UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERTO RAMOS et. al., Plaintiffs, v. SIMPLEXGRINNELL LP, Defendant.	Honorable Steven M. Gold Case No. 1:07-cv-981 (SMG)

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTIONS FOR
CLASS CERTIFICATION AND SUMMARY JUDGMENT

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. FACTS APPLICABLE TO BOTH MOTIONS 3

A. SimplexGrinnell and its New York State Operations 3

B. The Plaintiffs and the Proposed Class of Workers 6

C. The Nature of Defendant's Work on New York Public Sites. 6

D. SimplexGrinnell's Nonpayment of Prevailing Wages and Benefits 9

E. SimplexGrinnell's Failure to Keep Adequate Records Regarding Prevailing Wages 12

F. SimplexGrinnell's Electronic Data 14

G. New York Department of Labor Opinion Letter on Testing and Inspection. 15

H. Damages 16

III. ARGUMENT--MOTION FOR CLASS CERTIFICATION 18

A. This Case, As a Prevailing Wage Case, is Perfectly Suited for Class Treatment. 18

B. Rule 23 Is Satisfied. 20

1. *The Rule 23 Requirements* 20

2. *The Class Satisfies Rule 23(a).* 21

a. The Class is Sufficiently Numerous. 21

b. Questions of Law and Fact are Common. 21

c. Plaintiffs' Claims are Typical of the Class' Claims. 25

d. The Class is Adequately Represented. 26

3. *The Class Satisfies Rule 23(b)(3)* 28

a. Common Questions Predominate. 28

b. A Class Action is the Superior Method for Resolving This Dispute. 31

IV. ARGUMENT--MOTION FOR SUMMARY JUDGMENT 34

A. The Applicable Law and Legal Standards 34

1. *The New York Prevailing Wage Law Requires the Payment of Prevailing Wages to Laborers, Workmen and Mechanics on Public Works* 34

2. *Courts' Construction of Prevailing Wage Law Favors the Entry of Summary Judgment to Plaintiffs* 35

3. *Plaintiffs May Recover for Unpaid Prevailing Wages as Third Party Beneficiaries of Defendant's Government Contracts* 37

4. *Summary Judgment Standards* 38

B. SimplexGrinnell Has Violated Section 220 by Failing to Pay Plaintiffs and the Class Members Prevailing Wages for Work Performed on Public Job Sites... 39

1. *Plaintiffs Have Shown That SimplexGrinnell Has Entered Into Public Works Contracts Covered by the New York Prevailing Wage Law* 39

2. *New York Labor Law Requires Employers to PayPrevailing Wage to Workers Who Test and Inspect Fire and Life Safety Systems* 41

3. *The Evidence Is Undisputed That Defendant Failed to Pay Prevailing Wages and Therefore Breached Its Contractual Obligations* 46

C. Plaintiffs and Class Members Are Entitled to Summary Judgment on Damages......... 47

1. *Legal Standards Support the Entry of Summary Judgment for Plaintiffs on Damages* 47

2. *Plaintiffs Are Not Required to Present Damages in the Form Demanded by Defendant, Particularly in Light of the Deficiencies in Defendant's Employment Recordkeeping.* 49

3. *Damages Should Be Awarded to Each Class Member in the Amounts Stated in Dr. Crawford's Report* 52

4. *In the Alternative, the Court Should Enter Partial Summary Judgment on Damages* 52

V. CONCLUSION 54

TABLE OF AUTHORITIES

FEDERAL CASES

Alcantara v. CNA Mgmt., Inc.,
2009 WL 4667091 (S.D.N.Y. Dec. 8, 2009) 32

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 27

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 38

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) 50, 51

Ansoumana v. Gristede's Operating Corp.,
201 F.R.D. 81 (S.D.N.Y. 2001) 27

Barone v. Safway Steel Prods., Inc.,
2005 WL 2009882 (E.D.N.Y. Aug. 23, 2005) .... passim

Barragan v. Evanger's Dog & Cat Food Co.,
259 F.R.D. 330 (N.D. Ill. 2009) 22-23

Bigelow v. RKO Radio Pictures, Inc.,
327 U.S. 251 (1946) 51

Bragdon v. Abbott,
524 U.S. 624 (1998) 45

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 38-39

Consol. Rail Corp. v. Town of Hyde Park,
47 F.3d 473 (2d Cir. 1995) 21

Contemporary Mission, Inc. v. Famous Music Corp.,
557 F.2d 918 (2d Cir. 1977) 48

Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.,
502 F.3d 91 (2d Cir. 2007) 26-27

Cuzco v. Orion Builders, Inc.,
262 F.R.D. 325 (S.D.N.Y. 2009) 19

Damassia v. Duane Reade, Inc.,
250 F.R.D. 152 (S.D.N.Y. 2008) 22, 26, 27

Doo Nam Yang v. ACBL Corp.,
427 F. Supp. 2d 327 (S.D.N.Y. 2005).. 49

Dupler v. Costco Wholesale Corp.,
249 F.R.D. 29 (E.D.N.Y. 2008) 24

Dziennik v. Sealift, Inc.,
2007 WL 1500080 (E.D.N.Y. May 29, 2007) 20

Eastman Kodak Co. v. S. Photo Material Co.,
273 U.S. 359 (1927).. 51

Gonzalez v. Zito Racing Stable Inc.,
2008 WL 941643 (E.D.N.Y. Mar. 31, 2008).. 29

Gortat v. Capala Bros., Inc.,
2009 WL 3347091 (E.D.N.Y. Oct. 16, 2009).. passim

Haddock v. Nationwide Fin. Servs., Inc.,
262 F.R.D. 97 (D. Conn. 2009).. 21, 22, 30, 33

Haywood v. Barnes,
109 F.R.D. 568 (E.D.N.C. 1986) 22

Hnot v. Willis Group Holdings Ltd.,
241 F.R.D. 204 (S.D.N.Y. 2007) 25

In re Agent Orange Prod. Liab. Litig.,
818 F.2d 145 (2d Cir. 1987).. 21

In re Initial Pub. Offerings Secs. Litig.,
471 F.3d 24 (2d Cir. 2006).. 20, 21

In re Visa Check / MasterMoney Antitrust Litig.,
280 F.3d 126 (2d Cir. 2001).. 28, 29, 31

In re Visa Check/MasterMoney Antitrust Litigation,
297 F. Supp. 2d 503, aff'd, 396 F.3d 96 (2d Cir. 2005) 27

In re WRT Energy Secs. Litig.,
2006 WL 2020947 (S.D.N.Y. July 13, 2006) 24

Indu Craft, Inc. v. Bank of Baroda,
47 F.3d 490 (2d Cir.1995).. 48

Jankowski v. Castaldi,
2006 WL 118973 (E.D.N.Y. Jan. 13, 2006) 20, 29, 30

Koss v. Wackenhut Corp.,
2009 WL 928087 (S.D.N.Y. Mar. 30, 2009) 23, 27

Lee v. ABC Carpet & Home,
236 F.R.D. 193 (S.D.N.Y. 2005) 24, 27

Levinson v. About.com,
2009 WL 1026021 (S.D.N.Y. Apr. 13, 2009).. 20

Mack v. Suffolk County,
191 F.R.D. 16 (D. Mass. 2000).. 22

Marcella v. Cap. Dist. Physicians' Health Plan, Inc.,
293 F.3d 42 (2d Cir. 2002).. 45

Marisol A. v. Giuliani,
126 F.3d 372 (2d Cir. 1997).. 20, 25, 26, 27

Martin v. Selker Bros., Inc.,
949 F.2d 1286 (3d Cir. 1991).. 50

Mendez v. Radec Corp.,
232 F.R.D. 78 (W.D.N.Y. 2005).. 20, 31, 33

Mendez v. Radec Corp.,
260 F.R.D. 38 (W.D.N.Y. 2009).. 29

Niemic v. Ann Bendick Realty,
2007 WL 5157027 (E.D.N.Y. Apr. 23, 2008) 20

Perero v. Food Jungle, Inc.,
2006 WL 2708055 (E.D.N.Y. Aug. 7, 2006).. 48

R.B. Ventures, Ltd. v. Shane,
112 F.3d 54 (2d Cir. 1997).. 38

Reich v. S. New England Telecommc'ns Corp.,
121 F.3d 58 (2d Cir.1997).. 50, 51

Rodriguez v. Hayes,
591 F.3d 1105 (9th Cir. 2010) 23, 25

Secretary of Labor v. DeSisto,
929 F.2d 789 (1st Cir. 1991) 51

Smilow v. Sw. Bell Mobile Sys., Inc.,
323 F.3d 32 (1st Cir. 2003) 30

Steinberg v. Nationwide Mut. Ins. Co.,
224 F.R.D 67 (E.D.N.Y. 2004) 22, 24

Story Parchment Co. v. Paterson Parchment Paper Co.,
282 U.S. 555 (1931) 51

Torres v. Gristede's Operating Corp.,
2006 WL 2819730 (S.D.N.Y. Sept. 29, 2006) 24, 33

Tractebel Energy Mktg. v. AEP Power Mktg.,
487 F.3d 89 (2d Cir. 2007) 48

Trinidad v. Breakaway Courier Sys., Inc.,
2007 WL 103073 (S.D.N.Y. Jan. 12, 2007) 21, 26, 31, 32

United States v. Jones,
958 F.2d 520 (2d Cir. 1992) 39

Zeng Liu v. Jen Chu Fashion Corp.,
2004 WL 33412 (S.D.N.Y. Jan. 7, 2004) 49

STATE CASES

Alphonse Hotel Corp. v. Sweeney,
674 N.Y.S.2d 351 (1st Dep't 1998) 51

Austin v. City of N.Y.,
258 N.Y. 113 (1932) 36, 37

Bernstein v. Toia,
43 N.Y.2d 437 (1977) 45

Bolanos v. Norwegian Cruise Lines Ltd.,
212 F.R.D. 144 (S.D.N.Y. 2002) 25, 28, 29, 32

Bridgestone/Firestone, Inc. v. Hartnett,
572 N.Y.S.2d 770 (3d Dep't 1991) 35

Bucci v. Vill. of Port Chester,
292 N.Y.S.2d 393 (1968) 35-36

Cardona v. Maramont Corp.,
2009 WL 4026815 (Sup. Ct. N.Y. Co. Nov. 12, 2009) 19, 27, 33

Cox v. NAP Constr. Co.,
10 N.Y.3d 592 (2008) 38

Edwards v. Jet Blue Airways Corp.,
2009 WL 4482409 (Sup. Ct. N.Y. Co. 2008) 45

Fata v. S.A. Healy Co.,
289 N.Y. 401 (1943) 36, 37, 39, 41

Galdamez v. Biordi Constr. Corp.,
2006 WL 296951 (Sup. Ct. N.Y. Co. Oct. 17, 2006) 19

Georgakis Painters Corp. v. Hartnett,
565 N.Y.S.2d 863 (3d Dep't 1991) 52

Inglesias-Mendoza v. LaBelle Farm, Inc.,
239 F.R.D. 363 (S.D.N.Y. 2007) 19, 21

Matter of Gen. Elec. Co. v. N.Y.S. Dep't of Labor,
565 N.Y.S. 2d 863, *aff'd on op. below*, 76 N.Y.2d 946 (1990) 43

Matter of Kelly v. Beame,
15 N.Y.2d 103 (1965) 37, 43

McKernan v. City of N.Y. Civ. Serv. Comm'n,
127 Misc. 2d 946 (Sup. Ct. N.Y. Co. 1985) 40

Mid Hudson Pam Corp. v. Hartnett,
549 N.Y.S.2d 835 (3d Dep't 1989) 52

Miele v. Joseph,
113 N.Y.S.2d 689, *aff'd,* 305 N.Y. 667 (1953) 37

Pajaczek v. Cema Constr. Corp.,
2008 WL 541298 (Sup. Ct. N.Y. Co. Feb. 21, 2008) 19, 24, 31

Pesantez v. Boyle Envtl. Servs., Inc.,
673 N.Y.S.2d 659 (1st Dep't 1998) 19, 28, 31, 32, 33

Strong v. American Fence Construction Co.,
245 N.Y. 48 (1927) 38

Tenalp Constr. Co. v. Roberts,
532 N.Y.S.2d 801 (2d Dep't 1989) 34, 35, 36, 37

Twin State CCS Corp. v. Roberts,
72 N.Y.2d 897 (1988) 36

Wakeman v. Wheeler & Wilson Mfg. Co.,
101 N.Y. 205 (1886) 48

Wright v. Herb Wright Stucco, Inc.,
50 N.Y.2d 837 (1980) 38

STATUTES, RULES & OTHER AUTHORITIES

N.Y. Lab. Law § 220 .... *passim*

N.Y. C.P.L.R. § 213 32

N.Y. C.P.L.R. § 901 19

N.Y. C.P.L.R. § 5001 .... 48, 49

N.Y. C.P.L.R. § 5004 48

N.Y. Gen. Bus. Law Art. 6 .... 9, 11, 12

Fed. R. Civ. P. 23 .... *passim*

Fed. R. Civ. P. 56 .... *passim*

Fed. R. Evid. 201 .... 40, 42, 43, 44

NEWBERG ON CLASS ACTIONS (4th ed. 2002) 53

Plaintiffs Roberto Ramos, *et al.,* by their attorneys and pursuant to Federal Rules of Civil Procedure 23 and 56, respectfully move the Court to: (1) certify the class of more than 600 current and former employees of defendant SimplexGrinnell LP claiming defendant's failure to pay them wages and supplements due and owing them under New York's Prevailing Wage Law, New York Labor Law § 220; and (2) grant summary judgment to plaintiffs and class members on liability, and award damages in the total sum of $16.0 million.

