested Answer: *Yes. Accepting Plaintiff's allegations as true, he pleads that he agreed to participate in Defendant's tip share program as a contractual term of his employment.*

8. Does a two year limitations period also apply to the unjust enrichment claim?

Suggested Answer: *Yes.*

II. Facts

A. Plaintiff's Allegations

This is a "tip pool" case, primarily asserted under the Pennsylvania Minimum Wage Act ("MWA") and the Philadelphia Gratuity Protection Ordinance ("GPO"). *See* 43 Pa. Stat. §§ 333.103; Phila. Admin. Code ("PAC") § 9-614. A tip pool is an arrangement under which an employer, such as a restaurant, pools together all or some of the gratuities left by customers and then distributes them among employees who participate in the customer's service experience.

Plaintiff Ryan Downey is a former server at a Broad Street restaurant operated by Defendant McCormick & Schmick Restaurant Corporation ("M&S"). (Am. Compl. ¶¶ 2, 8.) He alleges that, as a term of his employment, M&S required him and other servers to contribute a portion of the gratuities left by customers to a "tip pool." (*Id.* ¶ 10.) According to Plaintiff, his tip pool contribution equaled 3.5% of his customer sales. (*Id.*) From this 3.5%, Plaintiff alleges that M&S distributed 1% to bartenders, 1.5% to bussers, and 1% to hosts. (*Id.*)

Plaintiff alleges that M&S distributes tip-pool proceeds to "bartenders, bussers, and hosts regardless of whether or how much they worked during the shift." (*Id.* ¶ 11.) For example, Plaintiff alleges that on September 5, 2017, he contributed $13.29 to the tip pool, a portion of which M&S paid to "a restaurant host who did not even work during this particular shift." (*Id.*)

Plaintiff further contends that M&S includes bussers in the tip pool even though he believes they "do not directly provide service to customers." (*Id.* ¶ 7.) In this regard, Plaintiff proffers that "Restaurant management has specifically instructed that bussers should stay away from tables until *after* customers have departed." (*Id.*) For support, Plaintiff references M&S's "Job Description" for "Busser," which "requires bussers to clean and reset tables" but "explicitly instructs that such activities must take place 'once Guests have left.'" (*Id.*) Aside from the Busser job description, Plaintiff alleges that other busser job duties include "pre-bussing tables

before customers arrive and after customers leave, removing trash and garbage to the dumpster area, cleaning and restocking restrooms, [and] ensuring that the outside of the Restaurant is clean." (Am. Comp. ¶ 7.) Plaintiff comments that "[n]one of these activities entail interacting with customers or directly providing service to customers." (*Id.*)

Plaintiff postulates that this alleged conduct violates the MWA and GPO. (*Id.* ¶¶ 20-28.) Plaintiff further theorizes that M&S's tip pooling policies constitute unjust enrichment. (*Id.* ¶¶ 30-32.) Based on these claims, Plaintiff seeks to certify a class action consisting of "himself and others who have been employed by Defendant as servers" at the Broad Street restaurant where he worked. (*Id.* ¶ 13.)

B. Defendants' Grounds For Preliminary Objections

While Plaintiff's Amended Complaint raises several novel questions of first impression, its legal theories are misplaced.

The Pennsylvania Minimum Wage Act ("MWA") does not prohibit employers from including bussers in a tip pool. To the contrary, it expressly permits restaurants to pay the tipped minimum wage while including employees who "customarily and regularly receive tips" in a tip pool. And for more than 40 years, it has been understood that this category includes bussers.

As for the GPO, it does not regulate tip pools at all. The legislative history makes it clear that City Council did not intend for it to do so. For a good reason: the MWA would preempt any such regulation. *See* 43 Pa. Stat. §§ 333.103(d), 333.114a. Even putting these deficiencies aside, nothing in the GPO prohibits employers from pooling tips across different shifts or days (thereby permitting employers to share tips with employees who did not work when a particular tip was left). *See* PAC § 9-614. Nor does the GPO prohibit including bussers in a tip pool.

For all these reasons, Plaintiff's MWA and GPO claims fail as a matter of law. Beyond that, they are insufficiently pled. Plaintiff alleges that M&S somehow violated the MWA and GPO because he believes that bussers do not interact with customers or directly provide service to them. But, for support, Plaintiff relies upon a busser "Job Description" that actually refutes the factual premise of his claims. Throughout the relevant time period, M&S's "Job Description" for "Busser" has made it clear that a busser's "ESSENTIAL DUTIES AND RESPONSIBILITIES" include customer-interactive functions such as "Refill[ing] water, tea, and coffee if needed," "Inform[ing] a manager as soon as a guest has a complaint or problem," "Assist[ing] servers when necessary," and "Remov[ing] all dishes, trash, napkins, etc. from the table and floor." (*See* Preliminary Objections, Ex. 2 (hereafter, "Ex. 2").[1]) And Plaintiff pleads no facts to support that M&S's bussers do not fulfill such duties.

Plaintiff's unjust enrichment claim also does not present a viable cause of action. Plaintiff pleads that M&S contractually required him to contribute to the tip pool as a term and condition of his employment (indeed, he could not assert claims based on his *voluntary* choice to share tips). Such an express contract precludes recovery in unjust enrichment.

Furthermore, although Plaintiff attempts to plead a GPO claim for an indeterminate period of time (*see* Am. Compl. ¶ 12), the GPO provides a statutory remedy for common law conversion. Thus, it is subject to a two-year statute of limitations. *See* 42 Pa. Stat. §§ 5524(2); 5524(7). And, as the unjust enrichment claim sounds in an alleged GPO violation, it is also subject to a two year limitations period. *Id.*; *see also* 42 Pa. Stat. §5524(5).

For these reasons, and other reasons set forth below, M&S submits that the Court should sustain its preliminary objections and dismiss the Complaint with prejudice.

[1] Ex. 2 is the busser job description that M&S has used since 2012. This is the only busser job description that has been used at the M&S Broad Street restaurant since Plaintiff began his employment.

III. Argument

A. Standard Of Review

Rule 1019(a) requires plaintiffs to set forth "[t]he material facts on which a cause of action or defense is based." As such, "Pennsylvania is a fact-pleading state" requiring a plaintiff to "not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but . . . also formulate the issues by summarizing those facts essential to support the claim." *Feingold v. Hendrzak*, 15 A.3d 937, 942 (Pa. Super. 2011). A complaint is "legally insufficient" when it is "devoid of factual averments that would entitle [the plaintiff] to relief on any of his claims." *Id.* And, accordingly, preliminary objections should be sustained when "the facts pled are "insufficient to establish" a right to relief. *Little Mountain Cmty. Ass'n, Inc. v. S. Columbia Corp.*, 92 A.3d 1191, 1200 (Pa. Super. 2014). Additionally, preliminary objections in "the nature of a demurrer" should be sustained only if "the law would not permit recovery by the plaintiff upon the facts averred." *Stewart v. FedEx Exp.*, 114 A.3d 424, 426 (Pa. Super. 2015).

When ruling upon preliminary objections, courts "must accept as true all well-pleaded material allegations in a complaint and any reasonable inferences that may be drawn" from them. *Allan A. Myers, LP v. Montgomery Cnty.*, 92 A.3d 102, 106 (Pa. Commw. 2014). But courts should disregard "conclusions of law, unwarranted inferences, allegations, or expressions of opinion." *Crozer Chester Med. Ctr. v. Dep't of Labor & Indus., Bureau of Workers' Comp., Health Care Servs. Review Div.*, 22 A.3d 189, 194 (Pa. 2011).

B. The Pennsylvania Minimum Wage Act Claim Must Be Dismissed

Plaintiff first purports to assert an MWA claim. In brief, Plaintiff posits that M&S lost its right under the MWA to pay servers the tipped hourly wage of $2.83 an hour because it shared tips with bussers "who rarely or never interact with customers." (Am. Compl. ¶ 22.) Thus, Plaintiff postulates that the MWA required M&S to pay servers at $7.25 an hour, plus tips,

instead of $2.83 an hour. (Am. Compl. ¶ 23.) For support, Plaintiff cites *Ford v. Lehigh Valley Restaurant Group, Inc.*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 11 (Pa. Ct. Com. Pl., Lackawanna Cnty. April 24, 2015). (Am. Compl. ¶ 22.) But Plaintiff's MWA claim is baseless, and his reliance on *Ford* is misplaced.

Contrary to Plaintiff's belief, MWA neither authorizes nor forbids employers from including employees in a tip pool based on how often they "interact with customers." Instead, the MWA expressly permits employers to pay the tipped minimum wage while including employees who "customarily and regularly receive tips" in a tip pool. 43 Pa. Stat. § 333.103(d). In so doing, the MWA copies, word-for-word, identical language found in the federal Fair Labor Standards Act ("FLSA"). *See* 29 U.S.C. § 203(m). For over 40 years, it has been well-settled that this category of tip pool-eligible employees includes bussers. Indeed, the legislative history makes clear that, when Congress amended the FLSA in 1974 to cover tip pooling, it intended to include "busboys" as "employees who customarily and regularly receive tips." See S. Rep. 93-690, at 43 (1974). Not surprisingly, the United States Department of Labor has followed Congress' lead by consistently reaffirming that "bussers" are "employees who customarily and regularly receive tips." *See, e.g.*, U.S. Dep't of Labor, Wage and Hour Division, Fact Sheet #15: Tipped Employees Under The Fair Labor Standards Act (FLSA); U.S. Dep't of Labor, Field Operations Handbook § 30d04(b)(4) ("bussers" qualify as employees who "customarily and regularly receive tips"); 29 C.F.R. § 531.54 ("busboys" included among tip pool eligible employees). There is no basis for believing that the Pennsylvania legislature somehow intended a different interpretation, despite purposefully copying the FLSA's language when it amended the MWA in 1974. *See Com., Dep't of Labor & Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003), *aff'd sub nom.* 580 Pa. 66 (2004) (the MWA

"mirrors" the FLSA and, when their language "substantially parallels," Pennsylvania courts should defer to federal interpretations[2]); P.L. 916, No. 303, § 1 (Dec. 10, 1974). For this basic reason, the MWA claim is legally insufficient and should be dismissed with prejudice.

