

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

ROBERTO RAMOS, *et al.*,

Plaintiffs,

v.

SIMPLEXGRINNELL LP,

Defendant.

: Hon. Steven M. Gold
:
: Case No. 1:07-cv-00981-SMG
:
: *Civil Action*
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**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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OVERVIEW

Some claims fail on summary judgment because of an inherent legal defect. Plaintiffs' primary claim—that Defendant SimplexGrinnell LP ("SimplexGrinnell") failed to pay prevailing wages for routine, code-driven testing and inspection of fire alarms and sprinklers—is just such a claim. The New York Department of Labor has ruled that during the relevant time period, the New York Labor Law did not require SimplexGrinnell to pay prevailing wages to employees for routine, code-driven testing and inspection of fire alarms and sprinklers. That ruling extinguishes Plaintiffs' main claim.

Other claims fail on summary judgment for want of evidentiary support. In this action, Plaintiffs have steadfastly refused to accept that their claims and the claims of the putative class required them to: (1) prove the contracts on which their claims are founded, and (2) obtain the essential records for the necessary—although highly individualized—inquiries into their daily activities. Consequently, Plaintiffs turned a blind eye to the voluminous records containing the information that *might* support their claims, and they never obtained copies of these documents. By failing to collect the evidence necessary to prove their claims, Plaintiffs ruined their chances of prevailing on the merits, and if the Court grants class certification, Plaintiffs' evidentiary deficiencies alone will extinguish the claims of hundreds of unwitting employees.

INTRODUCTION

Fifteen named plaintiffs brought this putative class action against SimplexGrinnell, claiming that SimplexGrinnell breached its contractual promises to pay its employees the prevailing rate of pay in accordance with the Prevailing Wage Act, New York Labor Law Section 220, *et seq.* Plaintiffs' First Amended Complaint ("FAC") asserts a claim for third party beneficiary breach of contract, a derivative claim for unpaid overtime, and equitable claims for

unjust enrichment and quantum meruit. All claims arise from Plaintiffs' primary allegation that SimplexGrinnell failed to pay its employees the prevailing rate of pay for work performed on public facilities.

After roughly three years of discovery, during which SimplexGrinnell freely granted Plaintiffs access to their paper records and electronic data, Plaintiffs failed to obtain the evidence needed to support the fundamental elements of their claims. For example, although Plaintiffs base their contract claims on alleged promises contained in thousands of contracts with state agencies, Plaintiffs can prove the contents of only *twenty-nine* contracts.¹ They similarly cannot identify the projects and dates on which they claim SimplexGrinnell failed to pay prevailing wages. Absent that and other crucial evidence, Plaintiffs cannot possibly carry their burden of proof at trial.

A multitude of other reasons exist for dismissing the FAC in whole or in part. First, Plaintiffs' expert, Dr. David Crawford, has identified 120 members of the putative class who have suffered no damages, and another 206 who did not incur damages for one of two major categories of work. Absent any damages, their claims cannot stand. Second, Plaintiffs base many of their claims and the claims of the putative class on the performance of job tasks that did not require SimplexGrinnell to pay prevailing wages, including but not limited to code-related testing and inspection from 2001 through 2009. All claims based on job tasks not covered by the Prevailing Wage Act must fail.

¹ In an Affidavit filed in support of Plaintiffs' Motions for Class Certification and Summary Judgment, Dr. Crawford identified 13,409 public projects. If each project represents a separate contract, Plaintiffs have produced less than ¼ of 1% of the applicable contracts.

Plaintiffs' equitable claims fail as a matter of law. Plaintiffs cannot use equity to enforce alleged contractual provisions. Even if they could, SimplexGrinnell has always paid its hourly employees at least their regular rate of pay for their work.

Fourth, Plaintiffs' overtime claims fail because Labor Law Section 655 and 12 N.Y.C.R.R. § 142-3.2 do not authorize lawsuits for unpaid prevailing wages. Section 220 of the Prevailing Wage Act provides the exclusive statutory remedy for unpaid overtime prevailing wages, and that statute requires Plaintiffs to first seek an administrative review from the Department of Labor before filing a lawsuit. Plaintiffs have no evidence to establish their claims in any event. For similar reasons, Plaintiffs' statutory claim for unpaid wages in violation of Article 6 of the Labor Law Sections 190, 191 and 198-c fails. Plaintiffs' exclusive statutory remedy for unpaid prevailing wages lies in the administrative remedy set forth in Article 8, Section 220.

SimplexGrinnell respectfully submits the Court should grant summary judgment in SimplexGrinnell's favor and dismiss the FAC.

