

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION (1)**

BRIAN SMITH; and ROSEANN  
MIRACOLA, SCOTTY POARCH, and MARK  
YOUNG, on behalf of themselves and those  
similarly situated,

Plaintiffs,

– vs. –

KELLOGG COMPANY and KELLOGG  
SALES COMPANY,

Defendants.

No. 1:18-cv-01341-PLM-RSK

District Judge Paul L. Maloney  
Magistrate Judge Ray Kent

**ANSWER AND AFFIRMATIVE AND  
OTHER DEFENSES OF KELLOGG COMPANY AND  
KELLOGG SALES COMPANY TO PLAINTIFFS' AMENDED COMPLAINT**

Defendants Kellogg Company and Kellogg Sales Company (collectively “Defendants” or “Kellogg”), in answer to Plaintiffs’ Amended Complaint, admits, denies, and alleges as follows:

1. This case is brought to remedy the failure of Defendant KELLOGG COMPANY and Defendant KELLOGG SALES COMPANY (collectively, “Kellogg”) to pay Plaintiffs and other employees who were required to visit retail stores and merchandise Kellogg products on shelves and displays and who were paid on a salary basis without compensation at the rate of time and one-half for all hours worked more than 40 in a workweek as required by the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*, including without limitation Retail Sales Representatives (“RSRs”), Territory Managers (“TMs”), Retail Sales Managers (“RSMs”), and Kellogg Sales Representatives (“KSRs”) (together referred to as “RSRs”).

**ANSWER:** Kellogg admits that Plaintiffs purport to proceed as set forth in Paragraph 1. Kellogg, however, denies that Plaintiffs or any putative class member has any valid cause of action or is entitled to any alleged unpaid compensation. To the contrary, Kellogg has fully and properly compensated Plaintiffs and the putative class, and denies all liability under the referenced statute.

2. Kellogg employed Smith from approximately April 2014 until August 2017. He began working as an RSR in approximately August 2014.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Kellogg Sales Company employed Smith during the referenced timeframe. Kellogg denies the remaining allegations contained in Paragraph 2.

3. Kellogg employed Miracola from approximately August 2001 until June 2016. She began working as an RSR in approximately 2003.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Kellogg Sales Company employed Miracola during the referenced timeframe. Kellogg denies the remaining allegations contained in Paragraph 3.

4. Kellogg employed Poarch from approximately July 2011 until November 2017 as an RSR.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Kellogg Sales Company employed Poarch during the referenced timeframe. Kellogg denies the remaining allegations contained in Paragraph 4.

5. Kellogg employed Young from June 2006 until March 2017. He began working as an RSR in approximately September 2007.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Kellogg Sales Company employed Young during part of the referenced timeframe. Kellogg denies the remaining allegations contained in Paragraph 5.

6. The job responsibilities of an RSR include loading product onto a cart; bringing product from backroom to the store floor; pulling, facing, and rotating product on the shelves; noting what inventory to bring out on the floor; organizing the back stock area; hanging signs on shelves; placing coupons on product; transferring product from shelf to display; building, relocating, and removing displays; recording inventory levels; in some cases replenishing inventory and processing returns; interacting with Kellogg personnel; and cleaning up trash and disposing of it.

**ANSWER:** Kellogg denies the allegations contained in Paragraph 6 because they are factually incorrect and misstate/mischaracterize the job responsibilities of the referenced position.

7. Smith, Miracola, Poarch, Young and the other RSRs regularly worked in excess of 40 hours in a week for which Kellogg did not pay them overtime premium wages.

**ANSWER:** Denied.

8. By the conduct described in this Complaint, Kellogg has violated the FLSA by failing to pay its employees proper overtime compensation. These violations arose out of Kellogg's company-wide policies and pattern or practice of violating wage and hour by not paying RSRs overtime premium pay at the rate of time and one-half the regular rate.