I. INTRODUCTION AND SUMMARY

SimplexGrinnell indisputably violated Section 220 by failing to pay prevailing wages to fire alarm and sprinkler workers on nonfederal public works in the State of New York. SimplexGrinnell has violated not only the substantive provisions of the legal mandate, but also has disregarded the procedural provisions of the statute by failing to maintain or report accurate payroll records, by failing to advise workers of their rights under the prevailing wage law, and even by failing to maintain basic contractual prevailing wage schedules required by law. As a result, enforcement has been difficult and workers have been challenged to know their rights under the law or to have the tools to redress longstanding violations.

Plaintiffs ask the Court to certify the class of more than 600 current and former employees of SimplexGrinnell who have performed fire alarm and sprinkler system work on nonfederal public sites in New York and who have not been paid prevailing wages due them under Section 220. This Court should join numerous other courts in recognizing that wage claims such as these are perfectly suited for classwide treatment. SimplexGrinnell applied a practice of not paying prevailing wages due for maintenance, repair, testing, inspection, and installation of fire alarm of sprinkler systems statewide. As shown by defendant's pay records, plaintiffs share commonly with other class members the nature of the work and the types of wage

claims for which they seek redress, making class certification appropriate.

On undisputed facts, plaintiffs are entitled to summary judgment for SimplexGrinnell's failure to pay proper prevailing wages since February 2001. The New York prevailing wage law requires SimplexGrinnell to include the obligation to pay prevailing wages in each contract with public entities, and to post prevailing wage rates. As third party beneficiaries of defendant's public works contracts, plaintiffs are entitled to recover for any breach of the prevailing wage obligations in those contracts. SimplexGrinnell's own business records show that the members of the plaintiff class worked hundreds of thousands of hours on public works under hundreds if not thousands of contracts, and were paid less than the prevailing wage. SimplexGrinnell's liability for breach of contractual obligations intended to confer benefits on plaintiffs and class members is clear.

The only noteworthy legal issue to be decided on summary judgment is whether SimplexGrinnell is required to pay prevailing wages to laborers, workmen, or mechanics who perform testing and inspection of fire alarm systems. Assisted by the record of undisputed facts, the Court should enter summary judgment for plaintiffs. First, it is well-settled that maintenance of public works is covered work. Second, SimplexGrinnell workers performing testing and inspection maintain the systems as well, as supported not only by the testimony of the individuals actually performing the work, but also by the business records of SimplexGrinnell that describe testing and inspection as part of the maintenance function. Third, the New York Department of Labor, the enforcement agency of the State prevailing wage law, has confirmed, upon a request for ruling by SimplexGrinnell and after SimplexGrinnell made repeated presentations and demonstrations, that testing and inspection work requires the payment of prevailing wages. Plaintiffs' Exhibit ("PX") 3 (December 31, 2009 letter from M. Patricia

Smith, New York Commissioner of Labor, to SimplexGrinnell) ("NYSDOL Op. Ltr.").[1]

Plaintiffs seek summary judgment on damages as well as on liability. Plaintiffs have presented the damages study of David Crawford, Ph.D., an economist from the University of Pennsylvania with three decades of experience in employment and wage cases. PX 1. Dr. Crawford has presented a reliable and relevant methodology for the calculation of estimated damages to plaintiffs and members of the class to a reasonable degree of certainty. Dr. Crawford, using the same SimplexGrinnell electronic pay and project records used by defendant in the ordinary course of business, accurately compiled the wage and benefit rates for class members, compared those with the wages they should have been paid under the prevailing wage schedules, added statutory interest, and subtracted the value of partial payments made by SimplexGrinnell. With interest as allowed by New York law, these losses total $16.0 million.

Therefore, plaintiffs request that the Court certify the class, enter summary judgment on both liability and damages in favor of the plaintiff class, and award each plaintiff and class member the amounts set forth for them in Dr. Crawford's report. In the alternative, in the event that the Court finds that there is a remaining material factual dispute with regard to any of the claimed amounts due, then plaintiffs request partial summary judgment on all but the amounts the Court finds in dispute, or an aggregate damages award to the class as a whole, and a prompt trial by jury on any remaining damages issues.

II. FACTS APPLICABLE TO BOTH MOTIONS

A. SimplexGrinnell and its New York State Operations

Defendant SimplexGrinnell provides testing, inspection, maintenance, repair and

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[1] Plaintiffs' exhibits 1 and 2 are attached to the Declaration of David L. Crawford, Ph.D. ("Crawford Decl.") submitted herewith. Plaintiffs' remaining exhibits, beginning with PX 3, are attached to the Declaration of Kerin E. Coughlin ("Coughlin Decl.") submitted herewith. Certain of plaintiffs' exhibits have been filed with the Court under seal pursuant to the Protective Order entered in this case September 11, 2007 (Dkt. 14).

installation of fire, security and communications systems inside private and public buildings throughout the United States. PX 33 (SimplexGrinnell website). Fire alarm, detection, and suppression equipment includes fire alarm systems, fire sprinklers, and other fire suppression systems. *Id.*

SimplexGrinnell has nine district offices that administer work throughout the state of New York. PX 61 at 21. All of these district offices operate in the same way. All offices are staffed in the same manner, and various template contracts are entered with clients. Field workers do the same work, and are generally paid pursuant to the same policies and practices.[2]

All New York district offices have a district manager, service managers, hourly rate field workers and clerical/administrative employees. PX 64 at 100-05; PX 20 ¶¶ 3-9. SimplexGrinnell's hourly rate field workers perform work on federal, state and municipal public job sites, such as schools, hospitals and prisons.[3]

New York Labor Law ("NYLL") § 220 requires the payment of a "prevailing rate of wage" (§ 220(5)) to "laborers, workmen or mechanics" for employment on "public works" (§ 220(3)(a)) contracted with "the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law" (§ 220(2)), at wage rates set by reference to wages "in the same trade or occupation in the locality in which the work is being performed" (§ 220(5)(a)).[4] The wage rates themselves, by job category and location, are revised annually by the New York Department of Labor and are published in schedules found on the agency's

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[2] PX 64 at 100-05, 183-84; PX 20 ¶ 8; PX 10 at Appx. D (OMH Contract); PX 11 (SUNY Albany Contract); PX 9 (NYC Dep't of Corrections Contract); PX 12 at SG 26631-38, 26672-81 (Onondaga County Purchase Orders).

[3] PX 64 at 183-84; PX 10 at Appx. D (OMH Contract); PX 11 (SUNY Albany Contract); PX 9 (NYC Dep't of Corrections Contract); PX 12 at SG 26631-38, 26672-81 (Onondaga County Purchase Orders).

[4] New York Labor Law § 220(5)(e) also requires payment of prevailing wages and benefits to laborers, workmen or mechanics who work on public sites pursuant to contract with the City of New York. The New York City Comptroller, rather than the New York State Commissioner of Labor, sets these prevailing wage and benefit rates.

website.[5]

SimplexGrinnell enters into contracts to provide service, installation and preventive maintenance services to state and local government agencies in New York State.[6] The New York Labor Law requires that defendant's public works "contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be paid the wages herein provided." § 220(3)(a). Some of defendant's contracts contain a "standard" procurement clause reflecting the obligation to pay prevailing wages: "Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law." PX 10 at SG0021473 (OMH)**;** *see* PX 8 at SG0026714 (Cayuga Correctional Facility). A slight variant of the standard clause states that "any employees whose prevailing wage is required to be fixed pursuant to Section 220… shall be paid such prevailing wage." PX 6 at SG0011506 (Apple Industrial Development Corp. #13510041); *see* PX 7 at SG0010752 (Apple Industrial Development Corp. #13510034).

Most local counties and municipalities have the same or similar provisions in its public contracts or other documents associated with the contracts. For example, Purchase Orders contain the legend: "The provisions of Section 220 of the NY Labor Law are deemed part of every purchase order with the same force and effect as if set forth at length." PX 12 at SG0026674 (Onondaga County). Bid documents usually contain the above mandate. Further, the prevailing wage schedules are easily accessible on the New York Department of Labor

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[5] *See* http://wpp.labor.state.ny.us/wpp/publicViewPWChanges.do?method=showIt. *See also* PX 64 at 26:18 – 27:17 (Love Dep.).

[6] *See, e.g.,* PX 10 (OMH); PX 9 (NYC Dep't of Corrections); PX 12; PX 64 at 183-86; PX 61 at 75-76.

website and have warning language written on the top page directing contractors to contact the Department of Labor. PX 64 at 26-27; PX 48; PX 56 at 27-28.

B. The Plaintiffs and the Proposed Class of Workers

Plaintiffs and members of the proposed class are former and current SimplexGrinnell employees who test, inspect, maintain, repair and install fire alarm, sprinkler system and other life safety devices annexed to private and public buildings throughout New York.[7] Between February 2001 and the present, over 475 workers did this work and were supervised primarily by Shawn Love and Richard Zammitti, SimplexGrinnell's New York area Regional Managers during this time. PX 64 at 38, 40, 59, 61-62; PX 72 at 27-28*; see* PX 1 at Table 4 (showing over 600 employees as having performed work on public sites). Plaintiffs and members of the class were regularly assigned to work on public work sites, including but not limited to, Office of Mental Health sites throughout New York.[8] Between 50% and 75% of their time was spent working on public buildings. PX 50.

Although SimplexGrinnell identifies some of the plaintiffs and class as "supervisors" or "site supervisors," these workers use tools and do virtually the same work that their colleagues do on site. "Site supervisor" is just a title that SimplexGrinnell sets up as a single point of contact. PX 64 at 92; PX 63 at 36-40; PX 21 ¶ 16; PX 15 ¶ 6. SimplexGrinnell pays its "site supervisors" an hourly wage rather than a weekly or annual salary. PX 29

C. The Nature of Defendant's Work on New York Public Sites.

Plaintiffs and members of the class throughout the state performed the same type of work, regardless of where they worked. PX 64 at 62-64; PX 72 at 148; PX 56 at 72-74. Fire

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[7] PX 5 (SimplexGrinnell, Job Posting); PX 63 at 36-40; PX 71 at 73; PX 66 at 19-22, 29, 41; PX 67 at 80-83; PX 17 ¶¶ 3, 7, 9, 10; PX 19 ¶¶ 3, 6, 8, 9; PX 13 ¶¶ 3, 5, 6, 8, 9, PX 21 ¶¶ 3, 5, 7, 8; PX 18 ¶¶ 3, 5, 7, 9; PX 15 ¶¶ 3, 4, 5, 7.

[8] PX 63 at 25; PX 60 at 53, 71-72; PX 64 at 67.

alarm technicians, inspectors (fire alarm and sprinkler) and sprinkler fitters throughout New York, when working on public job sites, did the same type of work. PX 64 at 62-64. These job titles were created by SimplexGrinnell corporate headquarters in Westminster, Massachusetts. PX 64 at 71. The New York Department of Labor has determined that the nature of the work performed by defendant's electricians who install fire systems is "the same" as those who do testing and inspection, and that therefore "[e]mployees performing testing and inspection work on fire systems are properly categorized as laborers, workmen, or mechanics." PX 3 at 2.

Plaintiffs and members of the class doing work on construction/installation projects program and install components within the original fire alarm panel, connect the wires leading to the other parts of the building ("field"), and troubleshoot the system until it functions properly. PX 20 ¶ 8**.** Those that do service work perform regular inspections and testing of existing systems and perform service calls to repair damaged systems. They also spend time in the field visually inspecting and testing fire alarm systems, cleaning, replacing or repairing equipment, and performing other tasks associated with ensuring that existing fire alarm systems continue to function properly. *Id.* Those plaintiffs and class members who install and service sprinkler systems work with pipes, flow switches, sprinkler heads and other mechanical equipment. *Id.* ¶ 9.

Plaintiffs Roberto Ramos and Frank Rodriguez, NYC technicians who primarily worked on fire alarm systems, did things such as tracing out circuits, replacing faulty horn strobes, checking voltages on wiring, replacing DACT cards, running wire and replacing smoke detectors. PX 70 at 36-39, 65, 132; PX 67 at 84. Plaintiff Jose Fernandez, a NYC technician who primarily worked on sprinkler systems, did things such as testing stand pipes and risers, checking sprinkler heads, moving or replacing sprinkler heads, working with fire hydrants and

repairing sprinkler valves, sprinkler heads and fire pumps. PX 59 at 26-29. Plaintiff Rafiu Owalobi, another NYC technician who usually worked on fire alarm systems, did things such as troubleshooting of sprinkler systems, installing smoke detectors, pulling electrical wire, terminating wires, diagnosing fire alarm panel problems, installing electronic panels and tagging wires. PX 66 at 19, 25, 30, 39, 42.