STATEMENT OF FACTS

I. Parties

SimplexGrinnell formed in 2001 with the merger of Simplex and Grinnell Fire Protection—two long-time leaders in the fire and life-safety systems. (Affidavit of Richard Zammitti ("Zammitti Aff."), ¶2) SimplexGrinnell has offices throughout the United States, including nine that serve customers in the State of New York. (Zammitti Aff. ¶2)

Plaintiffs are fifteen current and former fire alarm and sprinkler employees who worked in the field performing various tasks for SimplexGrinnell's public and private customers. (FAC, ¶¶1,3,18) All fifteen named Plaintiffs have worked exclusively out of the New York City District

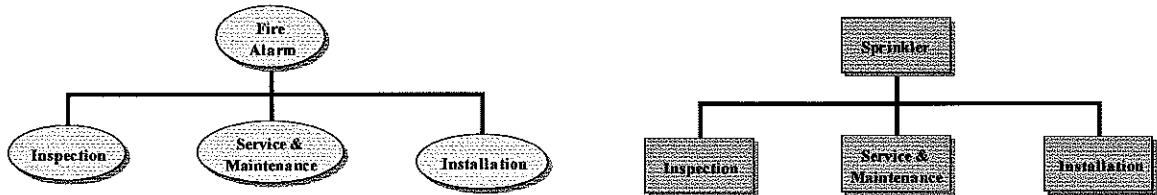
Office. (Affidavit of Marion Rivera (“Rivera Aff.”), ¶2) Eleven of the named Plaintiffs—Agban, Bennekaa, Gonzalez, Maietta, Maldonado, Owolabi, Ramos, Rodriguez, Smith, Wray, and Zimerer—belong (or at one time belonged) to Local 3, Division H of the International Brotherhood of Electrical Workers (“Local 3H”). (Rivera Aff. ¶3) During the time that they belonged to Local 3H and worked for SimplexGrinnell, their regular rates of pay matched or exceeded the pay rates for journeymen and apprentices established in the collective bargaining agreement between Local 3H and the New York Systems Suppliers Association. (Rivera Aff. ¶3)

Many of SimplexGrinnell’s sprinkler workers belong to the Enterprise Association of Steamfitters, Local 638, Divisions A and B. (Rivera Aff. ¶4) Named Plaintiff Maietta quit Local 3H and joined Local 638B in 2008. (Deposition of Chris Maietta, 11:2-12:2) Named Plaintiff Oyarvide also joined Local 638B in 2008. (Deposition of Jaime Oyarvide, 70:19-71:12) The collective bargaining agreements between Local 638 and the Mechanical Contractors Association of New York, Inc., govern the employment relationship between SimplexGrinnell and the members of Local 638, including the regular rates of pay. (“Rivera Aff. ¶4) At all times, SimplexGrinnell has matched or exceeded the applicable journeymen and apprenticeship rates for the members of Local 638 in its employ. (Rivera Aff. ¶4) None of the named Plaintiffs have ever belonged to Local 638A. (Rivera Aff. ¶4)

Named Plaintiffs Estrella, Fernandez, and Florez have never belonged to any unions while they have worked for SimplexGrinnell. (Deposition of Maximo Estrella, 23:5-7; Deposition of Jose Fernandez, 6:21-7:1; Deposition of Omar Florez, 18:3-19:2; Rivera Aff. ¶5)

II. An Overview of SimplexGrinnell's Business.

As indicated in the diagram below, SimplexGrinnell's business involves the installation,² maintenance, repair, and routine, code-driven testing and inspection of fire safety systems, including fire alarms and sprinkler systems. (Affidavit of Christie Hext ("Hext Aff."), ¶2) (Deposition of David Crawford ("Crawford Dep.") 1, pp. 58:22-59:7)



SimplexGrinnell conducts routine testing and inspection of fire alarm and sprinkler systems under National Fire Protection Association Standards adopted by New York State to ensure the operational integrity of different types of fire, life, and safety systems. (Hext Aff. ¶4) The New York State Fire Code requires fire, life, and safety systems to undergo periodic testing or operation to ensure the proper functioning of the system. 19 NYCRR § 1221.1.

For large fire alarm or sprinkler installation projects, public entities usually require SimplexGrinnell to submit bids in response to requests for proposals. (Zammitti Aff. ¶3) If a public entity awards an installation project to SimplexGrinnell, the public entity and SimplexGrinnell typically enter into a detailed, written contract specifying the work SimplexGrinnell will perform and the price for that work. (Zammitti Aff. ¶3)

For work involving routine, code-driven testing and inspection, service and/or maintenance public entities sometimes require SimplexGrinnell to participate in a competitive bid process. (Zammitti Aff. ¶4) Written contracts between SimplexGrinnell and its public

² In some cases, SimplexGrinnell installs all elements of the fire safety systems. In other cases, SimplexGrinnell's involvement with the installation of a new system is limited to "parts and smarts," *i.e.*, SimplexGrinnell supplies the fire alarm panels and technical support, while separately employed electricians install the wiring, conduit, and other devices. (Hext Aff. ¶3)

customers may take many forms, ranging from a simple purchase order to a 100-page installation contract. Since February, 2001, SimplexGrinnell has entered into thousands of contracts with New York State and New York City public entities to perform various installation, maintenance, repair, and/or testing and inspection services on life safety systems. (Zammitti Aff. ¶5)

