

IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

FRANCISCO GOMEZ,  
and others similarly situated,

Plaintiff,

v.

Case No. 6:09-CV-576-Orl-31-GAP-GJK

UNITED FORMING, INC.,  
a Georgia corporation,

Defendant.

---

---

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR  
CONDITIONAL CERTIFICATION OF COLLECTIVE ACTION AND PERMISSION  
TO SEND COURT SUPERVISED NOTICE ADVISING SIMILARLY SITUATED  
INDIVIDUALS OF THEIR OPT-IN RIGHTS PURSUANT TO 29 U.S.C. § 216(B)

---

By:

Mary Anne Ackourey  
Florida Bar No. 0041459  
Benton J. Mathis, Jr.

*Pro Hac Vice*

Freeman Mathis & Gary, LLP  
100 Galleria Parkway, Suite 1600  
Atlanta, Georgia 30339-5948  
T: 770.818.0000  
F: 770.937.9960

[mackourey@fmglaw.com](mailto:mackourey@fmglaw.com)

[bmathis@fmglaw.com](mailto:bmathis@fmglaw.com)

Trial Counsel for the Defendant

COMES NOW, the Defendant in the above-styled civil action, and files this, its Response in Opposition to Plaintiffs' Motion for Conditional Certification of Collective Action and Permission to Send Court Supervised Notice Advising Similarly Situated Individuals of Their Opt-In Rights Pursuant To 29 U.S.C. § 216(b).

As discussed in more detail below, Plaintiffs seek certification of a Company-wide class of Laborers based on virtually identical declarations submitted by four of the Plaintiffs, only one of which was a Laborer. These four declarations are utterly devoid of any specific allegations, and they merely contain conclusory allegations that they were denied overtime and assert that unspecified others are interested in joining this lawsuit. For the reasons discussed below, Plaintiffs' request to certify a class of approximately 3,200 Laborers working at approximately 134 job sites in 10 states during the preceding three years based on the flimsy evidence submitted by Plaintiffs should be denied.

### **I. PROCEDURAL HISTORY**

Plaintiff Francisco Gomez filed this action on March 30, 2009 alleging that he was denied overtime pay. On April 27, 2009, Marcos Velasquez, Marcos Gomez, Jeronimo Gomez, Daniel Gomez, Alfonso Gomez, and Jose Romero filed consents to join the litigation as opt-in Plaintiffs. The opt-in Plaintiffs filed their responses to the Court's Interrogatories on April 30, 2009. All but one of the opt-in Plaintiffs verified the correctness of their responses to the Court's Interrogatories on January 16, 2008.<sup>1</sup> Plaintiffs filed the instant Motion for Conditional Class Certification on September 9, 2009. On September 16, 2009, four of the Plaintiffs submitted virtually identical declarations containing conclusory

---

<sup>1</sup> Opt-in Plaintiff Daniel Gomez verified his responses to the Court's Interrogatories on an undecipherable date in 2008.

allegations in support of Plaintiffs' Motion.

## II. BACKGROUND

### A. UFI's Management Structure And Operations In 10 States

UFI is a construction company providing concrete forming and other construction services. Its field operations currently are organized into four Districts: the North Carolina District, the Florida District, the Texas/Gulf Coast District and the Georgia District. Prior to 2009, UFI's field operations were organized into seven business units, including the North Carolina District, a Central Florida District, a South Florida District, a Gulf Coast District, the Georgia District, a Speciality Systems Division and a Texas District. In 2009, UFI consolidated the Georgia District and Speciality Division into the Georgia District, the Central Florida District and South Florida District into the Florida District and the Texas/Gulf Coast districts because of the current economic climate. (Declaration of Tim Wisner, ¶ 3, attached hereto as Exhibit 1.)

Each district has had generally the following management structure, depending on the number and size of the ongoing projects in that District during the preceding three years: A project will have one or more Foreman depending on the size and complexity of the project. A Foreman directs the work of a smaller group of employees. Each project has one or more Project Superintendents, and sometimes a Senior Superintendent (again depending on the size and complexity of the project) responsible for handling the day-to-day operations on the project. A General Superintendent typically oversees more than one project in each District, and an Operations Manager generally oversees all the operations on projects in a given District. Districts are led by District Managers that provide oversight of the District's sales

efforts and the general business of the District. These management positions have been filled by different employees at any given time. (Wiser Decl. ¶ 5.)