Andrew Kwasigroch, a member of the proposed class who worked out of the Syracuse district office, removed cages and performed fire alarm and smoke detector tests and inspections, accessed and tested duct detectors; conducted panel checks and grounded wires, disassembled and replaced detectors, removed pull stations, conducted sprinkler tests and inspections, and replaced flow switches and fire hydrants. PX 63 at 36-40. Sean Orr, another member of the proposed class who worked out of the Syracuse district office, primarily did testing and inspection work on fire alarm and sprinkler systems. PX 65 at 52-54.

William Hobbs, a member of the proposed class who worked for SimplexGrinnell in three different district offices (Buffalo, Rochester and Long Island) for a total of over 25 years, inspected, tested, repaired and installed fire alarm systems. PX 14. Donald Kuhlman, a member of the proposed class who worked out of the Newburgh district office from 2001 to 2009, inspected and tested fire alarm and sprinkler systems and did repair and service work including installation of strobes, smoke detectors, compressors, valves, water flow switches and tamper switches. PX 15 ¶¶ 3, 6, 7.

The entire class, like the above plaintiffs and proposed class members throughout New York, filled out the same paperwork, such as time sheets and service reports, to document their hours and the general work they did. PX 64 at 71-72, 89-90, 125-29; PX 40-42.

Plaintiffs and members of the class were considered technicians. Many were trained to

work on both fire alarm and sprinkler systems and, in fact, many performed inspection and testing and/or service and repair of both fire alarm and sprinkler systems. Inspection, testing and repair work are frequently performed at the same time.[9]

The New York Department of State, in regulating the life safety business, requires an entity like SimplexGrinnell to be licensed to perform testing, inspecting, maintaining, repairing or installing an alarm system. N.Y. Gen. Bus. Law Art. 6-D. Defining "installation of an alarm system" as placing and connecting various equipment and devices into buildings, New York law also includes the work done to program a control panel. 19 N.Y. Comp. Codes R. & Regs. § 195.1(c) (2009). The maintenance or "maintaining an alarm system" includes the inspection and testing of components, devices or systems for the purpose of establishing proper operating conditions and detecting or preventing problems with the equipment. *Id.* § 195.1(d); *see* PX 3 (NYSDOL Op. Ltr.).

A building is not safe unless its fire alarm and sprinkler systems are properly inspected, tested and maintained. PX 58 at 26. Plaintiffs and class members who test and inspect fire alarms and sprinkler systems are doing work that is integral to the maintenance of the life safety systems in public buildings.[10] SimplexGrinnell employees who test and inspect fire alarm and sprinkler systems use specialized tools and instrumentation to detect problems undetectable by visual inspection alone. PX 4 (SimplexGrinnell Web Advertisement).

D. SimplexGrinnell's Nonpayment of Prevailing Wages and Benefits

SimplexGrinnell entered into hundreds if not thousands of contracts with public entities that required it to pay prevailing wages and benefits to the plaintiffs and proposed class of

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[9] PX 39; PX 43; PX 5; PX 55 at 54:2-18. PX 59 at 7; PX 15 ¶¶ 4, 10; PX 65 at 52-54; PX 13 ¶ 19; PX 66 at 19, 25, 30, 39, 42-43, 126:9-12.; PX 64 at 54:23-55:11; PX 63 at 50:8-51:19; PX 71 at 55:11-22.

[10] PX 3 (NYSDOL Op. Ltr.); PX 4 (SimplexGrinnell Web Advertisement); PX 72 at 158; PX 54 at 180; PX 69 at 45-46.

workers. PX 2; PX 64 at 183-86; PX 61 at 76**;** PX 6-12; NYLL § 220. Despite spending the majority of their work hours on public job sites pursuant to contracts entered into with public entities, plaintiffs and members of the class were not paid the prevailing wages and benefits due them.[11] SimplexGrinnell's records and payroll practices corroborate this. *See infra* Part F (Simplex Grinnell's Electronic Data).

SimplexGrinnell's payroll process was the same throughout all of the New York district offices. SimplexGrinnell paid and continues to pay its workforce on a weekly basis. PX 56 at 81-82. In order to get paid, plaintiffs would submit their time sheets to the district office, where a clerical person would input the time into the company's computer system, known as Time Entry, and electronically deliver it to payroll in Westminster, Massachusetts. Pay checks were generated in Westminster and mailed (or direct deposited) to employees. PX 56 at 59-61*;* PX 64 at 105-09. These records confirm that SimplexGrinnell regularly did not pay the plaintiffs and the class of workers prevailing wages and benefits for thousands of hours when they worked on public sites. *See* PX 1 Table 4; PX 13-15, 17-19, 21.

SimplexGrinnell systematically failed to identify government jobs as "public" jobs when it entered the jobs and contracts into its data base systems. PX 56 at 71; PX 69 at 149; PX 61 at 217-27; PX 37; PX 72 at 78-79. Christie Hext, SimplexGrinnell's National Prevailing Wage Manager, explained that these public jobs were not identified or "flagged" as public or prevailing wage jobs. PX 61 at 216-27. Even if a job was "flagged" as a public or prevailing wage job does not mean, by itself, that defendant paid the workers who performed work on the public job site prevailing wages and benefits. "Flagging" a job was only the first step. PX 61 at 202-03. In order for plaintiffs to get paid prevailing wages and benefits, a form called a wage set-up form

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[11] PX 1 Table 4; PX 50; PX 13-15, 17-19, 21; PX 64at 69-70, 78, 84-85, 114-17; PX 56 at 34-35, 53; PX 72 at 192.

had to be filled out for the individual or individuals who worked on the public site, too. This rarely happened. PX 61 at 202-03, 207; PX 56 at 31-35. Instead, on the rare occasion when a worker knew about prevailing wages and asked for payment, a manual override was executed so he or she could get paid the difference between his or her regular hourly rate and the relevant prevailing wage rate. PX 64 at 240-41; PX 56 at 66; PX 44. Very few public jobs were properly "flagged"; little proof was produced by defendant to show that wage set-up forms were filled out by its payroll administrator; and relatively few manual override forms were processed for post-hoc prevailing wage payments. PX 61 at 216-27; PX 28 (Document Request 5, response identifying only approximately 700 manual override forms during entire liability period).

Ms. Hext, as SimplexGrinnell's National Prevailing Wage Manager, oversees its prevailing wage policies. PX 61 at 13. She has been in this position since March, 2005. PX 61 at 8. Her responsibilities include familiarizing herself with prevailing wage policies, setting up processes to ensure correct payment of prevailing wage and training personnel in district offices regarding prevailing wage practices. PX 61 at 15-17. Prior to August 1, 2006, no information was distributed to the New York district offices or to employees regarding the payment of prevailing wages. PX 61 at 32-35. Prior to August 1, 2006, SimplexGrinnell had no statewide policy or practice of paying prevailing wages to workers. PX 61 at 52-53; *see also id.* at 48-50.

Defendant rarely paid prevailing wages and supplemental benefits to plaintiffs and members of the class until early 2007. PX 17 ¶ 11; PX 21 ¶ 12; PX 14 ¶ 5. SimplexGrinnell held meetings in all of the NY district offices in late 2006/early 2007 to discuss prevailing wages. Planned change of the time sheets and inaccurate understanding of New York prevailing wage law were the two primary issues discussed. PX 17 ¶ 13; PX 67 at 6-11; PX 75 at 69-72; PX 73 at 90-94, 97; PX 61 at 83-85. Thereafter, SimplexGrinnell started to pay plaintiffs and

members of the class prevailing wages for work performed on public sites, but only for time spent working on certain tasks. PX 67 at 29-30; PX 73 at 133-135; PX 74 at 125-126; PX 70 at 81, 113-114; PX 17 ¶¶ 11, 13; PX 60 at 92-93.

On August 31, 2006, Ms. Hext traveled from Texas to meet with several SimplexGrinnell attorneys, managers and New York City field workers to make a presentation concerning prevailing wages. PX 61 at 83-85. After her presentation, Ms. Hext asked every New York district office to provide her a list of 50 jobs and to identify whether they had been properly marked as a public or private site. PX 35. These jobs, and thousands of others, were not properly identified as public jobs to alert SimplexGrinnell to pay plaintiffs and the proposed class prevailing wages. PX 37; PX 56 at 71; PX 69 at 149; PX 64 at 78; PX 72 at 78-79.

As a result, each New York district office changed its time sheets to include (for the first time) a space on the sheets for workers to mark off whether they performed work on a public site on the particular day that they worked. PX 45. SimplexGrinnell called this new time sheet a daily project journal. It contained a "prevailing wage" column where plaintiffs and the class were instructed to check off "yes" or "no" and a space where plaintiffs and the class were instructed to provide a detailed description of the work they performed. PX 45. This was the first time a document used for payroll, rather than billing, included a place for workers to describe in detail their work. *Id.*

E. SimplexGrinnell's Failure to Keep Adequate Records Regarding Prevailing Wages

New York law requires public contractors, such as defendant, to submit to the public agency it contracts with, a transcript of the original payroll record, also known as a certified payroll record, after it issues its first payroll on a public job and every thirty days thereafter. Subscribed and affirmed as true under the penalties of perjury, these records are kept to ensure

that public contractors are held responsible for paying their laborers, workers and mechanics prevailing wages and benefits for those hours they work on public job sites. NYLL § 220 (3-a. a. (iii)).

New York Labor Law requires that these certified payroll records be preserved for three years from the date of completion of the work on the awarded contract. NYLL § 220 (3-a. a.). SimplexGrinnell failed to regularly submit or preserve certified payroll records documenting and subscribing as true the hourly (prevailing) wage rate and supplements paid to its workers who performed work on public job sites in New York as required by Labor Law Section 220(3-a. a). PX 64 at 167-68; PX 27**;** PX 49. Annexed to and part of the certified payroll is the certification page, which must be signed and certified by the employer as true. Aim'ee Bourgoin, SimplexGrinnell's payroll administrator whose job it was to complete and sign the certification page, signed thousands of such pages without any knowledge of the wages paid to SimplexGrinnell's workers or whether the workers were paid prevailing wages and benefits. PX 56 at 11, 31-35, 71, 91-96, 99-100; PX 51**.**

New York law also requires public contractors, such as SimplexGrinnell, to post in a prominent and accessible place on public job sites a legible statement of all prevailing wage rates and supplements as specified in the public contracts that are required to be paid. NYLL § 220 (3-a. a. (ii)). SimplexGrinnell failed to post information and notify its workers throughout New York State who worked on Office of Mental Health sites of the prevailing wage rates and benefits. PX 61 at 135:11 – 137:1. The NYC region's manager of the OMH project, Marion Rivera, did not even know when prevailing wages should have been paid as late as mid-2008 when her deposition was taken. PX 68 at 64-65, 68-69. On company time sheets and pay stubs, there was no space prior to late 2006 for plaintiffs and class members to indicate they worked on

a public job site and sought payment of prevailing wages and benefits. PX 72 at 113-14; PX 41; *see* PX 76.

On April 9, 2008, the New York State Department of Labor found SimplexGrinnell in violation of the law for failing to notify workers of the prevailing wage rates and benefits as required by New York Labor Law Section 220 (3-a. a.). PX 36; PX 61 at 134-36. The New York State Department of Labor also withheld $100,000.00 from SimplexGrinnell during the course of its investigation into the company's failure to pay its laborers, workers and mechanics prevailing wages and supplements. PX 53**.**

F. SimplexGrinnell's Electronic Data

In the regular course of its business, SimplexGrinnell maintained several databases to keep track of the work done for their customers. Those were known as "ACE," "LEGACY," "Job Cost," and "AS/400" (collectively, the "project databases"). SimplexGrinnell started to implement ACE in September of 2001 and was fully implemented in all district offices by August of 2006. PX 62 at 8. ACE (an acronym for "Achieving Customer Excellence") was used to "track all customer interactions and transactions for the sales and service of the products we sell." *Id.* at 7. This includes the local district office, customer name, project address, project county, the product type worked on, employee name, employee identification number, actual hours worked, the date of service, task type, problem code, and resolution code. *See id.* at 73. The "resolution code" is a numerical code that indicates the work actually performed on site. *Id.* at 66-67, 84-85. The system ensured that the time spent working on a task would be recorded in ACE. *Id.* at 96-97. The information given to the customer on the "service acknowledgment form" is also entered into the ACE system. *Id.* at 48-51.

The LEGACY system preceded ACE and served the same function - as a centralized

database to track all service transactions for all customers. *Id*. at 17; PX 56 at 102. Again, similar to ACE, LEGACY's data fields include the local district name, the product type worked on, the date of the service, customer name, project name, project address, project county, employee name, straight time hours worked, and overtime hours worked. PX 25.

A separate database, "Job Cost," tracks the work done on installation projects, as distinguished from service projects. PX 61 at 76 ; PX 62 at 19-20; PX 56 at 45-46. Job Cost's data fields include project name, employee ID, employee name, the date of the work, and hours spent. PX 24.