III. Procedural History.

Plaintiffs filed their original class action Complaint on February 6, 2007, seeking damages for alleged unpaid prevailing wages on fire alarm work other than installation. (Original Complaint, ¶3) On July 14, 2008, Plaintiffs amended their Complaint to add claims for alleged unpaid prevailing wages arising from fire alarm *installation* projects, as well as all sprinkler and suppression work. (FAC, ¶18)

The FAC alleges five claims for relief, the first being a claim for third party beneficiary Breach of Contract. In this claim, Plaintiffs assert that SimplexGrinnell breached its contracts with various New York State and municipal agencies by allegedly failing to adhere to its written contractual promises to pay the prevailing rate of pay to its employees. (FAC, ¶¶22-24) Plaintiffs' second and third claims for relief are equitable claims for Unjust Enrichment and Quantum Meruit. These claims seek to do the same thing as their Breach of Contract claim, namely, secure for Plaintiffs and other SimplexGrinnell employees the prevailing wages that SimplexGrinnell allegedly promised the contracting state agencies it would pay, but allegedly failed to provide. (FAC, ¶¶26-33)

Plaintiffs' fourth claim asserts that SimplexGrinnell violated the overtime provisions of New York Labor Law Section 655 and 12 N.Y.C.R.R. § 142-3.2. (FAC, ¶35) Plaintiffs do not dispute that SimplexGrinnell always paid them at least one-and-one-half times the regular rate of pay for all hours worked over forty in a week. (Depositions of Agban Agban, p. 140:25-141:23;

Maximo Estrella, Jr., p. 76:6-11; Jose Fernandez, p. 71:12-77:9; Omar Florez, p. 149:15-150:18; Yadira Gonzalez, p. 83:15-84:18; Chris Maietta, p. 133:12-20; Jose Luis Maldonado, p. 147:13-17; Rafiu Owolabi, p. 202:4-13; Jaime Oyarvide, p. 124:23-125:11; Roberto Ramos, p. 173:12-175:6; Frank Rodriguez, p. 139:18-21; Rogelio Smith, p. 93:24-94:20; Randy Wray, 126:8-15, Breno Zimerer, p. 113:10-115:12) Rather, Plaintiffs contend that SimplexGrinnell failed to pay the difference between the overtime rate they claim they should have received by virtue of their performance of prevailing wage work, and the overtime rate they actually received based on their regular rate of pay. (Florez Dep., 150:6-18; Zimerer Dep., p. 113:10-115:12) Plaintiffs' fifth claim alleges that SimplexGrinnell willfully failed to pay wages in violation of Labor Law Sections 190, 191 and 198-c.

Discovery commenced on May 3, 2007 and ended December 15, 2008. (Capozzola Aff. ¶3) Plaintiffs served a series of document requests, the very first of which requested SimplexGrinnell to produce "all documents that describe the work performed and time spent by [SimplexGrinnell's] employees while working on public works projects" for a nearly seven-year period. (Capozzola Aff. ¶3) Individual employees' paper time sheets are of great importance because they constitute the "system of record" concerning the time spent and work performed by SimplexGrinnell's employees. (Deposition of Dorothy Keene, 92:12-21)) SimplexGrinnell indicated that it would grant Plaintiffs access, for the purposes of inspection and copying, to the requested paper time sheets and individual employee work-related records as those paper records were maintained in the ordinary course of business at SimplexGrinnell's nine offices serving New York State. (Capozzola Aff. ¶3)

There were more than one million such time sheets and individual employee work-related paper records encompassed by their request. (Crawford Dep., p. 225:23-226:16) At a discovery

conference on September 11, 2007, Plaintiffs objected to the “access” granted by SimplexGrinnell and asked the Court to direct SimplexGrinnell to gather the requested paper documents and produce them at their offices in New York City. The Court declined Plaintiffs’ invitation and left Plaintiffs to their own resources to review the paper time sheets and work records in each of SimplexGrinnell’s offices. (Capozzola Aff. ¶4)

Over the course of the discovery period, Plaintiffs visited only four of SimplexGrinnell’s offices serving New York State. (Capozzola Aff. ¶5) During those visits they gathered and copied approximately 25,000 pages of paper time sheets and related work documents. (*Id.*) In a letter dated February 8, 2010 identifying the documents Plaintiffs believed were responsive to interrogatories relating to the fundamental elements of their claims, they referenced only approximately 13,500 pages of documents. (Capozzola Aff. ¶¶23-24) Those 13,500 pages of paper documents obviously constituted less than 2% of the 1,000,000 or more pages of time records and related work documents that SimplexGrinnell made available for inspection and copying. Plaintiffs gathered no paper work records from five of SimplexGrinnell’s offices serving New York State. (Capozzola Aff. ¶6)

