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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

NOTICE TO PLEAD

To: Plaintiff Ryan Downey

You are hereby notified to file a written response to the Preliminary Objections within twenty (20) days from service hereof or a judgment may be entered against you.

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

DEFENDANT'S PRELIMINARY OBJECTIONS
TO PLAINTIFF RYAN DOWNEY'S AMENDED COMPLAINT

Defendant McCormick & Schmick Restaurant Corporation hereby files the following preliminary objections to Plaintiff Ryan Downey's Amended Complaint, pursuant to Pa. R. Civ. P. 1028(3), 1028(4).

I. Facts

A. Plaintiff's Allegations

1. 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.

2. 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.

3. 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.)

4. 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.)

5. 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.*)

6. 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.)

7. 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.*)

8. 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.)

9. In this regard, Plaintiff proffers that "Restaurant management has specifically instructed that bussers should stay away from tables until *after* customers have departed." (*Id.*)

10. 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.*)

11. 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.)

12. Plaintiff comments that "[n]one of these activities entail interacting with customers or directly providing service to customers." (*Id.*)

13. Plaintiff postulates that this alleged conduct violates the MWA and GPO. (*Id.* ¶¶ 20-28.)

14. Plaintiff further theorizes that M&S's tip pooling policies constitute unjust enrichment. (*Id.* ¶¶ 30-32.)

15. 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. <u>Defendants' Grounds For Preliminary Objections</u>

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

17. The Pennsylvania Minimum Wage Act ("MWA") does not prohibit including bussers in a tip pool.

18. 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.

19. For more than 40 years, it has been understood that the category of employees who "customarily and regularly receive tips" includes bussers.

20. 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.

21. For a good reason: the MWA would preempt any attempt by Philadelphia to regulate tip pools. *See* 43 Pa. Stat. §§ 333.103(d), 333.114a.

22. 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.

23. Likewise, nothing in the GPO prohibits including bussers in a tip pool.

24. For all these reasons, Plaintiff's MWA and GPO claims fail as a matter of law.

25. Beyond that, Plaintiff's MWA and GPO claims are insufficiently pled.

26. 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.

27. But, for support, Plaintiff relies upon a busser "Job Description" that actually refutes the factual premise of his claims.

28. 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.

29. Plaintiff's unjust enrichment claim also does not present a viable cause of action.

30. 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

[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.

voluntary choice to share tips). Such an express contract precludes recovery in unjust enrichment.

31. 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).

32. 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).

33. 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.

II. Argument

A. Standard Of Review

34. Rule 1019(a) requires plaintiffs to set forth "[t]he material facts on which a cause of action or defense is based."

35. 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).

36. 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.*

37. 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).

38. 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).

39. 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).

40. 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. <u>The Pennsylvania Minimum Wage Act Claim Must Be Dismissed</u>

41. 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.)

42. 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.)

43. Plaintiff's MWA claim is baseless, and his reliance on *Ford* is misplaced.

44. 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."

45. 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).

46. 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).

47. For over 40 years, it has been well-settled that this category of tip pool-eligible employees includes bussers.

48. 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).

49. 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).

50. 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).

51. For this basic reason, the MWA claim is legally insufficient and should be dismissed with prejudice.

52. 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.

53. To the contrary, *Ford* exemplifies why Plaintiff's MWA claim is groundless.

54. 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.

55. 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.

56. With that background, *Ford* did not address the status of busboys/bussers.

57. Rather, *Ford* looked at whether an employer could include employees known as "expos" in a tip pool.

58. "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

[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.

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.

59. Unlike bussers, there is no Congressional, United States Department of Labor, or case law guidance on "expos."

60. 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.

61. Whatever the merits of that approach, *Ford* never suggested that -- as to busboys/bussers -- such a test could override over 40 years of consistent interpretation and precedent.

62. 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.

63. Alternatively, Plaintiff may attempt to argue that M&S's bussers do not actually serve as "bussers" or "busboys."

64. But the facts he pled belie any such argument.

65. 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."

66. These duties are 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").

67. 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.

68. Furthermore, although Plaintiff's MWA claim fails as a matter of law, it is also insufficiently pled.

69. Plaintiff incorporates M&S's Busser Job Description into his Amended Complaint by reference. (*See* Am. Compl. ¶ 7.[3])

70. This document contradicts Plaintiff's allegation that bussers "rarely or never interact" with customers.

71. M&S's Busser Job Description 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.)

72. 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).