Plaintiff appears to believe that the Court of Common Pleas for Lackawanna County decision in *Ford* supports his "rarely or never interact with customers" interpretation. (*See* Am. Compl. ¶ 22); 2015 Pa. Dist. & Cnty. Dec. LEXIS 11. It does not. To the contrary, *Ford* exemplifies why Plaintiff's MWA claim is groundless. After all, *Ford* correctly recounted how Congress, the U.S. Department of Labor, and the federal courts have consistently recognized that "busboys" qualify as employees who "customarily and regularly receive tips." *Id.* at *16-17. Indeed, the *Ford* plaintiff (***who was represented by the same attorneys as Plaintiff here***) acknowledged that employees who "customarily and regularly receive tips" included "bartenders, hosts and busboys." *Id.* at *1. With that background, *Ford* did not address the status of busboys/bussers. Rather, it looked at whether an employer could include employees known as "expos" in a tip pool. "Expos" are not bussers. According to the *Ford* complaint, "expos" are employees who work "in or near the kitchen area" and whose job responsibilities are "to fix any orders that do not adhere to the Red Robin standard or recipe, to help prepare food when the kitchen is extremely busy, and to check the flow of tickets and make sure the orders match what's on the plates." *Id.* at *5. Unlike bussers, there is no Congressional, United States Department of Labor, or case law guidance on "expos." So the Court instead postulated a test for whether "expos" "customarily and regularly receive tips" based on their alleged level of customer interaction. *See generally id.* at *18-32. Whatever the merits of that approach, *Ford*

[2] Plaintiff may argue that courts do not always follow the FLSA when interpreting the MWA. Such an argument is a red herring. Pennsylvania's courts interpret the MWA differently from the FLSA when their language is "materially distinct." *Bayada Nurses, Inc. v. Com., Dep't of Labor & Indus.*, 607 Pa. 527, 555 (Pa. 2010). Here, the MWA and FLSA share identical language.

never suggested that -- as to busboys/bussers -- such a test could override over 40 years of consistent interpretation and precedent. Put another way: *Ford* never suggested that a disgruntled server could somehow use the MWA to overturn how restaurants have "customarily and regularly" compensated bussers for several decades, thereby costing bussers money by effectively forbidding restaurants from distributing a portion of customer tips to them.

Alternatively, Plaintiff may attempt to argue that M&S's bussers do not actually serve as "bussers" or "busboys." But the facts he pled belie any such argument. Plaintiff acknowledges that M&S bussers "clean and reset tables," "pre-bus[] tables before customers arrive," and "ensur[e] that Restaurant tables are clean and orderly." This is the core of what a restaurant busser/busboy does. *See generally* The Occupational Information Network ("O*Net"), a free online database of occupational definitions developed under the sponsorship of the United States Department of Labor, at www.onetonline.org/find/score/35-9011.00?s=bus%2520cleaner, last visited February 21, 2018); Pa. R. Evid. 201(b)(1) (the Court may take judicial notice of facts that are "generally known within the trial court's territorial jurisdiction"); Pa. R. Evid. 201(d) (the Court "may take judicial notice at any stage of the proceeding"). M&S's instruction that bussers should wait to perform some of those duties until after guests leave does not deprive bussers of "busser status"; it simply means that M&S does not want to rudely nudge its guests out the door by resetting tables while its guests remain seated, enjoying their dining experience.

Furthermore, although the MWA claim fails as a matter of law, it is also insufficiently pled. Plaintiff incorporates M&S's Busser Job Description into his Amended Complaint by reference. (*See* Am. Compl. ¶ 7.[3]) And this document contradicts Plaintiff's allegation that

[3] On preliminary objections, the Court can consider documents referred to in the complaint. *See St. Peter's Roman Catholic Par. v. Urban Redevelopment Auth. of Pittsburgh*, 394 Pa. 194, 196 (1958); *Regal Indus. Corp. v. Crum & Forster, Inc.*, 890 A.2d 395, 398–99 (Pa. Super. Ct. 2005); *Bitter Sweet Properties, LP v. City of Farrell*, 2017 WL

bussers "rarely or never interact" with customers. It makes clear that bussers' "ESSENTIAL DUTIES AND RESPONSIBILITIES" include "Refill[ing] water, tea, and coffee if needed," "Inform[ing] a manager as soon as a guest has a complaint or problem," and "Assist[ing] servers when necessary." (*See* Preliminary Objections, Ex. 2.) Plaintiff cannot state a claim based upon factual allegations that are contradicted by the documents his Amended Complaint relies upon. *See Green v. Pa. State Bd. of Vet. Med.*, 116 A.3d 1164, 1167 (Pa. Commw. Ct. 2015). Beyond that, Plaintiff acknowledges that bussers engage in "pre-bussing." (Am. Compl. ¶ 7.) At M&S, and generally in the restaurant industry, "pre-bussing" is a core busser duty and refers to the practices of "removing all used utensils, sweetener wrappers, ramekins, empty glassware, used plates, etc. from the table throughout the dining experience," such as between appetizers and main courses. (*See* Preliminary Objections, Ex. 3[4]; *see also* Ex. 2 (referencing how bussers "Remov[e] all dishes, trash, napkins, etc. from the table and floor").) This is yet more interaction with customers, which dooms even Plaintiff's mistaken interpretation of the MWA.

For these reasons, Plaintiff's MWA claim must be dismissed for both legal insufficiency and insufficient factual specificity. See Pa. R. Civ. P. 1028(3), 1028(4).

C. The Gratuity Protection Ordinance Claim Must Be Dismissed

i. If The GPO Prohibits The Challenged Conduct, The Pennsylvania Minimum Wage Act Preempts It

Plaintiff's second cause of action asserts a claim under the GPO, alleging that M&S's tip pool violated the ordinance. For the reasons discussed later on, the GPO should not be interpreted as regulating tip pooling arrangements at all. But, if the GPO somehow does regulate tip pooling, the MWA preempts it.

4701245, at *3 (Pa. Commw. Ct. Oct. 20, 2017); *Raynor, Esq. v. D'Annunzio, Esq.*, 2017 WL 6734144 (Pa. Com. Pl. Phila. Cnty. 2017).

[4] Exhibit 3 is an excerpt from M&S's Busser Training Guide, which is attached to provide clarity and context regarding the "pre-bussing" allegation. M&S will supply the entire guide at the Court's request, which contains many examples of how M&S requires bussers to interact with customers and directly provide service to them.

In 2006, Pennsylvania amended the MWA to "preempt and supersede any local ordinance or rule concerning the subject matter of this act." 43 Pa. Stat. § 333.114a. This amendment to the MWA passed with large bi-partisan majorities in both the House (161 to 37) and Senate (38 to 11), prior to Governor Ed Rendell signing it into law.[5] It controls here. The MWA concerns the same "subject matter" as the GPO because it: (1) prohibits employers from taking their employees' tips; and (2) permits employers to operate tip pooling programs among employees who "customarily and regularly receive tips." *See* 43 Pa. Stat. § 333.103(d). Indeed, a side-by-side comparison shows that, if the GPO regulates tip pooling arrangements, the GPO and the MWA cover the exact same "subject matter." *See* 43 Pa. Stat. § 333.114a. As follows:

Subject Matter	**MWA (43 Pa. Stat. §333.103(d)**	**GPO (PAC § 9-614(2))**
Tips are employees' property.	"the gratuity shall become the property of the employe[6]"	"Every gratuity shall be the sole property of the employee or employees to whom it was paid, given, or left for."
Employers can't take tips to pay wages.	"All tips received by such employe have been retained by the employe and shall not be surrendered to the employer to be used as wages"	"No employer may deduct any amount from wages due to an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due to the employee from the employer."
But tip pooling programs are permitted	"this subsection shall not be construed to prohibit the pooling of tips among employes who customarily and regularly receive tips."	"Nothing in this Section shall prohibit an employer from adopting and enforcing a policy under which gratuities are pooled and distributed among all employees who directly provide service to patrons."

[5] *See* Pa. S. Jour., 2006 Reg. Sess. No. 49 (June 30, 2006), Pa H.R. Jour., 2006 Reg. Sess. No. 47 (June 30, 2006). 2006 Pa. Legis. Serv. Act 2006-112 (S.B. 1090).
[6] Due to a spelling reform which failed to obtain popularity, the MWA spells employee as "employe."

In short, if the GPO covers the type of conduct that Plaintiff alleges, then the MWA preempts it. Accordingly, the Court should sustain M&S's preliminary objections and dismiss the GPO claim with prejudice as legally insufficient. *See* Pa. R. Civ. P. 1028(a)(4).

ii. The GPO Simply Does Not Prohibit What Plaintiff Complains About

Plaintiff's GPO claims fail for another threshold legal reason: if not preempted, the GPO simply does not prohibit the conduct that Plaintiff complains about. To understand why, it is necessary to examine the relevant text and legislative history.

The GPO declares 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." PAC § 9-614(2)(a). Thus, it prohibits employers from misappropriating tips, or making any "deduction for any credit card processing fees or costs" from gratuities paid to an employee. PAC § 9-614(2)(b). The GPO makes clear, however, that "Nothing in this Section shall prohibit an employer from adopting and enforcing a policy under which gratuities are pooled and distributed among all employees who directly provide services to patrons." PAC § 9-614(2)(c). In so doing, the GPO recognizes that employer-mandated tip pools are perfectly lawful and legitimate.

Plaintiff asserts two theories under the GPO: (1) that M&S violated the GPO by pooling and sharing tips with "employees who were not working at the time the tips were earned" (hereafter, the "Temporal Theory"); and (2) that M&S violated the GPO by including bussers in the tip pool, because (according to Plaintiff) bussers do not "directly provide service" to customers (hereafter, the "Bussers Theory"). (Am. Compl. ¶¶ 27-28.) As far as M&S can tell, no Pennsylvania court has recognized either theory under the GPO as cognizable. And for a good reason: neither the GPO's text nor its legislative history supports Plaintiff's claims.

Regarding the Temporal Theory, the GPO does not prohibit a restaurant from pooling and sharing tips with "employees who were not working" at the time a particular tip was earned. (Am. Compl. ¶ 29.) In fact, the GPO does not prohibit restaurants from pooling tips across multiple shifts, or even multiple days. *See generally* PAC § 9-614. Thus, for example, nothing in the GPO's text prohibits a restaurant from pooling together all tips earned during a one week period — so as to prevent employees who happen to get assigned to a slow shift from earning significantly less than employees who happen to get assigned to a busy shift. *Id.* To the contrary: the GPO's sole temporal restriction is that employers must pay credit card tips "not later than the next regular payday." PAC § 9-614(2)(b). So long as tips are distributed by "the next regular payday," the GPO says nothing about whether employers can pool together tips earned over a shift, a day, a week, or an entire pay period. For this reason, the Court should sustain M&S's preliminary objections and dismiss Plaintiff's Temporal Theory with prejudice as legally insufficient. *See* Pa. R. Civ. P. 1028(a)(4).

Plaintiff's "Bussers Theory" is equally without merit. The GPO's text does not prohibit including bussers in a tip pool. Nor does the GPO's legislative history suggest that City Council intended such a prohibition when it set forth that "[n]othing in this Section shall prohibit" an employer from including "all employees who directly provide service to patrons" in a tip pool. PAC § 9-614(2)(c). To the contrary, when introducing the GPO, Councilman James Kenney (now Mayor Kenney) described his own experience as a "busboy" and how his "hard-working and generous" employers "tipped us out" every night, "even on the credit cards." (Rules Committee Tr., Nov. 1, 2011 at p. 19:10-14.[7]) He then contrasted this positive experience with what he wanted to the ordinance to prohibit: (1) employers who withheld "1 to 3 percent" for

[7] (*See* http://legislation.phila.gov/transcripts/Public%20Hearings/rules/2011/ru110111.pdf, last visited March 13, 2018).

credit card processing fees; and (2) employers who "hold the tips for an entire month." (Rules Committee Tr., Nov. 1, 2011 at p. 20:1-22; *see also* 21:3-24.) At no point did Councilman Kenney indicate that he intended to deprive bussers of money or lower their pay by preventing restaurants from "tipping them out" from a tip pool.