SimplexGrinnell served its Third Set of Interrogatories on November 14, 2008. (Capozzola Aff., ¶23) This set of discovery included Interrogatories 9-12, which required Plaintiffs to identify: (1) the specific public work projects on which they or other putative class members worked when they suffered damages; (2) the dates they or other putative class members worked at each such project without receiving adequate pay; (3) the job tasks performed at a particular public site on each date on which they did not receive adequate pay; and (4) the actual wage rate paid to the employees for that work on that date and that particular public site. (Capozzola Aff. ¶23) SimplexGrinnell also issued Request for Production No. 45, which

requested copies of all of the contracts between SimplexGrinnell and state agencies in which SimplexGrinnell promised to pay prevailing wages. (Capozzola Aff. ¶7 & Ex. 1)

Following approximately one year of continued litigation, SimplexGrinnell filed a motion to compel responses to Interrogatories 9-12 on November 23, 2005. On January 11, 2010, the Court ordered Plaintiffs to provide SimplexGrinnell with a letter identifying the evidence upon which they may rely at trial to prove the elements addressed by these Interrogatories. Plaintiffs provided a letter on February 8, 2010, identifying all of the documents and other information on which they relied in response to Interrogatories 9-12. (Capozzola Aff. ¶24) Taken collectively, these documents do not answer SimplexGrinnell's interrogatories and are inadequate to support all but a tiny fraction of Plaintiffs' claims. (Capozzola Aff. ¶¶25-51)

In a separate letter issued on the same date, Plaintiffs identified additional contracts on which they rest their claims and which were responsive to Request for Production No. 45. (Capozzola Aff. ¶¶7-13) In all, Plaintiffs have identified only thirty-nine purported contracts. (Capozzola Aff. ¶13) Ten of these documents do not constitute actionable contracts. (Capozzola Aff. ¶¶14-22) Thus, out of the thousands of contracts SimplexGrinnell has entered into with public agencies in New York state during the relevant time period (Zammitti Aff, ¶5), Plaintiffs possess only twenty-nine contracts on which they may base their breach of contract claims.

IV. SimplexGrinnell's Request for Guidance from the New York Department of Labor.

Not all work performed on public work facilities requires the payment of prevailing wages. Thus, Christopher Alund, the Director of the New York Bureau of Public Work, which enforces the New York prevailing wage law (Capozzola Aff. Ex. 42, 65), has testified by way of deposition in this case that "not all people employed on [a public site] will be required to be paid prevailing wage." (Deposition of Christopher Alund, p. 89:14-16) "[J]ust because someone is on

a public work project does not mean that they're entitled to prevailing wage." (Alund Dep., p. 102:17-19); N.Y. Lab. Law § 220(3)(a) (requiring payment of prevailing wages to "laborers, workmen or mechanics upon such public works" only); *Varsity Transit, Inc. v. Saporita*, 98 Misc.2d 255, 413 N.Y.S.2d 868 (1979), *aff'd* 71 A.D.2d 643, 418 N.Y.S.2d 667 (1979), *aff'd* 48 N.Y.2d 767, 423 N.Y.S.2d 910, 399 N.E.2d 941 (1979) ("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. It has long been established that this law does not blanket all workers who have some working contact with the city or agency or department of the city.").

Indeed, "[i]t is hornbook law that the Labor Law provision applies only to workers involved in the construction, replacement, maintenance and repair of public works in a legally restricted sense of that term." *Erie County Indus. Dev't Agency v. Roberts*, 94 A.D.2d 532, 465 N.Y.S.2d 301 (1983), *aff'd*, 63 N.Y.2d 810, 472 N.E.2d 43, 482 N.Y.S.2d 267 (1984) (quoting *Varsity Transit, Inc. v. Saporita*, 71 A.D.2d at 644, 418 N.Y.S.2d 667). As the Director of the Bureau of Public Work has testified, "in order to determine where a worker is a laborer, workman or mechanic, you have to look at the nature of their work . . . [and] the task that they are actually performing." (Alund Dep., p. 182:18-183:1)

[Y]ou have to look at the function and task, that the individual is performing on a public project [to determine if a worker is a] laborer, workman, or mechanic, [t]o use the definition of the Labor Law, yes, whether or not they should be receiving the prevailing wage for the time that they're on that project. You may work on a project all day long. You may only perform a function or a task that entitles you to prevailing wage for one hour that day. So, we're going to look at your function and task.