**ANSWER:** Denied.

9. Smith brings individual claims, and, Miracola, Poarch, and Young bring individual claims and representative claims to remedy these overtime violations. Miracola, Poarch, and Young bring FLSA claims as a nationwide collective action, on their own behalf and on behalf of other similarly situated employees, under 29 U.S.C. §§ 201 et seq., and specifically, the collective action provision, 29 U.S.C. § 216(b).

**ANSWER:** Kellogg admits that Plaintiffs purport to proceed as set forth in Paragraph 9. Kellogg, however, denies that Plaintiff Smith may bring individual claims in court because his claims must be arbitrated, and that by continuing to pursue his claims in court, he is breaching his contractual obligations. Kellogg further denies that any Plaintiff has standing and/or can satisfy the evidentiary prerequisites necessary to entitle them to pursue claims on a representative basis. Kellogg also denies that Plaintiffs or any putative collective action member has any valid cause of action or is entitled to any alleged unpaid compensation. To the contrary, Kellogg has fully and properly compensated Plaintiffs, and denies any and all liability under the referenced statutes.

10. This case seeks to compel Kellogg to pay Smith, Miracola, Poarch, Young, and similarly situated Plaintiffs all the wages it wrongfully withheld from them, plus damages under federal law, penalties, and fees and costs as prescribed by law.

**ANSWER:** Kellogg admits that Plaintiffs seek the relief sought as set forth in Paragraph 10. Kellogg, however, denies that Plaintiffs or any putative collective action member has any valid cause of action, is entitled to any alleged unpaid compensation, or is entitled to pursue such claims on a collective basis. To the contrary, Kellogg has fully and properly compensated Plaintiffs and the putative collective, and is not liable under the referenced statutes.

11. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337.

**ANSWER:** Denied as stated. Kellogg admits that this Court has subject matter jurisdiction over Plaintiffs' individual claims.

12. In addition, the Court has jurisdiction over the Smith's claims under the FLSA pursuant to 29 U.S.C. § 216(b). In addition, Plaintiffs herein attach their consents to joinder as Exhibits A-D.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Plaintiffs attach documents which they label "consent forms" as Exhibits A-D. Kellogg, however, denies that Plaintiffs' alleged "consent forms" are entitled to any legal effect at this time or that Plaintiffs are otherwise entitled to joinder. Kellogg also denies that Section 216(b) of the FLSA confers jurisdiction or that Plaintiff Smith may bring individual claims in court because his claims must be arbitrated and are in fact pending in arbitration. Kellogg further denies the allegations contained in Paragraph 12 to the extent they are conclusions of law to which no responsive pleading is required.

13. Upon information and belief, Kellogg is subject to personal jurisdiction in Nevada.

**ANSWER:** Kellogg denies the allegations contained in Paragraph 13. The allegation is a conclusion of law, the correctness of which is dependent on the specific Plaintiff(s) asserting the allegation.

14. Upon information and belief, Kellogg also is subject to personal jurisdiction in Michigan.

**ANSWER:** Kellogg denies the allegations contained in Paragraph 14 because they state a conclusion of law, the correctness of which may be dependent on the specific Plaintiff(s) asserting the allegation and/or the specific claims and/or factual basis for same.

15. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

**ANSWER:** Denied.

16. Venue is proper in the District of Nevada pursuant to 28 U.S.C. § 1391(b) and (c) because a substantial part of the events or omissions giving rise to the claim occurred in this District and Kellogg is subject to personal jurisdiction here.

**ANSWER:** Denied.

17. Kellogg has employed Smith and other RSRs in this District since at least 2007.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Kellogg Sales Company employed Smith in Nevada. Kellogg denies the remaining allegations contained in Paragraph 17.

18. Kellogg conducts business in the District of Nevada.

**ANSWER:** Admitted.

19. Venue is proper in the Western District of Michigan pursuant to 28 U.S.C. § 1391(b), (c), and (d) because Kellogg is subject to personal jurisdiction in Michigan, and because Kellogg's headquarters and principal place of business is located within the Western District of Michigan.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that its corporate headquarters and principal place of business is within the Western District of Michigan. Kellogg denies the remaining allegations contained in Paragraph 19 because they are conclusions of law to which no responsive pleading is required.