Furthermore, as noted earlier, the MWA and FLSA both expressly permit including all employees who "customarily and regularly receive tips" in a tip pool, including bussers (indeed, as reflected by Councilman Kenney's testimony, restaurants have customarily and regularly included bussers in tip pools for several decades). And nothing in the GPO's legislative history suggests that Councilman Kenney intended to pick a fight over preemption, or for the GPO to supersede Pennsylvania or federal law in any manner. There is no discussion for instance, either by Councilman Kenney or anyone else, about whether the GPO's statement that "[n]othing in this Section shall prohibit" tip pools among employees who "directly provide service to patrons" would narrow the group of employees eligible to participate in a tip pool under the MWA or the FLSA. Quite the opposite: in the only discussion of Pennsylvania or federal law, Councilman Kenney affirmed that the GPO would not override federal law. Specifically, although the GPO's plain text does not distinguish between employers who pay the regular minimum wage or the lower tipped employee minimum wage ($2.83 an hour), Councilman Kenney represented that employers could "get around" the GPO's prohibition on "deduct[ing] credit card fees from tips" by paying the regular "federal minimum wage," instead of the tipped employee minimum wage. (Rules Committee Tr., Nov. 1, 2011 at p. 6:10-17.)

The rest of the legislative history further supports that the GPO was understood to regulate only when employers paid tips, and whether employers could deduct credit card processing fees. It was not intended to broadly rewrite how Philadelphia employers operate tip

pools. For instance, Kevin Dow, Chief Operating Officer for the City of Philadelphia's Commerce Department, testified that the "proposed legislation would prohibit any employer from passing on fees associated with credit card transactions to employees." (Rules Committee Tr., Nov. 1, 2011 at p. 3:23-4:2.) Mr. Dow further testified that, although Mayor Michael Nutter's Administration supported this credit card fee legislation "to protect employees," it nevertheless wanted to recognize that the hospitality industry is "the engine for Philadelphia's economic and cultural vitality" responsible for "creating thousands of new hotel and restaurant jobs," and that Philadelphia needed to "support and enhance the City's ability to remain a place of choice for this key industry." (*Id.* 4:19-5:12.) Implicit in Mr. Dow's statement was that Mayor Nutter supported the GPO (and ultimately signed the legislation) precisely because he understood it as a narrowly-tailored initiative that concerned credit card fees, not a wide-ranging piece of legislation that would unduly burden or dramatically affect the vital hospitality industry. And the remaining Council member statements and witness testimony likewise spoke about businesses passing credit card fees onto tipped employees, or about wage theft generally. (*See generally* Rules Committee Tr., Nov. 1, 2011; *see also* City Council Meeting Tr., Nov. 17, 2011.[8]) No one — not Council members, city officials, or constituents — spoke about any presumed need to prevent restaurants from including bussers in tip pools, or for otherwise narrowing the MWA's and FLSA's permission that tip pools may include employees who "customarily and regularly receive tips." (*See generally id.*)

In short, the legislative history strongly suggests that the GPO was simply intended to address two "gaps" not expressly covered by federal or Pennsylvania statutes: (1) when employers must pay tips; and (2) whether restaurants can deduct credit card processing fees from tips. *Compare* PAC§ 9-614 *with* 43 Pa. Stat. § 333.101 *et seq.* The GPO **was not intended** to

[8] (*See* http://legislation.phila.gov/transcripts/Stated%20Meetings/2011/sm111711.pdf, last visited March 13, 2018).

override, supersede, or even complement the MWA's tip pool restrictions. Thus, it does not do so. *Commonwealth v. Ricker*, 170 A.3d 494, 512 (Pa. 2017) ("When language is ambiguous, this Court generally may resolve the ambiguity by considering: the occasion and necessity for the statute or regulation; the circumstances under which it was enacted; the mischief to be remedied; the object to be attained; the former law, if any, including other statutes or regulations upon the same or similar subjects; the consequences of a particular interpretation; and administrative interpretations of such statute") (citations and quotations omitted); 1 Pa. Stat. § 1921 (statutorily codifying these factors, and also noting that courts can rely upon "legislative history"). Beyond aligning with the legislative history, such an interpretation also avoids preemption problems, and thus preserves the remainder of the GPO. *See generally id.* (discussing the "cannon of constitutional avoidance" under which "when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Id.* (citations and quotations omitted).

Plaintiff may argue that, notwithstanding the GPO's original intention and purpose, its text somehow authorizes the Bussers Theory because it says that "[e]very gratuity shall be the sole property of the employee or employees to whom it was paid, given, or left for," and prohibits employers from taking "deduct[ions]" from those tips. GPO § 9-614(2)(a). But even if the Court could interpret the GPO's language without considering its purpose and legislative history (and it cannot), such an argument places the cart before the horse. The GPO specifically recognizes that tips may be "left for" either a particular "employee" or for a group of "employees." *Id.* And the Amended Complaint pleads no *facts*, or even insufficient conclusory allegations, to support that customers at the Broad Street restaurant leave tips *exclusively* to compensate their servers, instead of for the benefit of all employees who participated in their

dining experience. Instead, the Amended Complaint simply presumes, without factual or legal support, that tips belong to servers. (*See* Am. Compl. ¶ 10, referencing "their tips.:) This is precisely the kind of "expression[] of opinion" and "conclusion[] of law" that courts should not accept as true on preliminary objections. *Crozer Chester Med. Ctr.*, 22 A.3d at 194.

Accordingly, the Court should sustain M&S's preliminary objections, and dismiss Plaintiff's Bussers Theory as legally insufficient. *See* Pa. R. Civ. P. 1028(a)(4).

iii. Plaintiff's GPO "Bussers Theory" Is Both Legally And Factually Insufficient

For the reasons set forth above, the GPO does not authorize Plaintiff's "Bussers Theory." And, if it somehow does, the MWA preempts such a cause of action. But even if Plaintiff can show that such a cause of action is cognizable under the GPO and not preempted by the MWA, Plaintiff still has not pled a claim.

Boiled down, Plaintiff contends that including bussers in a tip pool violates the GPO because bussers do not "directly provide service to customers." (Am. Compl. ¶ 7.) Instead, Plaintiff alleges that "Restaurant management has specifically instructed that bussers should stay away from tables until *after* customers have departed." (*Id.*) Plaintiff further sets forth that the Busser "Job Description" "explicitly instructs" bussers to not "clean and reset tables" until after "Guests have left." (*Id.*) These allegations do not state a claim, for five reasons.

First, the "Job Description" that Plaintiff references refutes his allegation that "management has specifically instructed that bussers should stay away from tables until *after* customers have departed." *Green*, 116 A.3d at 1167 (plaintiff cannot premise claim on allegations contradicted by documents that the complaint relies upon). As noted above, the Job Description makes clear that M&S instructs bussers to "Refill[] water, tea, and coffee if needed," "Inform[] a manager as soon as a guest has a complaint or problem," and "Assist[] severs when

necessary." (Ex. 2.) Plaintiff cannot seriously dispute that tasks such as refilling a customer's beverages and relaying a customer's complaints qualify as "directly provid[ing] service."

Second, even if bussers *never* interact with customers (and they do), Plaintiff mistakenly believes that bussers must physically interact with a customer to "directly provide service." But the GPO says no such thing. Nor does its plain language support such an interpretation. To "service" a customer means to provide "some useful act or series of act for the [customer's] benefit." Black's Law Dictionary (10th ed. 2014). "In this sense, service denotes an intangible commodity in the form of human effort, such as labor, skill, or advice." *Id.* "Directly" means "1. In a straightforward manner. 2. In a straight line or course. 3. Immediately." *Id.* Thus, to "directly provide service" simply means that an employee must "[i]n a straightforward manner" provide some kind of "useful act" or "human effort" for the customer's benefit. Here, Plaintiffs *plead* that bussers do exactly that, including by "pre-bussing tables before customers arrive" and "ensuring that Restaurant tables are clean and orderly before customers arrive." *Id.* (Am. Compl. ¶ 7.) The Job Description likewise notes that, in addition to performing tasks such as refilling water, coffee and tea, and informing management of customer complaints, bussers also benefit customers by "Remov[ing] all dishes, trash, napkins, etc. from the table and floor" (activities which include pre-busing between courses while a guest is dining) and "Wip[ing] tables with a sanitized towel and reset[ting] all condiments." (*See* Ex. 2.)

Third, Plaintiff's remaining allegation that bussers do not "directly provide service" to customers amounts to nothing more than a formulaic recitation of the statutory text. This does not plead a claim. *See Allan A. Myers, LP*, 92 A.3d at 106 (on preliminary objections, the Court should disregard "legal conclusions," "unwarranted inferences," "argumentative allegations," "expressions of opinion," and "unsubstantiated suspicions").

Fourth, although Plaintiff alleges that bussers perform certain other duties that are not customer related (such as "ensuring that the outside of the restaurant is clean"), the GPO never says that tip-pool eligible employees must *exclusively* "directly provide service" to customers, and perform *no other duties*.

Fifth, and relatedly, assuming *arguendo* that the GPO regulates tip pools, then it would actually require M&S to include bussers in any employer operated tip pool. This is because the GPO states that "[n]othing" in the GPO "prohibit[s]" arrangements in which tips are "pooled and distributed among ***all employees*** who directly provide service to patrons." PAC § 9-614(2). Thus, if this language is construed as imposing restrictions on employer conduct (and it should not be), the GPO seemingly specifies that tips must be shared among "all employees" who "directly provide service," not "some" of these employees or "employees whom the employer wishes to include." Accordingly, so long as bussers *sometimes* "directly provide service" to customers (such as by refilling a cup of coffee), then -- if intended to have legal force -- the GPO's text would *require* their inclusion in a tip pool.

In response, Plaintiff may argue that the GPO requires that bussers be included in a tip pool only when a busser directly provides service to a specific customer and otherwise forbids a busser from collecting a portion of the gratuity that this customer left. But, as addressed earlier, nothing in the legislative history suggests that either City Council or Mayor Nutter sought to impose significant new burdens on hospitality providers, much less demand that they micromanage tip pools on a customer-by-customer basis. There is no suggestion, for instance, that City Council or Mayor Nutter intended to force employers operating in a hectic restaurant environment to keep records of every single task performed by every single busser regarding every single customer in order to distinguish those occasions in which a busser "directly

provided service" from those in which the busser only "indirectly" provided service and -- based on those records -- determine whether bussers *must* be included in a tip pool for a specific customer order or *must* be excluded from a tip pool for that order. Indeed, the absurdity of such a suggestion only further supports that the GPO did not intend to regulate tip pools at all. *See generally* 1 Pa. Stat. § 1922 (courts should presume that statutes do not "intend a result that is absurd, impossible of execution or unreasonable"); *Hutchison ex rel. Hutchison v. Luddy*, 946 A.2d 744, 752 (Pa. Super. Ct. 2008) (courts should consider the "practical consequences of a particular interpretation") (citations and quotations omitted); *Ricker*, 170 A.3d at 512.

For all these reasons, Plaintiff's "Bussers Theory" must be dismissed for both legal insufficiency and insufficient factual specificity. *See* Pa. R. Civ. P. 1028(3), 1028(4).