(Alund Dep., p. 183:15-184:1)

From as early as the time the Company formed, SimplexGrinnell firmly believed that the New York Prevailing Wage Act did not apply to code-related testing and inspection, and certain

other aspects of fire safety system service, maintenance, and repair. (Deposition of Shawn Love (“Love Dep.”), 117:13-118:10) To evaluate the accuracy of its views, SimplexGrinnell reached out to the New York Department of Labor’s Bureau of Public Work in an effort to obtain clarity on the application of the New York Prevailing Wage Act to the fire alarm and sprinkler industries. (Zammiti, ¶6.) To that end, SimplexGrinnell representatives met with the Director of the Bureau of Public Work, Mr. Chris Alund, in January and April, 2008, and otherwise engaged in an extensive dialogue that included not only face-to-face meetings but conference calls and letters. (Alund Dep., p. 13:3-12; 15:6-24; 19:11-16; 23:1-25; 61:13-15; 64:1-65:4) During this time period, Mr. Alund also conferred extensively with his staff, other industry leaders, and officials of the relevant unions about the specific tasks performed by the fire alarm and sprinkler workers and the application of the prevailing wage law to those tasks. (Alund Dep., p. 44:25-47:16; 48:6-12; 56:20-57:9; 58:4-15; 60:2-14; 78:19-79:10; 95:11-16; 96:2-20; 117:6-19)

Ultimately, Mr. Alund concluded that routine, code-driven testing and inspection work was not covered by the prevailing wage law. More specifically, he testified at his deposition that if a worker is “performing solely a code related inspection, . . . we would view him as not covered by prevailing wage.” (Alund Dep., p. 93:12-17) Thus, if a worker is “doing a code related inspection . . . he or she is not a laborer, workman, or mechanic pursuant to Labor Law Section 220.” (Alund Dep., p. 94:17-22) According to the Director of the Bureau of Public Work, when fire alarm and sprinkler employees are doing code-related testing and inspection, “they’re not laborers, workers, or mechanics” within the coverage of the prevailing wage law. (Alund Dep., p. 124:7-10) To emphasize the importance of identifying the specific task that an employee is performing, Mr. Alund offered this cogent example:

Well, if a person who does a code related inspection finds a deficiency or a problem and then does the repair work, . . . the employer's only required to pay prevailing wage for the work that was done to repair, rather than to inspect and repair.

(Alund Dep., p. 123:25-124:6)

During the process of reaching this conclusion, Mr. Alund sought "to drill down this particular occupation" and to identify the "particular tasks" involved. (Alund Dep., p. 130:7-10) As a result of this drilling down process, in December, 2008, the Bureau of Public Work adopted matrices breaking down the tasks performed by fire alarm and sprinkler technicians and specifying whether each task required the payment of prevailing wages. (Alund Dep. 129:11-130:21; Zammitti Aff., Ex. 1) Mr. Alund distributed the matrices to his staff. (Alund Dep., 105:4-9; 108:8-16; 125:20-23) We show below the Fire Alarm matrix adopted by the Bureau of Public Work. The Bureau of Public Work adopted a similar matrix for sprinkler work. (Zammitti Aff., Ex. 1)

**Public Work Guideline
for Classification of
Fire Alarm and Low Voltage Security Systems**

Work Categories & Tasks	Prevailing Wage	
	COVERED	NOT COVERED
Inspection:		
➤ Periodic code-related inspections		✓
➤ Testing related to code inspections		✓
➤ Incidental cleaning related to code inspections		✓
Service/Maintenance: *		
➤ Repairs of fire alarm/low voltage system	✓	
➤ Replace components, devices or equipment	✓	
➤ Relocate components, devices or equipment	✓	
➤ Additions of new devices and equipment to existing systems	✓	
➤ Troubleshooting in conjunction with service or maintenance work	✓	
➤ Re-set system without service or maintenance		✓
➤ Re-program without service or maintenance		✓
➤ Supervision including meetings and paperwork		✓
Installation:		
➤ Sales/design/engineering		✓
➤ Off-site programming		✓
➤ On-site uploading of program		✓
➤ Supervision including meetings and paperwork		✓
➤ Technical support including advice, monitor system performance at the panel, training, re-programming		✓
➤ Installation of fire alarm/low voltage system	✓	
➤ Install panel and components	✓	
➤ Pull wire, install cable	✓	
➤ Install conduit	✓	
➤ Label/tag wires	✓	
➤ Install field devices	✓	
➤ Terminate wires in panel	✓	
➤ Check wires and field devices	✓	
➤ Additions/upgrades to existing system	✓	
➤ Retrofits/renovations of existing system	✓	
➤ Warranty labor	✓	
➤ Government required final test (AIIJ present)	✓	
➤ Warranty test and inspection for manufacturer		✓
Other Work:		
➤ Delivery/return of material or parts		✓
➤ Off-site fabrication (only if work is customarily done off-site)		✓

* Note: Some counties have separate rates for service/maintenance and/or other low voltage work.

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The Department of Labor published these matrices on its website on or before April 14, 2009. (Hext Aff. ¶5) These matrices provided that code-related testing and inspection, and an

assortment of other tasks (*e.g.*, design, programming, paperwork, supervision), *did not* require the payment of prevailing wages.