20. Brian Smith's written consent to be a party to this action is attached as Exhibit A.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Exhibit A purports to be Smith's written consent to join this action. Kellogg denies that it is in fact a valid consent to join.

21. Smith resides in North Las Vegas, Nevada.

**ANSWER:** Kellogg admits that its records reflect that Smith's last known address is in North Las Vegas, Nevada.

22. Smith was employed by Kellogg in Nevada from approximately April 2014 until August 2017. Smith worked for Kellogg as an RSR from approximately August 2014 until August 2017.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Smith was employed by Kellogg Sales Company and that his employment terminated in August 2017. Kellogg denies the remaining allegations contained in Paragraph 22.

23. Pursuant to Kellogg's policy and pattern or practice, Smith regularly worked more than 40 hours per week as an RSR for Kellogg's benefit without receiving overtime compensation at the rate of time and one-half his regular rate.

**ANSWER:** Denied.

24. Smith was engaged in commerce in his work for Kellogg.

**ANSWER:** Kellogg denies the allegation contained in Paragraph 24 because it is a conclusion of law to which no responsive pleading is required.

25. Roseann Miracola's written consent to be a party to this action was filed on October 23, 2017 as Docket number 76. It is attached hereto as Exhibit B.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Exhibit B purports to be Miracola's written consent to join this action, filed on October 23, 2017. Kellogg denies that it is in fact a valid consent to join.

26. Miracola resides in Colorado Springs, Colorado.

**ANSWER:** Kellogg admits that its records reflect that Miracola's last known address is in Colorado Springs, Colorado.

27. Miracola was employed by Kellogg in Colorado from approximately August 2001 to June 2016 as an RSR.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Miracola was employed by Kellogg Sales Company and that her employment terminated on or about June 2016. Kellogg denies the remaining allegations contained in paragraph 27.

28. Pursuant to Kellogg's policy and pattern or practice, Miracola regularly worked more than 40 hours per week as an RSR for Kellogg's benefit without receiving overtime compensation at the rate of time and one-half her regular rate.

**ANSWER:** Denied.

29. Miracola was engaged in commerce in her work for Kellogg.

**ANSWER:** Kellogg denies the allegation contained in Paragraph 29 because it is a conclusion of law to which no responsive pleading is required.

30. Scotty Poarch filed his written consent to sue in this action on August 10, 2017 as Docket number 18. It is attached hereto as Exhibit C.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Exhibit C purports to be Poarch's written consent to join this action, filed on August 10, 2017. Kellogg denies that it is in fact a valid consent to join.

31. Poarch resides in Lewisburg, Tennessee.

**ANSWER:** Kellogg admits that its records reflect that Poarch's last known address is in Lewisburg, Tennessee.

32. Poarch was employed by Kellogg in Tennessee from approximately July 2011 until November 2017 as an RSR.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Poarch was employed by Kellogg Sales Company and that his employment terminated on or about November 2017. Kellogg denies remaining allegations contained in paragraph 32.

33. Pursuant to Kellogg's policy and pattern or practice, Poarch regularly worked more than 40 hours per week as an RSR for Kellogg's benefit without receiving overtime compensation at the rate of time and one-half his regular rate.

**ANSWER:** Denied.

34. Poarch was engaged in commerce in his work for Kellogg.

**ANSWER:** Kellogg denies the allegation contained in Paragraph 34 because it is a conclusion of law to which no responsive pleading is required.

35. Mark Young filed his consent to sue in this action on December 22, 2017 as Docket number 93. It is attached hereto as Exhibit D.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Exhibit D purports to be Young's written consent to join this action, filed on December 22, 2017. Kellogg denies that it is in fact a valid consent to join.