The "AS/400" database (also known as CGC) included within its data fields project name, employee name, employee ID, week end date, total hours, and total overtime hours. PX 34. AS/400 was used prior to the Job Cost database coming into existence. PX 61 at 77.

In addition to the project databases, SimplexGrinnell maintained the Time Entry database. This database kept track of the hours the employee worked on each day, including data on the project the employee worked on, based on a paper time sheet filled out by the employee and input into the system. PX 57 at 12-17, PX 62 at 118-19, 120-22; *see also* PX 26. This data was input at the local district office, and then electronically delivered to the payroll department in Westminster, MA. There, the Time Entry data is fed into the payroll program called PeopleSoft, which has the employees' tax and deduction information, and a paycheck is issued. PX 56 at 59-61.

G. New York Department of Labor Opinion Letter on Testing and Inspection.

The New York Department of Labor, the administrative enforcement agency for the prevailing wage law, issued an opinion to SimplexGrinnell dated December 31, 2009, confirming that testing and inspection of fire systems are included as maintenance work under

the prevailing wage law. PX 3. After considering a series of submissions and *ex parte* presentations by SimplexGrinnell, the Department opined that "public contracts for inspection and testing of fire systems do fall within the coverage of Article 8 [§ 220] of the New York State Labor Law;" more specifically, that "the testing of fire systems is included within the category of system maintenance and is, therefore, subject to the payment of prevailing wages." *Id.* at 1, 3.

The Department of Labor determined:

- Defendant's electricians who install fire systems are, without dispute, laborers, workmen or mechanics under Section 220,
- The nature of this work is "the same" as testing and inspection, and
- Therefore "[e]mployees performing testing and inspection work on fire systems are properly categorized as laborers, workmen, or mechanics." PX 3 at 2.

The Department concluded that "testing and inspection appear to be included…as integral parts of the maintenance of fire systems by employees working within your own company." *Id.* at 3.

H. Damages

Plaintiffs' expert damages witness, David L. Crawford, Ph.D., analyzed data provided from defendant's employee payroll and job project electronic files. From February 6, 2001 (from July 14, 2002 for sprinklerfitter damages) through December 31, 2009, for each class member, Dr. Crawford identified work on the public jobs, from the SimplexGrinnell job project data. PX 1; *see* Crawford Decl. From the payroll data, he determined the wage and benefit rates for class members, including regular and prevailing wages, and overtime. Then, from the project data identifying public work and from the New York prevailing wage schedules, he computed the difference between what the employee should have been paid and what the employee actually got paid, calculated the statutory interest, and subtracted payments made by SimplexGrinnell in

the course of its "self-audit."[12]

In conducting his study, Dr. Crawford used the electronic data files of SimplexGrinnell referred to above—pay data in Time Entry (and, to a minor extent, in PeopleSoft), and project data in the Legacy, ACE, AS/400 and Job Cost systems. From these data, which he merged into a single data set, Dr. Crawford identified the public projects the proposed class members worked on, the number of hours spent working on public projects and the general work that they actually did. Crawford Decl.; PX 1.

Dr. Crawford obtained from defendant computerized lists of public jobs its employees worked on during the liability period. *See* PX 1 Ex. 2 (Public Job Lists Source Files). He extracted the records concerning these public jobs identified in defendant's records in the Project Data, and forwarded a list of the remaining projects to plaintiffs' counsel. From these remaining projects, plaintiffs' counsel identified an additional 337 public projects, for a total of 13,408. Dr. Crawford used this master list, identified as "List of PublicProjectsIncluded.xls" (PX 2), as a basis for calculating the hours spent on public projects by the members of the proposed class.

Dr. Crawford used the prevailing wage and benefit rates from the 2001-2009 New York State and City Prevailing Wage Schedules for fire alarm and sprinkler work. PX 1 ¶ 52. The date the work was performed, the location of the work and the type of product associated with the work (to determine if the work was fire alarm or sprinkler work) were used to insure the proper prevailing wage and benefit rate. Crawford Decl.

With the above information, Dr. Crawford calculated, on a weekly basis, the difference between the public hours worked (from the Project data) for each class member, and the hours

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[12] As a result of investigations by the New York Department of Labor and the Suffolk County District Attorney's Office, SimplexGrinnell undertook a limited "self-audit" of its prevailing wage practices and made payments to employees totaling $2.9 million. PX 61 at 196-99, 66-70; PX 47. Dr. Crawford deducted the audit payments, with interest credit to defendant, from the damages. PX 1 Table 4.

worked for which they were paid prevailing wages (from the Time/Payroll data). Interest was then added and any audit payments made by Defendant to each class member were subtracted, yielding total damages of $16,136,638 through December 31, 2009. *See* PX 1 Table 4 (List of each class member's total damages).[13]

III. ARGUMENT--MOTION FOR CLASS CERTIFICATION

Plaintiffs in this case respectfully seek certification under Federal Rule of Civil Procedure 23 of a class of all laborers, workmen and mechanics who furnished labor to SimplexGrinnell on non-federal public works projects in the State of New York at any time from February 6, 2001 until the final judgment in this matter, and who claim that they have not been paid prevailing wages and benefits as required by law (the "class").[14] Compl. ¶¶ 1, 7.

The class should be certified because, as courts have consistently recognized, unpaid prevailing wage claims such as theirs are ideal for classwide resolution. Further, the Rule 23 requirements are satisfied, including those of Rule 23(a)(1) and Rule 23(b)(3). Accordingly, as set forth more fully below, certification is warranted.

A. This Case, as a Prevailing Wage Case, is Perfectly Suited for Class Treatment

The class should be certified because their prevailing wage claims are perfectly suited for class treatment. This truism has been acknowledged explicitly and repeatedly by New York federal and state courts.

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[13] After the submission of his report and deposition, Dr. Crawford discovered a minor programming error that would reduce the total damages to $15,991,174. Crawford Decl. ¶ 10.

[14] The damages period for fire alarm work begins February 6, 2001, and for sprinkler work, July 14, 2002. PX 1 ¶ 16. This difference is due to statutes of limitations. *See* July 14, 2008 minute entry.

The New York Supreme Court and the Appellate Division for the First Department, which apply the same class certification requirements as this Court,[15] have both observed that "the class action mechanism [is] the best way of adjudicating a controversy . . . where Plaintiffs are seeking payment of *unpaid prevailing wages and supplemental benefits*." *Pajaczek v. Cema Constr. Corp.*, 2008 WL 541298, at *2 (Sup. Ct. N.Y. Co. Feb. 21, 2008) (emphasis added). *See also Pesantez v. Boyle Envtl. Servs., Inc.*, 673 N.Y.S.2d 659, 661 (1st Dep't 1998) (same); *Cardona v. Maramont Corp.*, 2009 WL 4026815 (Sup. Ct. N.Y. Co. Nov. 12, 2009) (same); *Galdamez v. Biordi Constr. Corp.,* 2006 WL 296951, at *3 (Sup. Ct. N.Y. Co. Oct. 17, 2006).

The Southern District of New York has noted that "whether Defendants' pay practices violated the NYLL [wage] provisions . . . are about the *most perfect questions* for class treatment." *Cuzco v. Orion Builders, Inc.*, 262 F.R.D. 325, 334 (S.D.N.Y. 2009) (quoting *Iglesias-Mendoza v. LaBelle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y. 2007)) (emphasis added).

New York courts' regard for prevailing wage claims as ideal for class treatment is evident from their frequent certification of prevailing wage classes. *See, e.g., Cardona*, 2009 WL 4026815 (certifying prevailing wage class and collecting cases that did the same); *Barone v. Safway Steel Prods., Inc.*, 2005 WL 2009882 (E.D.N.Y. Aug. 23, 2005) (sole reported prevailing wage class certification decision in this Court, following this trend).

It is also evident from New York courts' frequent certification of wage classes generally. *See, e.g., Mendez v. Radec Corp.*, 260 F.R.D. 38, 54 (W.D.N.Y. 2009) ("*Mendez II*") ("My conclusion that class certification is proper [for plaintiffs seeking lost wages] is in accord with *many other decisions* from within this circuit.") (emphasis added) (collecting Second Circuit

[15] *See* N.Y. C.P.L.R. § 901 (New York equivalent to Fed. R. Civ. P. 23); *Pajaczek*, 2008 WL 541298, at *2; *Pesantez.* 673 N.Y.S.2d at 660-61 (both cited in full *infra*, applying CPLR § 901).

cases); *Levinson v. About.com*, 2009 WL 1026021 (S.D.N.Y. Apr. 13, 2009); *Niemic v. Ann Bendick Realty*, 2007 WL 5157027 (E.D.N.Y. Apr. 23, 2008); *Dziennik v. Sealift, Inc.*, 2007 WL 1500080 (E.D.N.Y. May 29, 2007); *see also* the numerous wage class action cases cited throughout this memorandum.

In keeping with this well-established precedent, the class should be certified here.

B. Rule 23 is Satisfied

1. *The Rule 23 Requirements*

"[I]t seems beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification." *Gortat v. Capala Bros., Inc.*, 2009 WL 3347091, at *2 (E.D.N.Y. Oct. 16, 2009) (Gold, J.) ("*Gortat II*") (quoting *Gortat v. Capala Bros., Inc.*, 257 F.R.D. 353, 361-62 (E.D.N.Y. 2009) ("*Gortat I*")). Accordingly, "[t]he Second Circuit has emphasized that Rule 23 should be given liberal rather than restrictive construction . . . ." *Id.* (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997)). *See also Jankowski v. Castaldi*, 2006 WL 118973, at *1 (E.D.N.Y. Jan. 13, 2006) (quoting *Marisol A.*, 126 F.3d at 377) (alteration omitted) (courts considering class certification "are to adopt a standard of flexibility").

Rule 23 permits a class to be certified when it satisfies the elements of Rule 23(a) and one of the subsections of Rule 23(b). *See In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 32 (2d Cir. 2006) ("*IPO*"). The Rule 23(a) elements are: (1) the class is too numerous for joinder to be practicable; (2) the class shares at least one common question of law or fact; (3) the named plaintiffs' claims are typical of the class; and (4) the named plaintiffs will adequately represent the class. *Id.* Rule 23(b)(3), under which plaintiffs seek certification here, requires "predominance, i.e., law or fact questions common to the class predominate over questions

affecting individual members, and superiority, i.e., class action is superior to other methods." *Id.* All of these requirements are satisfied here.

2. *The Class Satisfies Rule 23(a)*

a. The Class is Sufficiently Numerous

"Courts in the Second Circuit presume numerosity when the putative class has at least forty members." *Gortat II*, 2009 WL 3347091, at *3 (citing *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)). SimplexGrinnell's own data and testimony show that the class has well over 400 members. *See* PX 1 Table 4 (listing more than 600 class members, all identified from SimplexGrinnell data); PX 16 ¶ 5 (Since "February 2, 2001 . . . over 400 different individuals . . . performed electrical work on public works jobs covered by the Complaint."). Therefore, numerosity is satisfied. *See, e.g., Gortat II*, 2009 WL 3347091, at *3 (certifying class of 74); *Iglesias-Mendoza*, 239 F.R.D. at 370 (125 members "easily satisfy the numerosity requirement").[16]

b. Questions of Law and Fact are Common

Commonality requires only one common issue of law or fact. *See In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 145, 166-67 (2d Cir. 1987); *Barone*, 2005 WL 2009882, at *4; *see also Haddock v. Nationwide Fin. Servs., Inc.*, 262 F.R.D. 97, 116 (D. Conn. 2009) ("Commonality is established so long as the plaintiffs can identify some unifying thread among the members' claims.") (quotation and citation omitted).

Plaintiffs need not show that all class members' claims are identical. *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 156 (S.D.N.Y. 2008). Any differences among class members,

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[16] The factors demonstrating superiority under Rule 23(a)(4) also demonstrate numerosity. *See infra*; *Trinidad v. Breakaway Courier Sys., Inc.*, 2007 WL 103073, at *8 (S.D.N.Y. Jan. 12, 2007) (superiority and numerosity are "closely related," and superiority was found for the same reasons as numerosity).

"while arguably relevant as defenses to liability, do not change the fact that [a] class action raises the same basic claim and shares common questions of law." *Mack v. Suffolk County,* 191 F.R.D. 16, 23 (D. Mass. 2000) (certifying class despite "varying defenses to liability which may be raised regarding particular individuals"). A class should be certified where the class claims arise "from a common nucleus of operative fact regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." *Haywood v. Barnes,* 109 F.R.D. 568, 577 (E.D.N.C. 1986); *see also Steinberg v. Nationwide Mut. Ins. C*o., 224 F.R.D 67, 74 (E.D.N.Y. 2004) (claims arising from the interpretation of key terms that repeatedly appear in a contract show commonality and are also perfectly suited for class certification).