During the course of the last three years, UFI has had approximately 134 job sites and projects in 10 states, including Florida, Texas, North Carolina, Georgia, New Mexico, Virginia, South Carolina, Tennessee, Alabama and Oklahoma. (Id. at ¶ 4.) Between March 31, 2006 and March 31, 2009, there were approximately 3,835 current or former employees of UFI who held the position of “Carpenter,” including approximately 1,430 Carpenters in Florida. (Id. at ¶ 10.) During this same time period, there were approximately 3,197 current or former employees of UFI who held the position of “Laborer,” including approximately 895 Laborers in Florida. (Id.) The job duties of Laborers and Carpenters are substantially different. The work schedules of Laborers and Carpenters also will differ, depending on the size and complexity of a project, work schedule, and flow of work on any given project. (Id. at ¶ 12; Defendant’s Responses and Objections to Plaintiffs’ First Interrogatories, attached as Exhibit 2, p. 11.)

**B. UFI’s Decentralized Methods For Recording Time Worked By Hourly Employees**

The Company does not have a standard practice for the manner in which the time worked by hourly employees on projects is recorded. (Wiser Decl. ¶ 7.) The manner in which the time worked by hourly employees is recorded is generally determined by the General Superintendent or the Project Superintendent on a project-by-project basis. (Id.) Factors that are considered in determining the method to track the time worked by hourly employees include the size and complexity of the project and the preferences of the General or Project Superintendent. (Id.) Methods used on a project-by-project basis for tracking the

time worked by hourly employees include: (1) a foreman or crew chief keeping daily time books for the time worked by hourly employees; (2) a Project Superintendent's recording the time for hourly employees; and (3) utilizing employee sign-in sheets for hourly employees to record their time worked. (Id. at ¶ 8.)

**C. Plaintiffs Are All Related To Each Other**

As revealed in deposition testimony in connection with a personal injury lawsuit filed by three of the Plaintiffs, all of the Plaintiffs are related to each other. Plaintiff Marcos Velasquez is the father of Plaintiff Marcos Gomez and original Plaintiff Francisco Gomez. (Francisco Gomez Dep. pp. 5, 8-9; Jeronimo Gomez Dep. pp. 24-25.) (The cited excerpts of the transcripts of this deposition testimony are attached as Exhibit 3.) Plaintiffs Jeronimo Gomez and Daniel Gomez are cousins with original Plaintiff Francisco Gomez and Plaintiff Marcos Gomez. (Jeronimo Gomez Dep. pp. 10, 18-19; Daniel Gomez Dep. pp. 16-19.) Plaintiff Daniel Gomez also is cousins with Plaintiff Alfonso Gomez and Plaintiff Marcos Velasquez. (D. Gomez Dep. pp. 12, 17.) According to Plaintiff Jeronimo Gomez, Plaintiff Jose Romero also is "in his family." (J. Gomez Dep. p. 24.)

Furthermore, the information provided to the Company by the Plaintiffs reveal that all of the Plaintiffs lived at one of two addresses: 2927 Dover Lane, Lakeland, FL or 1715 Venus Street, Lakeland, FL. (Employment Applications, attached as Exhibit 4.)

**D. All But One Of The Plaintiffs Worked On The Grand Palisades Project As Carpenters**

In the fall of 2007, UFI was working on a large time share project referred to as Grand Palisades in Orlando, Florida. Due to the size and complexity of the Grand Palisades project, there were numerous Project Superintendents on that job and a Senior Project

Superintendent. Because of the size and complexity of the project, a General Superintendent worked exclusively on site on that project. (Wiser Decl. ¶ 6.)

Plaintiffs were hired by UFI in the fall of 2007 and worked exclusively on the Grand Palisades project until they were terminated on January 14, 2008 for an attendance violation. (Exhibit 2 pp. 13-15.) Plaintiffs Francisco Gomez, Daniel Gomez, Jeronimo Gomez, Marcos Gomez, Jose Romero, and Marcos Velasquez were employed in the position of Carpenter. (Id. at pp. 11, 13-15; Exhibit 4.) Their duties included putting walls together, securing them, and ensuring that they were in the proper location. (Exhibit 2 p. 11.) Their duties also included installing columns. (Id.) Plaintiff Alfonso Gomez was employed in the position of Laborer. (Id. at p. 11, 13-14; Exhibit 4.) His job duties included providing any necessary equipment to Carpenters installing walls and also tightening and securing the walls once they were installed. (Exhibit 2 p. 11) In addition, he would close the columns and provide any necessary equipment to the Carpenters. (Id.)

The six Plaintiffs who were Carpenters were paid at hourly rates ranging from \$13.00 per hour to \$16.00 per hour. (Id. at pp. 13-15.) Plaintiff Alfonso Gomez's rate of pay as a Laborer was \$11.00 per hour. (Id. at p. 13.)