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

73. Beyond all that, Plaintiff acknowledges that bussers engage in "pre-bussing." (Am. Compl. ¶ 7.)

74. 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.

75. 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

76. 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.

77. 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.

[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.

78. 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]

79. 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).

80. 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."

81. 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

82. 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.

83. 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).

84. 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).

85. 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.

86. 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.)

87. 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.

88. 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.)

89. In fact, the GPO does not prohibit restaurants from pooling tips across multiple shifts, or even multiple days. *See generally* PAC § 9-614.

90. 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.*

91. 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).

92. 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.

93. 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).

94. Plaintiff's "Bussers Theory" is equally without merit. The GPO's text does not prohibit including bussers in a tip pool.

95. 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).

96. 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])

97. Councilman Kenney then contrasted this positive experience with what he wanted to the ordinance to prohibit: (1) employers who withheld "1 to 3 percent" for 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.)

98. 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.

99. 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).

100. 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.

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

101. 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.

102. Quite the opposite: in the only discussion of Pennsylvania or federal law, Councilman Kenney affirmed that the GPO would not override federal law.

103. 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.)

104. 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.

105. The GPO was not intended to broadly rewrite how Philadelphia employers operate tip pools.

106. 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.)

107. 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.)

108. 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.

109. 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])

110. 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.*)

111. 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.*

112. The GPO **was not intended** to override, supersede, or even complement the MWA's tip pool restrictions. Thus, it does not do so. *Commonwealth v. Ricker*, 170 A.3d 494,

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

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").

113. 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).

114. 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).

115. 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.

116. The GPO specifically recognizes that tips may be "left for" either a particular "employee" or for a group of "employees." *Id.*

117. 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.

118. 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.

119. 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

120. 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.

121. 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.

122. 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.)

123. Instead, Plaintiff alleges that "Restaurant management has specifically instructed that bussers should stay away from tables until *after* customers have departed." (*Id.*)

124. Plaintiff further sets forth that the Busser "Job Description" "explicitly instructs" bussers to not "clean and reset tables" until after "Guests have left." (*Id.*)

125. These allegations do not state a claim, for five reasons.

126. ***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).

127. 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.)

128. 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."

129. ***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.

130. 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.*

131. 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.

132. 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.)

133. The Job Description likewise notes that bussers, in addition to performing tasks such as refilling water, coffee and tea, and informing management of customer complaints, 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.)

134. ***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").

135. ***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*.

136. ***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.

137. 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).

138. 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."

139. 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.

140. 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.

141. 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.

142. 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.

143. 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.

144. 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. <u>The Unjust Enrichment Claim Also Must Be Dismissed</u>

145. 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.)

146. Plaintiff's unjust enrichment claim must be dismissed for two reasons.

147. ***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.

148. 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.)

149. 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

[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");

*6 (M.D. Pa. 2004) ("continued performance" under an at will contract sufficient to establish acceptance and consideration).

150. 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).

151. "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).

152. 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).

153. 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).

154. 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).

155. 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.)

156. Consequently, M&S's collection and distribution of those contributions on those exact terms was not unjust enrichment.

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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).

157. ***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.*

158. 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).

159. M&S's adherence to what Pennsylvania law specifically permits is not "unjust."

E. <u>The Amended Complaint Is Partially Time-Barred</u>

160. 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

161. Plaintiff purports to seek relief under the GPO for an indeterminate time period. (Am. Compl. ¶ 12.)

162. The appropriate limitations period is two years or, at most, three years.

163. 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).

164. 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.*

165. 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).

166. Here, as in *Ash*, a two-year statute of limitations applies -- although for a somewhat different reason.

167. 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.

168. 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).

169. 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.)

170. 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").

[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).

171. 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).

172. 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 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* 9 (three year limitations period for MWA claims); PAC § 9-4303(b) (three year limitations period for Philadelphia wage theft complaints).

173. 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

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

175. 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.

176. But courts 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).

[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).

177. 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.)

178. Plaintiff's unjust enrichment claims do not sound in implied contract and, in fact, seek to override the contractual terms and conditions of Plaintiff's employment. *See supra* at ¶¶ 145-159.

