

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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	:
KYLE PIPPINS and JAMIE SCHINDLER, Individually	:
and On Behalf of All Others Similarly Situated,	:
	:
Plaintiffs,	:
	:
-against-	:
	:
KPMG LLP,	:
	:
Defendant.	:
	:
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11 CV 0377 (CM)(JLC)

ANSWER TO COLLECTIVE ACTION COMPLAINT

KMPG LLP (“KPMG”), by its undersigned counsel, Sidley Austin LLP, respectfully submits this Answer in response to the Complaint filed on or about January 19, 2011 in this matter (the “Complaint”) by plaintiffs Kyle Pippins and Jamie Schindler, and avers as follows:

1. Admits the allegations contained in Paragraph 1 of the Complaint, except denies that KPMG is the U.S.-member firm of KPMG International, and avers that KPMG is the U.S. member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative, a Swiss entity
2. Denies the allegations contained in Paragraph 2 of the Complaint, except admits that Plaintiffs worked for KPMG as Audit Associates.
3. Denies the allegations contained in Paragraph 3 of the Complaint.
4. Denies the allegations contained in Paragraph 4 of the Complaint.
5. Denies the allegations contained in Paragraph 5 of the Complaint.

6. Denies the allegations contained in Paragraph 6 of the Complaint, except admits that Plaintiffs purport to bring this action on behalf of themselves and current and former KPMG Audit Associates whom KPMG classified as exempt and who elect to opt-in to this action pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* and 29 U.S.C. § 216(b).

7. Admits the allegations contained in Paragraph 7 of the Complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegations concerning Plaintiff's residency.

8. Admits the allegations contained in Paragraph 8 of the Complaint.

9. Admits the allegations contained in Paragraph 9 of the Complaint.

10. States that Paragraph 10 contains a legal conclusion as to which no response is required, and, to the extent it requires a response, denies the allegations contained in Paragraph 10 of the Complaint.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 of the Complaint.

12. Admits the allegations contained in Paragraph 12 of the Complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegations concerning Plaintiff's residency.

13. Admits the allegations contained in Paragraph 13 of the Complaint.

14. Admits the allegations contained in Paragraph 14 of the Complaint.

15. States that Paragraph 15 contains a legal conclusion as to which no response is required, and, to the extent it requires a response, denies the allegations contained in Paragraph 15 of the Complaint.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint.

17. Denies the allegations contained in Paragraph 17 of the Complaint, except admits that throughout the relevant period, KPMG had the right to control, oversee, and direct its employees (including Plaintiffs), including the payroll and other employment practices that applied to them.

18. Admits the allegations contained in Paragraph 18 of the Complaint.

19. Admits the allegations contained in Paragraph 19 of the Complaint.

20. Denies the allegations contained in Paragraph 20 of the Complaint.

21. Denies the allegations contained in Paragraph 21 of the Complaint, except admits that KPMG hired approximately 3,682 recent graduates.

22. Admits the allegations contained in Paragraph 22 of the Complaint.

23. States that Paragraph 23 contains a legal conclusion as to which no response is required, and, to the extent it requires a response, denies the allegations contained in Paragraph 23 of the Complaint, except admits that KPMG employed Plaintiffs.

24. Admits the allegations contained in Paragraph 24 of the Complaint.

25. Admits the allegations contained in Paragraph 25 of the Complaint.

26. Denies the allegations contained in Paragraph 26 of the Complaint, except admits that Audit Associates do not receive overtime throughout the United States, and avers that such employees are exempt from overtime requirements.

27. Admits the allegations contained in Paragraph 27 of the Complaint.

28. States that Paragraph 28 contains legal conclusions as to which no response is required, and, to the extent it requires a response, denies the allegations contained in Paragraph 28 of the Complaint.

29. States that Paragraph 29 contains legal conclusions as to which no response is required, and, to the extent it requires a response, denies the allegations contained in Paragraph 29 of the Complaint.

30. Admits the allegations contained in Paragraph 30 of the Complaint.

31. Admits the allegations contained in Paragraph 31 of the Complaint.

32. States that Paragraph 32 contains legal conclusions as to which no response is required, and, to the extent it requires a response, admits the allegations contained in Paragraph 32 of the Complaint and specifically avers that Plaintiffs are not entitled to any such declaratory judgment.

33. States that Paragraph 33 contains legal conclusions as to which no response is required, and, to the extent it requires a response, admits the allegations contained in Paragraph 33 of the Complaint, except denies that a substantial part of the events or omissions giving rise to the claim occurred in this district.

34. Denies the allegations contained in Paragraph 34 of the Complaint, except admits that Plaintiffs purport to bring FLSA claims on behalf of themselves and other persons, and specifically avers that collective treatment is not proper.

35. Denies the allegations contained in Paragraph 35 of the Complaint.

36. Denies the allegations contained in Paragraph 36 of the Complaint, except admits that, to the extent that Plaintiffs and potential collective opt-in plaintiffs performed

work assigned by KPMG and recorded their time performing such work, KPMG was aware of such work.

