

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

KRISTAL FREEMAN, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

PROGRESS RESIDENTIAL PROPERTY
MANAGER, LLC,

Defendant.

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Civil Action No. 3:16-CV-00356

**DEFENDANT’S ORIGINAL ANSWER, DEFENSES, AND AFFIRMATIVE DEFENSES
TO PLAINTIFF’S ORIGINAL COLLECTIVE ACTION COMPLAINT**

Defendant Progress Residential Property Manager, LLC (“Defendant” or “Progress Residential”)¹ files this Original Answer, Defenses, and Affirmative Defenses (“Answer”) to the Original Collective Action Complaint (“Complaint”) filed by Plaintiff Kristal Freeman (“Freeman” or “Plaintiff”) and in support of its Answer, respectfully shows the Court as follows:

LIMITED GENERAL DENIAL

Pursuant to Rule 8(b) of the Federal Rules of Civil Procedure, Defendant denies all factual allegations contained in the Complaint except those expressly admitted below.

ANSWER TO PLAINTIFF’S ALLEGATIONS

In addition to its limited general denial, Defendant specifically responds to the Plaintiff’s factual allegations as follows (which correspond to the Complaint’s numbered paragraphs):

¹ In the caption and introduction of the Complaint, Plaintiff identifies Progress Residential Property Manager, LLC as the proper party to this case, which is correct because Progress Residential Property Manager, LLC was Plaintiff’s employer. However, in Paragraphs 2.4 and 2.5, Plaintiff names Progress Residential LP, which never employed Plaintiff. Defendant assumes this was a typographical error and all answers herein are on behalf of Defendant Progress Residential Property Manager, LLC, which is the proper party to this case.

I. INTRODUCTION

1.1 Defendant admits that Plaintiff brings claims under the Fair Labor Standards Act (“FLSA”) and seeks to represent a putative collective of Defendant’s current and former leasing agents. Defendant denies, however, any violation of the FLSA or any other law, denies that such a putative collective should be certified, and denies the remaining factual allegations contained in Paragraph 1.1 of the Complaint.

1.2 Defendant admits that Plaintiff seeks to represent a putative collective of Defendant’s current and former leasing agents or those with similar titles. Defendant denies, however, any violation of the FLSA or any other law, denies that such a putative collective should be certified, and denies the remaining factual allegations contained in Paragraph 1.2 of the Complaint.

1.3 Defendant admits that Plaintiff seeks a jury trial, but denies that all matters alleged in the Complaint may be tried to a jury.

II. PARTIES

2.1 Defendant admits that Plaintiff was employed by Defendant as a leasing agent. Defendant denies the remaining allegations in Paragraph 2.1 of the Complaint.

2.2 Defendant admits that Plaintiff seeks to represent a putative class of leasing agents, but denies that any such class should be certified or that Plaintiff is similarly situated to such a class.

2.3 Admit.

2.4 Defendant admits that Progress Residential Property Manager, LLC is engaged in interstate commerce with annual sales in excess of \$500,000, but denies the remaining allegations in Paragraph 2.4.

2.5 Defendant admits that Progress Residential Property Manager, LLC was Plaintiff's employer and it constitutes an enterprise engaged in commerce as defined in 29 U.S.C. §§ 203(r), 203(s), but denies the remaining allegations in Paragraph 2.5.

III. JURISDICTION AND VENUE

3.1 Admit.

3.2 Deny.

IV. FACTUAL BACKGROUND

4.1 Admit.

4.2 Deny.

4.3 Deny.

4.4 Deny.

4.5 Deny.

4.6 Deny.

4.7 Defendant admits that part of Plaintiff's job duties were to tend to prospective customers and showing homes for lease, but deny the remaining allegations in Paragraph 4.7.

4.8 Deny.

4.9 Deny.

4.10 Deny.

4.11 Deny.

4.12 Deny.

4.13 Deny.

4.14 Deny.

4.15 Deny.

4.16 Deny.

4.17 Deny.

4.18 Deny.

4.19 Deny.

4.20 Deny.

4.21 Deny.

4.22 Deny.

4.23 Deny.

V. COLLECTIVE ACTION ALLEGATIONS

5.1 Defendant admits that Plaintiff re-alleges the foregoing allegations in Plaintiff's Complaint, and Defendant re-alleges the foregoing allegations in its Answer.