**E. UFI Paid Plaintiffs For All Hours They Worked Based On Sign-In Sheets Signed By Plaintiffs**

The Carpenter and Laborer job classifications are hourly, non-exempt positions for which the Company paid overtime. (Exhibit 2 p. 5.) Plaintiffs were required to record their hours worked on sign-in sheets. (Id. at pp. 4, 6. See also Sign-In Sheets, attached as Exhibit 5.) Plaintiffs were required to record on the sign-in sheet the times they started and ended work that day and verify the actual hours they worked by signing their names. (Id.)

Chris Mumford, who was a Project Superintendent on the Grand Palisades project and Plaintiffs' supervisor at the time, generally oversaw the hours worked by Plaintiffs. (Id. at p. 4; Declaration of Chris Mumford, at ¶ 4-5, attached as Exhibit 6.) Matt Mathis, another Project Superintendent, typically ensured that Plaintiffs' time sheets were submitted from the Grand Palisades project to UFI's corporate office. (Exhibit 2 p. 4.) A Job Clerk typically calculated Plaintiffs' time in a spreadsheet format and transmitted the spreadsheet to the corporate office, where payroll was processed using an automated system. (Id. See also Time Sheets, attached Exhibit 7.) Plaintiffs were paid weekly, every Friday. (Exhibit 2 p. 6.) Any overtime paid to Plaintiffs was calculated at a rate of one and one-half times their regular hourly rate for compensable time worked in excess of forty (40) hours in a workweek. (Id.)

The total number of hours Plaintiffs worked was derived from the daily sign-in sheets that they completed and signed. (Exhibit 2 p. 6; Exhibits 6-7.) As set forth in UFI's Employee Handbook (attached as Exhibit 8), UFI takes all reasonable steps to ensure that employees receive the correct amount of pay in each paycheck and that employees are paid promptly on the scheduled payday. In the event there is an error in the amount of pay, employees are directed to promptly bring the discrepancy to the attention of their supervisor for review so that required corrections can be made as quickly as possible. (Exhibit 8.)

In fact, on limited occasions, due to clerical errors, a modest discrepancy existed between the number of overtime hours worked by and paid to some of the Plaintiffs. (Exhibit 2 pp. 6; Mumford Decl. ¶ 6.) Those Plaintiffs brought these modest discrepancies to the attention of Mr. Mumford or another supervisor. (Mumford Decl. ¶ 6.) In these instances, UFI reviewed the situation and paid the overtime pay owed as soon as practicable. (Id.;

Exhibit 2 p. 6.)

Neither Plaintiffs nor anyone else on Mr. Mumford's crew ever complained to him that UFI had a policy or practice of not paying overtime pay to employees. (Mumford Decl. ¶ 8.) Indeed, each of the Plaintiffs acknowledged in their responses to the Court's Interrogatories that they never complained to any UFI managers or supervisors that they were being denied overtime pay. (See Plaintiffs' Responses to Court's Interrogatories, ¶¶ 7-9, attached as Exhibit 9.) Yet Plaintiffs now claim that they worked an average of 20 hours of overtime per week and were not paid for this overtime. (Id. at ¶ 6.)

**F. The Absence Of Any Evidence That Other Laborers, Carpenters, Or Other Hourly Employees Were Denied Overtime Pay Or Desire To Join Class Action Suit**

Mr. Mumford is unaware of any current or former employees (other than Plaintiffs) who claim that they worked hours for which they were not paid, including overtime hours. (Mumford Decl. ¶ 9.) Mr. Mumford believes that all the employees on the crew he supervised, including Plaintiffs, were paid for all of the time they worked, including overtime. (Id. at ¶ 7.) Two supervisors who supervised other crews of Carpenters and/or Laborers on the Grand Palisades project likewise are unaware of any current or former employees (other than Plaintiffs) who claim that they worked hours for which they were not paid, including overtime hours, and they believe that all the employees on the crews they supervised were paid for all of the time they worked, including overtime. (Declaration of Freddy Ortega, ¶¶ 2-9, and Declaration of Leonardo Martinez, ¶¶ 2-4, collectively attached as Exhibit 10.)

Mr. Martinez and the only two Carpenters UFI has located who worked on Plaintiffs'

crew on the Grand Palisades project and who are still employed with UFI (David Landaverde and Misael Maroquin Lopez) were paid for all the time they worked, including overtime. They do not wish to join any class of plaintiffs in a lawsuit against UFI for alleged failure to pay overtime and do not know of any current or former employees who wish to join such a class. (Martinez Decl. ¶¶ 3, 5; Declaration of David Landaverde, ¶¶ 2-6, and Declaration of Misael Maroquin Lopez, ¶¶ 2-6, collectively attached as Exhibit 11.) The same is true for two other non-exempt employees who worked on the Grand Palisades project. (See Declarations of Bernardino Catalan and Francisco Ramirez, attached as Exhibit 12.)<sup>2</sup>

UFI also has submitted declarations from other Laborers in Florida who did not work on the Grand Palisades project, but who likewise have been paid for all the time they worked, including overtime; do not know any current or former employees who claim that they worked hours for which they were not paid, including overtime hours; and do not know of any current or former employees who wish to join any class of plaintiffs in a lawsuit against UFI for alleged failure to pay overtime. (See Declarations of Delvair Ramos Cruz, Kelly Holloway, Harry Kato, and John Williams, attached as Exhibit 13.)