The requisite commonality is present here. Plaintiffs and the class allege a common wrong, i.e., that SimplexGrinnell failed to honor its contractual obligation to pay them, as third party beneficiaries, prevailing wages as required by law. Compl. ¶ 19; *see* PX 15, 17, 18. This alone is enough to satisfy Rule 23(a)(2). *See Barone*, 2005 WL 2009882, at *4 (commonality satisfied where "plaintiffs allege a common wrong -- that Safway failed to pay the prevailing wages and supplemental benefits required for public works contracts"); *Haddock*, 262 F.R.D. at 117 ("If one or more Class members brought suit individually, they would raise the same legal claim, that is, that Nationwide breached its fiduciary duty [in violation of ERISA] . . . . Thus, the commonality requirement is met."); *Barragan v. Evanger's Dog & Cat Food Co.*, 259 F.R.D. 330, 334 (N.D. Ill. 2009) (commonality satisfied where one "alleged common employment practice [i.e., denying overtime pay] represents a sufficient common issue of law or fact").

In addition, as plaintiffs allege and the evidence shows, SimplexGrinnell's wrong arose from a common factual background, e.g.: (1) plaintiffs and the class did the same public work for

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SimplexGrinnell;[17] (2) plaintiffs and the class performed the public work pursuant to contracts between SimplexGrinnell and government agencies;[18] and (3) plaintiffs and the class all were subject to the same payroll procedures.[19] These facts show that commonality is satisfied. *See Koss v. Wackenhut Corp.*, 2009 WL 928087, at *6 (S.D.N.Y. Mar. 30, 2009) (where "[e]ach potential class member is or was a security officer employed by [defendant], . . . allegedly promised a [] Bonus . . . [and] never received [it] . . . plaintiffs' claims arise from a single set of operative facts" such that commonality was present); *see also Rodriguez v. Hayes*, 591 F.3d. 1105, 1122 (9th Cir. 2010) (citing, *inter alia*, *Marisol A.*, 126 F.3d 372) ("[T]he commonality requirement asks us to look only for . . . a common core of salient facts.").

Commonality also is satisfied because plaintiffs and the class share several specific questions of fact and law, such as:

- whether SimplexGrinnell entered certain contracts with government agencies to perform work on public sites;
- whether SimplexGrinnell's government contracts required it to pay prevailing wages to its workers;
- whether plaintiffs and the class performed work on public sites within the meaning the New York prevailing wage law;
- whether SimplexGrinnell is required to pay plaintiffs and the class prevailing wages for the testing and inspection work they perform on public sites;
- whether plaintiffs' and the class' work for SimplexGrinnell required payment of prevailing wages;
- what are the prevailing wage and benefit rates to which plaintiffs and the class are entitled for their work on public sites for SimplexGrinnell;
- whether SimplexGrinnell paid plaintiffs and the class the wages they were due; and
- whether SimplexGrinnell is liable to plaintiffs and the class can sue SimplexGrinnell under a third-party beneficiary contract theory.

Numerous plaintiff classes have been certified for sharing these very same questions.

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[17] Compl. ¶ 18; *see* PX 64 at 62-64, 92; PX 72 at 148; PX 56 at 72-74; PX 63 at 36-40.

[18] Compl. ¶ 18; *see* PX 64 at 67, 183-86; PX 61 at 75-76; PX 63 at 25; PX 60 at 53; *see also* PX 16 ¶ 5 ("over 400 . . . individuals have performed electrical work for SimplexGrinnell in the State of New York . . . on public works jobs covered by the Complaint").

[19] *See* PX 64 at 71-72; 89-90; 125-29**;** PX 56 at 59-61, 82.

See, e.g., Pajaczek, 2008 WL 541298, at *3 (prevailing wage case); *Barone*, 2005 WL 2009882, at *4 (same).[20]

The different limitations periods for fire alarm and sprinkler work will not undermine commonality. *See Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 78 (E.D.N.Y. 2004) ("Courts have been nearly unanimous in holding that possible differences in the application of a statute of limitations . . . does not preclude certification[.]") (quotation, citation and alteration omitted); *see also Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 203 (S.D.N.Y. 2005). Nor will differences in work performed, schedules, or rates of pay. *See Noble*, 224 F.R.D. at 343 (commonality satisfied despite "differences among employees -- i.e., responsibilities, hours worked, and salaries"); *Gortat I*, 257 F.R.D. at 362 (rejecting defendant's argument that "individualized questions regarding the number of hours that a specific employee worked" defeat certification).

Individualized defenses that SimplexGrinnell may raise also do not thwart commonality. *See In re WRT Energy Secs. Litig.*, 2006 WL 2020947, at *2 (S.D.N.Y. July 13, 2006) (finding commonality despite individualized defenses and noting that such defenses will not "defeat . . . commonality"). Indeed, they may *support* commonality because their disposition is a common issue of law. *See Dupler v. Costco Wholesale Corp.,* 249 F.R.D. 29, 45 (E.D.N.Y. 2008) (certifying class over defendants' objection regarding individualized defenses because those defenses actually "provide[d] an additional link of commonality between the class members") (quotation and citation omitted). For example, SimplexGrinnell's expected defense that testing and inspecting are not included in the New York prevailing wage law raises a common issue

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[20] *See also Torres v. Gristede's Operating Corp.*, 2006 WL 2819730, at *12 (S.D.N.Y. Sept. 29, 2006) (in overtime case, common questions warranting certification included "whether Defendants have failed to compensate class members"); *Bolanos*, 212 F.R.D. at 153-54 (same).

because as most if not all of the class performed such work. *See* PX 43; PX 5; PX 59 at 7; PX 15 at 4, 10; PX 65 at 52-54; PX 13 ¶ 19; PX 66 at 19, 25, 30, 39-40, 42-43.

The same goes for SimplexGrinnell's other potential defenses, such as that the class is not the intended beneficiary of the public contracts, and that plaintiffs' damages methodology is inaccurate. *See id.; see also Hnot v. Willis Group Holdings Ltd.,* 241 F.R.D. 204, 209 (S.D.N.Y. 2007) (employer's defense regarding its salary decisionmaking process "*actually supported* a finding of commonality" as it reflected a "common practice") (emphasis in original). Therefore, commonality is satisfied.

c. Plaintiffs' Claims are Typical of the Class' Claims

Rule 23(a)(3) "requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Gortat II*, 2009 WL 3347091, at *6 (quoting *Marisol A.*, 126 F.3d at 376). "[T]he typicality requirement is permissive and requires only that the representative's claims are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Rodriguez*, 591 F.3d at 1124 (internal quotation omitted) (citing, *inter alia*, *Marisol A.*, 126 F.3d at 326). *See also Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. 144, 155 (S.D.N.Y. 2002) ("Since the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding.") (quotation and citation omitted).

Here, typicality is satisfied for the same reasons as commonality. *See Gortat I*, 2009 WL 3347091, at *6 (quoting *Marisol A.*, 126 F.3d at 376) ("The commonality and typicality requirements tend to merge into one another, so that similar considerations animate the analysis of each."). That is, plaintiffs' and class members' claims arise from the same core set of facts.

See supra. And, plaintiffs and the class make the same claims and legal arguments, including: (1) they all performed fire alarm and sprinkler work on non-federal public work sites during the relevant period; (2) SimplexGrinnell is required by contract and under the New York prevailing wage law to pay them prevailing wages for all their public work; and (3) SimplexGrinnell breached the contract for which they were the third party beneficiaries and violated the New York prevailing wage law by failing to pay them prevailing wages. *See supra* (identifying and citing evidence regarding common factual and legal questions).[21]

For these reasons, typicality is present and the class should be certified. *See Gortat II*, 2009 WL 3347091, at *6 (finding typicality where "[n]amed plaintiffs allege that they each performed similar work for defendants and that, like the other members of the class, they were never compensated for all the hours they worked as a result of Defendants' common scheme to deprive employees of pay for all hours worked") (quotation omitted).

d. The Class is Adequately Represented

Adequacy under Rule 23(a)(4) "typically entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) (quotation and citation omitted). *See also Damassia.*, 250 F.R.D. at 158 (applying same inquiry in wage-and-hour context); Fed. R. Civ. P. 23(g) (considering lawyers' qualifications in appointing class counsel).

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[21] Further, plaintiffs' claims are typical of the class' claims regardless of the part of the state in which they worked. Investigations into SimplexGrinnell's wage practices throughout the state (Westchester, Newburgh, Syracuse, Long Island and New York City) consistently revealed failures to pay prevailing wages. *See* PX 47; PX 61 at 43:4-46:3, 72:8-19, 75:24-76:5, 78:20-21; PX 63 at 69:13-72:5; *Trinidad*, 2007 WL 103073, at *5 ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met . . . .").

Here, plaintiffs' interests are not antagonistic to the class. Plaintiffs and the class all allege the same wrongs and seek the same relief. *See Barone*, 2005 WL 2009882, at *5 (prevailing wage plaintiffs were adequate where they "seek the same relief as the rest of the class") (citing *Marisol A.*, 126 F.3d at 378); *see also Koss*, 2009 WL 928087, at *8 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997)). Further, nothing suggests any conflicts between plaintiffs and the class, or that plaintiffs will not adequately and aggressively represent the class. *See, e.g., Cardona*, 2009 WL 4026815 (noting, in certifying prevailing wage class, "nothing in the record to indicate that plaintiffs and their counsel could not fairly and adequately represent the class").

In addition, because commonality and typicality are satisfied, adequacy is satisfied. *See Damassia*, 250 F.R.D. at 158 ("[t]he fact that plaintiffs' claims are typical of the class is strong evidence that their interests are not antagonistic to those of the class"); *see also Lee*, 236 F.R.D. at 204 (S.D.N.Y. 2006) (same); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 87 (S.D.N.Y. 2001) (same).

Finally, plaintiffs' counsel are qualified, experienced and able to conduct this litigation.[22] *See Lee*, 236 F.R.D. at 204 ("based on the past experiences and current conduct of plaintiff's counsel, [] they are entirely capable of conducting the instant litigation."). Therefore, adequacy is present, and the class should be certified.

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[22] Beranbaum Menken has substantial class action experience and has represented workers in numerous wage-and-hour cases before this Court and others. PX 31. Constantine Cannon previously served before this Court as lead counsel for the plaintiff class in *In re Visa Check/MasterMoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003) (Gleeson, J.), *aff'd*, 396 F.3d 96 (2d Cir. 2005). *See id.* at 524 ("a premiere plaintiffs' litigation firm"). The lead Constantine Cannon attorney on this case, Raymond C. Fay, has extensive experience in employment litigation of all types and at all judicial levels. PX 32. Both firms have done extensive work investigating this case and will continue to devote significant resources to representing the Class. Coughlin Decl. For these reasons, plaintiffs respectfully request that Beranbaum Menken and Constantine Cannon be appointed co-lead Class Counsel pursuant to Rule 23(g).

3. *The Class Satisfies Rule 23(b)(3)*

Certification is appropriate under Rule 23(b)(3) because (1) "questions of law or fact common to class members predominate" over questions affecting only individual class members and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating [this] controversy." Fed. R. Civ. P. 23(b)(3).

a. Common Questions Predominate

Predominance is satisfied when "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." *In re Visa Check / MasterMoney Antitrust Litig.*, 280 F.3d 126, 136 (2d Cir. 2001) (quotation, citation and alteration omitted); *Gortat II*, 2009 WL 3347091, at *7 (same). "When determining whether common questions predominate courts focus on the liability issue[,] and if the liability issue is common to the class, common questions are held to predominate[.]" *Bolanos*, 212 F.R.D. at 157-58 (quotation, citation and alteration omitted).

Issues "predominate" when they are fundamental to the claim. *See Koss*, 2009 WL 928087, at *11 ("While some degree of individualized analysis will be necessary . . . the fundamental factual issue -- whether [bonuses should have been] paid . . . -- is subject to generalized proof" therefore predominance was satisfied). In wage cases such as this, the fundamental issues are whether the employer paid its employees properly, therefore predominance generally is found. *See id.*; *Pesantez*, 673 N.Y.S.2d at 660 ("the nature of the claims [for failure to pay prevailing wages] is such as to indicate a predominance of common issues of law and fact"); *see also Noble*, 224 F.R.D. at 345 (where "the gravamen of [plaintiffs'] claim is that defendants . . . deprived employees of . . . overtime pay[,] [a]lthough [some]

determinations . . . will require individualized findings, common liability issues otherwise predominate").

As with commonality, predominance will not be defeated by such factual variations as job titles, hours, and locations of work. *See Gortat II*, 2009 WL 3347091, at *7 (differences in position, hours and method of payment "do not predominate over the main issue: . . .that defendants paid all of these employees for fewer hours than they claim to have worked") (citing *Gortat I*, 257 F.R.D. at 362, which found defendants' arguments regarding these "distinctions" "not persuasive"); *Bolanos*, 212 F.R.D. at 157-58 (rejecting defendant's argument that "each class member must individually prove actual overtime worked in the unique circumstances of his or her position, . . . [location,] time and place" because plaintiffs' claims are based on alleged across-the-board deprivation of overtime wages[,]" therefore predominance was satisfied); *see also Gonzalez v. Zito Racing Stable Inc.,* 2008 WL 941643 at *7 (E.D.N.Y. Mar. 31, 2008) ("some factual variation among the circumstances of the class members is inevitable and does not defeat the predominance requirement").