36. Young resides in Champions Gate, Florida.

**ANSWER:** Kellogg admits that its records reflect that Young's last known address is in Champion Gate, Florida.

37. Young was employed by Kellogg in Florida from approximately June 2006 to March 2017. Young worked as an RSR from approximately September 2007 to March 2017.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Young was employed by Kellogg Sales Company and that his employment terminated in or about March 2017. Kellogg denies the remaining allegations contained in paragraph 37.

38. Pursuant to Kellogg's policy and pattern or practice, Young regularly worked more than 40 hours per week as an RSR for Kellogg's benefit without receiving overtime compensation at the rate of time and one-half his regular rate.

**ANSWER:** Denied.

39. Young was engaged in commerce in his work for Kellogg.

**ANSWER:** Kellogg denies the allegation contained in Paragraph 39 because it is a conclusion of law to which no responsive pleading is required.

40. The term "Plaintiffs" as used in this Complaint refers to Miracola, Poarch, Young, and any additional represented class members pursuant to the collective action provision of 29 U.S.C. § 216(b), as well as Smith.

**ANSWER:** The allegation contained in Paragraph 40 states a definition to which no responsive pleading is required and Kellogg therefore denies it.

41. Miracola, Poarch, and Young bring FLSA claims on behalf of themselves and the "FLSA Collective Action Class" defined as:

All persons who have worked for Kellogg between three years prior to the filing of this case and the date of final judgment in this matter and were required to visit retail stores and merchandise Kellogg

products on retail store shelves and displays and were paid on a salary basis without compensation at the rate of time and one-half for all hours worked more than 40 in a workweek. Job positions within this class include without limitation RSRs (Retail Sales Representatives), TMs (Territory Managers), KSRs (Kellogg Sales Representatives), and RSMs (Retail Sales Managers)

**ANSWER:** Kellogg admits that Plaintiffs purport to proceed as set forth in Paragraph 41.

Kellogg denies, however, that Plaintiffs or any putative collective action member has any valid cause of action, is entitled to any alleged unpaid compensation, and/or that they are legally entitled to pursue such claims on a collective action basis.

42. Miracola, Poarch, and Young bring this case as a collective action for class members throughout the United States as defined in the preceding paragraph, under the collective action provision of the FLSA as set forth in 29 U.S.C. § 216(b).

**ANSWER:** Kellogg admits that Plaintiffs purport to proceed as set forth in Paragraph 42.

Kellogg denies, however, that Plaintiffs or any putative collective action member has any valid cause of action, is entitled to any alleged unpaid compensation, and/or that they are legally entitled to pursue such claims on a collective basis under the federal Fair Labor Standards Act (“FLSA”).

43. Kellogg is liable under the FLSA for failing to properly compensate Miracola, Poarch, Young, and the FLSA Collective Action Class. Upon information and belief, there are many similarly situated current and former employees of Kellogg who have been underpaid in violation of the FLSA who would benefit from the issuance of a court-supervised notice of the present lawsuit and the opportunity to join the present lawsuit. Those similarly situated employees are known to Kellogg, are readily identifiable, and can be located through Kellogg’s records. Notice should be sent to the FLSA Collective Action Class pursuant to 29 U.S.C. § 216(b).

**ANSWER:** Denied.

44. Defendant Kellogg Company is a publicly held company.

**ANSWER:** Admitted.

45. Defendant Kellogg Company and its subsidiaries are engaged in the manufacturing and marketing of ready-to-eat cereal and convenience foods.

**ANSWER:** Admitted.

46. Defendant Kellogg Company's headquarters are located at One Kellogg Square, P.O. Box 3599, Battle Creek, Michigan 49016-3599.

**ANSWER:** Admitted.

47. Defendant Kellogg Sales Company is a subsidiary of Defendant Kellogg Company.

**ANSWER:** Admitted.

48. Upon information and belief, Defendant Kellogg Sales Company's headquarters are located at One Kellogg Square, P.O. Box 3599, Battle Creek, Michigan 49016-3599.