### **III. ARGUMENT AND CITATION OF AUTHORITY**

In order to maintain a collective action under 29 U.S.C. § 216(b), the named plaintiff must establish that the potential plaintiffs are “similarly situated” employees. Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208, 1217 (11th Cir. 2001). The decision to conditionally certify a collective FLSA action is within the sound discretion of the Court. Id.; Parrilla v. Allcom Construction & Installation Services, LLC, 2009 WL 1456442, at \* 1 (M.D. Fla. May 22, 2009)

---

<sup>2</sup> In the limited time since Plaintiffs filed their Motion, UFI has not been able to locate any former employees who worked as Laborers or Carpenters on the Grand Palisades project.

(Presnell, J.).

The Eleventh Circuit has suggested, but not required, district courts to apply a two-tiered approach to certifying classes in FLSA cases. Hipp, 252 F.3d at 1219; Parrilla, 2009 WL 1456442, at \*1. This Court recently has explained that, at the first tier, the named plaintiff has the burden of demonstrating that notice of the action should be given to other employees and often meets this burden by presenting “detailed allegations supported by affidavits.” Parilla, 2009 WL 1456442, at \*1 (quoting Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996)). The plaintiff’s burden, even at the first stage, is not “invisible” and cannot be satisfied by relying on the conclusory allegations of a few employees. Id. (citations omitted).

Under the two-tiered approach, the plaintiff must show that there are other employees who desire to opt-in and who are similarly situated to the plaintiff. Dybach v. State of Fla. Dep’t of Corr., 942 F.2d 1562, 1567-68 (11th Cir. 1991). For the reasons discussed below, Plaintiffs have failed to demonstrate that there are other UFI employees who may desire to opt in or that these other employees are similarly situated to Plaintiffs.

**A. Plaintiffs Have Failed To Demonstrate That Other Employees Desire To Opt In To A Putative Collective Action**

Plaintiffs have failed to demonstrate that other employees desire to opt-in to a putative class as is required before certification and notice will be authorized by the Court. Sandate v. Makotek, LLC, 2006 WL 4792782, at \* 3 (M.D. Fla. Sep. 28, 2006) (Presnell, J.) (citation omitted). “Evidence of other employees who desire to opt in may be based on affidavits, consents to join the lawsuit, or expert evidence on the existence of other similarly-situated employees.” Id. (citation omitted). However, “[a] plaintiff’s or counsel’s belief in the existence of other employees who desire to opt in and ‘unsupported expectations that additional plaintiffs

will subsequently come forward are insufficient to justify' certification of a collective action and notice to a potential class." Id. (citations omitted). Moreover, "[c]ertification of a collection action and notice to a potential class is not appropriate to determine whether there are others who desire to join the lawsuit." Id. (citations omitted).

**1. The Court Should Decline To Certify A Company-Wide Class Of Laborers Based On The Declaration Of One Laborer**

Based on the authorities set forth above, Plaintiffs have failed to satisfy their burden of showing that other Laborers desire to join this lawsuit to warrant conditional certification of a company-wide class of Laborers. Only one of the seven Plaintiffs (opt-in Plaintiff Alfonso Gomez) was a Laborer; the other six Plaintiffs were Carpenters. (Exhibit 2 pp. 11, 13-15; Exhibit 4.) As discussed above, Carpenters were paid more than Laborers, who often simply assisted Carpenters. Carpenters thus performed fundamentally different job duties than Laborers and were paid significantly higher wages than Laborers. (Exhibit 2 pp. 11, 13-15.)

Plaintiffs essentially have asked the Court to certify conditionally a Company-wide class of Laborers solely on the basis of the declaration of one Laborer. Plaintiffs have not cited, and Defendant has not located, any case law holding that class certification is appropriate based on the declaration of only one current or former employee who belongs to the proposed class.

**2. The Court Should Not Certify A Company-Wide Class Of Laborers Based Solely On The Declarations Of Family Members**

Plaintiffs also have failed to identify any non-family members who desire to join this lawsuit. As discussed above, the original Plaintiff (Francisco Gomez) and the six opt-in Plaintiffs are all related to each other and live together at two residences. (Exhibits 2-3.) Moreover, since the opt-in Plaintiffs all verified their responses to the Court's Interrogatories

in January 2008, the original Plaintiff (Francisco Gomez) obviously hand-picked his kin to join this litigation more than one year in advance. The fact that Plaintiffs have not been able to locate any Laborer who is not a family member to join this lawsuit since January 2008 further demonstrates that no such Laborer exists.