Individualized defenses also will not defeat predominance. *Visa Check*, 280 F.3d at 139 ("the fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones") (quotation and citation omitted); *Mendez v. Radec Corp.*, 232 F.R.D. 78, 92 (W.D.N.Y. 2005) ("*Mendez I*"); *Jankowski*, 2006 WL 118973, at *4. Nor will differences in damages. *See Barone*, 2005 WL 2009882, at *5; Mar. 25, 2009 Hr'g Tr. at 16 (SimplexGrinnell counsel acknowledging that damages differences cannot preclude certification).

SimplexGrinnell may argue that individual claims predominate because determining class membership requires examining individualized hardcopy employment records (e.g., pay

stubs and service reports). This argument fails. The electronic records that SimplexGrinnell produced to plaintiffs identify, for the entire damages period: (a) all SimplexGrinnell employees who worked on public sites in New York; (b) the sites on which they worked; (c) the nature of their work; (d) the dates and hours they worked; and (e) the wages and benefits they were paid. *See* Crawford Decl.[23] Dr. Crawford used those electronic records, together with the job classification and wage rate information in the State and City Prevailing Wage Schedules, to identify the Class members and calculate their damages. *See* PX1 ¶¶ 51-57. Specifically, Dr. Crawford calculated, on a weekly basis, the difference between each class member's actual wages and benefits received and the wages and benefits they *should have received* had prevailing rates appropriately been applied. PX 1 Table 4.

Courts have consistently held that the availability of electronic records such as those produced here favors certification. *See Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003) (noting, in certifying class, that "individual factual determinations can be accomplished using computer records"); *see also Haddock*, 262 F.R.D. at 128 (where defendant "produced data demonstrating the amount of [wrongful] payments . . . determining the appropriate [recovery] for each Class member requires a mechanical calculation using readily available data" such that certification was appropriate); *Jankowski*, 2006 WL 118973, at *5 (reasons for certification included fact that "whether an individual worked [hours] for which they were not paid [proper] wages. . . can be verified by reference to objective documentation, including employee payroll records").

As demonstrated earlier, numerous common questions of law and fact exist here. These common questions are central to the "common wrong" alleged, i.e., that SimplexGrinnell failed

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[23] *See also* NYLL § 220(3-a. a. (iii)) (requiring government contractors to maintain pay records that include specific information, in order "to adequately enforce the provisions of this article").

to pay plaintiffs prevailing wages. *See id.*; *Pajaczek*, 2008 WL 541298, at *3 (certifying prevailing wage class because, *inter alia*, "questions of law and fact common to the class [] predominate over questions affecting only individual class members, namely, that [defendant] failed to ensure payment of the prevailing rates of wages"). Moreover, they outweigh any individual questions that may exist. *See Pesantez*, 673 N.Y.S.2d at 660; *Trinidad*, 2007 WL 103073, at *8 (predominance satisfied where "resolution of the common questions [e.g., regarding compensation and records of work] . . . are more substantial for each class member's case than the issues subject only to individualized proof"); *Mendez I*, 232 F.R.D. at 93 (where plaintiffs challenge "policies, which allegedly have been applied in a more or less uniform fashion to [all] employees[,] . . . [common issues] 'predominate over those issues that are subject only to individualized proof'") (quoting *Visa Check*, 280 F.3d at 136). Therefore, predominance is present and the class should be certified.

b. A Class Action is the Superior Method for Resolving This Dispute

Rule 23(b)(3) also is satisfied because a class action is the superior method for resolving plaintiffs' and the class' claims.

First, as discussed *supra*, courts have explicitly and repeatedly held that "the class action mechanism [is] the best way of adjudicating a controversy . . . where plaintiffs are seeking payment of *unpaid prevailing wages and supplemental benefits*." *Pajaczek*, 2008 WL 541298, at *2 (emphasis added). *See Pesantez*, 673 N.Y.S.2d at 12 (same); *see also Barone*, 2005 WL 2009882, at *3 (class action may be "the only avenue by which the individual [prevailing wage] plaintiffs are able to seek legal redress").

Second, although the State Department of Labor can prosecute employers who fail to pay prevailing wages and award unpaid wages to workers, it can only reach back two years. NYLL §

220-b(2)(a)(1). Therefore, an administrative proceeding is an unsatisfactory alternative for the class, given that they can seek unpaid wages in this Court under a contract theory going back six years. N.Y. C.P.L.R. § 213.

Third, class members have little interest "in individually controlling . . . separate actions." Fed. R. Civ. P. 23(b)(3)(A). Many of them still are employed by SimplexGrinnell, thus "the concern for possible employer reprisal action exists" if they institute their own lawsuits. *See Trinidad*, 2007 WL 103073, at *9 (quotation and citation omitted); *Gortat I*, 257 F.R.D. at 362-63 (same); *see also Alcantara v. CNA Mgmt., Inc.*, 2009 WL 4667091, at *4 (S.D.N.Y. Dec. 8, 2009); Coughlin Decl. Further, many of them seek relatively modest damages that may not justify the cost of individual litigation. *See Barone*, 2005 WL 2009882, at *3; *Pesantez*, 673 N.Y.S.2d at 661.

Fourth, continuing this litigation in this forum is desirable. Fed. R. Civ. P. 23(b)(3)(C). This Court has presided over plaintiffs' claims since 2007, during which time it likely has become "intimately familiar with [the case's] intricacies . . . having managed discovery and having ruled on various motions." *See Bolanos*, 212 F.R.D. at 158 (finding superiority on this basis). *See also Strip Search*, 461 F.3d at 230 (superiority present where "this action already has progressed substantially"). Further, "concentrating the litigation in [this] forum simplifies and streamlines the litigation process." *See id.* finding superiority on this ground); *see also Barone*, 2005 WL 2009882, at *3 (certifying prevailing wage class to "save [] considerable time and expense").[24] And deciding all class members' claims in this Court "would eliminate the risk that

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[24] Indeed, efficiency benefits such as these are among the main reasons courts so frequently certify prevailing wage and other wage plaintiff classes. *See, e.g., Barone,* 2005 WL 2009882 at *6 (noting, in certifying prevailing wage class, that doing so will "serve judicial economy by avoiding the time and expense associated with a separate adjudication of each plaintiff's claims"); *Cardona,* 2009 WL 4026815 ("it would be impractical and inefficient to pursue independent actions for the [prevailing] wages and benefits owed"); *see generally* discussion *supra* of how prevailing wage claims are perfectly suited for class treatment and cases cited therein.

[common] questions . . . will be decided differently in [different] lawsuit[s]." *See Torres*, 2006 WL 2819730, at *16 (finding superiority on this ground).

Finally, a class action is superior because it would be manageable. *See* Fed. R. Civ. P. 23(b)(3)(D). As demonstrated *supra*, the many common questions in this case predominate over any individual questions. *See Strip Search*, 461 F.3d at 230 ("we perceive little difficulty in managing a class action of liability, especially since . . . any individualized inquiries will be few and far between"). To the extent that individual issues exist, "most of [them] can be resolved by [] documentary evidence[,]" particularly SimplexGrinnell's electronic records. *See Pesantez*, 673 N.Y.2d at 661; *see also Haddock*, 262 F.R.D. at 128-29 (where defendant "produced data demonstrating the amount of [wrongful] revenue sharing payments . . . determining the appropriate figure [of disgorgement] for each class member requires a mechanical calculation using readily available data[,]" therefore class action was manageable). Individual issues also can be managed through such "tools" as "bifurcation . . . and appointment of a magistrate judge or special master to proceed over individual damages proceedings . . . ." *Mendez*, 232 F.R.D. at 95 (quoting *In re Visa Check*, 280 F.3d at 141).[25]

For all of these reasons, a class action is the superior method for adjudicating this case. Therefore, the class should be certified.

[25] Even if a class action were deemed unmanageable here, that would be "an insufficient reason for denying class certification." *Mendez I*, 232 F.R.D. at 93 (citing, *inter alia*, *In re Visa Check* for proposition that "dismissal for management reasons is never favored") (additional citations omitted).

IV. ARGUMENT--MOTION FOR SUMMARY JUDGMENT

A. The Applicable Law and Legal Standards

1. *The New York Prevailing Wage Law Requires the Payment of Prevailing Wages to Laborers, Workmen and Mechanics on Public Works*

New York Labor Law § 220 requires the payment of a "prevailing rate of wage" (§ 220(5)) to "laborers, workmen or mechanics" for employment on "public works" (§ 220(3)(a)) contracted with "the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law" (§ 220(2-a)). The prevailing wage rate is set by the New York Department of Labor annually, by reference to wages "in the same trade or occupation in the locality where the work is being performed." § 220(5)(a). The law provides: "The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall not be less than the prevailing rate of wages…." § 220(3)(a).

Employees on public works must be paid, in addition to prevailing wages, "supplements" by reference to "prevailing practices in the locality." § 220(3)(b), (5)(b) and (c). Supplements include non-wage fringe benefits, such as "health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay[,] life insurance, and apprenticeship training." § 220(5)(b). Employees must also be paid, for overtime work in excess of eight hours per day and five days per week, "a premium wage commensurate with the premium wages prevailing in the area in which the work is performed." § 220(2).

Public works contracts include "reconstruction and repair of any such public work." § 220(3)(c). "Repair" of public works includes maintenance of those public works. *Tenalp Constr. Co. v. Roberts*, 532 N.Y.S.2d 801, 804 (2d Dep't 1989) ("an analysis of the Labor Law reveals that the legislators were interested in protecting that specific portion of the work force

which is involved in the construction, replacement, maintenance and repair of public works") (citation omitted). The prevailing wage law contains various provisions regarding the content and administration of such contracts. The key mandate is: "Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be paid the wages herein provided." § 220(3)(a).

In addition, the prevailing wage law has specific reporting, record-keeping, and notice requirements. First, the contracting employer must keep and report, by sworn statement under penalty of perjury, a certified copy of its public works payroll every thirty days, in a form "as may be deemed necessary to adequately enforce the provisions of this article." § 220(3-a)(a)(iii). Second, the contracting employer must prominently post in the workplace, in large type, the "Prevailing Rate of Wages" setting forth the prevailing wages and supplements for the various classes of laborers, workers or mechanics employed on the public work. § 220(3-a)(a)(ii). Third, the contracting employer must notify all employees in writing of the prevailing rate of wage for their job classification: "Such notification shall be given to every laborer, worker or mechanic on their first pay stub and with every pay stub thereafter." *Id*. And at the beginning of the contract and annually thereafter the employer must notify the employees in writing of their right to contact the state agency contracting officer to air complaints about not being paid the correct prevailing wages and supplements. *Id.*

2. *Courts' Construction of Prevailing Wage Law Favors The Entry of Summary Judgment to Plaintiffs*

New York courts hold that the prevailing wage law is remedial legislation to be construed liberally in favor of the workers whom it is designed to protect. "The Labor Law's prevailing wage requirement reflects a strong public policy in this State and the statute is to be liberally

construed to effectuate its beneficent purposes." *Bridgestone/Firestone, Inc. v. Hartnett,* 572 N.Y.S.2d 770, 772 (3d Dep't 1991) (citation omitted). *See also Bucci v. Vill. of Port Chester,* 292 N.Y.S.2d 393, 397 (1968) ("[S]ection 220 must be construed with the liberality needed to carry out its beneficent purposes"); *Austin v. City of N.Y.,* 258 N.Y. 113, 117 (1932) ("The present statute is an attempt by the State to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen and mechanics. It is to be interpreted with the degree of liberality essential to the attainment of the end in view.")

The prevailing wage law's liberal construction and protective purpose, as well as long-settled principles of contract law, lead courts to enforce the law even when the contracting agencies and employers do not adhere to its provisions in their contracts. Long ago the Court of Appeals stated that Section 220 "governs the contract and the rights of the parties, whether actually incorporated into the writing or not, since all contracts are assumed to be made with a view to existing laws on the subject." *Fata v. S.A. Healy Co.,* 289 N.Y. 401, 406 (1943). *See also Twin State CCS Corp. v. Roberts,* 72 N.Y.2d 897, 899 (1988) ("the failure to annex the PRS [prevailing rate schedule] to the work specifications did not relieve petitioner of its obligation to pay prevailing wages").

Another important principle of construction relates to the scope of work and type of worker covered by the prevailing wage law. The statute defines neither "public work" nor "laborers, workmen or mechanics." However, consistent with the broad, remedial purposes of the statute, the courts have construed these terms liberally, and the same liberal construction should govern the disposition of the instant motion in favor of plaintiffs here. "Public work" includes "construction, replacement, maintenance, and repair of public works." *Tenalp,* 532 N.Y.S.2d at 804 (quoting *Varsity Transit v. Saporita,* 98 Misc. 2d 255, 259, 260, *aff'd*, 48

N.Y.2d 910 (1979)); *see also Miele v. Joseph,* 113 N.Y.S.2d 689, *aff'd,* 305 N.Y. 667 (1953) (sign painters doing "public work"). A broad construction of the phrase "laborers, workmen or mechanics" is also supported by Section 220(4), which sets forth certain workers who are excluded from the statute.