179. 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.*

180. Thus, when unjust enrichment claims are predicated on violations of the MWA or another wage payment 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).

181. 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.

182. 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").

183. More to the point, Plaintiff's unjust enrichment claim depends on the same tip conversion allegations that form the basis of his GPO claim.

184. 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).

185. 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.

III. Relief

186. 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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VERIFICATION

I, Jay Twardowski, hereby verify that I am a Regional Director, of the Defendant in this matter; and that in such capacity, I am authorized to execute this verification on Defendant's behalf; that I am familiar with the matters set forth in the foregoing Preliminary Objections, and that the same are true and correct to the best of my personal knowledge and information and that I further understand that false statements made herein are made subject to the penalties of 18 PA. C. S. A. § 4904 relating to unsworn falsification to authorities.

JAY TWARDOWSKI

Dated: April 20, 2018

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.

[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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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)

Peter Winebrake
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Ph: (215) 884-2491
E-Mail: pwinebrake@winebrakelaw.com

EXHIBIT 2

Landry's Restaurants, Inc.
Job Description

Job Title: Busser/Service Attendant
Department: Operations
Reports To: General Manager/Front Manager
FLSA Status: Non-exempt

SUMMARY
Clears and cleans tables after customer has left. Prepares tables for the next customer.

ESSENTIAL DUTIES AND RESPONSIBILITIES include the following. Other duties may be assigned.

Removes all dishes, trash, napkins, etc. from the table and floor.

Buses all tables within 1-2 minutes after customer has left.

Wipes tables with a sanitized towel and resets all condiments.

Wipes all chairs and picks up and sweeps around the tables.

Cleans restrooms and reports any plumbing problems to management.

Refills water, tea, and coffee if needed.

Informs a manager as soon as a guest has a complaint or problem.

Assists servers when necessary.

Follows the safety rules provided in the Landry's Restaurants, Inc. Safety Program found in the Employee Orientation Manual and reports any safety hazards to management.

QUALIFICATIONS To perform this job successfully, an individual must be able to perform each essential duty satisfactorily. The requirements listed below are representative of the knowledge, skill, and/or ability required. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

EDUCATION and/or EXPERIENCE
Less than high school education; or up to one month related experience or training; or equivalent combination of education and experience.

LANGUAGE SKILLS
Ability to read and comprehend simple instructions, short correspondence, and memos. Ability to write simple correspondence. Ability to effectively present information in one-on-one and small group situations to customers, clients, and other employees of the organization.

MATHEMATICAL SKILLS
Ability to add and subtract two digit numbers and to multiply and divide with 10's and 100's. Ability to perform these operations using units of American money and weight measurement, volume, and distance.

REASONING ABILITY
Ability to apply common sense understanding to carry out detailed but uninvolved written or oral instructions. Ability to deal with problems involving a few concrete variables in standardized situations.

PHYSICAL DEMANDS The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing the duties of this job, the employee is regularly required to stand, walk, talk or hear, and taste or smell. The employee frequently is required to use hands to finger, handle, or feel and reach with hands and arms. The employee is occasionally required to sit; climb or balance; and stoop, kneel, crouch, or crawl. The employee must regularly lift and/or move up to 25 pounds, frequently lift and/or move up to 50 pounds, and occasionally lift and/or move up to 100 pounds. This may include lifting up full bus tubs. Specific vision abilities required by this job include close vision, distance vision, color vision, peripheral vision, depth perception, and ability to adjust focus.

RESTRICTIONS The Company has a light duty work program that will accommodate any light or modified duty restriction as directed by the treating doctor for a workers' compensation injury.

WORK ENVIRONMENT The work environment characteristics described here are representative of those an employee encounters while performing the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing the duties of this job, the employee is occasionally exposed to wet and/or humid conditions, moving mechanical parts, and outside weather conditions. The noise level in the work environment is usually loud.