Plaintiffs have not cited, and Defendant has not located, any case law holding that Plaintiffs may satisfy their burden of showing that other employees desire to join this lawsuit merely by submitting declarations from family members who also worked for the same employer and who indicated their desire to join the lawsuit more than one year before it was filed. The declarations from other family members submitted by Plaintiffs simply demonstrate family loyalty and pre-litigation collusion and do not constitute evidence that any employees who otherwise have no personal relationship with Plaintiffs have a genuine desire to join a lawsuit alleging FLSA violations. In the absence of any affidavits or declarations from employees who are not relatives of Plaintiffs demonstrating that other employees desire to join this lawsuit, Plaintiff's Motion should be denied without hesitation.

In a futile attempt to overcome this fatal defect in their Motion, four of the Plaintiffs signed declarations containing identical allegations that they are "aware of other Laborers, who have expressed an interest in joining the lawsuit, have complained about the practices forming the basis of the suit, and/or are fearful of joining without an assurance from the Court that retaliation is prohibited. These persons have expressed their interest to me in confidence." (Francisco Gomez Decl. ¶ 10; Daniel Gomez Decl. ¶ 10; Jeronimo Gomez Decl. ¶ 10; Alfonso Gomez Decl. ¶ 10.) These allegations are deficient because the FLSA itself already contains anti-retaliation provisions. Moreover, claiming to know unspecified others

who are interested in joining a lawsuit or who merely express dissatisfaction about pay practices does not demonstrate that others are interested in joining the lawsuit and is entirely insufficient at this stage.

In Gonzales v. Hair Club for Men Ltd., Inc., 2007 WL 1079291, at \*1 (M.D. Fla. Apr. 9, 2007) the plaintiffs (who were represented by the same attorney representing Plaintiffs in this case) submitted affidavits asserting that they were “aware of other stylists who have expressed interest in joining the lawsuit, but are afraid to do so because of potential retaliation.” Notwithstanding those allegations, the court denied the plaintiff’s request for conditional class certification because the two affidavits submitted by plaintiffs did not provide sufficient facts to support conditional certification of a company-wide collective action. Id. at \*3. In addition, it is axiomatic that the FLSA prohibits employers from retaliating against employees who file complaints or assert claims alleging uncompensated overtime or who testify or who are about to testify in FLSA proceedings. 29 U.S.C. § 215(a)(3). Therefore, Plaintiffs cannot excuse their inability to identify a single Laborer who desires to join this lawsuit and who is not a family member based on a nebulous and unfounded fear of “retaliation.”

Finally, Plaintiffs’ apparent contention that other unidentified UFI Laborers have expressed an interest in joining the lawsuit and/or have complained about the practices forming the basis for this lawsuit likewise is insufficient because Plaintiffs have not submitted declarations from these alleged would-be class members, and merely expressing dissatisfaction with a pay practice is not the same as expressing a desire to join a lawsuit. See Mooney v. Advanced Disposal Services, 2008 WL 3843550, at \*4 (M.D. Ala. Aug. 14, 2008)

(absent additional consent forms from other employees desiring to join litigation, “the fact that four named plaintiffs who merely claim they know of others who wish to join the litigation is insufficient to establish the first prong of the notice stage requirements”); Davis v. Charoen Pokphand (USA), Inc., 303 F. Supp. 2d 1272, 1277 (M.D. Ala. 2004) (testimony that at least 12 other employees were unhappy with specific policies at issue and that these employees would join lawsuit was insufficient without affidavits or consents from these “would-be class members”). Moreover, the testimony of Plaintiffs’ former supervisor, other supervisors at the Grand Palisades project, and other non-exempt employees who worked at the Grand Palisades project and/or other projects in Florida further demonstrate that Plaintiffs cannot satisfy their burden of showing that there are other Laborers who desire to join this lawsuit. (Exhibits 6, 11-13.)

**3. The Court Should Not Conditionally Certify A Company-Wide Class Of Laborers Based On The Declarations Of A Few Plaintiffs Who Worked On The Same Crew On One Job Site**

Plaintiffs all worked at the same site – the Grand Palisades project in Orlando, Florida. (Mumford Decl. ¶ 2.) In fact, although there were many crews working at the Palisades project, Plaintiffs worked on the same crew. (Mumford Decl. ¶¶ 2-3; Ortega Decl. ¶ 3.) The Florida Grand Palisades project is just one of many projects that UFI has had during the preceding three years. In this regard, UFI has had approximately 134 job sites in the past three years in 10 states, including Florida, Texas, North Carolina, Georgia, New Mexico, Virginia, Tennessee, Alabama and Oklahoma. (Wiser Decl. ¶ 4.) There are approximately 3,197 current or former Laborers who have been employed with the Company during the preceding three years, including 895 Laborers in Florida. (Id. at ¶ 10.)