**ANSWER:** Admitted.

49. Plaintiff Smith performed work on behalf of Kellogg in Nevada.

**ANSWER:** Denied as stated. Kellogg admits that Smith worked on behalf of Kellogg Sales Company in Nevada and elsewhere.

50. Plaintiff Miracola performed work on behalf of Kellogg in Colorado.

**ANSWER:** Denied as stated. Kellogg admits that Miracola worked on behalf of Kellogg Sales Company in Colorado and elsewhere.

51. Plaintiff Poarch performed work on behalf of Kellogg in Tennessee.

**ANSWER:** Denied as stated. Kellogg admits that Poarch worked on behalf of Kellogg Sales Company in Tennessee and elsewhere.

52. Plaintiff Young performed work on behalf of Kellogg in Florida.

**ANSWER:** Denied as stated. Kellogg admits that Young worked on behalf of Kellogg Sales Company in Florida and elsewhere.

53. Upon information and belief, Kellogg Company and Kellogg Sales Company individually and collectively grossed more than \$500,000 in each of the last ten calendar years.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Kellogg Sales Company gross more than \$500,000 in each of the last ten calendar years. Kellogg denies the remaining allegations contained in paragraph 53.

54. Kellogg Company and Kellogg Sales Company individually and collectively are an enterprise engaged in interstate commerce for the purposes of the FLSA.

**ANSWER:** Kellogg denies the allegations contained in Paragraph 54 because they state conclusions of law to which no response is required.

55. Kellogg employed Smith, Miracola, Poarch, Young, and members of the FLSA Collective Action Class, and Kellogg participated directly in employment decisions regarding the rights for which Smith, Miracola, Poarch, Young, and the FLSA Collective Action Class Plaintiffs seek redress in this case. All actions and omissions described in this Complaint were made willfully by Kellogg directly or through its supervisory employees and agents.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that Kellogg Sales Company employed the Named Plaintiffs. Kellogg denies the remaining allegations contained in Paragraph 55 either because they state conclusions of law to which no responsive pleading is required or because they are factually incorrect, or both.

56. Smith was employed by Kellogg in Nevada from approximately April 2014 to August 2017. He worked for Kellogg as an RSR from approximately August 2014 to August 2017.

**ANSWER:** Paragraph 56 contains the identical allegations to paragraph 22. Kellogg therefore incorporates its responsive pleading to paragraph 22 in response to paragraph 56.

57. Miracola was employed by Kellogg in Colorado from approximately August 2001 to June 2016 as an RSR.

**ANSWER:** Paragraph 57 contains the identical allegations to paragraph 27. Kellogg therefore incorporates its responsive pleading to paragraph 27 in response to paragraph 57.

58. Poarch was employed by Kellogg in Tennessee from approximately July 2011 until November 2017 as an RSR.

**ANSWER:** Paragraph 58 contains the identical allegations to paragraph 32. Kellogg therefore incorporates its responsive pleading to paragraph 32 in response to paragraph 58.

59. Young was employed by Kellogg in Florida from June 2006 until March 2017. He worked for Kellogg as an RSR from approximately September 2007 until March 2017.

**ANSWER:** Paragraph 59 contains the identical allegations to paragraph 37. Kellogg therefore incorporates its responsive pleading to paragraph 37 in response to paragraph 59.

60. Kellogg employs RSRs throughout the country.

**ANSWER:** Denied.

61. RSRs, including Smith, Miracola, Poarch, and Young, are responsible for loading product onto a cart; bringing product from backroom to the sales floor; pulling, facing, and rotating product on the shelves; noting what inventory to bring out on the floor; organizing the back stock area; hanging signs on shelves; placing coupons on product; transferring product from shelf to display; building, relocating, and removing displays; recording inventory levels; in some cases replenishing inventory and processing returns; interacting with Kellogg personnel; cleaning up the trash and disposing of it.