EXHIBIT 3

McCORMICK & SCHMICK'S

SEAFOOD & STEAKS

BUSSER TRAINING GUIDE

Revised 5/7/2015

PRE-BUSSING & CLEARING TABLES

Pre-Bussing / Table Maintenance

You can help the service staff with pre-bussing and table maintenance. Examples of ways you can assist is by removing all used utensils, sweetener wrappers, ramekins, empty glassware, used plates, etc. from the table throughout the dining experience using silent service whenever possible. If you see a used appetizer plate pushed to the side, remove it. If you are unsure if the Guest still needs the item, ask if you may remove it. **Pre-bussing must take place constantly and before each and every course delivery.** Keeping the table free of unnecessary clutter provides a clean presentation and more comfortable atmosphere for our Guests. **Remember the 3 R's.**

The 3 R's

REMOVE	**R**emove what is not being used by the Guest. Bread, plates, utensils, sugar packets, etc
REPLACE	**R**eplace plates and utensils. Utensils and plates should be pre-set ***before*** the Guest needs them. Utilize the Silverware Replacement Plate to replenish needed utensils.
REFILL	**R**efill beverages that are half full. Offer to keep all non-alcoholic beverages full. Offer the Guest another cocktail.

Clearing Plates and Courses

Always clear the table clockwise, starting with ladies first. Plates should always be removed using an open-arm approach, clear each Guest, one piece at a time, including plates, silverware and glassware. **Never stack items in front of the Guest.** Never reach in front of the Guest and always use an open-arm approach. If you have to reach in front of a Guest due to an obstruction, say, "Pardon my reach". Remove the entire place setting and clear the area for one Guest before moving to the next Guest.

Staging Areas

Staging areas are designated locations in the dining room for placement of tray jacks and trays when food or beverages are being delivered to or removed from the table. While the staging area may be visible to the Guest, they are positioned to allow minimal disturbance to the Guest. It is extremely important that conversation be kept to a minimum and low key to prevent distraction. Teamwork is instrumental. The moment a tray or tray jack is set in the staging area the common goal must be its quick removal. Once a table has been bussed, the tray must be immediately removed from the staging area. Keep in mind that trays should be returned to the kitchen full. Look for pre-bussing opportunities. Under no circumstances should a tray of bussed items remain unattended in the staging area. Tray jacks should be returned to their designated area.

Clearing the Table for Resetting

When a Guest leaves, the table should only have glassware, napkins, and dessert plates on it. All items should have been cleared during the course of the meal by the server or busser (pre-bussing). To properly clear a table, you will need a large tray and a tray jack as well as the proper items needed to reset the table immediately after clearing.

Bussing with a Tray

The most important thing to remember about carrying a tray is that you place items by balancing out their weight and size. As you bus a table, place all the taller items in the middle of the tray with the shorter items surrounding them. If the taller items are placed on the outside of the tray, they have a better chance of tipping over. NEVER carry too much at one time! Teamwork is always the answer! The "2-Tray Method" is the most efficient way to bus a table. This method is best described as having your top tray set up with the proper number of sets for the table and the bottom tray will be used for clearing the table. Remember to load your top tray correctly to prevent breakage of china. After the table has been cleared of service items, the entire surface must be wiped clean and dried (if applicable) then set with a new top linen before setting the table. Always check the bottom linen to ensure it is clean; replace when necessary.

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

Defendant McCormick & Schmick Restaurant Corp.'s Preliminary Objections are SUSTAINED. The Amended Complaint is DISMISSED WITH PREJUDICE, for the following reasons:

1. Count I alleges violations of the Pennsylvania Minimum Wage Act ("MWA"). In brief, Plaintiff alleges that Defendant violated the MWA by including bussers in a tip-pool while paying servers at the tipped minimum wage. This cause of action fails as a matter of law.

(a) The MWA expressly permits employers to pay tipped employees, such as servers, the tipped minimum wage while operating tip pools that include employees who "customarily and regularly receive tips." 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 the category of employees who "customarily and regularly receive tips" includes bussers. See S. Rep. 93-690, at 43 (1974); 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). Thus, the MWA claim is legally insufficient. Pa. R. Civ. P. 1028(4).

(b) Furthermore, Plaintiff acknowledges that M&S's bussers serve as "bussers," because their core duties include tasks such as "clean[ing] and reset[ting] tables," "pre-bussing tables before customers arrive," and "ensur[ing] that Restaurant tables are clean and orderly." (Am. Compl. ¶ 7.)