Because Plaintiffs' request to certify a class of Laborers<sup>3</sup> is unlimited in geographic scope (Pls.' Mtn. pp. 1-2), Plaintiffs apparently are seeking conditional certification of a Company-wide class of Laborers. However, "federal courts across the Middle and Southern Districts of Florida have routinely denied requests for conditional certification where . . . the plaintiffs attempt to certify a broad class based [on] only the conclusory allegations of a few employees." Rappaport v. Embarq Management Company, 2007 WL 4482581, at \*4 n.3 (M.D. Fla. Dec. 18, 2007) (Fawsett, J.) (citing cases).

For example, in Rappaport, two plaintiffs submitted affidavits from themselves and four other former employees who worked in two Florida offices. Each of the affidavits asserted that the affiant was denied overtime compensation and knew others who were interested in joining the lawsuit. Because the plaintiffs merely defined their proposed class as "inside sales agent[s]," the court construed the proposed class as including employees from all the employer's locations nationwide. Id. at \*4. The court then held as follows:

The six affidavits Plaintiffs have submitted do not provide any support for this extraordinary request. At most, these affidavits support the position that certain employees at [two Florida offices] were required by their supervisors to work overtime without recording the extra hours. The affidavits offer no basis to assume that Defendants deny overtime compensation on a company-wide scale.

Id. Accordingly, the court declined to conditionally certify a class of "inside sales agents."

Similarly, in Rodgers v. CVS Pharmacy, Inc., 2006 WL 752831, at \*3 (M.D. Fla. Mar. 23, 2006), the plaintiff argued that managers at CVS were changing employee's hours in the computer database to ensure that employees did not work more than 40 hours per

---

<sup>3</sup> The conclusion of Plaintiffs' Motion seeks certification for a class of "installation technicians" who were "paid by the piece, . . ." (Pls.' Mtn. p. 5.) This typographical error demonstrates that Plaintiffs' Motion and the accompanying affidavits primarily are "form documents recycled from previous litigation." Rappaport v. Embarq Management Co., 2007 WL 4482581, at \*4 n.5 (M.D. Fla.) (Fawsett, J.).

week. The plaintiff submitted an affidavit wherein he stated that he believed if other employees were made aware of this practice, they would be interested in joining his lawsuit. Id. In addition, two former CVS employees joined the lawsuit as opt-in plaintiffs and submitted declarations containing bare allegations that they “believe” other employees are interested in joining, without identifying any other employees. Id. In light of the small number of employees who had joined the suit to the size of the potential class (250,000 employees of CVS at 5,375 stores in 36 states), the court concluded that the plaintiff “failed to provide sufficient evidence that there are other employees who desire to opt in to this action, other than the two who have filed consents.” Id. at \*4.

Other federal courts in Florida and elsewhere likewise have refused to certify a company-wide class of employees based on the affidavits of a few employees who worked at one or two locations. See, e.g., Robinson v. Dolgencorp, Inc., 2006 WL 3360944, at \* 1, 4-5 (M.D. Fla. Nov. 13, 2006) (affidavits from two opt-in plaintiffs insufficient to certify nationwide class of 58,000 customer service employees employed at any given time at 8,000 stores in 34 states); Gonzales, 2007 WL 1079291, at \* 2, 3 (M.D. Fla.) (largely identical affidavits from two opt-in plaintiffs insufficient to certify company-wide class of 753 current and former hair stylists at 47 locations nationwide); Wombles v. Title Max of Alabama, Inc., 2005 WL 3312670, at \*3 (M.D. Ala. Dec. 7, 2005) (affidavits from five original plaintiffs and two opt-in plaintiffs insufficient to certify company-wide class of managers, assistant managers, and over staff managers); Harper v. Lovett’s Buffet, Inc., 185 F.R.D. 358, 363 (M.D. Ala. 1999) (affidavits from 15 employees who worked at single location of restaurant chain insufficient to certify company-wide class).

In this case, Plaintiffs seek certification of a Company-wide class of approximately 3,200 Laborers based on the declarations of four of the seven Plaintiffs – all of whom worked at one of the 134 job sites on which UFI has had projects during the preceding three years in 10 states. The declarations submitted by Plaintiffs do not reveal any knowledge of the Company’s alleged overtime practices at any job site other than the Grand Palisades project or even any of the various crews working at the Grand Palisades project under different Project Superintendents than their own. Based on the foregoing, Plaintiffs’ request for conditional certification of a Company-wide class of approximately 3,200 Laborers should be denied.