D. The Unjust Enrichment Claim Also Must Be Dismissed

The Amended Complaint also includes a duplicative claim for unjust enrichment. In brief, Plaintiff alleges that M&S "received a monetary benefit" by requiring Plaintiff and other servers to share their tips, and that M&S's retention of this benefit was "inequitable." (Compl. ¶¶ 30-32.) But Plaintiff's unjust enrichment claim must be dismissed for two reasons.

First, the Amended Complaint's allegations refute any suggestion of unjust enrichment, because they establish that M&S had a contractual right to operate its tip share program. Specifically, Plaintiff alleges that M&S required servers to participate in its tip share program as part of the compensation terms and conditions that governed their employment, by "making them" contribute a portion of their tips. (Am. Compl. ¶ 30; *see also* ¶¶ 10-11.) Plaintiff "signifie[d] acceptance of these terms and conditions by continuing to perform the duties of his" job. *Zandier v. Babcock & Wilcox Const. Co. Inc.*, 2015 WL 757480, at *10 (W.D. Pa. 2015) (quoting *Baron v. Quad Three Group, Inc.*, 2013 WL 3822134, at *6 (Pa. Super. Ct. 2013) (unpublished)); *Alexander v. Raymours Furniture Co.*, 2014 WL 3952944, at *5 (E.D. Pa. 2014)

(employee accepted arbitration agreement by "continuing his employment after receiving notice of the program"[9]); *Shaull Equip. & Supply Co. v. Rand*, 2004 WL 3406088, at *6 (M.D. Pa. 2004) ("continued performance" under an at will contract sufficient to establish acceptance and consideration). For this reason, employees such as Plaintiff cannot state a claim for unjust enrichment when they receive the exact compensation promised by the employer. *See McGoldrick v. TruePosition, Inc.*, 623 F. Supp. 2d 619, 625 (E.D. Pa. 2009); *Mercante v. Preston Trucking Co.*, 1997 WL 288614, at *4 (E.D. Pa. 1997). "To the contrary, it may be more unjust to have an employer pay the employee the agreed wage and then pay more . . . under an unjust enrichment theory." *Bowden v. Schenker*, 2016 WL 3981354, at *5 (E.D. Pa. 2016), aff'd 693 F. App'x 157 (3d Cir. 2017).

All of this is fatal to Plaintiff's unjust enrichment claim. Unjust enrichment "arises from a quasi-contract." *Stoeckinger v. Presidential Fin. Corp. of Delaware Valley*, 948 A.2d 828, 833 (Pa. Super. Ct. 2008). A quasi-contract exists "not as a result of an agreement," but rather "in spite of the absence of an agreement." *Id.* (citations and quotations omitted). Accordingly, unjust enrichment claims cannot survive when an express contract controls the parties' relationship. *Villoresi v. Femminella*, 856 A.2d 78, 84 (Pa. Super. Ct. 2004).

Here, Plaintiff alleges the express terms of his employment required him to contribute to the tip pool, for distribution to hosts, bartenders, and bussers, by "making" him share tips. (Am. Compl. ¶¶ 10, 30.) So M&S's collection and distribution of those contributions on those exact terms was not unjust enrichment.

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[9] For cases holding the same, in connection with a mandatory arbitration agreement, *see e.g., Gutman v. Baldwin Corp.*, 2002 WL 32107938, at *4 (E.D.Pa. 2002) ("[a]cceptance" of employment terms "does not need to be in writing, but can be expressed through performance"); *Hamilton v. Travelers Prop. & Cas. Corp.*, 2001 WL 503387, at * 2 (E.D. Pa. 2001); *Wilson v. Darden Rests., Inc.*, 2000 WL 150872, at *3–4 (E.D. Pa. 2000); *Venuto v. Ins. Co. of N. Am.*, 1998 WL 414723, at *5–6 (E.D.Pa. 1998) ("an employee's decision to continue working with an employer for a substantial period of time after the imposition of new policy, demonstrates acceptance of its terms"); *cf. Brennan v. CIGNA Corp.*, 282 F. App'x 132, 135–36 (3d Cir. 2008) (a valid arbitration agreement existed where employer made binding arbitration a term and condition of employment).

Second, and relatedly, unjust enrichment tautologically requires that the enrichment of the defendant be "unjust." *Id.* "The doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff." *Id.*

Here, for the reasons set forth above, Plaintiff has merely pled that M&S operated a perfectly lawful tip pool in accord with the MWA's dictates that employers can require tip pooling among employees who "customarily and regularly receive tips." 43 Pa. Stat. § 333.103(d). M&S's adherence to what Pennsylvania law specifically permits is not "unjust."

E. The Amended Complaint Is Partially Time-Barred

For the reasons discussed above, the Amended Complaint must be dismissed in its entirety. However, if the Court finds that Plaintiff somehow pleads a cognizable GPO or unjust enrichment claim, the Amended Complaint must still be partially dismissed as time-barred.

i. A Two Year Statute of Limitations Applies To the GPO Claim

Plaintiff purports to seek relief under the GPO for an indeterminate time period. (Am. Compl. ¶ 12.) The appropriate limitations period is two years or, at most, three years.

Under Pennsylvania law, when a statute or municipal ordinance lacks an express statute of limitations, courts infer an appropriate limitations period by looking at where the statutory "duty" "derives" from. *Ash v. Cont'l Ins. Co.*, 593 Pa. 523, 535–36 (Pa. 2007). Thus, for example, although Pennsylvania's bad faith insurance statute lacks an explicit statute of limitations, a two-year limitations period applies because the statute "imposed [a duty] by law as a matter of social policy" and "breach of that duty derives primarily from the law of torts." *Id.* Similarly, although the MWA lacks an express statute of limitations, courts have uniformly borrowed the limitations period found in another Pennsylvania wage statute, the Pennsylvania

Wage Payment and Collection Law ("WPCL"), and applied it to MWA claims.[10] The Pennsylvania Department of Labor's recordkeeping rules, likewise, adopt such a limitations period administratively. *See* 34 Pa. Code §§ 231.31(a), 231.53, 231.61(e), 231.95(e).

Here, as in *Ash*, a two-year statute of limitations applies -- although for a somewhat different reason. Specifically, a two-year limitations period applies because, boiled down, the GPO defines gratuities as an employee's "sole property" and then creates a statutory cause of action against employers for unlawfully taking that property. PAC § 9-614. Pennsylvania law provides for a two-year limitations period in connection with "an action for taking, detaining, or injuring personal property" or "intentional, or otherwise tortious conduct" causing "injury" to property. 42 Pa. Stat. §§ 5524(2); 5524(7). That is exactly this case: Plaintiff has commenced an "action" premised on allegations that M&S intentionally took his tips and used them for its own purposes, such as to supposedly "subsidize the pay of other Restaurant employees." (*See* Am. Compl. ¶ 30; *see also* ¶¶ 10, 11, 23, 27.) Put another way, under the GPO, Plaintiff has essentially asserted a statutory claim for converting tips. *See PTSI, Inc. v. Haley*, 71 A.3d 304, 314 (Pa. Super. Ct. 2013) (conversion means "the deprivation of another's right of property" or "other interference therewith, without the owner's consent and without lawful justification"). So, as the statutory "duty" derives from conversion, the two-year statute of limitations for conversion must apply. *See Ash*, 593 Pa. 523, 535–36 (applying such a "duty" analysis)*; Mariner Chestnut Partners, L.P. v. Lenfest*, 152 A.3d 265, 277 (Pa. Super. Ct. 2016) (two-year limitations period for conversion).

Alternatively, it could be argued that the GPO's statutory duty derives from the MWA's declaration, as a matter of Pennsylvania law, that tips "shall become the property of the

[10] *See e.g., Zellagui v. MCD Pizza, Inc.*, 59 F. Supp. 3d 712, 715 (E.D. Pa. 2014); *Cerutti v. Frito Lay, Inc.*, 777 F. Supp. 2d 920, 925 (W.D. Pa. 2011); *Gonzalez v. Bustleton Servs., Inc.*, 2010 WL 1813487, at *6 (E.D. Pa. 2010); 43 Pa. Stat. § 260.9a(g).

employe," must be "retained by the employe," and "shall not be surrendered to the employer to be used as wages." 42 Pa. Stat. §333.103(d). Or the GPO's statutory duty may derive from the PAC's more general prohibition on wage theft, which in turn derives from prohibitions in the MWA and WPCL.[11] In such a case, the appropriate limitations period would be three years. *See supra note* 10 (three year limitations period for MWA claims); PAC § 9-4303(b) (three year limitations period for Philadelphia wage theft complaints).

For these reasons, the GPO claim must be partially dismissed as legally insufficient. Pa. R. Civ. P. 1028(4).

ii. A Two Year Statute Of Limitations Also Applies To Unjust Enrichment

Plaintiff's unjust enrichment claim is subject to the same two year limitations period as his GPO claim.

To be sure, in many cases, courts have found that the four-year statute of limitations found in 42 Pa. Stat. § 5525(4) applies to unjust enrichment claims. But they have done so based on a finding that the unjust enrichment claims at issue depended upon "contract implied in law." *Cole v. Lawrence*, 701 A.2d 987, 989 (Pa. Super. Ct. 1997). Here, conversely, Plaintiff's unjust enrichment claims derive from a conversion theory: *i.e.*, that M&S pilfered servers by taking "their" tips and using them to "subsidize" its business. (Am. Compl. ¶ 30.) They do not sound in implied contract and, in fact, seek to override the contractual terms and conditions of Plaintiff's employment. *See supra* at 20-22.

Furthermore, as § 5525(4) explains, its default four-year limitations period does not apply when "an action" is "subject to another limitations specified in this subchapter." *Id.* Thus, when unjust enrichment claims are predicated on violations of the MWA or another wage payment

[11] *See* PAC §§ 9-4301 ("'Wage Theft' means a violation of the Pennsylvania Wage Payment and Collection Law . . . or a violation of the Pennsylvania Minimum Wage Act"); 9-4303 (authorizing wage theft complaints).

statute, a shorter limitations period applies. *See generally Herzfeld v. 1416 Chancellor, Inc.*, 2017 WL 2531949, at *2, *6 (E.D. Pa. 2017) (certifying a class action going back three years before the complaint was filed based on MWA, WPCL, and unjust enrichment allegations). Indeed, if the law were otherwise, than plaintiffs could always unilaterally extend the three-year WPCL and MWA limitations period simply by pleading duplicative claims for unjust enrichment. That would frustrate the legislature's intent, and flout the principle that statutory remedies (*i.e.*, commencing a civil action within three years) preempt common law remedies (*i.e.*, a theoretical four year limitations period). *See* 1 Pa. Stat. § 1504 ("In all cases where a remedy is provided or a duty is enjoined or anything is directed to be done by any statute, the directions of the statute shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the common law, in such cases, further than shall be necessary for carrying such statute into effect"). More to the point, Plaintiff's unjust enrichment claim depends on the same tip conversion allegations that form the basis of his GPO claim. Thus, notwithstanding Plaintiff's description of the claim as sounding in "unjust enrichment," it remains an "action" for "taking, detaining, or injuring personal property" or "intentional, or otherwise tortious conduct" causing "injury" to property, subject to the two year conversion statute of limitations. 42 Pa. Stat. §§ 5524(2); 5524(7).