On or before June 18, 2009, the Department of Labor began reconsidering whether code-driven testing and inspection required the payment of prevailing wages. (Capozzola Aff., Ex. 41) After meeting with SimplexGrinnell and other industry representatives, the Labor Commissioner, Patricia M. Smith, issued an opinion letter to SimplexGrinnell on December 31, 2009, announcing that the Department “now” believed that all testing and inspection work on fire safety systems required the payment of prevailing wages. (Zammitti Aff. ¶8 & Ex. 2) The DOL’s opinion letter applies prospectively only, except in those instances in which the contracts between New York agencies and life-safety contractors specifically require the payment of prevailing wage for testing and inspection. (Zammitti Aff. Ex. 2) The letter provides:

[T]he Department of Labor **is now of the opinion** that the testing of fire systems is included within the category of system maintenance and is, therefore, subject to the payment of prevailing wages. . . . However, because there has been much confusion in the past about the Department’s position as to the applicability of the prevailing wage law to this work, **this opinion shall be applied prospectively to contracts that are put out for bid after January 1, 2010**, unless a previous contract actually required the payment of prevailing wages for this work.

(Zammitti Aff. Ex. 2 (emphasis added)) The Labor Commissioner’s letter did not address any of the tasks contained in the Bureau of Public Work matrices, other than testing and inspection.

(*Id.*)

V. Plaintiffs’ Expert Report.

In recognition of the fact that they had gathered only a miniscule number of paper records supporting their claims, Plaintiffs turned to an expert, Dr. David Crawford, to examine certain elements of SimplexGrinnell’s electronic records in the apparent hope of using his analysis to establish their claims. In its contemporaneously filed *Daubert* motion to exclude Dr. Crawford’s

report and accompanying spreadsheet (“report”) in their entirety, SimplexGrinnell details the plethora of fatal errors committed by Dr. Crawford.

As described at length in SimplexGrinnell’s *Daubert* motion, Dr. Crawford’s report provides not one of the elements needed by Plaintiffs to support their claims. Thus, Dr. Crawford’s report does not identify a single public site on which any putative class member worked. (Crawford Dep. 2, pp. 515:24-520:10) *A fortiori*, Dr. Crawford’s report does not identify work performed pursuant to any of the twenty-nine contracts on which Plaintiffs’ claims rest. (Crawford Dep. 2, pp. 515:24-520:10) Dr. Crawford’s report cannot identify the pay that any employee received for work on any specific date or at any specific public site. (Crawford Dep. 2, pp. 515:24-520:10) Thus, even if the Court were to admit Dr. Crawford’s report, it does not provide any evidentiary support for liability.

Even disregarding the specific elements of proof necessary to establish a *prima facie* claim, Dr. Crawford’s report itself deals a fatal blow to many of Plaintiffs’ claims. Dr. Crawford separated his analysis into two categories; one category includes all testing and inspection performed on state public work projects in the State of New York (“TI” work), while the other category includes all work on state public work projects except the testing and inspection work described in the first category (“Non-TI” work). (Crawford Dep. 1, p. 59:8-23; Crawford Dep. 2, pp. 279:13-282:1; 284:15-23; and 432:23-433-8)

In his analysis, Dr. Crawford identified 120 members of the putative class, including Plaintiff Agban Agban, who suffered no damages *at all* for work performed on public work projects from February 6, 2001. (Capozzola Aff. ¶47, Ex. 38) He identified 145 more, including Plaintiffs Rafiu Owolabi and Rogelio Smith, who have incurred no damages from testing and inspecting work performed for the State of New York. (Capozzola Aff. ¶48, Ex. 39) He

identified another 61 employees, including Plaintiffs Nacim Bennekaa and Breno Zimerer, who incurred no damages from the performance of Non-TI prevailing wage work. (Capozzola Aff. ¶49, Ex. 40)

In addition to the above, Dr. Crawford's Report also indicates that between February 6, 2001 and June 29, 2005, no employees in the New York City District Office suffered any damages from the alleged nonpayment of prevailing wages for work performed on testing and inspection projects. (Capozzola Aff. ¶50; Crawford Dep. 2, p. 461:16-463:8)

LEGAL STANDARD

The seeds of Plaintiffs' demise lie in the United States Supreme Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). There, the Supreme Court established that the burden on a defendant moving for summary judgment "may be discharged by 'showing'—that is, pointing out to the district court—that there is an **absence of evidence to support the nonmoving party's case.**" *Id.* at 325 (emphasis added); *see also Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2001) (same, citing *Celotex Corp.*); *SEC v. Meltzer*, 440 F. Supp. 2d 179, (E.D.N.Y. 2006) ("Where the non-moving party would bear the ultimate burden of proof on an issue at trial, the burden on the moving party is satisfied if he can point to an absence of evidence to support an essential element of the non-movant's claim.").