**ANSWER:** Denied.

62. Kellogg established the job responsibilities for Smith, Miracola, Poarch, Young, and other RSRs.

**ANSWER:** Admitted in part; denied in part. Kellogg admits that it established the job responsibilities for the positions that it hired Plaintiffs to fill. Kellogg denies the remaining allegations contained in Paragraph 62.

63. Kellogg regularly studies RSRs' job performance and responsibilities.

**ANSWER:** Denied.

64. Kellogg uses its regular studies of RSR job performance to model RSR workloads.

**ANSWER:** Denied.

65. Upon information and belief, job responsibilities for Smith, Miracola, Poarch, Young, and other RSRs were and are jointly established, controlled, and implemented by Kellogg Company and Kellogg Sales Company.

**ANSWER:** Denied.

66. Upon information and belief, the method by which Smith, Miracola, Poarch, Young, and other RSRs were paid was established jointly by Kellogg Company and Kellogg Sales Company.

**ANSWER:** Denied.

67. Kellogg did not pay Smith, Miracola, Poarch, Young, and other RSRs overtime premium pay at the rate of time and one-half the regular rate for all hours worked more than forty in a work week. For example, (a) Kellogg failed to pay Smith overtime wages for work during the weeks of March 20, 2017 to April 2, 2017, during which Smith worked in excess of forty hours per week; (b) Kellogg failed to pay Miracola overtime wages for work during the weeks of March 21, 2016 to April 3, 2016, during which Miracola worked in excess of forty hours per week; (c) Kellogg failed to pay Poarch overtime wages for work during the weeks of November 14, 2016 to November 27, 2016, during which Poarch worked in excess of forty hours per week; (d) Kellogg failed to pay Young overtime wages for work during the weeks of February 6, 2017 to February 19, 2017, during which Young worked in excess of forty hours per week. See redacted paystubs attached hereto as Exhibits E-H, respectively.

**ANSWER:** Denied. At all times, Kellogg paid Plaintiffs all compensation to which they were entitled.

68. Kellogg failed to record daily work start and stop times, and failed to record daily and weekly hours worked by Smith, Miracola, Poarch, Young, and other RSRs.

**ANSWER:** Kellogg denies that they “failed” to record any such start and stop times, as the law does not require Kellogg to do so in the first instance. Kellogg denies the remaining allegations contained in Paragraph 68

69. Kellogg records the daily start and stop times and the daily and weekly hours worked by other non-exempt employees.

**ANSWER:** Denied. Kellogg admits that it tracks the hours worked of non-exempt employees.

70. The hours worked by Smith are discernible through Kellogg’s records and/or testimony. The hours worked by Miracola, Poarch, Young, and other RSRs are discernible through Kellogg’s records and/or representative testimony of the Plaintiffs.

**ANSWER:** Denied.

71. Kellogg’s failure to pay Smith, Miracola, Poarch, Young, and the Plaintiffs the proper wages required by law was willful.

**ANSWER:** Denied. Kellogg paid Plaintiffs the proper wages required by law.

### **FIRST CAUSE OF ACTION**

72. Smith re-alleges and incorporates by reference all allegations in all preceding paragraphs.

**ANSWER:** Paragraph 72 of Plaintiffs' Amended Complaint is an incorporation paragraph. As a result, Kellogg incorporates each and every one of its responses to the prior paragraphs by reference.

73. Kellogg did not compensate Smith at a rate of one and one-half times his regularly hourly rate for pay for all time worked in excess of forty (40) hours in individual workweeks.

**ANSWER:** Denied. Kellogg properly compensated Smith for all of his work.

74. Kellogg's failure to pay overtime premium wages to Smith is a violation of the FLSA, 29 U.S.C. §§ 201 et seq., and its implementing regulations.

**ANSWER:** Denied.

75. Kellogg's failure to pay proper wages to Smith for each hour worked more than 40 per week was willful within the meaning of the FLSA.