In short, if Plaintiff's unjust enrichment claim survives dismissal, then it is subject to the same statute of limitations which governs his GPO claim.

IV. Relief

For all the foregoing reasons, the Court should sustain M&S's preliminary objections and dismiss the Amended Complaint with prejudice.

Dated: April 23, 2018

By: */s/ Jacob Oslick*

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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

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S PRELIMINARY OBJECTIONS TO THE AMENDED COMPLAINT

TABLE OF CONTENTS

Plaintiff Ryan Downey ("Plaintiff") pursues 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. On April 3, 2018, Plaintiff filed an Amended Complaint, and, on April 23, 2018, Defendant filed preliminary objections in the nature of demurrer. Plaintiff responds to the preliminary objections as follows:[1]

I. MATTER BEFORE THE COURT

Defendants' preliminary objections are in the nature of demurrer. As such, the question presented "is whether, on the facts averred, the law says with certainty that no recovery is possible." Bruno v. Erie Insurance Co., 630 Pa. 79, 106 A.3d 48, 56 (Pa. 2014). In making this determination, the Court must "accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts." Connor v. Archdiocese of Philadelphia, 601 Pa. 577, 580, 975 A.2d 1084, 1086 (Pa. 2009). "If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections." Lenau v. Co-Exprise, Inc., 102 A.3d 423, 439 (Pa. Super. 2014).

II. STATEMENT OF QUESTIONS INVOLVED

1. Whether, accepting as true the facts asserted in the Amended Complaint and all inferences fairly deducible from those facts, the law says with certainty that Plaintiff cannot possibly prevail on his PMWA claim? Suggested Answer: No.

2. Whether, accepting as true the facts asserted in the Amended Complaint and all inferences fairly deducible from those facts, the law says with certainty that Plaintiff cannot possibly prevail on his GPB claim? Suggested Answer: No.

[1] Defendant's filing consists of a 26-page legal brief and a 186-paragraph document headed "Preliminary Objections." Thankfully, Local Civil Rule 1028(c)(3) excuses Plaintiff from filing a formal answer to the 186-paragraph document.

3. Whether, accepting as true the facts asserted in the Amended Complaint and all inferences fairly deducible from those facts, the law says with certainty that Plaintiff cannot possibly prevail on his unjust enrichment claim? Suggested Answer: No.

4. Whether Plaintiff's GPB and unjust enrichment claims are time-barred? Suggested Answer: No.

III. FACTS AND LEGAL CLAIMS

Plaintiff lives in Philadelphia, see Amended Complaint ("Am. Cpl.") at ¶ 3, and worked at Defendant's Philadelphia restaurant as a server until around November 2017, see id. at ¶¶ 2, 5, 8. Plaintiff and other servers "take customers' orders, serve food and drinks to customers, and otherwise wait on customers." Id. at ¶ 6.

Plaintiff makes the following allegations regarding the manner in which Defendant pays Plaintiff and other servers at the Philadelphia restaurant:

> 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.

Am. Cpl. at ¶¶ 9-11.

Plaintiff makes the following allegation regarding the bussers who receive some of the tips paid to Plaintiff and other restaurant servers:

> 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.

Am. Cpl. at ¶ 7.

Based on the above factual allegations, Plaintiff asserts three legal claims:

Count I asserts the following **PMWA** claim:

> 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.

Am. Cpl. at ¶¶ 21-23.

Count II asserts the following **GPB** claim:

> 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.

Am. Cpl. at ¶¶ 25-28.

Count III asserts the following **unjust enrichment** claim:

> 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.

Am. Cpl. at ¶¶ 30-32.

IV. ARGUMENT

As discussed below, Defendants' preliminary objections lack merit and should be overruled:

A. Plaintiff states a claim under the PMWA.

The PMWA entitles workers to a minimum hourly wage of $7.25. See 43 P.S. § 333.104(a.1). However, under certain circumstances, restaurants are permitted to apply customer tips towards their minimum wage obligations to servers. See id. at § 333.103(d). This is called taking a "tip credit" because the restaurant gets to "credits" tips towards its minimum wage obligation.

In Ford v. Lehigh Valley Restaurant Group, Inc., 47 Pa. D. & C.5th 157 (P.C.C.P., Lacka. Cty. 2015), Judge Terrence R. Nealon provided a cogent summary of the circumstances in which a restaurant can utilize the tip credit. Judge Nealon explained that under the PMWA

> an employer may satisfy its minimum wage obligations by including an employee's tips in the minimum wage determination. Stated otherwise, an employer may pay an employee a cash wage below the stated minimum wage of $7.25 an hour, provided that the employer supplements that shortfall with the employee's tips. The employer may utilize such a "tip credit" toward the minimum wage only if the employer informs the employee of the "tip credit" practice and the employee retains all tips received by the employee. Notwithstanding that fact, the employee may receive tips pursuant to a tip pooling arrangement, but only if the tip pool is shared exclusively among employees who customarily and regularly receive tips.

Id. at 168-69.

After explaining the PMWA's general tip credit rules, Judge Nealon set out to determine the types of restaurant employees who "customarily and regularly receive tips," and, therefore, may participate in a tip pool without upsetting the restaurant's utilization of the tip credit. Judge Nealon undertook a scholarly analysis of the law, see Ford, 47 Pa. D. & C.5th at 169-81, and,

based on this analysis, "conclude[d] that ***direct customer interaction*** is a relevant factor in determining whether employees 'customarily and regularly receive tips' for purposes of tip pool eligibility under [the PMWA's tip credit provision]," id. at 181 (emphasis supplied). Thus, the Ford servers pled a PMWA claim by alleging that the restaurant (which utilized the tip credit) allowed employees who "***rarely interact with customers***" to share in the tip pool. Id. (emphasis supplied).

The legal principles described in Ford apply to Plaintiff's PMWA claim. Plaintiff alleges that Defendant: (i) utilizes the tip credit in paying him the minimum wage, see Am. Cpl. at ¶ 9; (ii) requires him to contribute some of his tips to a tip pool, see id. at ¶ 10; and (iii) distributes some of the tip pool proceeds to bussers, see id. Under Ford, the legality of including bussers in the tip pool depends on the bussers' "direct customer interaction." See Ford, 47 Pa. D. & C.5th at 181. If, as in Ford, the bussers "rarely interact with customers," id., then Plaintiff has stated a PMWA claim.

In this regard, Plaintiff's amended complaint clearly alleges that Defendant's bussers do ***not*** interact with restaurant customers. Paragraph 7 of the Amended Complaint reads:

> 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.*

Am. Cpl. at ¶ 7 (emphasis supplied).

Under Ford, the above factual allegations plead a PMWA claim. While Defendant may disagree with Plaintiff's factual assertion that the bussers did not interact with customers, see Defendant's Brief ("Def. Br.") at 6-10, such fact-intensive arguments are improper in a demurrer motion. The Court must "accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts." Connor, 601 Pa. at 580, 975 A.2d at 1086.

B. Plaintiff states a claim under the GPB.

Defendant next argues that Plaintiff's GPB claim should be dismissed because: (i) the GPB is preempted by the PMWA, see Def. Br. at 10-12; (ii) the GPB does not prohibit Defendant from diverting Plaintiff's gratuities to other restaurant employees who were not working at the restaurant when Plaintiff received the tips and to bussers who did not directly provide service to restaurant customers, see id. at 12-17; and (iii) Plaintiff fails to state a GPB claim because, in fact, Defendant's bussers "directly provide service" to restaurant customers, see id. at 17-20. As discussed below, each of these arguments should fail:

1. The GPB claim is not preempted.

The PMWA includes a section headed "Preemption" and stating 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 supplied). Thus, in addressing preemption, we initially must understand the "subject matter" of the PMWA.

The PMWA's "subject matter" is straightforward: (i) ensuring that workers are paid a minimum wage (currently $7.25/hour) for all hours worked and (ii) ensuring that workers receive extra overtime premium pay for hours worked over 40 per week. See 43 P.S. §§ 333.101, et seq. That is the extent of the PMWA's subject matter. Defendant does not – and cannot – argue otherwise.

As already discussed, the PMWA allows restaurant employers to utilize a tip credit in fulfilling their minimum wage obligations and sets out various "tip-pooling" rules that restaurants utilizing the tip credit must follow. See Section IV.A supra. Crucially, however, the PMWA's tip credit rules exist within the strict confines of the PMWA's subject matter of safeguarding the minimum wage. The PMWA's tip-pooling rules apply *only if* the restaurant utilizes the tip credit to fulfill its minimum wage obligations.

Meanwhile, Plaintiff's GPB claim rests on statutory provisions that have nothing to do with the PMWA's minimum wage subject matter. Plaintiff primarily invokes the GPB's Sole Property Rule, which provides: "Every 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." Am. Cpl. at ¶ 25 (quoting Phila. Code § 9-614(2)(a)). Plaintiff also recognizes the Direct Service Exception to the Sole Property Rule. This exception provides that gratuities may be "pooled and distributed among all employees who directly provide service to patrons." Am. Cpl. at ¶ 26 (quoting Phila. Code § 9-614(2)(c)).

This brings us to the central question for purposes of preemption: Does the GPB's Sole Property Rule and Direct Service Exception "concern" the PMWA's "subject matter" of ensuring the payment of minimum wages and overtime premium compensation? The answer is a resounding "No." The GPB has nothing to do with minimum wages or overtime pay. Instead, the GPB provisions invoked by Plaintiff focus on the economic relationship between restaurant customers (who leave gratuities), restaurant servers (who wait on the customers), and restaurant owners (who have the economic power to divert gratuities away from servers and towards other restaurant employees).

The pertinent GPB provisions simply codify some common-sense principles of fairness with respect to the Philadelphia restaurant industry: (i) customers are assured that their gratuities are actually paid to the workers who directly wait on their tables; (ii) servers are assured that their hard-earned gratuities are not diverted to other employees who did not directly serve the customers; and (iii) restaurant owners may not use customer gratuities to subsidize general restaurant operations. *None of this has anything to do with the PMWA's "subject matter" of ensuring a minimum wage and overtime pay.*

In sum, the Court should reject Defendant's preemption argument. The City of Philadelphia has a thriving restaurant industry and has every right to regulate that industry. Defendant offers no evidence that, in enacting the PMWA, the state legislature sought to prevent the City of Philadelphia from passing laws that promote fairness and transparency in the Philadelphia restaurant industry. Accord Hoffman Mining Co. v. Zoning Hearing Board of Adams Township, 612 Pa. 598, 609-18, 32 A.3d 587, 593-98 (Pa. 2011) (express preemption provision in Pennsylvania Surface Mining and Reclamation Act did not preempt local zoning ordinance because the zoning ordinance was enacted for a different purpose than the Pennsylvania Act); Huntley & Huntley, Inc. v. Borough Council of Oakmont, 600 Pa. 207, 217-26, 964 A.2d 855, 861-66 (Pa. 2009) (express preemption provision in Pennsylvania Oil and Gas Act did not preempt local zoning ordinance because the two laws "serve[d] different purposes").