The non-movant then bears the burden of establishing through admissible evidence the existence of elements essential to its case, which it would have to prove at trial. *Celotex Corp.*, 477 U.S. at 322; *Delaware & Hudson Ry.*, 902 F.2d 174, 177 (2d Cir. 1990); Fed. R. Civ. P. 56(e). If no rational fact finder could find in the non-movant's favor, there is no genuine issue of material fact, and summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 251-52, 106 S. Ct. 2505 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348 (1986).

Under this standard, SimplexGrinnell need not affirmatively disprove any elements of Plaintiffs' claims. It suffices simply to point out—as SimplexGrinnell will show time and time again—that Plaintiffs lack the necessary evidence to prove a *prima facie* case on their claims. The “absence of evidence” is fatal to their claims and the claims of the putative class. *Celotex Corp.*, 477 U.S. at 325.

ARGUMENT

I. Even If the Court Admits Plaintiffs' Expert Report Into Evidence, the Court Should Grant Summary Judgment on Plaintiffs' Breach of Contract Claims, in Whole or in Part.

Under their claim for Breach of Contract, Plaintiffs seek to advance hundreds of thousands of individual claims that SimplexGrinnell failed to pay prevailing wages to different employees performing different tasks on different dates, at different worksites, and under different contracts. Except for a very small number of these claims, Plaintiffs lack the evidence necessary to show where putative class members worked, what tasks they performed, and the amount of pay they actually received for that work. Plaintiffs cannot even prove the terms of the overwhelming majority of the contracts upon which they base their claims.

What few claims survive an examination of the evidence must also face serious legal hurdles, namely, the inapplicability of the Prevailing Wage Act to testing, inspection, and many other tasks, and the effect of LMRA Section 301 preemption.

A. Plaintiffs' Breach of Contract Claims Fail for All Work Not Related to the Twenty-Nine Contracts Plaintiffs Have Identified That Contain Promises to Pay Prevailing Wages.

1. Plaintiffs' Breach of Contract Claim Permits Them to Enforce Only SimplexGrinnell's *Contractual* Obligations to Pay Prevailing Wages.

Plaintiffs had two options for instituting an action for claimed unpaid prevailing wages. First, using the statutory mechanism found in the New York Prevailing Wage Act, Labor Law Section 220, *et seq.* (the "Prevailing Wage Act"), Plaintiffs could have enforced SimplexGrinnell's *statutory* obligation to pay prevailing wages. This would have required Plaintiffs to first seek an administrative determination from the Department of Labor before filing an action in court. N.Y. Lab. Law § 220(7)-(8). *Brandy v. Canea Mare Contr., Inc.*, 825 N.Y.S.2d 230, 231-32, 34 A.D.3d 512, 514 (2006) ("It is undisputed that the plaintiffs did not exhaust their administrative remedies and that exhaustion is required under Labor Law § 220."); *Pesantez v. Boyle Envtl. Servs., Inc.*, 251 A.D.2d 11 (1998) ("[A] private right of action for underpayment of wages does not exist under Labor Law § 220 until there has been an administrative determination pursuant to subdivision (8) that either has gone unreviewed or been affirmed in the claimants-employees' favor."). In fact, named Plaintiffs Ramos and Jose Luis Maldonado originally opted for this approach and filed administrative charges with the New York Department of Labor. (Capozzola Aff. Ex. 46). However, on advice of counsel, they chose not to pursue this option and withdrew their charges. (*Id.*)

Instead, Plaintiffs brought third party beneficiary breach of contract claims to enforce any *contractual* obligations SimplexGrinnell may have assumed to pay prevailing wages to its employees. The New York Court of Appeals first endorsed this method in *Fata v. S. A. Healy Co.*, 289 N.Y. 401, 406-07 (1943). There, the plaintiff alleged that the defendant contractor breached its express promise, contained in a contract with the Board of Water Supply, to pay

prevailing wages to its employees. *Id.* at 405. Eschewing the remedies permitted under the Prevailing Wage Act, the employee brought a common law claim for breach of contract as a third party beneficiary. The case required the Court to decide “whether a common-law action may be maintained by an employee *for breach of the agreement contained in the contract* between the employer and the Board of Water Supply.” *Id.* (emphasis added)

Although the Prevailing Wage Act provides the exclusive remedy for enforcing *statutory* obligations, *Brandy*, 825 N.Y.S.2d at 231-32, 34 A.D.3d at 514; *Pesantez*, 673 NYS2d at 660, 251 A.D.2d at 12, the Court of Appeals differentiated those obligations from *contractual* obligations, and it held that employees working pursuant to contracts in which employers have promised to pay the prevailing rate of pay may nonetheless maintain common law breach of contract claims as third party beneficiaries. Carefully distinguishing between the obligations imposed by statute and the obligations assumed via contract, the Court reasoned:

[T]he agreement which the parties have inserted in their contract is . . . an agreement to pay wages at rates fixed in accordance with the statute and set forth in a schedule of wages annexed to the contract.³ The obligation thus assumed by the contractor is precise, and extends beyond the scope of the statutory obligation. The statutory remedy provided for breach of the statutory obligation would be an inadequate and unsuitable remedy for a violation of this contractual obligation.