**ANSWER:** Denied.

76. As a result of Kellogg's violations of the FLSA, Smith has suffered damages by being denied overtime wages in accordance with the FLSA and is entitled to recovery of such amounts, as well as liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation pursuant to 29 U.S.C. § 201 et seq.

**ANSWER:** Denied.

## **SECOND CAUSE OF ACTION**

77. Miracola, Poarch, and Young re-allege and incorporate by reference all allegations in all preceding paragraphs.

**ANSWER:** Paragraph 77 of Plaintiffs' Amended Complaint is an incorporation paragraph. As a result, Kellogg incorporates each and every one of its responses to the prior paragraphs by reference.

78. Kellogg did not compensate Miracola, Poarch, Young, and the FLSA Collective Action Class at a rate of one and one-half times their regularly hourly rate for pay for all time worked in excess of forty (40) hours in individual workweeks.

**ANSWER:** Denied.

79. Kellogg's failure to pay overtime premium wages to Miracola, Poarch, Young, and the FLSA Collective Action Class is a violation of the FLSA, 29 U.S.C. §§ 201 et seq. and its implementing regulations.

**ANSWER:** Denied.

80. Kellogg's failure to pay proper wages to Miracola, Poarch, Young, and the FLSA Collective Action Class for each hour worked more than 40 per week was willful within the meaning of the FLSA.

**ANSWER:** Denied.

81. As a result of Kellogg's violations of the FLSA, Miracola, Poarch, Young, and the FLSA Collective Action Class have suffered damages by being denied overtime wages in accordance with the FLSA, and are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees, costs, and other compensation pursuant to 29 U.S.C. § 201 et seq.

**ANSWER:** Denied.

#### **AFFIRMATIVE AND OTHER DEFENSES**

1. To the extent Plaintiffs have failed to comply with the FLSA's applicable statute of limitations, their claims are barred in whole or in part.

2. The Amended Complaint, and each purported cause of action alleged therein, is barred in whole or in part to the extent any Plaintiffs lack standing to assert some or all of the purported causes of actions.

3. Plaintiffs' claims are barred to the extent that they seek duplicative relief or amounts seeking more than a single recovery.

4. Plaintiffs' purported claims and the claims they seek to assert on behalf of others are barred in whole or in part by the doctrine of laches.

5. Plaintiffs' purported claims and the claims they seek to assert on behalf of others are barred to the extent the doctrine of accord and satisfaction applies to limit their respective claims.

6. The Amended Complaint and each purported cause of action alleged therein is barred in whole or in part because Plaintiffs consented to and/or acquiesced in the conduct about

which they now complain.

7. Kellogg's actions related to Plaintiffs' compensation and the compensation of the alleged putative collective members were made in good faith and in conformity with, and reliance upon, the administrative regulations, orders, rulings or interpretations, and judicial interpretations of the Administrator of the Wage and Hour Division of the U.S. Department of Labor. Specifically, Plaintiffs (and all alleged putative collective action members) are not entitled to overtime compensation because they were exempt from the overtime provisions of the Fair Labor Standards Act under one or more exemptions, or combination of exemptions, including but not limited to, the outside sales exemption, the administrative exemption, and the executive exemption as they exist and are construed by relevant federal and/or state law.

8. Plaintiffs are not entitled to any equitable relief insofar as they have an adequate remedy at law and the FLSA does not authorize it.

9. Kellogg has not willfully failed to pay Plaintiffs (or any alleged putative collective member) any wages, and there is a bona fide, good faith dispute with respect to the Company's obligation to pay any wages that may be found to be due and as such, neither liquidated, punitive nor exemplary damages should be awarded. Moreover, only the FLSA's two-year statute of limitations should apply.

10. Plaintiffs' claims are barred to the extent Plaintiffs and/or alleged similarly situated employees did not work more than forty (40) hours in any given work week and, therefore, are not entitled to overtime.

11. Plaintiffs and the members of the putative collective group are not similarly-situated.

12. Some or all of the purported causes of action in the Amended Complaint are subject to setoff, offset, and/or recoupment.