2. Plaintiff pleads a valid claim under the GPB's Sole Property Rule.

Next, Defendant argues that the GPB "simply does not prohibit the conduct that Plaintiff complains about." See Def. Br. at 12-17. Plaintiff disagrees for the following reason:

As already discussed, the GPB's Sole Property Rule provides: "Every 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). Plaintiff asserts that Defendant violated this rule by requiring him to share tips with "other restaurant employees (regardless of job title) who were not working at the restaurant at the time the tips were earned." Id. at ¶ 28. 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.

Id. at ¶ 11.

The above allegation pleads a claim under the GPB's Sole Property Rule. Unambiguous statutes are interpreted based on their plain language, see 1 P.S. § 1921(b), and the GPB plainly provides that gratuities "paid, given, or left for" Plaintiff are his "sole property." Phila. Code § 9-614(2)(a). As such, Defendant violated the GPB by diverting some of Plaintiff's gratuities to other employees who were not even at the restaurant when the patron left the gratuity. No restaurant patron would ever "pa[y], give[], or le[ave]" a tip for someone who was not even working during the patron's visit.[2]

Plaintiff also asserts that Defendant violated the GPB's Sole Property Rule by "implementing a tip-pooling program under which server's tips are shared with bussers." Am. Cpl. at ¶ 26. These 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

[2] Moreover, GPB's Direct Service Exception cannot apply because individuals who are absent from work cannot possibly "directly provide service to customers."

> 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.*

Id. at ¶ 7 (emphasis supplied).

The above allegations sufficiently plead that bussers are not the types of employees for whom a gratuity would be "paid, given, or left for." Phila. Code § 9-614(2)(a). Restaurant patrons do not leave gratuities for employees with whom they have no contact. As such, the gratuities are the "sole property" of Plaintiff. Moreover, because the bussers do not "directly provide service to customers," the GPB's Direct Service Exception cannot apply.

In sum, the GPB language relied on by Plaintiff is clear and unambiguous: "Every gratuity shall be the sole property of the employee or employees to whom it was paid, given, or left for," Phila. Code § 9-614(2)(a), and servers cannot be required to share gratuities with other restaurant employees who do not "directly provide service to" restaurant patrons, id. § 9-614(2)(c). Defendant seeks to avoid these clear statutory mandates by selectively quoting individuals who spoke at a City Council hearing. See Def. Br. at 14-16. This tactic is unavailing. Where, as here, the GPB's language is "clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 P.S. § 1921(b); accord Commonwealth v. McCoy, 599 Pa. 599, 609-10, 962 A.2d 1160, 1166 (Pa. 2009); Dept. of Transportation v. Taylor, 576 Pa. 622, 628-29, 841 A.2d 108, 111-12 (Pa. 2004).

3. Plaintiff pleads around the GPB's Direct Service Exception.

Next, Defendant argues that Plaintiff fails to state a GPB claim because, in fact, Defendant's bussers do "directly provide service" to restaurant customers. See Def. Br. at 17-20.

Once again, Defendant refuses to "accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts." Connor, 601 Pa. at 580, 975 A.2d at 1086.

The Amended Complaint flatly alleges that Defendant's bussers do ***not*** "directly provide service to" restaurant customers:

> 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.*

Am. Cpl. at ¶ 7 (emphasis supplied).

Defendant's assertion that bussers "directly provide service" to restaurant customers is nothing more than a disagreement with Plaintiff over factual allegations. Such fact-intensive disputes are not ripe for resolution at the pleading stage.

D. Plaintiff states a claim for unjust enrichment.

In Pennsylvania, unjust enrichment claims are frequently pled alongside PMWA claims. See, e.g., Lugo v. Farmers Pride, Inc., 967 A.2d 963 (Pa. Super. 2009). Notwithstanding, Defendant seeks preliminary dismissal of Plaintiff's unjust enrichment claim, arguing that: (i) Defendant had a "contractual right" to share Plaintiff's tips with bussers, see Def. Br. at 20-22, and (ii) requiring Plaintiff to share tips with bussers could not have been "unjust" because

Defendant operated a "perfectly lawful tip pool," see id. at 22. As discussed below, these arguments should fail:

First, Defendant has not demonstrated a contractual basis for the challenged pay practices. Plaintiff's Amended Complaint makes no mention – either directly or indirectly – of a contract, and Defendant's preliminary objections fail to attach any contract or plead the existence of a contract. Defendant's unilateral requirement that Plaintiff share tips with bussers is not a contract, and Defendant fails to establish the basic elements – offer, acceptance, and consideration – of a real contractual agreement. See, e.g., Jones v. Washington Health System, 2018 U.S. Dist. LEXIS 52381 (W.D. Pa. Mar. 29, 2018) (compensation practices described in employee handbook do not form a contract).

Second, Defendant's argument that it could not have been "unjustly" enriched because it operated a "perfectly lawful tip pool," see id. at 22, is premature. As already discussed, Plaintiff has sufficiently pled that Defendant's pay practices are *illegal* under the PMWA and GPB. So Defendant "perfectly lawful tip pool" argument puts the cart before the horse.

E. Plaintiff's GPB and unjust enrichment claims are not time-barred.

Finally, Defendant ponders the limitations periods applicable to GPB and unjust enrichment claims and concludes that such claims carry a two-year limitations period. See Def. Br. at 22-25. But this discussion is irrelevant to Plaintiff's right to pursue GPB and unjust enrichment claims. Plaintiff worked as a server at Defendant's restaurant *until November 2017*. See Am. Cpl. at ¶ 8. So, even under the two-year limitations period advocated by Defendant, Plaintiff may proceed with his GPB and unjust enrichment claims.

At some later stage of this litigation, it might become necessary for the Court to address the statute of limitations issues raised by Defendant. For example, if class certification is

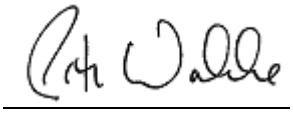
granted, the Court will need to define the temporal parameters of the GPB and unjust enrichment class claims. Until then, the resolution of such issues is neither ripe nor necessary.

V. CONCLUSION

For all of the above reasons, Plaintiff respectfully requests that the Court enter an order overruling Defendant's preliminary objections.

Date: June 6, 2018

Respectfully,



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CERTIFICATE OF SERVICE

I, Peter Winebrake, hereby certify that, on June 6, 2018, the accompanying document was filed electronically and is available for viewing by all counsel of record. In addition, the accompanying document has been sent by regular mail to:

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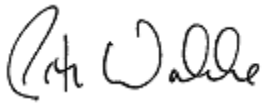

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EXHIBIT 4

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

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.

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

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

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Deputy City Solicitor, Law Department
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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”

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Attorney for Intervenor Plaintiff, City of Philadelphia

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

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 1[3]). 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

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[4] In 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

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

that when I learned about this 3 percent, 1 to 3 percent withholding, I also learned that some of these restaurants will hold the tips for an entire month; therefore, having their bank account get the interest on it as opposed to in that person's hand.

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

So I'd just like to ask if anyone here has any questions for these 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:

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Dated: June 28, 2018

EXHIBIT 5

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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

DEFENDANT'S REPLY BRIEF
IN FURTHER SUPPORT OF PRELIMINARY OBJECTIONS

Preliminary Statement

For many decades, thousands of bussers in Philadelphia have depended on receiving a share of customer gratuities through tip pools for a significant portion of their income. Plaintiff believes that the Pennsylvania and Philadelphia law render such arrangements illegal. He is mistaken. Indeed, his papers opposing M&S's preliminary objections provide no legal authorities or cogent argument sufficient to save his claims from dismissal. To the contrary, Plaintiff's opposition brief is most noticeable for what he does not even attempt dispute. In particular, Plaintiff ignores, concedes, or otherwise does not attempt to dispute that:

- For over 40 years, Congress, the U.S. Department of Labor, and the federal courts have consistently recognized that -- under the federal FLSA -- bussers may participate in tip pools as employees who "customarily and regularly receive tips." (*Compare* Def. Br. 7-8 *with* Pl. Opp. Br.)
- The Pennsylvania legislature intended for the Minimum Wage Act ("MWA") to apply the same tip pooling standards as the FLSA, copying the relevant language word-for-word. (*Compare* Def. Br. 7-8 *with* Pl. Opp. Br.)
- In *Ford v. Lehigh Valley Restaurant Group*, the Lackawanna Court of Common Pleas expressly recognized that bussers qualify as employees who "customarily and regularly receive tips." (*Compare* Def. Br. 8-9 *with* Pl. Opp. Br.)
- Although *Ford* postulated that customer interaction was a "relevant factor" in deciding whether a new class of employee ("expos") was tip-pool eligible, *Ford* never suggested this test could override 40 years of precedent regarding existing classes of employees (such as bussers). (*Compare* Def. Br. 9 *with* Pl. Opp. Br.)
- M&S's bussers serve as "bussers." (*Compare* Def. Br. 9 *with* Pl. Opp. Br.)
- As the GPO's legislative history shows, and as the City of Philadelphia's petition to intervene now confirms,[1] City Council did not intend to broadly rewrite how Philadelphia employers operate tip pools. City Council sought only to regulate only when employers paid tips, and whether employers could deduct expenses such as credit card processing fees. (*Compare* Def. Br. 12-16, Phila. Pet. Br. 5-6 *with* Pl. Opp. Br.)

[1] In addition to this brief, M&S will respond in accordance with the Court's rules to the City of Philadelphia's petition to intervene. In brief, the City of Philadelphia's position fully aligns with what M&S has explained from the beginning: the GPO does not regulate tip pooling, and thus does not prohibit the alleged conduct that Plaintiff complains about. (*See* Def. Br. 12-16.)

- Plaintiff's interpretation of the GPO would ***require*** employers to ***include*** bussers in tip pools whenever they "directly provide service" to a specific customer, and to exclude them whenever they do not. The extreme, absurd micromanagement that such an interpretation would require only further shows that Plaintiff's proposed interpretation is untenable. (*Compare* Def. Br. 19-20 *with* Pl. Opp. Br.)

- If it finds that the GPO does not cover the conduct alleged, the Court need not reach any potential preemption issues. (*Compare* Def. Br. 16 *with* Pl. Opp. Br.)

- Plaintiff pleads no facts to support that tips are the "sole property" of servers, because he pleads nothing to back up his speculation that customers leave tips *exclusively* for servers, instead of for the all the employees who participated in their dining experience. (*Compare* Def. Br. 16-17 *with* Pl. Opp. Br.)

- The Court can consider M&S's Busser Job Description on preliminary objections, because the pleadings rely on it. (*Compare* Def. Br. 9-10 *with* Pl. Opp. Br.)

- The Busser Job Description refutes Plaintiff's legal conclusions, by providing many examples of how bussers directly provide service to customers. (*Compare* Def. Br. 10 *with* Pl. Opp. Br.)

- Plaintiff's own "pre-bussing" allegations further show that bussers "directly provide service" to customers. (*Compare* Def. Br. 10 *with* Pl. Opp. Br.)