5.2 Deny.

5.3 Deny.

5.4 Defendant admits that Plaintiff brings this case as an "opt-in" collection action pursuant to §216(b), but denies that any certification is appropriate.

5.5 Defendant admits that Plaintiff brings this case on behalf of herself and all others similarly situated, but denies that any similarly situated individuals exist and further denies that any certification is appropriate.

5.6 Deny.

5.7 Deny.

5.8 Defendant admits that Plaintiff seeks to represent those who are similarly situated who provide a consent to join, but denies that any similarly situated individuals exist and further denies that any certification is appropriate.

5.9 Defendant denies that any class should be certified or that appropriate opt-ins exist.

5.10 Deny.

VI. COUNT 1 – VIOLATIONS OF THE FLSA

6.1 Defendant admits that Plaintiff re-alleges the foregoing allegations in Plaintiff's Complaint, and Defendant re-alleges the foregoing allegations in its Answer.

6.2 Deny.

6.3 Deny.

6.4 Deny.

6.5 Deny.

6.6 Deny.

6.7 Deny.

6.8 Deny.

6.9 Deny.

VII. JURY DEMAND

7.1 Defendant admits that Plaintiff demands a jury trial for those issue subject to trial by jury.

PRAYER

Defendant is not required to respond to Plaintiff's Prayer; however, to the extent the Prayer asserts factual allegations, Defendant denies each and every allegations therein.

DEFENSES AND AFFIRMATIVE DEFENSES

1. Pleading further, and to the extent necessary, Plaintiff's claims are barred in whole or in part by the following defenses and/or affirmative defenses, each of which are offered in the alternative and to the extent applicable:

2. Plaintiff has failed to state a claim upon which relief can be granted.

3. Unless an allegation is expressly admitted, it is denied.

4. Plaintiff's claims cannot be maintained as a collective action under the FLSA because Plaintiff is not similarly situated to the other members of the putative collective she purports to represent, the existence of which is expressly denied; and, therefore, Plaintiff is an inadequate representative of the putative collective members.

5. Plaintiff's action cannot be maintained as a collective action because the requirements for such an action cannot be met under the facts pleaded.

6. Plaintiff's action cannot be maintained as a collective action because the allegations, facts, and defenses relating to Plaintiff and the putative class separately and individually will not support a collective action.

7. Defendant requests that Plaintiff and/or members of the putative collective she purports to represent specifically plead the amount of damages they are seeking.

8. Plaintiff lacks standing to raise some or all of her claims and/or the claims of the members of the putative collective they purport to represent against Defendant.

9. Plaintiff and/or members of the putative collective she purports to represent are precluded from recovering any amounts from Defendant where it paid Plaintiff and/or members of the putative class all sums legally due under the FLSA.

10. The Complaint is barred because Plaintiff and/or all or some members of the putative collective she purports to represent are exempt from the overtime requirements of the FLSA under the following exemptions, each of which are pled in the alternative and to the extent applicable:

A. Administrative Exemption. Plaintiff was employed in a *bona fide* administrative capacity. Their primary duty was the performance of non-manual or office work which was directly related to Defendant's and/or its customers' management and/or general business operations. Plaintiff's primary duty included the exercise of discretion and independent judgment with respect to matters of significance. Plaintiff was compensated in such a way as to qualify for this exemption.

B. Executive Exemption. Plaintiff's primary duties were managing Defendant's enterprise or a customarily recognized subdivision of Defendant's enterprise. Additionally, Plaintiff customarily and regularly directed the work of at least two or more full time employees or their equivalent. Plaintiff's suggestions and recommendations as to the hiring, firing, advancement, promotion, or other change of statuses of other employees were given particular weight. Plaintiff was compensated in such a way as to qualify for this exemption.

C. Combination Exemption. Plaintiff's employment met a combination of factors from the above two exemptions such that they were exempt from the FLSA's overtime requirements.

D. Outside Sales Exemption. Plaintiff was employed in a capacity of an outside salesperson. Their primary duty was to make sales or obtain orders for services or to lease premises for which consideration will be paid by customers. Plaintiff also was

regularly and customarily engaged away from Defendant's place of business in performing their primary duties.