37. Denies the allegations contained in Paragraph 37 of the Complaint.

38. Denies the allegations contained in Paragraph 38 of the Complaint, except admits that Audit Associates have been classified as exempt from the overtime provisions of the FLSA.

39. Admits the allegations contained in Paragraph 39 of the Complaint.

40. Denies the allegations contained in Paragraph 40 of the Complaint, and avers that it paid Audit Associates on a salary basis.

41. Denies the allegations contained in Paragraph 41 of the Complaint.

42. Denies the allegations contained in Paragraph 42 of the Complaint.

43. Denies the allegations contained in Paragraph 43 of the Complaint.

44. Denies the allegations contained in Paragraph 44 of the Complaint.

45. Denies the allegations contained in Paragraph 45 of the Complaint.

46. Denies the allegations contained in Paragraph 46 of the Complaint.

47. Denies the allegations contained in Paragraph 47 of the Complaint, except admits that Plaintiffs were classified as exempt.

48. Denies the allegations contained in Paragraph 48 of the Complaint.

49. Denies the allegations contained in Paragraph 49 of the Complaint.

50. Denies the allegations contained in Paragraph 50 of the Complaint.

51. Denies the allegations contained in Paragraph 51 of the Complaint, except admits that Pippins sometimes worked more than 40 hours per week and, on one occasion, worked more than 65 hours in one week.

52. Denies the allegations contained in Paragraph 52 of the Complaint, except admits that Pippins was classified as exempt.

53. Admits the allegations contained in Paragraph 53 of the Complaint, except denies that there is a position at KPMG titled “Audit Associate Second”.

54. Admits the allegations contained in Paragraph 54 of the Complaint, except denies that there is a position at KPMG titled “Audit Associate Second”.

55. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 55 of the Complaint, and avers that KPMG maintained records of the hours recorded by Pippins (albeit for purposes other than calculating overtime) and that any inaccuracy in KPMG’s records was the result of Pippins’ own conduct.

56. Denies the allegations contained in Paragraph 56 of the Complaint.

57. Denies the allegations contained in Paragraph 57 of the Complaint, except admits that Schindler sometimes worked more than 40 hours per week.

58. Denies the allegations contained in Paragraph 58 of the Complaint, except admits that Schindler was classified as exempt.

59. Admits the allegations contained in Paragraph 59 of the Complaint.

60. Admits the allegations contained in Paragraph 60 of the Complaint.

61. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 61 of the Complaint, and avers that KPMG maintained records of the hours recorded by Schindler (albeit for purposes other than calculating overtime) and that any inaccuracy in KPMG’s records was the result of Schindler’s own conduct.

RESPONSE TO FIRST CAUSE OF ACTION

62. In response to Paragraph 62 of the Complaint, KPMG repeats and realleges its responses contained in Paragraphs 1 through 61 of the Answer, as if fully contained herein.

63. Denies the allegations contained in Paragraph 63 of the Complaint.

64. Denies the allegations contained in Paragraph 64 of the Complaint, except to the extent the allegations state conclusions of law as to which no answer is required, and admits that KPMG engaged in commerce.

65. Denies the allegations contained in Paragraph 65 of the Complaint, except to the extent the allegations state conclusions of law as to which no answer is required, and admits that KPMG is generally subject to the FLSA.

66. Denies the allegations contained in Paragraph 66 of the Complaint, except to the extent the allegations state conclusions of law as to which no answer is required, and admits that KPMG is an employer and is engaged in commerce.

67. Denies the allegations contained in Paragraph 67 of the Complaint, except to the extent the allegations state conclusions of law as to which no answer is required, and admits that Plaintiffs were employees of KPMG.

68. Denies the allegations contained in Paragraph 68 of the Complaint, except to the extent the allegations state conclusions of law as to which no answer is required, and admits that Plaintiffs were employees of KPMG.

69. Denies the allegations contained in Paragraph 69 of the Complaint, and specifically avers that Plaintiffs and other Audit Associates are/were not entitled to overtime pay under the FLSA.

70. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 70 of the Complaint, and avers that KPMG maintained

records of the hours recorded by Plaintiffs and other Audit Associates (albeit for purposes other than calculating overtime) and that any inaccuracy in KPMG's records was the result of Plaintiffs' own conduct or the conduct of the other Audit Associates.

71. Denies the allegations contained in Paragraph 71 of the Complaint.

72. Denies the allegations contained in Paragraph 72 of the Complaint.

73. Denies the allegations contained in Paragraph 73 of the Complaint, except to the extent the allegations state conclusions of law as to which no answer is required.

74. Denies the allegations contained in Paragraph 74 of the Complaint, and specifically avers that Plaintiffs and other Audit Associates have not been damaged by KPMG's conduct in any matter or amount.

DEFENSES AND AFFIRMATIVE DEFENSES

FIRST DEFENSE

Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action against KPMG.

SECOND DEFENSE

Plaintiffs' claims, and the claims of every person on whose behalf relief is sought, are barred in whole or in part by the applicable statute of limitations.

THIRD DEFENSE

Plaintiffs' claims, and the claims of every person on whose behalf relief is sought, are barred because Plaintiffs, and every other person on whose behalf relief is sought, are and were at all relevant times exempt from overtime and the other allegedly relevant provisions of the FLSA and applicable regulations promulgated thereunder pursuant to the professional, administrative, and/or executive exemptions, or a combination thereof.