- The plain meaning of "directly provide service" does not require customer interaction. It is sufficient for an employee to "straightforward[ly]" provide some kind of "useful act" or "human effort" for the customer's benefit. And Plaintiff alleges that bussers perform such acts. (*Compare* Def. Br. 18 *with* Pl. Opp. Br.)

- Plaintiff alleges that M&S required servers to participate in the tip pools as a term and condition of their at-will employment, thereby alleging a contract which bars recovery in unjust enrichment. (*Compare* Def. Br. 21-22 *with* Pl. Opp. Br.)

- Plaintiff received the exact compensation that M&S promised him, dooming his unjust enrichment claim. (*Compare* Def. Br. 21-22 *with* Pl. Opp. Br.)

- A two-year imitations period applies to the GPO and unjust enrichment claims. (*Compare* Def. Br. 22-25.)

Because Plaintiff ignores these arguments, he effectively concedes them. *See generally* Pa. R. App. Proc. 302(a) (issues not raised in the trial court are waived); *Levy-Tatum v. Navient Sols., Inc.*, 183 F. Supp. 3d 701, 712 (E.D. Pa. 2016) ("a plaintiff's failure to address a defendant's arguments for dismissal" should be treated "as an abandonment") (collecting cases).

As for the arguments that Plaintiff does raise, none have merit. Plaintiff, for instance, contends that the MWA does not preempt the GPO because its "subject matter" does not include tip pooling. Yet the MWA contains express tip pooling provisions. Similarly, Plaintiff asks the Court to ignore the GPO's legislative history because the statutory language is supposedly unambiguous. But Plaintiff's GPO claim *depends* upon purported ambiguities (such as the meaning of "directly provide service") that Plaintiff asks the Court to construe in his favor. Beyond all that, the Court should defer to the City of Philadelphia's interpretation of the GPO, which confirms that the GPO does not regulate "[t]ip pooling policies." (Phila. Pet. Br. 5.)

For these reasons, and for those set forth in M&S's opening brief, the Court should dismiss Plaintiff's Amended Complaint in its entirety, and with prejudice.

I. Plaintiff's Minimum Wage Act Claim Must Be Dismissed

Plaintiff's first count contends that M&S violated the MWA by including bussers in a tip pool, because Plaintiff posits that they do not "directly provide" service to customers. He argues that the Lackawanna County trial court's analysis in *Ford* justifies this theory, because *Ford* held that direct customer interaction is a "relevant factor" in determining whether employees "customarily and regularly receive tips." Plaintiff is mistaken, for four reasons:

First, *Ford* began its analysis by recognizing that, under applicable precedent, "busboys" (*i.e.* bussers) qualify as employees who "customarily and regularly receive tips." 2015 Pa. Dist. & Cnty. Dec. LEXIS 11 at *16-17. It is nonsensical to interpret *Ford* as standing for the precisely opposite proposition.

Second, and relatedly, even if direct customer interaction is a "relevant factor" in determining tip pool eligibility, *Ford* never suggested that this "factor" could override forty years precedent holding that bussers "customarily and regularly receive tips." To the contrary: *Ford*

derived its "relevant factor" analysis comparing the *existing, well-established* categories of customarily tipped employees (such as "waiters," "***busboys***," and "bellhops") with the *existing, well-established* categories of non-tipped employees ("janitors, dishwashers, chefs and laundry room attendants"). In short, *Ford* found that direct customer interaction is a "relevant factor" for analyzing a new occupation (*i.e.*, "expos"), but not the only factor, *because* most customarily tipped employees directly interact with customers. *Ford* did not suggest that bussers cease to "customarily and regularly receive tips" if they do not meet some customer interaction quota. After all, a busboy/busser is "the only occupation explicitly validated for tip-pool inclusion by an authoritative source," even though that its job duties do not involve "much customer interaction." *Barrera v. MTC, Inc.*, 2011 WL 3273196, at *6 (W.D. Tex. 2011) (citing 29 C.F.R. § 531.54); *Lentz v. Spanky's Rest. II, Inc.*, 491 F. Supp. 2d 663, 670 (N.D. Tex. 2007) (bussers "customarily and regularly receive tips" but "do not necessarily interact directly with restaurant patrons").

Third, if *Ford* stands for the proposition that Plaintiff claims (and it does not), the Court should reject its reasoning. Four decades of nationwide precedent is more persuasive than a single unpublished trial court decision.

Fourth, Plaintiff postulates that bussers "do ***not*** interact with restaurant customers," and that any disagreement with that bald assertion amounts to a "fact-intensive argument[]." But he ignores that his own pleadings cite and rely upon M&S's Busser Job Description. That Job Description refutes Plaintiff's claims, because it makes clear that Bussers "Refill water, tea, and coffee if needed," "Inform a manager as soon as a guest has a complaint or problem," "Assist servers when necessary," and "Remove all dishes, trash, napkins, etc. from the table and floor." (*See* Preliminary Objections, Ex. 2 (hereafter, "Ex. 2"). Plaintiff cannot state a claim based upon factual allegations contradicted by the documents his pleadings rely upon. *See Green v. Pa.*

State Bd. of Vet. Med., 116 A.3d 1164, 1167 (Pa. Commw. Ct. 2015). More to the point, Plaintiff's own "pre-bussing" allegations further establish that bussers "directly provide service" to patrons. (*See* Def. Br. 10.)

For these basic reasons, the Court should - consistent with 40 years of precedent - recognize that the MWA permits M&S to include bussers in its tip pool. It should thus sustain M&S's preliminary objections and dismiss Plaintiff's MWA claim.

II. Plaintiff's GPO Claim Must Be Dismissed

A. The GPO Does Not Cover The Conduct Alleged

As Plaintiff effectively concedes, the legislative history undercuts his belief that the GPO rewrites restaurant tipping practices in Philadelphia. (Pl. Opp. Br. 11.) He just asks the Court to ignore the legislative history because the GPO's language is supposedly "clear." (*Id.*) The City of Philadelphia disagrees with Plaintiff's interpretation. And for a good reason: it is mistaken.

i. The Court Should Defer to the City's Interpretation

The City of Philadelphia interprets the GPO in essentially the same manner as M&S. The City agrees that the GPO's function is to regulate when employers pay tips, and whether they can take deductions from tips for business expenses (such as credit card fees). (Phila. Pet. Br. 6.) Indeed, the City references M&S's brief as "confirm[ing]" the City's own position. (Phila. Pet. Br. 6 n. 4.) Conversely, like M&S, the City agrees that the GPO's tip pooling references are merely "incidental," and mentioned simply to clarify that tip pooling was not "precluded." (Phila. Pet. Br. 5.) The GPO, thus, was not intended to either regulate tip pooling or impose different tip pooling requirements than the MWA. (*See generally* Phila. Pet. Br. 5-6.)

The City of Philadelphia's interpretation of its own ordinances is entitled to "great deference," as Philadelphia is charged with "overseeing the implementation of such legislation."

Winslow-Quattlebaum v. Maryland Ins. Grp., 561 Pa. 629, 635 (Pa. 2000) ("It is well settled that when the courts of this Commonwealth are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation."); *Mitman v. Police Pension Comm'n of City of Easton*, 972 A.2d 1276, 1282 (Pa. Commw. Ct. 2009) ("courts ordinarily afford deference to municipalities in interpreting their ordinances"). Affording the City of Philadelphia that deference, the Court should find that the GPO does not regulate tip pooling, and thus does not prohibit Plaintiff's "Busser Theory" or "Temporal Theory." (*See* Def. Br. 12-16.) In so doing, the Court can also avoid addressing whether the MWA preempts the GPO or any portion of it. (*See* Def. Br. 16.)

ii. The GPO's Language Accords With Its Legislative History

Despite disagreeing with both M&S and the City of Philadelphia, Plaintiff insists that the GPO's clear language favors his interpretation. (Pl. Opp. Br. 11.) But Plaintiff's claims actually depend upon purported ambiguities that Plaintiff construes in his favor.

Plaintiff insists that, for an employee to "directly provide service" under the GPO, that employee must directly interact with customers. (*See* Am. Compl. ¶¶ 7, 22, 30; Pl. Opp. Br. 3, 4, 6-7, 10-12.) As M&S explains, the plain meaning of the words "directly provide service" does not support this interpretation. *See infra* at 11; (Def. Br. 18.) But to the extent that any ambiguity exists, then the legislative history must be consulted. And, like the plain meaning, the legislative history establishes that the City Council had no intention of regulating tip pools at all, much less prohibiting restaurants from including bussers in tip pools. (*See* Phila. Pet. Br. at 5, agreeing that the reference to tip pools was "merely incidental").

Relatedly, Plaintiff theorizes that what he deems the "Sole Property Rule" prohibits employers from pooling together tips earned over several shifts or days, because that means

sharing tips with employees who "were not even at the restaurant" when a particular patron left a particular tip. (Pl. Opp. Br. 10.) But the GPO proves that "[n]othing" prohibits policies "under which gratuities are ***pooled and distributed among all employees who directly provide service to patrons***." PAC § 9-614(2) (emphasis supplied). And this language places no temporal limitations on tip pools. (*See* Def. Br. 13.) Thus, it does not preclude employers from "pool[ing] and distribut[ing]" tips among "all employees" who directly provided service to "patrons" (plural) during an entire pay period (to, for instance, prevent employees from being unfairly penalized for happening to be assigned a slow shift). Alternatively, if any ambiguity somehow exists, the legislative history must be consulted. And, as with Plaintiff's Busser Theory, that legislative history reflects that City Council had no intention of micromanaging tip pools, or prohibiting employers from pooling tips across multiple shifts or days. (*See* Phila. Pet. Br. 5-6.)

Perhaps a more fundamental ambiguity: the GPO says that tips are the "sole property" of employees and "shall be paid over in full" to them. Yet it then prohibits only: (1) employers "deducting" tips from owed wages; (2) employers taking "deduction[s]" for "credit card fees or costs"; and (3) employers paying credit card tips "later than the next regular payday." PAC § 9-614(2). These "deduction" prohibitions are consistent with a narrow reading of the GPO, in accord with the legislative history. (*See* Def. Br. 12-18; Phila. Pet. Br. 5-6.) But they are "superfluous" if City Council intended for the GPO's so-called "Sole Property Rule" to have the broad-ranging effect that Plaintiff proposes. *See Branton v. Nicholas Meat, LLC*, 159 A.3d 540, 559 (Pa. Super. Ct. 2017) (when interpreting a statute, the court presumes the legislature did not "intend superfluous language"). This further warrants consulting the legislative history.

Because the GPO contains numerous statutory ambiguities, the Court should consider the statutory history and, consequently, interpret the GPO in accord with the position taken by M&S and the City of Philadelphia.

B. The Minimum Wage Act Preempts The GPO

As M&S and the City of Philadelphia both agree, the GPO does not regulate tip pooling. (Def. Br. 12-16); (Phila. Pet. Br. 5.) Thus, under the cannon of constitutional avoidance, the Court should determine that the GPO does not prohibit what Plaintiff complains about, without reaching potential preemption questions. (*See* Def. Br. 16.)