In determining whether an employee is a covered "laborer, workman or mechanic," "[j]ob titles are not controlling." Rather, "the pivotal question is the nature of the work actually performed." *Tenalp,* 532 N.Y.S.2d at 803, 804 (quoting *Matter of Kelly v. Beame*, 15 N.Y.2d 103, 109 (1965)). Thus, workers with the title of "foreman" or "supervisor" are not excluded from the law's coverage on the basis of those titles alone. *Austin*, 258 N.Y. at 115-16 ("His duties, though they put him in a grade above his fellows, were so close akin to theirs, so predominantly physical in content and attendant risks, that he was still in the same *genus*, the broadly inclusive class of 'workmen,' though, perhaps, in a different species…. If the plaintiff, while serving as a foreman, was still within the trade, he was still within the statute."). The New York law does not contain exemptions for various classifications of work like those found in federal wage and hour law. *Tenalp,* 532 N.Y.S.2d at 804-05; *see* PX 3.

3. *Plaintiffs May Recover For Unpaid Prevailing Wages as Third Party Beneficiaries of Defendant's Government Contracts*

New York courts long have held that employees may recover as third party beneficiaries in a breach of contract action if the employer fails to pay the wages and supplements mandated by the New York prevailing wage law. In *Fata v. S.A. Healy Co.,* 289 N.Y. 401 (1943), the Court of Appeals held that the workers had a common law contract claim even though the prevailing wage law had its own administrative enforcement mechanism. The court held that "where a valid statute requires the insertion of provisions intended for the protection of laborers or other groups in contracts relating to matters which are subject to regulation by the State," a

"contractual obligation is created which may be enforced by action brought by one of the group for whose benefit the provisions have been inserted." 289 N.Y. at 406. *See also Wright v. Herb Wright Stucco, Inc.*, 50 N.Y.2d 837 (1980) (approving dissent below, reported at 422 N.Y.S.2d 253, 254) (affirming that private right of action available alongside proceedings in Department of Labor).

More recently, the Court of Appeals reviewed the history of third party beneficiary actions, observing that, as a matter of New York law, "the fact that the contractual provisions at issue were inserted in order to comply with statutes does not alter plaintiffs' status as third-party beneficiaries." *Cox v. NAP Constr. Co.,* 10 N.Y.3d 592, 602 (2008). The court quoted *Strong v. American Fence Construction Co.,* 245 N.Y. 48, 53 (1927) (Cardozo, C.J.): "A beneficiary of the promise, a laborer or materialman for whose protection it was given, has a right of action for the damages resulting from the breach (*Lawrence v. Fox*, 20 N.Y. 268; *Seaver v. Ransom,* 120 N.E. 639). The promise was exacted by the promise in fulfillment of a legal duty. *It was exacted for the very purpose of assuring* to the plaintiff and to others similarly situated *the benefit* of the security *established by the statute*." *Cox*, 10 N.Y.3d at 602 (emphases in original).

4. *Summary Judgment Standards*

Summary judgment for the moving party "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *see also R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 57 (2d Cir. 1997). Summary judgment must be entered "against a party who fails to make a

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In such a situation, there is no genuine issue of material fact "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322-23. Summary judgment may be rendered "on liability alone, even if there is a genuine issue on the amount of damages." Fed. R. Civ. P. 56(d)(2).

B. SimplexGrinnell Has Violated Section 220 by Failing to Pay Plaintiffs and the Class Members Prevailing Wages for Work Performed On Public Job Sites

1. *Plaintiffs Have Shown That SimplexGrinnell Has Entered Into Public Works Contracts Covered by the New York Prevailing Wage Law*

Defendant has entered into numerous public works contracts in the State of New York covered by the prevailing wage law over the course of the liability period in this case, from February 2001 to the present. Some of the contracts contain the prevailing wage language and schedules mandated to be incorporated by Section 220(3)(a), but many do not. This does not matter, as the requirements of section 220 are incorporated into the contracts as a matter of law. *Fata,* 289 N.Y. at 406. Thus, as a matter of law, defendant cannot perform public work without entering into a contract governed by the prevailing wage law. The existence of the contracts at issue here is shown by defendant's electronic records that contain the names of nonfederal public customers and projects for whom class members have performed work on public job sites, as confirmed in the entries in defendant's electronic project data. *See* Crawford Decl.; PX 2. Production of the hundreds if not thousands of public works contracts is not necessary to prove that they exist. *See United States v. Jones,* 958 F.2d 520, 521 (2d Cir. 1992) (best evidence rule does not require admitting document at trial to prove existence of document; permitted

admission of tax return transcript to prove existence of tax return) Although defendant would be hard-pressed to deny that the customers listed are not public entities covered by the prevailing wage law, the court can take judicial notice of their public status, *see, e.g., McKernan v. City of N.Y. Civil Serv. Comm'n,* 127 Misc. 2d 946, 955 (Sup. Ct. N.Y. Co. 1985) (court took judicial notice of departmental arms of New York City government)**,** and plaintiffs hereby request that the court do so. Fed. R. Evid. 201(b).[26]

A similar rationale applies to the contents of the contracts. Contrary to the expected contention of defendant, plaintiffs do not have to produce the hundreds or thousands of public works contracts here, because the relevant content of those contracts is ordained as a matter of law, irrespective of defendant's compliance *vel non* with the requirement to include the applicable prevailing wages in the contracts themselves. Stated another way, plaintiffs' proof of the existence of the contracts through defendant's electronic records, coupled with the legal requirement that each of those contracts must embody the obligation to pay prevailing wages for public work, provide the evidentiary basis for defendant's contractual obligation to pay prevailing wages on the public work conducted by the plaintiff class.

A review of some of the public works contracts produced by defendant confirms plaintiffs' contractual rights to be paid prevailing wages required under Section 220. For example, defendant's largest public works contract is the ten-year, base charge $50.0 million contract with the New York State Office of Mental Health to provide inspection, testing, maintenance, repair and replacement for myriad fire alarm and sprinkler systems and associated devices at facilities statewide. PX 10. That contract contains the obligation to pay prevailing wages in a "standard clause" appendix: "If this is a public work contract covered by Article 8 of

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[26] If there is any question about the status of any of the 13,000 plus entries on the public customer list, plaintiffs request that the court allow them to supply additional "necessary information," F.R.E. 201(d), to confirm the public status of the entity involved.

the Labor Law…Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law." *See* PX 8. A slight variant of the standard clause states that "any employees whose prevailing wage is required to be fixed pursuant to Section 220… shall be paid such prevailing wage." PX 6 (Apple Industrial Development Corp. Contract #13510041); *see* PX 7 (same: Apple Industrial Development Corp. Contract #13510034).[27] Since the required language is incorporated into each contract as a matter of law, *see Fata*, *supra*, plaintiffs may enforce their third party beneficiary contract claims on the basis of the legally-mandated wages and benefits found in the schedules issued by the Department of Labor.

2. *New York Labor Law Requires Employers to Pay Prevailing Wage to Workers Who Test and Inspect Life Safety Systems*

Defendant maintains that "code-related" testing and inspection of fire and life safety systems by its technical employees on public worksites is not work covered by the prevailing wage law. Specifically, defendant contends that testing and inspection does not fall within the scope of maintenance functions that are indisputably encompassed by the prevailing wage law. This presents a mixed question of fact and law for the court to decide. It should be decided in plaintiffs' favor on summary judgment, on undisputed material facts.

First, there is no practical separation between testing and inspection, on the one hand, and other maintenance functions, on the other, in the SimplexGrinnell workforce and in the jobs on public sites. SimplexGrinnell employees do the same type of work, whether they are called fire alarm technicians, fire alarm or sprinkler inspectors, or sprinklerfitters. Generally, they are all

[27] In another example, defendant entered into a contract with full detail concerning its obligations under the prevailing wage law. *See* PX 8 at SG0026757-6813.

considered technicians. They all use the tools of the trade to install, repair, maintain, test, and inspect the systems. PX 64 at 142-43.

Defendant touts this integrated function of its operations when it markets its testing and inspection services. It tells the public that "you can't tell if a system is working properly just by looking at it," and that its customers can expect "comprehensive, functional testing using specialized tools and instrumentation to detect malfunctions you can't find by visual inspection alone." Defendant further markets its "expertise to professionally test, inspect and service" its and others' systems. PX 4.

This is because of the very nature of fire alarm and sprinkler devices, which are only called upon to function in an emergency. Thus, it is usually non-obvious when such systems are in need of repair, and absent specialized, regular testing and inspection there is no way to determine if those systems are functioning at all. In fact, Paul Coons, the New York State Office of Mental Health official who helped negotiate the contract with defendant, testified that a building is not safe unless its fire alarm system is properly inspected and tested. PX 58 at 26.

Second, SimplexGrinnell's maintenance contracts themselves state that the inclusion of testing and inspection is part of the maintenance function. For example, the 2001 Life Safety Systems (sprinkler, standpipe systems, and fire extinguishers) maintenance contract for the New York Economic Development Corporation, South Brooklyn Marine Terminal states: "Maintenance shall include repair service required to keep the [Life Safety Systems] operational at all times, together with replacement of the system or its components, when for any reason they become undependable or inoperative. *Maintenance includes periodic recurring inspections and tests*...." PX 78 (emphasis added). Other service contracts with the same agency contain similar language: PX 7 at SG0010763 (inclusion of "periodic recurring inspections and tests" under

"General Maintenance and Repair"); PX 6 at SG0011518 (same); *id.* at SG0011523 ("Contractor shall conduct periodic inspections and tests and maintain and repair each System.").

Third, New York State, in licensing fire alarm technicians, recognizes that testing and inspection is an integral part of fire alarm system maintenance: "*Maintaining an alarm system* includes, but is not limited to, the inspection of a device, component or system for the purposes of detecting and preventing problems with equipment and devices….Maintenance shall also include testing of alarm components, devices or systems for the purpose of establishing proper operating conditions." 19 N.Y. Comp. Codes R. & Regs. § 195.1(d) (2009).

Fourth, the New York Department of Labor, the administrative enforcement agency for the prevailing wage law, has issued an opinion to SimplexGrinnell dated December 31, 2009, finding testing and inspection of fire systems to be squarely covered as maintenance work under the prevailing wage law. PX 3. The Department opined that "public contracts for inspection and testing of fire systems do fall within the coverage of Article 8 [§ 220] of the New York State Labor Law;" more specifically, that "the testing of fire systems is included within the category of system maintenance and is, therefore, subject to the payment of prevailing wages." *Id.* at 1, 3.

The Department of Labor reached its conclusions after a series of submissions and *ex parte* presentations by SimplexGrinnell in an attempt to convince the Department of the same position it has espoused in this lawsuit—that "code-related" inspections are not part of maintenance and repair under the prevailing wage law. In rejecting SimplexGrinnell's position, the Department started with the core inquiry under the statute—the "nature of the work," *Matter of Gen. Elec. Co. v. N.Y.S. Dep't of Labor,* 565 N.Y.S. 2d 863, *aff'd on op. below*, 76 N.Y.2d 946 (1990) (quoting *Matter of Kelly*, 15 N.Y.2d at 109). The Department found that defendant's employees who install fire systems are without dispute laborers, workmen or mechanics under

Section 220, that the nature of this work is "the same" as testing and inspection, and that therefore "[e]mployees performing testing and inspection work on fire systems are properly categorized as laborers, workmen, or mechanics." PX 3 at 2.

In rejecting SimplexGrinnell's argument trivializing testing and inspection of fire systems as merely satisfying a customer's compliance with fire and safety codes, the Department relied upon both public sources and SimplexGrinnell's own materials to conclude that code-related testing and inspection is "an integral part of an overall contract for the maintenance of a system and is, therefore, included with the coverage of Article 8 of the Labor Law." *Id.* at 3. The Department cited to the Fire Code itself, New York State procurement practices, defendant's testing and inspection contracts, and defendant's marketing materials. Fully consistent with the contract examples cited above, the Department noted that the testing and inspection contracts "generally require inspections to be undertaken so as to ensure that systems are properly operating up to code standard, and if not, that necessary repairs are made." *Id.* at 2. Like the website materials referred to above, the SimplexGrinnell marketing materials on "maintenance activities for fire alarm systems" helped lead the Department to conclude that "testing and inspection appear to be included…as integral parts of the maintenance of fire systems by employees working within your own company." *Id.* at 3.

Plaintiffs submit that the Court should come to the same conclusion as the Department of Labor, and grant plaintiffs summary judgment on the question of inclusion of testing and inspection as maintenance work covered by the prevailing wage law. The Department's conclusion is wholly in line with the purposes of the statute, the case law, and the undisputed record here concerning the integration of testing and inspection with defendant's system maintenance function. Moreover, the Department of Labor has special expertise in the matter, as

the administrative agency in charge of enforcing the prevailing wage law, and its interpretations, if not irrational or unreasonable, should be deemed persuasive. *See Bernstein v. Toia,* 43 N.Y.2d 437, 448 (1977); *see also Marcella v. Cap. Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 48 (2d Cir. 2002) (Sotomayor, J.) ("[T]hese opinion letters, as the views of the agency charged with implementing ERISA, are at least 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance[.]'") (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)).