FOURTH DEFENSE

Plaintiffs' claims, and the claims of every person on whose behalf relief is sought, are barred to the extent KPMG did not "suffer or permit" the alleged overtime work.

FIFTH DEFENSE

Plaintiffs, and every person on whose behalf relief is sought, are not entitled to any recovery under the FLSA to the extent the actions taken by KPMG were taken in good faith in conformity with and in reliance on a written administrative regulation, order, ruling, approval, or interpretation, and/or an administrative practice or enforcement policy, of the Department of Labor.

SIXTH DEFENSE

Plaintiffs, and every person on whose behalf relief is sought, are not entitled to any penalty award or liquidated damages under the FLSA because, at all times relevant herein, KPMG acted in good faith and had reasonable grounds for believing that it did not violate the FLSA.

SEVENTH DEFENSE

To the extent any damages were sustained under the FLSA by Plaintiffs or persons on whose behalf relief is sought, which is expressly denied by KPMG, such damages should be calculated in accordance with 29 C.F.R. § 778.114.

EIGHTH DEFENSE

Some or all of the disputed time is not compensable pursuant to the Portal-to-Portal Act of 1947.

NINTH DEFENSE

The Complaint, and each purported cause of action contained therein, is barred, in whole or in part, by the doctrine of res judicata and/or collateral estoppel as to Plaintiffs and every person on whose behalf relief is sought to the extent their claims have been adjudicated in prior proceedings.

TENTH DEFENSE

The Complaint, and each purported cause of action contained therein, is barred in whole or in part to the extent it has been settled, released, and/or is subject to an accord and satisfaction.

ELEVENTH DEFENSE

Any finding of liability under the Complaint would violate the Due Process Clauses of the Fourteenth Amendment to the United States Constitution because the standards of liability under the alleged statutes are unduly vague and subjective and permit retroactive, random, arbitrary and capricious punishment that serves no legitimate government interest.

TWELFTH DEFENSE

Plaintiffs' Complaint, to the extent it seeks liquidated damages or penalties, violates KPMG's right to procedural due process under the Fourteenth Amendment of the United States Constitution, and to substantive due process under the Fifth and Fourteenth Amendments of the United States Constitution, and fails to state a cause of action upon which exemplary, double or punitive damages or penalties may be awarded.

THIRTEENTH DEFENSE

This action does not meet the requirements for a collective action under federal law, and Plaintiffs cannot prosecute it on a collective basis.

FOURTEENTH DEFENSE

To the extent any damages were sustained by Plaintiffs or persons on whose behalf relief is sought, which is expressly denied by KPMG, such damages should be reduced in whole or in part to the extent they are subject to an offset, representing amounts improperly obtained from or owing to KPMG or which would constitute unjust enrichment of Plaintiffs or persons on whose behalf relief is sought.

FIFTEENTH DEFENSE

Plaintiffs, and persons on whose behalf relief is sought, cannot proceed in this action to the extent they have failed to satisfy the “opt-in” requirements of 29 U.S.C. § 216(b).

SIXTEENTH DEFENSE

Plaintiffs, and every person on whose behalf relief is sought, are not entitled to equitable relief because they have not suffered harm and will not suffer any imminent and irreparable harm as a result of any actions or conduct by KPMG and because they have an adequate remedy at law for any alleged injuries; any such injuries are expressly denied by KPMG.

SEVENTEENTH DEFENSE

Plaintiffs and other non-current employees on whose behalf relief is sought are not entitled to injunctive relief because they are not current KPMG employees.

EIGHTEENTH DEFENSE

The claims of Plaintiffs, or persons on whose behalf relief is sought, are barred to the extent they have been guilty of improper conduct connected to the matters alleged in the Complaint.

NINETEENTH DEFENSE

The Complaint is barred in whole or in part by the doctrine of laches.

TWENTIETH DEFENSE

The Complaint is barred, in whole or in part, by the doctrine of waiver.

TWENTY-FIRST DEFENSE

Plaintiffs, and persons on whose behalf relief is sought, by their own acts and omissions, are estopped from asserting some or all of their claims alleged in the Complaint and are barred from any recovery therefrom.

TWENTY-SECOND DEFENSE

The claims of Plaintiffs and persons on whose behalf relief is sought are barred to the extent any alleged injury to Plaintiffs or other persons on whose behalf relief is sought was a result of the conduct or omissions of Plaintiffs or others, including but not limited to a failure to properly perform their jobs.

KPMG reserves the right to allege additional defenses as they may become known and to amend its Answer accordingly.

WHEREFORE, KPMG respectfully requests that the Court enter a judgment:

- (1) dismissing the Complaint against KPMG in its entirety, with prejudice;
- (2) awarding KPMG its costs, expenses and attorneys fees incurred in defending this suit; and
- (3) granting such other and further relief that is just and proper.

Dated: New York, New York
April 4, 2011

SIDLEY AUSTIN LLP

By: /s/ Andrew W. Stern

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