Indeed, although the City of Philadelphia argues that the MWA does not preempt the GPO, it does so precisely *because* it understands that "Tip pooling policies are not the subject matter of the Ordinance." (Phila. Pet. Br. at 5.) Put another away, the City of Philadelphia believes that the MWA does not preempt the GPO precisely *because* the GPO has nothing to do with tip pooling. (*Id.*) M&S agrees. (*See* Def. Br. 12.)

If, however, the Court reaches the preemption issue, the Court should reject Plaintiff's argument that the GPO is not preempted. In brief, Plaintiff notes that the MWA only preempts local laws dealing with its "subject matter." He then postulates that the MWA's "subject matter" solely concerns minimum wages and overtime, while his claim invokes the GPO's alleged rule that gratuities remain "the sole property of the employee or employees." (PAC § 9-614(2)(a).) Plaintiff is wrong on all counts.

First, Plaintiff defines the MWA's "subject matter" far too narrowly. The MWA generally explains its subject matter as rectifying "[t]he evils of unreasonable and unfair wages,"

and the lack of employee "equality in bargaining." 43 Pa. Stat. § 333.101. The MWA does not limit its "subject matter" to minimum wages or overtime. *See id.*[2]

Second, for purposes of preemption, statutes or ordinances "cover the same subject matter" when "they comprise, include, or embrace the issue in an effective scope of operation." *United Transp. Union v. Pa. Pub. Util. Comm'n*, 68 A.3d 1026, 1037 (Pa. Commw. Ct. 2013). Here, Plaintiff cannot seriously dispute that the MWA's provisions "include" and "embrace" the "issue" that he calls the "Sole Property rule." Indeed, the MWA and GPO use almost identical language: the MWA says that "the gratuity shall become the property of the employe," while the GPO articulates that "every gratuity shall be the sole property of the employee." *Compare* 43 Pa. Stat. § 333.103(d)(2) *with* PAC § 9-614(2)(a). The MWA's provisions similarly "include" and "embrace" the "issue" of what constitutes a lawful tip pool. The MWA explains that tip pools may include "employees who customarily and regularly receive tips," irrespective of whether these employees directly provide service to patrons. 43 Pa. Stat. § 333.103(d)(2). As such, if the GPO's tip pooling language has an operative effect (*i.e.*, is not merely "incidental," *see* Phila. Pet. Br. 5.), then the MWA preempts it. *See Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 220-221 (Pa. 2009) ("local legislation cannot . . . prohibit what state enactments allow").

Third, while Plaintiff contends that the GPO "has nothing to do with minimum wages," the GPO's author, Mayor Kenney, disagrees. As he explained, the GPO applies only to employers who pay the tipped minimum wage of $2.87 an hour.[3] Employers have "a way

[2] By analogy, PAC §§ 9-600 *et seq.* addresses a host of issues aside from tips, such as pawnbrokers, firearms, and massage businesses. Yet the fact that this Chapter addresses a plethora of other concerns does not mean that its "subject matter" also does not include tipped employees.

[3] http://legislation.phila.gov/transcripts/Public%20Hearings/rules/2011/ru110111.pdf at 6

around" the GPO by paying the full "federal minimum wage." *Id.*' (*see also* Phila. Pet. Br. at 5, noting Mayor Kenney's statement that restaurants "can't pay somebody under $3 an hour and then take their tip money or a portion of it to pay [their] bills.") Notably, this is *same* distinction that the MWA and FLSA draw. *See* 43 Pa. Stat. § 333(d); 29 U.S.C. § 203(m)(2).

Fourth, Plaintiff contends that the MWA does not preempt the GPO because the laws have different "purpose[s]," citing *Hoffman Mining Co. v. Zoning Hearing Board of Adams Township*, 612 Pa. 598, 609-18 (Pa. 2011) and *Huntley & Huntley, Inc*. These cases are distinguishable. Both addressed Pennsylvania mining/oil drilling statutes that had some incidental "overlap" with local zoning regulations. *See id.* Conversely, if Plaintiff's interpretation of the GPO is correct (and it is not), then Philadelphia expressly sought to regulate issues (tip pooling and tips as employee "property") that the MWA already covered.

In short, if "purpose" is derived from the statutory text, both the MWA's and GPO's tip pooling language has the same "purpose": to regulate employer-mandated tip-pools. *Compare* 43 Pa. Stat. § 333(d) *with* PAC § 9-614(2)(c). As such, the MWA would preempt the GPO. Alternatively, if "purpose" is derived from the legislative history, then the GPO's purpose is much narrower: rectifying (1) when employers must pay tips; and (2) whether restaurants can deduct credit card processing fees from tips. *Compare* PAC§ 9-614 *with* 43 Pa. Stat. § 333.101 *et seq*; (Def. Br. 12-17; Phila. Pet. Br. 5-6.). Under this interpretation, the GPO simply doesn't cover Plaintiff's allegations. Either way, the GPO claim cannot survive.

C. Plaintiff's GPO Claim Otherwise Must Be Dismissed

Even if the GPO covers the alleged conduct, yet somehow escapes MWA preemption, the GPO claim must be dismissed. Three additional reasons compel this result:

First, as M&S's opening brief argued (*see* Def. Br. 16-17), and Plaintiff does not dispute (*see* Pl. Opp. Br. 9, 11.), his GPO claim depends upon his belief that patrons leave gratuities *exclusively* for their servers, rather than for *all* the employees who participate in their dining experience. Yet, Plaintiff pleads no *facts* to support his speculation. As such, it is merely an "expression[] of opinion," "unwarranted inference[]," and "conclusion[] of law," that the Court may disregard. *See Crozer Chester Med. Ctr., v. Dep't of Labor & Indus., Bureau of Workers' Comp., Health Care Servs. Review Div.*, 22 A.3d 189, 194 (Pa. 2011); *see also Stephano & Quick v. Twp. of St. Thomas***,** 39 Pa. D. & C.3d 563, 572 (Pa. Com. Pl. Franklin Cnty. 1985) ("speculative" allegations should not be accepted as true). Surely, at a minimum, many of the 50% of Americans who have worked in restaurants[4] anticipate and expect that, when they leave a tip, eateries such as M&S will "customarily" share those tips with bussers, or may "pool" tips across different shifts or days. The GPO even tacitly acknowledges this, recognizing that customers may leave tips for multiple "employees." PAC § 9-614(2)(a).

Second, Plaintiff contends that M&S's "disagreement" about whether bussers "directly provide service" to customers is a "fact-intensive dispute[]." He ignores that documents that *he* incorporated by reference (such as the Busser Job Description), and his own "pre-bussing" allegations, refute his bare assertions. Even at the preliminary objection stage, Plaintiff cannot state claims based upon theories contracted by the documents and factual allegations.[5]

Third, as Plaintiff does not dispute, the plain meaning of the phrase "directly provide service" does not require interaction with customers. (*Compare* Def. Br. at 18 *with* Pl. Opp. Br.)

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[4] (*See* http://www.aspenwsi.org/wordpress/wp-content/uploads/The-Restaurant-Workforce-in-the-United-States.pdf, last visited June 19, 2018.)

[5] *See Green v. Pa. State Bd. of Veterinary Med.*, 116 A.3d 1164, 1167 (Pa. Commw. Ct. 2015) (court may disregard "allegations contradicted by documents on which the claim is based"); *St. Peter's Roman Catholic Par. v. Urban Redevelopment Auth. of Pittsburgh*, 394 Pa. 194, 196 (1958) (on preliminary objections, court may consider documents the complaint refers to).

It simply means that an employee must "[i]n a straightforward manner" provide some kind of "useful act" or "human effort" for the customer's benefit. (*See* Def. Br. 18, *citing* Black's Law Dictionary (10th ed. 2014).) Plaintiff's own allegations that bussers "pre-buss[] tables" and "ensur[e] that Restaurant tables are clean and orderly" refute Plaintiff's legal conclusions, and establish that bussers "directly provide service" to patrons. (*See* Am. Compl. ¶ 7.)

III. Plaintiff's Unjust Enrichment Claim Must Be Dismissed

Plaintiff next contends that he states an unjust enrichment claim because, in his view, the Amended Complaint "makes no mention" of a contract. (Pl. Opp. Br. 13.) Yet, as Plaintiff does not dispute, the crux of his legal theory is that M&S required servers to contribute a portion of their tips as a term and condition of their at will employment. (*Compare* Def. Br. 20-21 *with* Pl. Br.) That establishes a contract. (*Id.*) Moreover, as Plaintiff does not dispute, employees cannot recover in unjust enrichment when they receive the exact compensation promised by the employer. (*Compare* Def. Br. 20-21 *with* Pl. Br.) Furthermore, Plaintiff sole purported authority otherwise, *Jones v. Wash. Health Sys.*, is inapposite. *See* 2018 U.S. Dist. LEXIS 52381 (W.D. Pa. Mar. 29, 2018). That case stands only for the uncontroversial proposition that an employee handbook does not create contractual rights if it contains an express disclaimer denying that it is a contract. Neither *Jones* nor any other Pennsylvania authorities permit an "unjust enrichment" claim simply because an at-will employee considers the terms of his employment to be "unjust."

IV. The GPO and Unjust Enrichment Claims Are Time-Barred

Finally, if Plaintiff somehow states claims under the GPO and/or unjust enrichment (and he does not), the Court should hold that these claims are subject to a two-year statute of limitations. (*See* Def. Br. 22-25.) Plaintiff does not deny that such a limitations period applies.

(*See* Pl. Opp. Br. 13.) He simply asks that the Court not rule on this issue, supposedly on ripeness grounds. (*Id.*)

Plaintiff is wrong. If M&S's preliminary objections are overruled, the limitations period will immediately become relevant to the temporal scope of class discovery. Plaintiff should not be able to seek discovery going back *indefinitely*, perhaps a decade or more, simply because he refuses to plead or argue the appropriate limitations period. If the Court permits the GPO and unjust enrichment claims to survive, it should temporally limit both claims to two years.

V. Relief

For all the foregoing reasons, the Court should sustain M&S's preliminary objections and dismiss the Amended Complaint with prejudice.

Dated: July 2, 2018

By: */s/ Jacob Oslick*

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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 Reply Brief through the Court's Electronic Filing System on July 2, 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 2, 2018, the undersigned effected service on Plaintiff's counsel, R. Anthony Santillo, Esq., pursuant to Pa. R. Civ. P. 205.4(g)(1)(ii) and 205.4(g)(2)(ii), by emailing Mr. Santillo a copy of all of the foregoing Preliminary Objections 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.

Dated: July 2, 2018

By: */s/ Jacob Oslick* _____

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EXHIBIT 6

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

ORDER

AND NOW, this 5th day of July 2018, upon consideration of the preliminary objections of defendant McCormick & Schmick Restaurant Corp., and the response, it is hereby ORDERED that the preliminary objections are OVERRULED. Defendant is granted 20 days leave from the docketing of this order to answer the complaint.

Downey Vs Mccormick & S-ORDER

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Abbe F. Fl

J.

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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 Motion to Certify Order for Interlocutory Appeal, and all supporting papers, through the Court's Electronic Filing System on July 23, 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 23, 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 Motion to Certify Order for Interlocutory Appeal 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 23, 2018

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