If Plaintiffs modified their request to seek certification only of Laborers in Florida, any such request to conditionally certify such a modified class also should be denied.<sup>4</sup> Plaintiffs have no knowledge as to the payment of overtime to any Laborers who worked at other job sites in Florida involving different project supervisors, different general superintendents, and different foremen. Likewise, any attempt by Plaintiffs to modify their request to seek certification only of Laborers who worked on the Grand Palisades project should be rejected as well. Since Plaintiffs all worked on the same crew (Exhibit 2 p. 22; Exhibit 6 ¶ 2; Exhibit 9), they have not presented any evidence as to the payment of overtime to any Laborers who worked on the numerous other crews on the Grand Palisades project. Any attempt by Plaintiffs to modify their request to seek certification only of Laborers who worked on their crew should be rejected as well because Plaintiffs have failed to present any

---

<sup>4</sup> The four Declarations submitted by Plaintiff and three opt-in Plaintiffs assert that there are approximately 300 Laborers at UFI’s “Orlando office.” (Francisco Gomez Decl. ¶ 9; Daniel Gomez Decl. ¶ 9; Jeronimo Gomez Decl. ¶ 9; Alfonso Gomez Decl. ¶ 9.) These declarations are insufficient to convey a desire to certify a class of Laborers allegedly working in UFI’s Orlando office. In any event, UFI did not employ any Laborers at its Orlando office. Approximately 20 employees worked at UFI’s Orlando office (which recently closed), including the District Manager, the District Operations Manager, estimators, engineers, and safety and quality managers. (Wiser Decl. ¶ 11.)

evidence that any employee outside of their kin who worked on their crew desires to join this lawsuit. Moreover, because there were only approximately five to twenty-five employees on a crew (see Martinez Decl. ¶ 2; Ortega Decl. ¶ 2), any certification of such a limited number of employees (let alone Laborers) would be inappropriate.

**B. Plaintiffs Have Failed To Demonstrate A Reasonable Basis For Their Claim That There Are Similarly Situated Employees Who Have Been Denied Overtime Pay**

In order to obtain conditional class certification, a plaintiff also must demonstrate that there is a “reasonable basis” for his claim that there are other similarly situated employees. Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260 (11th Cir. 2008) (citing cases). In order to satisfy this burden, “[a] plaintiff must make some rudimentary showing of commonality between the basis for his claims and that of the potential claims of the proposed class, beyond the mere facts of job duties and pay provisions. Without such a requirement, it is doubtful that § 216(b) would further the interests of judicial economy, and it would undoubtedly present a ready opportunity for abuse.” Cohen v. Allied Steel Buildings, Inc., 554 F. Supp. 2d 1331, (S.D. Fla. 2008) (quoting White v. Osmose, Inc., 204 F. Supp. 2d 1309, 1314 (M.D. Ala. 2002)).

In Cohen, the plaintiffs submitted two declarations asserting that time records were not kept for “inside sales” employees and that they were not paid overtime wages. Cohen, 554 F. Supp. 2d at 1334. The court concluded that “[t]hese conclusory statements do not rise to the level contemplated” by the Eleventh Circuit. Id. The court also noted that “the allegations are sparse and limited to their knowledge of Defendants’ operations in Broward County” and did not even provide a job description. Id.

Numerous other courts have denied class certification where the plaintiff has relied on general and conclusory allegations. See, e.g., Parrilla, 2009 WL 1456442, at \*2 (concluding that, “[i]n the absence of any detailed allegations supported by affidavits, conditional class certification is not warranted at this time”); Mooney, 2008 WL 3843550, at \*4 (M.D. Ala. Aug. 14, 2008) (denying class certification because plaintiffs failed to identify payroll policy or practice that violated the FLSA); Rappaport, 2007 WL 4482581, at \* 4, n.4-5 (holding that allegation that employer “was well aware that we were working these overtime hours” was insufficient to support class certification because plaintiffs did not “make any detailed allegations of a company-wide policy that violates the FLSA,” but rather submitted affidavits that were “exceptionally vague and appear to be form documents recycled from previous litigation”); White v. KCPAR, Inc., 2006 WL 1722348, at \* 2-3 (M.D. Fla. Jun. 20, 2006) (denying class certification where plaintiff submitted virtually identical affidavits from three former cooks merely alleging that they worked in excess of 40 hours per week and were not paid time and one-half for overtime work); Ulysse v. Divosta Bldg. Corp., 2006 WL 3618449, at \*2 (S.D. Fla. Dec. 11, 2006) (denying class certification where plaintiff submitted affidavit containing hearsay that one individual “told” him that he had not been properly paid for his overtime hours and making conclusory allegation that other plasters work overtime hours without receiving adequate overtime compensation).