The Department of Labor's opinion on testing and inspection is especially persuasive here, given the manner in which it was obtained. SimplexGrinnell lobbied the Department long and hard to convince the Department to come to an opposite conclusion, culminating in an *ex parte* "show and tell" test and inspect session in late December 2009 at a state facility in Albany, at which the Commissioner of Labor was present. PX 77. In essence, defendant was attempting to try an issue in this lawsuit before the Labor Department, but without the plaintiffs or the Court present. Irrespective of the defendant's approach, the important persuasive point is that the Department was addressing the very situation before this Court. In similar circumstances, one New York court followed "DOL's application of these provisions to the factual circumstances at issue here." *Edwards v. Jet Blue Airways Corp.*, 2009 WL 4482409 at *4 (Sup. Ct. Kings Co. 2008).

Defendant will doubtlessly argue that the Department's agreement with defendant's request to apply the opinion prospectively for the most part (PX 3 at 3) blunts the persuasive power of the opinion in this case. The Department's discretionary timetable for administrative implementation of its opinion for its own purposes should have no impact on the Court's decision here. The Court is ruling on a legal controversy that has been before it for three years,

implicating the rights of plaintiffs and class members going back to 2001. The issues here include the substantive legal issue that was the focus of the Department's opinion letter, not the agency's enforcement timetable. The persuasive force of agency expertise lies in the Department's analysis of the inclusion of testing and inspection as prevailing wage work, a subject different from the ministerial temporal application of the opinion itself. No change in the law was worked by the opinion; rather, the Department was opining on what the law always had required. We submit that the Court should come to the same conclusion in granting the instant motion, using the Department's opinion as one strong point in favor of summary judgment for plaintiffs.

3. *The Evidence Is Undisputed That Defendant Failed to Pay Prevailing Wages and Therefore Breached Its Contractual Obligations.*

As set forth above in detail in Section D of the statement of facts, SimplexGrinnell has had a long history of not complying with the prevailing wage law, and in those instances where there was payment of prevailing wages, it was spotty and belated. Even after defendant appointed a national prevailing wage manager, years passed before the company even enunciated a policy of compliance, and additional time passed before payments owing were paid. On top of that, any enforcement of the prevailing wage law by either employees or the regulatory agency was hampered by defendant's failure to comply with the notice requirements and other formalities of the law, and defendant's submission of certified payrolls that did not comply with the law. In reviewing the weekly history of defendant's prevailing wage pay practices since 2001, Dr. Crawford found that over 600 employees had worked on public jobs for which they were not paid prevailing wages. Thus, there is no question that SimplexGrinnell breached the contracts the prevailing wage provisions of which were for the benefit of plaintiffs and class members as third party beneficiaries.

C. Plaintiffs and Class Members Are Entitled to Summary Judgment on Damages

In this case, simultaneously with their request for class certification, plaintiffs seek summary judgment on damages for themselves and class members who have suffered damages because of defendant's failure to pay prevailing wages for work on public jobs. The methodology used by plaintiffs, although somewhat difficult to implement because of the poor state of defendant's pay records, is straightforward, and is explained in Dr. Crawford's report. For each class member Dr. Crawford identified the public jobs worked during the entire liability period, from the SimplexGrinnell job project data. From the payroll data, he determined the hours for which they were paid prevailing wages. Then, from the project data identifying public work and from the New York prevailing wage schedules, he computed the difference between what the employee should have been paid and what the employee actually got paid, calculated the statutory interest, and subtracted payments made by SimplexGrinnell in the course of its "self-audit." The resulting damages, $16.0 million, should be awarded to the class members on summary judgment. PX 1; Crawford Decl.

1. *Legal Standards Support the Entry of Summary Judgment for Plaintiffs on Damages*

It is fundamental that once a plaintiff has shown the right to recovery, he need prove damages only to a reasonable degree of certainty, including the use of approximations where necessary, without the need for precise certainty. As is stated in the New York Pattern Jury Instructions: "So long as the figure arrived at has a reasonable basis of computation and is not merely speculative, possible or imaginary, the fact finder has the right to resort to reasonable conjectures and probable estimates and to make the best approximation possible through the

exercise of good judgment and common sense in arriving at an award of damages." New York Pattern Jury Instructions PJI:2:227 Damages general (V1B p 1493).

The applicable principles were summarized in *Tractebel Energy Marketing v. AEP Power Marketing*, 487 F.3d 89, 110 (2d Cir. 2007): "It has long been established in New York that a breaching party is liable for all direct and proximate damages which result from the breach. *Wakeman v. Wheeler & Wilson Mfg. Co.*, 56 Sickels 205, 209, 101 N.Y. 205, 4 N.E. 264, 266 (1886). The damages, however, 'must be not merely speculative, possible, and imaginary, but they must be *reasonably certain* and such only as actually follow or may follow from the breach of the contract.'" (quoting *Wakeman*) (emphasis in original). *See also Contemporary Mission, Inc. v. Famous Music Corp.,* 557 F.2d 918, 926 (2d Cir. 1977) (plaintiff need only show a "stable foundation for a reasonable estimate" of damages) (quotation and citation omitted); *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 496 (2d Cir.1995) (the amount of damages need only be proved with reasonable certainty).

The damages presented here contain a prejudgment interest component. In New York, prejudgment interest can be recovered "because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property." N.Y. C.P.L.R. § 5001(a). Prejudgment interest accrues at 9% per annum (except where otherwise provided by statute) on a simple interest basis. N.Y. C.P.LR. § 5004; *see Perero v. Food Jungle, Inc*., 2006 WL 2708055, at *8 (E.D.N.Y. Aug. 7, 2006).

Interest accrues and "shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable

intermediate date." N.Y. C.P.L.R. § 5001(b). For example, when the "damages were incurred at various times," plaintiffs may use the midpoint of the accrual of each set of damages to calculate interest. *See Doo Nam Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 342 (S.D.N.Y. 2005); *Zeng Liu v. Jen Chu Fashion Corp.*, 2004 WL 33412, at *5 (S.D.N.Y. Jan. 7, 2004). Dr. Crawford calculated interest from each period of loss, and credited the same rate of interest for payments made by defendant to the members of the class in the course of the self-audits.

2. *Plaintiffs Are Not Required to Present Damages in the Form Demanded by Defendant, Particularly in Light of the Deficiencies in Defendant's Employment Recordkeeping.*

Defendant criticizes Dr. Crawford's report because it does not break down, on a day by day basis for each individual, each public job for which prevailing wage pay is claimed. There is no controlling legal authority dictating that a litigant must break down its presentation of a reasonably certain damages estimate in the manner dictated by the defendant. The question is whether the plaintiffs' methodology yields a reasonably certain damages estimate, not whether another method could yield the same result or arguably one marginally more precise.

In this case, there is another practical limitation preventing the matching, on a daily basis, of the work performed by plaintiffs and members of the proposed class, on the one hand, with the amounts they were paid or the daily prevailing wage shortfall, on the other. As explained by Dr. Crawford, SimplexGrinnell's electronic pay data are deficient in that they do not record, contemporaneously or in a single location, pay and job task information. Often the job project information records lag the time entries by days or even weeks. This prevents the pay and job project databases from being merged completely on a contemporaneous basis. Crawford Decl. ¶ 9.

As explained above, SimplexGrinnell has been deficient in its employment record keeping not only with respect to its electronic databases, but in other respects as well—such as the failure to include required material regarding prevailing wages in its public work contracts, the failure to post prevailing wage schedules, and the failure to advise employees of their right to be paid prevailing wages. Collectively, these deficiencies prevent plaintiffs from presenting a damages study in the arbitrary fashion demanded by defendant, but they do not prevent plaintiffs from presenting a reliable, alternative method of presenting damages.

In these circumstances, the employee need not present an exact replication of daily employment records to justify an award of damages. The employee need only "submit sufficient evidence from which violations of the Act and the amount of an award may be reasonably inferred." *Martin v. Selker Bros., Inc.* , 949 F.2d 1286, 1296-97 (3d Cir. 1991). The Second Circuit, in *Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58, 66 (2d Cir.1997), quoted the applicable principles from the Supreme Court's seminal decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946):

> where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes . . . [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

The court in *Reich* went on to explain the plaintiff's burden in establishing a prima facie damages case under *Mt. Clemens*, 121 F.3d at 67:

> The Secretary's burden in such cases, while not overly onerous, is to establish a prima facie case. *See [Reich v.] Gateway Press [, Inc.]* , 13 F.3d [685,] 701 [(3d Cir. 1994)] ; *Secretary of Labor v. DeSisto* , 929 F.2d 789, 793 (1st Cir. 1991) (noting that "the Secretary's initial burden in these cases is minimal"). He is not required to do so in complete detail as to the wages lost by each employee. However, he must produce sufficient evidence to establish that the employees have in fact performed work for which they were improperly compensated and produce sufficient evidence to show the amount and extent of that work "as a matter of just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687; *cf. Gateway Press*, 13 F.3d at 701. Upon meeting this burden, the burden shifts to the employer, and if the employer fails to produce evidence of the "precise amount of work performed" or evidence to "negative the reasonableness of the inference to be drawn from the employee's evidence," the court may then "award damages to the employee[s], even though the result be only approximate." *Mt. Clemens*, 328 U.S. at 687 -88.

The *Mt. Clemens* rationale is a specialized application, in wage loss cases under remedial labor legislation, of the longstanding damages principle that "a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." *Eastman Kodak Co. v. S. Photo Material Co.*, 273 U.S. 359, 379 (1927); *see Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 563 (1931)*; Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264 (1946).

These principles have been followed in cases brought under the New York Labor Law. *See, e.g., Alphonse Hotel Corp. v. Sweeney,* 674 N.Y.S.2d 351 (1st Dep't 1998*)* (when a contractor refuses to produce records or provides inadequate or inaccurate records, use of best available evidence to determine underpayments to employees is permissible, even though these inferences are approximate in nature). When these alternate methods are applied, as under *Mt. Clemens* the burden shifts to the employer to negate the reasonableness of the calculations. *See*

Georgakis Painters Corp. v. Hartnett, 565 N.Y.S.2d 863, 864-65 (3d Dep't 1991) (prevailing wage case); *Mid Hudson Pam Corp. v. Hartnett*, 549 N.Y.S.2d 835 (3d Dep't 1989) (same).

3. *Damages Should Be Awarded to Each Class Member in the Amounts Stated in Dr. Crawford's Report*

The Court should enter summary judgment in favor of plaintiffs and the members of the plaintiff class in the amounts set forth in Table 4 of Dr. Crawford's report through the period ending December 31, 2009, regardless of whether the Court deems it appropriate or necessary to utilize the *Mt. Clemens* principles. Here plaintiffs have satisfied the principles of reasonable certainty. Using defendant's own electronic job project and payroll data, Dr. Crawford calculated each class member's losses. He used reasonable assumptions where those were required. For example, where full data were not available for the very beginning of the damages period in 2001 and for the latter half of 2009 following the cutoff of records produced by defendants, he provided estimates based on the closest chronological periods where the data were available. *See* PX 1 ¶¶ 11-12. Where one of two prevailing wage rates might have been paid on a particular project, he chose the lower rate. In general, where assumptions and estimates were required, Dr. Crawford consistently favored defendant in the calculation, lowering the damages figures from what they otherwise would have been.

4. *In the Alternative, the Court Should Enter Partial Summary Judgment on Damages*

In the alternative, plaintiffs ask the Court to enter partial summary judgment under Fed. R. Civ. P. 56(d).

First, if in the course of defendant's response to the calculations of particular class members the Court is persuaded that factual issues remain as to individual calculations, then those calculations should be set for trial promptly. In making this request, plaintiffs do not ask

that the Court give defendant the benefit of mistakes it has made and not corrected. For example, Dr. Crawford points out in his report, in response to criticism by defendant, that there are some instances of high workweek hours in the project data. PX 1 at 15 n. 16. Because defendant has not shown more accurate data, plaintiffs' primary request here is that the damages be awarded on the basis of what is shown in defendant's own records, as reflected in Table 4 of Dr. Crawford's report. Only if the Court allows defendant to dispute its own data do plaintiffs seek the alternative relief of sending certain individual damages claims to the jury.

Second, in the event that there are remaining questions about the individual damages awards even though the Court accepts the overall damages methodology as reliable and yielding just results, then plaintiffs ask the Court to award aggregate damages to the class as a whole in the amount calculated by Dr. Crawford, $15,991,174, and conduct additional appropriate proceedings to determine the individual damages awards. Crawford Decl. ¶ 10; *see* 3 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 10:2 (4th ed. 2002) ("Proof of aggregate monetary relief for the class is feasible and reasonable under various circumstances. In fact, the ultimate goal in class actions is to determine the aggregate sum, which fairly represents the collective value of claims of individual class members.") (internal citations omitted).

Third, given the fact that the data received by plaintiffs from defendant allowed a damages calculation up through December 31, 2009, the date of Dr. Crawford's report, plaintiffs' request that the Court order defendant to provide updated payroll data and allow plaintiffs' to file a supplemental summary judgment motion on damages through the date of judgment.

V. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court certify the class and enter summary judgment in favor of plaintiffs and class members on liability and damages, and award damages as prayed.

Respectfully submitted,

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By /s/

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