13. Plaintiffs failed to mitigate their losses, if any, and as a result of such failure, Plaintiffs' claims against Kellogg must be reduced, excused, and/or discharged.

14. Plaintiffs may not properly maintain this case as a collective action because: (1)

Plaintiffs failed to plead, and cannot establish, the necessary procedural elements for collective treatment; (2) a collective action is not an appropriate method for the fair and efficient adjudication of the claims described in the Amended Complaint; (3) common issues of fact or law do not predominate and, to the contrary, individual issues predominate; (4) Plaintiffs' claims are not representative or typical of the claims of the putative collective action members; (5) Plaintiffs are not similarly situated to the proposed collective group; (6) Plaintiffs cannot satisfy any of the requirements for collective action treatment, and collective action treatment is neither appropriate nor constitutional under the due process clause; (7) there is not a well-defined community of interest in the questions of law or fact affecting Plaintiffs and the members of the alleged putative collective group; and (8) to the extent that the alleged putative collective group is ascertainable and its members are identifiable, the number of putative class or collective action members is too small to meet the interest requirement for a collective action.

15. To the extent any members of the putative collective action have signed a release and/or waiver encompassing claims alleged in Plaintiffs' Amended Complaint, their claims are barred by that release and/or waiver.

16. The claims of Plaintiffs and the members of the putative collective action are barred in whole or part by the doctrines of *res judicata*, issue preclusion, and/or claim preclusion.

17. The claims of Smith and certain members of the putative class are the subjects of agreements to arbitrate; thus, these persons cannot proceed in court and must arbitrate their claims.

18. The Court lacks personal jurisdiction with respect to the claims of any out-of-state claimants. *Bristol-Myers Squibb Co. v. Superior Court of California*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1773 (2017).

19. The claims of Plaintiffs and the alleged putative collective action members are barred, in whole or in part, to the extent the specific facts and circumstances warrant application of the *de minimis* doctrine.

20. The adjudication of the claims of the putative collection group through

generalized group-wide proof violates Kellogg's rights to a trial by jury guaranteed by the United States.

21. Certification of a collective, as applied to the facts and circumstances of this case, would constitute a denial of Kellogg's procedural rights and right to trial by jury and to substantive and procedural due process, in violation of the Fourteenth Amendment of the United States Constitution.

22. Kellogg opposes class certification and disputes the propriety of collective action treatment. If the Court certifies a class in this case over Kellogg's objections, then Kellogg asserts the affirmative and other defenses set forth herein against each and every member of the certified class.

23. At this point, discovery in this action has not been completed, and, as such, Kellogg reserves the right to amend its answer as additional facts, issues or defenses may be discovered.

**WHEREFORE**, Kellogg requests that this Court dismiss Plaintiffs' Amended Complaint with prejudice; that it enter judgment in its favor and against Plaintiffs on all counts; that it deny Plaintiffs' request to allow this case to proceed as a collective and/or class action; and that this Court award Kellogg its costs and attorneys' fees incurred in defending this action and such other relief as it deems appropriate.

Dated: January 10, 2019

Respectfully submitted,

**GREENBERG TRAUIG, LLP**

s/ James N. Boudreau

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION (1)**

BRIAN SMITH; and ROSEANN  
MIRACOLA, SCOTTY POARCH, and MARK  
YOUNG, on behalf of themselves and those  
similarly situated,

Plaintiffs,

– vs. –

KELLOGG COMPANY and KELLOGG  
SALES COMPANY,

Defendants.

No. 1:18-cv-01341-PLM-RSK

District Judge Paul L. Maloney  
Magistrate Judge Ray Kent

**CERTIFICATE OF SERVICE**

I, Jim N. Boudreau, certify that on January 10, 2019, a copy of all papers contained in the foregoing *Answer and Affirmative and Other Defenses of Kellogg Company and Kellogg Sales Company to Plaintiffs' Amended Complaint* was served by electronic mail on the following:

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