In this case, the four declarations submitted by Plaintiffs in support of their Motion are virtually identical and contain only general and conclusory allegations. The declarations submitted by Plaintiffs summarily allege that they “were not paid for overtime compensation earned,” that UFI “compelled Laborers to work over forty hours a week without proper

overtime compensation,” and that UFI “was well aware that we were working these overtime hours and that we were entitled to overtime pay.” (Francisco Gomez Decl. ¶¶ 4, 7-8; Daniel Gomez Decl. ¶¶ 4, 7-8; Jeronimo Gomez Decl. ¶¶ 4, 7-8; Alfonso Gomez Decl. ¶¶ 4, 7-8.)

The declarations submitted by Plaintiffs are utterly devoid of any allegations as to what policy or practice supposedly caused them not to be paid overtime properly or even who was responsible for any alleged FLSA violation. In the absence of any such allegations, the Court cannot conclude that Plaintiffs are similarly situated to any other current or former Laborers employed with UFI.

Moreover, the undisputed evidence demonstrates that UFI’s policy was to pay overtime properly, as reflected in its employee handbook, in posters displayed in appropriate locations, and the steps UFI took to record employees’ hours worked. (Wiser Decl. ¶¶ 7-9; Exhibits 6, 8, 10-13.) Plaintiffs never complained to their crew supervisor that they were systematically being denied overtime pay. (Mumford Decl. ¶ 8; Exhibit 9 ¶¶ 7-9.) To the contrary, any discrepancies between the hours worked by Plaintiffs and the pay they received were quickly rectified. (Mumford Decl. ¶ 6.) In addition, the manner in which employees’ hours were tracked was decided on a project-by-project basis by the General Superintendent or the Project Superintendent. (Wiser Decl. ¶ 7.) Furthermore, individual Project Superintendents typically determined on a day-to-day basis whether it was necessary for employees on their crews to work overtime, which employees needed to work overtime, and how much overtime was necessary to complete a particular task. (*Id.* at ¶ 12.)

Plaintiffs therefore cannot demonstrate that there was a Company-wide policy or practice of not paying overtime to Laborers or that they were similarly-situated to other

Laborers.

#### IV. CONCLUSION

For all of the reasons set forth above, Defendant respectfully requests that Plaintiffs' Motion for Conditional Certification of Collective Action should be denied.<sup>5</sup>

Respectfully submitted,

**FREEMAN MATHIS & GARY, LLP**

/s/ Mary Anne Ackourey \_\_\_\_\_

Mary Anne Ackourey  
Florida Bar No. 0041459  
Benton J. Mathis, Jr.  
*Pro Hac Vice*  
Trial Counsel for the Defendant

100 Galleria Parkway  
Suite 1600  
Atlanta, Georgia 30339-5948  
T: 770.818.0000  
F: 770.937.9960  
[mackourey@fmglaw.com](mailto:mackourey@fmglaw.com)

John M. Finnigan  
Florida Bar No. 972363  
Local Counsel for the Defendant

Finnigan Law Firm  
1700 Maitland Avenue  
Maitland, FL 32751  
T: 407.478.3700  
F: 407.478.6999  
[john@finniganlaw.com](mailto:john@finniganlaw.com)

---

<sup>5</sup> If the Court decides to certify a class of Laborers, Defendant shows that the proposed notice attached to Plaintiffs' Motion is defective in several respects. For example, it does not inform potential class members of their obligations to participate in discovery or that counterclaims could be asserted against them. White, 2006 WL 1722348, at \* 4 (citing cases.) The Court should also set a cut-off date to expedite the disposition of this case. Robinson, 2006 WL 3360944, at \*6. Defendant requests the opportunity to submit an additional brief regarding the contents of the proposed notice if the Court decides to certify a class of Laborers.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day electronically submitted the foregoing **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION OF COLLECTIVE ACTION AND PERMISSION TO SEND COURT SUPERVISED NOTICE ADVISING SIMILARLY SITUATED INDIVIDUALS OF THEIR OPT-IN RIGHTS PURSUANT TO 29 U.S.C. § 216(B)** to the Clerk of Court using the CM/ECF system, which will automatically send electronic mail notification of such filing to counsel of record who are CM/ECF participants. Counsel of record is:

K. E. Pantas, Esq.  
Pantas Law Firm, P.A.  
250 North Orange Avenue  
Eleventh Floor  
Orlando, FL 32801

Dated this 5th day of October, 2009.

/s/ Mary Anne Ackourey  
Mary Anne Ackourey  
Florida Bar No. 0041459