2. Count II alleges violations of the Philadelphia Gratuity Protection Ordinance ("GPO"), Philadelphia Administrative Code § 9-614 *et seq.* The GPO requires employers to pay tips promptly, and prohibits them from deducting credit card processing fees from tips. But it does not regulate the activity alleged in Count II. To this end:

(a) The GPO does not prohibit restaurants from pooling together tips earned by employees across multiple shifts, or even multiple days. Thus, it does not prohibit restaurants from pooling and sharing tips with "employees who were not working" at the time a particular tip was earned. (Am. Compl. ¶ 28.)

(b) The GPO does not prohibit restaurants from including bussers in a tip pool. (Am. Compl. ¶ 27.) There is no indication that City Council or the Mayor intended such a restriction. To the contrary, if anything, the legislative history shows the GPO's original sponsor, Councilman James Kenney (now Mayor Kenney) did not want to harm "hard-working and generous" employers who "tipped out" bussers, and only wanted to target employers who failed to pay tips promptly, or who deducted credit card fees from tips. (*See* Rules Committee Tr., Nov. 1, 2011 at p. 19:10-14, 20:1-22; *see generally* p. 2-28.)

Because the GPO does not prohibit the conduct alleged in Count II, this count must be dismissed as legally insufficient. Pa. R. Civ. P. 1028(4).

3. Assuming, for the sake of argument, that the GPO does regulate the conduct alleged in Count II, this count must still be dismissed as legally insufficient. Pa. R. Civ. P. 1028(4). The Pennsylvania Minimum Wage Act expressly regulates tip pooling. *See* 43 Pa. Stat. Ann. § 333.103(d). And it "preempt[s] and supersede[s] any local ordinance or rule concerning the subject matter of this act." 43 Pa. Stat. Ann. § 333.114a. Accordingly, to the extent that the GPO regulates tip pooling, those restrictions are preempted by the Pennsylvania Minimum Wage Act.

4. Furthermore, Count II's allegations which pertain to bussers are also legally and factually insufficient on pleading grounds. Pa. R. Civ. P. 1028(3), 1028(4). The GPO sets forth that it does not prohibit tip pools which include "all employees who directly provide service to patrons." Philadelphia Administrative Code § 9-614(2). The Amended Complaint alleges that bussers do not "directly provide service to customers." (Am. Compl. ¶ 7.) But the "Job Description" that Plaintiff relies upon to support this claim actually refutes it. (*See* Ex. 2 to Def. Preliminary Objections.) Among other things, the Job Description reflects 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.)

In any event, the Amended Complaint contains no factual allegations to support that customers leave tips exclusively as compensation to their servers, instead of for the benefit of all employees who participated in their dining experience (such as their hosts, bussers, and bartenders). Count II fails for this additional reason.

5. Count III alleges unjust enrichment, predicated on the same tip pooling allegations. This count must be dismissed as legally insufficient. Pa. R. Civ. P. 1028(4). Accepting Plaintiff's

allegations as true, the tip pool procedures that he complains about were contractually required terms and conditions of his employment. The existence of this contract precludes recovery in unjust enrichment. Furthermore, because Plaintiff complains about a lawful tip pool program, there was nothing "unjust" about his employer requiring him to share tips with hosts, bartenders, and bussers.

6. The Complaint is also partially time-barred. The GPO provides a statutory remedy for common law conversion. Thus, Pennsylvania's two-year statute of limitations for conversion applies. *See* 42 Pa. Stat. §§ 5524(2); 5524(7). The unjust enrichment claim is predicated upon this same allegedly unlawful conversion. Thus, it is subject to the same statute of limitations.

Dated: _____, 2018

By: _____
Hon. Nina Padilla

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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

PRAECIPE FOR ORAL ARGUMENT

Pursuant to Pa. R. Civ. P. 211, Defendant McCormick & Schmick Restaurant Corp. hereby requests oral argument on its Preliminary Objections to Plaintiff Ryan Downey's Amended Complaint.

Dated: April 23, 2018

By: */s/ Jacob Oslick*
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Certificate of Service

The undersigned hereby certifies that, pursuant to Philadelphia Local Rule 205.4(f)(4), he electronically filed the foregoing Preliminary Objections, and all supporting papers, through the Court's Electronic Filing System on April 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 April 23, 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: April 23, 2018

By: */s/ Jacob Oslick*

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