E. Retail Sales Exemption. Plaintiff was employed in a capacity of a retail salesperson at Defendant's retail establishment and was paid in excess of one and one-half times the applicable minimum wage. Additionally, Plaintiff earned the requisite amount of commissions.

11. Because liability and/or damages, if any, to Plaintiff and each member of the putative collective she purports to represent may not be determined by a single jury and/or on a group-wide basis, allowing this action to proceed as a collective action would violate Defendant's rights under, without limitation, under the Seventh and Fourteenth Amendments to the United States Constitution.

12. Some or all of the disputed time for which Plaintiff and/or members of the putative collective she purports to represent seek recovery of wages allegedly owed are not compensable pursuant to the *de minimis* doctrine.

13. Plaintiff's claims and/or the claims of the members of the putative collective she purports to represent are barred by the provisions of the Portal-to-Portal Act, 29 U.S.C. § 254, as to all hours in which they were engaged in activities that were preliminary and/or postliminary to their principal activities.

14. Plaintiff's claims and/or the claims of the members of the putative collective she purports to represent are barred by the doctrine of unclean hands.

15. Plaintiff's claims and/or the claims of the members of the putative collective she purports to represent are barred by the applicable statutes of limitation governing commencement of suit and/or recovery of relief of any nature, legal or equitable, or otherwise available under the

FLSA, including, without limitation, unpaid overtime wages, liquidated damages, prejudgment interest, and attorneys' fees and costs.

16. Plaintiff's claims and/or the claims of the members of the putative collective she purports to represent are barred to the extent that such relief exceeds that available under the statutes and/or regulations under which they bring suit.

17. Plaintiff's claims and/or the claims of the members of the putative collective she purports to represent are subject to setoff, offset, and/or recoupment for overpayments made to Plaintiff.

18. Defendant's actions were not intentionally or willfully devised, nor did they operate to violate the requirement of the statutes and/or regulations at issue.

19. Defendant's actions were not undertaken with reckless disregard for the requirements of the statutes and/or regulations at issue.

20. All actions or omissions, if any, were in good faith and based on good cause and on reasonable grounds for believing that Defendant was complying with the FLSA.

21. Plaintiff's claims and/or the claims of the members of the putative collective she purports to represent are barred because Defendant has at all times acted reasonably and in good faith.

22. Plaintiff's claims and/or the claims of the members of the putative collective she purports to represent are barred by the doctrine of estoppel, res judicata, claim preclusion, and/or the law of the case.

23. Plaintiff's claims and/or the claims of the members of the putative collective she purports to represent are barred by the doctrine of laches.

24. The Complaint and each and every purported cause of action contained therein is barred to the extent Plaintiff or the members of the putative collective she purports to represent consented to the alleged conduct of which they complain.

25. All or part of the time for which Plaintiff or the putative collective members she purports to represent seek compensation does not constitute compensable working time under the law.

26. Defendant gives notice that it intends to rely on such other defenses and affirmative defenses as may become available or apparent during the course of discovery in this case. Defendant reserves the right to amend its Answer; to add additional affirmative or other defenses; to delete or withdraw affirmative or other defenses; and to add such counterclaims as may become necessary after a reasonable opportunity for discovery.

WHEREFORE, Defendant respectfully prays that on trial or other appropriate hearings, the Court grant a take nothing judgment in favor of Defendant and dismiss all of Plaintiff's causes of action with prejudice. Defendant further seeks any other relief, including attorneys' fees where applicable, to which it shows itself to be justly entitled.

Dated: January 23, 2017

JACKSON LEWIS P.C.

/s/ William R. Stukenberg
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**ATTORNEY-IN-CHARGE FOR DEFENDANT,
PROGRESS RESIDENTIAL PROPERTY
MANAGER, LLC**

CERTIFICATE OF SERVICE

I certify that if I filed *Defendant's Original Answer, Defenses, and Affirmative Defenses to Plaintiff's Original Collective Action Complaint* in accordance with the protocols for e-filing through the CM/ECF system in the United States District Court for the Southern District of Texas, Galveston Division, on January 23, 2017, and therefore the document has been served upon the counsel for Plaintiff in accordance with such e-filing protocols:

Rhonda H. Wills
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1776 Yorktown, Suite 570
Houston, Texas 77056

/s/ William Stukenberg
William Stukenberg