

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO.: 0:24-cv-60657-LIEBOWITZ

PAUL KELLER and LORENZO
HERRING, individually and on behalf
of others similarly situated,

Plaintiffs,

vs.

VENUS CONCEPT USA, INC.,

Defendant.

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES

The defendant, Venus Concept USA, Inc. ("Defendant"), files this Answer and Affirmative Defenses to the Plaintiffs' First Amended Collective Action Complaint ("Complaint") filed by the plaintiffs, Paul Keller ("Keller") and Lorenzo Herring ("Herring")(collectively, "Plaintiffs").

ANSWER

1. Defendant admits that Plaintiffs have brought this action pursuant to the Fair Labor Standards Act ("FLSA"), but denies any violation thereof. Except as explicitly admitted, the allegations in paragraph 1 are denied.
2. Defendant admits that Plaintiffs have brought this action pursuant to the Fair Labor Standards Act ("FLSA"), but denies any violation thereof. Except as explicitly admitted, the allegations in paragraph 2 are denied.
3. Defendant is without knowledge regarding the allegations in paragraph 3.
4. Defendant admits that Keller worked as an FSE for Defendant from June 7, 2021 through March 15, 2023; otherwise denied.

5. Defendant is without knowledge regarding the allegations in paragraph 5.

6. Defendant admits that Lorenzo worked as an FSE for Defendant from April 26, 2021 through December 9, 2022; otherwise denied.

7. Admitted.

8. Denied.

9. Denied.

10. Denied.

11. Admitted.

12. Admitted.

13. Admitted.

14. Defendant is without knowledge regarding the allegations in paragraph 14 with regard to “the FSEs.”

15. Admitted.

16. Admitted.

17. Denied.

18. Admitted.

19. Admitted.

20. Denied as to “frequently.”

21. Defendant is without knowledge regarding the allegations in paragraph 21, which are therefore denied.

22. Denied.

23. Denied.

24. Admitted.

25. Admitted.
26. Admitted.
27. Admitted.
28. Denied that Plaintiffs or Putative Collective Members were entitled to overtime.
29. Admitted.
30. Admitted.
31. Admitted.
32. Denied.
33. Denied.
34. Denied.
35. Denied.
36. Admitted.
37. Denied.
38. Denied.
39. Denied.
40. Denied.
41. Admitted.
42. Defendant admits that some FSEs may have worked more than 40 hours in a workweek on one or more occasions; otherwise denied.
43. Admitted.
44. Denied.
45. Denied.
46. Denied, including all sub-parts.

FIRST CAUSE OF ACTION

47. Admitted.

48. Defendant admits that it is covered by the FLSA.

49. Denied.

50. Denied.

51. Defendant admits that it is covered by the FLSA.

52. Admitted.

53. Denied.

54. Admitted that Defendant did not keep records of start and end times of work time for Plaintiffs and Putative Collective Members; denied that the FLSA requires time records for exempt employees.

55. Denied that Defendant failed to post the required FLSA notices.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

62. Denied.

63. Denied.

64. Denied.

SECOND CLAIM FOR RELIEF

65. Defendant re-alleges and incorporates by reference its responses to paragraphs 2-

46 as though fully set forth herein.

66. Denied.

67. Denied.

68. Denied.

69. Denied as to Plaintiffs.

70. Denied.

71. Denied.

72. Denied.

73. Denied.

74. Denied.

75. Denied.

76. Denied.

77. Denied.

THIRD CLAIM FOR RELIEF

78. Defendant re-alleges and incorporates by reference its responses to paragraphs 2-46 and 65-77 as though fully set forth herein.

79. Denied as to Plaintiffs.

80. Denied.

81. Denied.

82. Denied.

83. Denied.

FOURTH CLAIM FOR RELIEF

84. Defendant re-alleges and incorporates by reference its responses to paragraphs 2-

46 and 65-83 as though fully set forth herein.

85. Denied.

86. Denied.

87. Denied.

88. Denied.

89. Denied.

90. Denied.

GENERAL DENIAL

Defendant denies all allegations not specifically admitted herein.

DEFENSES AND AFFIRMATIVE DEFENSES

1. Plaintiffs' complaint fails to state a claim against Defendant upon which relief may be granted.

2. Plaintiffs' claims are barred in whole or in part by exemptions provided in Section 13(a)(1) of the FLSA.

3. Every portion of the Plaintiffs' claims arising more than two years prior to the date upon which the complaint was filed is barred by the limitations period contained in Section 6 of the Portal-to-Portal Act, 29 U.S.C. § 255.

4. Plaintiffs' claims for liquidated damages are barred by the provisions of Section 11 of the Portal-to-Portal Act, because the acts or omissions complained of, which acts are specifically denied by Defendant, were done in good faith and with reasonable grounds for believing that the acts or omissions were not in violation of the FLSA.

5. Plaintiffs have been paid in full relative to their employment.

6. Plaintiffs' claims are barred by the provisions of Section 4 of the Portal-to-Portal

Act, 29 U.S.C. §254, as to all hours during which Plaintiffs were engaged in activities which were preliminary or postliminary to their principal activities.

7. Defendant did not violate the FLSA, willfully or otherwise.

8. Plaintiffs have not and cannot satisfy the requirements for proceeding in a collective action under the FLSA on behalf of themselves and all others similarly situated.

9. Plaintiffs' claims under California law may be barred by the applicable statutes of limitations.

10. Plaintiffs' claims under California law are barred in whole or in part because the work they performed falls within one or more of the exemptions provided by the California *Labor Code* and/or the California Industrial Welfare Commission's Wage Orders.

11. Plaintiffs claim for penalties pursuant to California *Labor Code* section 203 is barred because the wages Plaintiff claims were not paid upon termination were subject to a good faith dispute of fact or law as to whether such wages were owed.

12. Plaintiffs claim for penalties pursuant to California *Labor Code* section 203 is barred because Plaintiffs did not reside and did not work in California at the time of their respective terminations.

13. Plaintiffs' claim for unfair business practices is barred because they cannot show an injury to competition, as distinguished from injury to themselves, the existence of which Defendant expressly denies, and because they cannot show a deception upon the public.

14. Defendant is informed and believe and based on that information and belief allege that any finding of liability pursuant to California *Business and Professions Code* sections 17200, *et seq.*, would violate Due Process and Equal Protection Clauses of the United States and California Constitutions because the standards of liability under those statutes are unduly vague and

subjective.

15. Defendant's wage practices are not unlawful and/or unfair within the meaning of Section 17200 of the *Business and Professions Code*.

16. An award of civil penalties under California law in the circumstances of this case would constitute an excessive fine and otherwise would be in violation of Defendant's due process and other rights under the United States Constitution.

WHEREFORE, Defendant asserts that Plaintiffs should take nothing in this action, and that Defendant should recover its costs and reasonable attorneys' fees in this matter, together with such other relief as the Court deems just and proper.

Date: May 28, 2024.

Respectfully submitted,

By: /s/ Cathy M. Stutin

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CERTIFICATE OF SERVICE

I hereby certify that on **May 28, 2024**, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Cathy M. Stutin

Cathy M. Stutin

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