³ In a later decision, the Court of Appeals ruled that a breach of contract claim may proceed where the contract contained a promise to pay prevailing wages but did not actually annex the schedule of wages. *Wright v. Herb Wright Stucco, Inc.*, 430 N.Y.S. 2d 52 (1980). In reversing the decision of the Appellate Division, the Court of Appeals adopted the rationale of the dissenting justice, who explained that establishing the prevailing wage rate for the locality was “not an impossible task, . . . as the term is appropriately defined in [the Prevailing Wage Act]. In addition, it is a term with a lengthy judicial history and well susceptible of ascertainment.” *Wright v. Herb Wright Stucco, Inc.*, 422 N.Y.S.2d 253, 255 (1979) (Cardamone, J.P., dissenting). Neither that case or any other case has held that breach of contract claims for unpaid prevailing wages may proceed where the contractor did not *contractually* agree to pay prevailing wages. Moreover, where multiple rates apply—as in New York City and Long Island—identifying the proper rate for a given task cannot be done unless the court were to undertake an interpretation of the relevant union collective bargaining agreements, an undertaking prohibited by the Labor Management Relations Act.

Fata v. S. A. Healy Co., 289 N.Y. at 406-07. The Court of Appeals allowed the employees to proceed with their action to enforce their employers' contractual duties. *Id.*

2. With the Exception of Only Twenty-Nine Contracts, Plaintiffs Cannot Establish That SimplexGrinnell Promised to Pay Prevailing Wages to Its Employees.

Breach of contract claims under New York law have four elements: (1) a valid contract; (2) the plaintiff's performance; (3) the defendant's breach; and (4) damages. *Harsco Corp. v. Segui*, 91 F.3d 337, 347 (2d Cir. 1996) (applying New York law); *Rexnord Holdings v. Bidermann*, 21 F.3d 522, 525 (2d Cir. 1994) (same). It is axiomatic that to prevail on their claims for breach of contract, Plaintiffs must prove the terms of the contracts at issue. Otherwise, they cannot establish that SimplexGrinnell promised to pay prevailing wages in the first place, and thus, they cannot show that the alleged failure to pay prevailing wages constitutes a breach. *Wunsch v. Espositio Building Specialty, Inc.*, 852 N.Y.S.2d 199, 200 (2008) (affirming lower court's grant of summary judgment on prevailing wage breach of contract causes of action because the complaint failed to specifically identify the provisions of the contract breached); *Jara v. Strong Steel Door, Inc.*, Kings Cty. Case No. 14643/05, 2008 WL 3823769, at *11 (N.Y. Sup. Ct., Aug. 15, 2008).

In *Jara v. Strong Steel Door, Inc.*, the Kings County Supreme Court granted summary judgment for the defendants on plaintiffs' claims for unpaid prevailing wages on two projects where the plaintiffs failed to identify the specific contractual language the defendants breached. The Court stated:

Plaintiffs do not allege the specific contractual provisions for the Richmond Center and Merchant Marine Academy projects Therefore, insofar as Huerta's eighth and ninth causes of action allege a breach of the Richmond Center and Merchant Marine contracts without specifying the provisions or terms of the contracts breached, summary judgment dismissing those causes of action is granted as a matter of law due to plaintiff's failure to provide the court and the

parties with notice of the specific transactions, occurrences, or series of transactions or occurrences, intended to be proved.

Id. (citations and quotes omitted). Notably, that same court denied the defendants' motion to dismiss claims where the plaintiff had properly identified the relevant language. *See also Jara v. Strong Steel Doors, Inc.*, No. 14643-05, 2007 NY Slip Op 51755U, 2007 WL 2696110, at *8 (N.Y. Sup. Sept. 12, 2007) (“[I]n order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based.”) (internal quotation marks and citations omitted).

Shortly before the discovery deadline, SimplexGrinnell issued a Request for Production requiring Plaintiffs to produce all of the contracts they had obtained between SimplexGrinnell and New York state agencies that contain promises to pay prevailing wages and upon which they rely. (Capozzola Aff. ¶7 & Ex. 1) Plaintiffs produced only twenty-nine contracts containing such promises.⁴ As to all other contracts between SimplexGrinnell and New York state agencies, Plaintiffs cannot prove the content of these contracts, and they cannot prove that SimplexGrinnell contractually agreed to pay prevailing wages. *A fortiori*, they cannot establish that SimplexGrinnell breached these contracts by allegedly failing to pay prevailing wages. The Court should therefore dismiss all claims for breach of contract premised on public work contracts other than the twenty-nine that plaintiffs have produced.

⁴ In their written discovery responses, and in a supplemental letter produced on February 8, 2010, Plaintiffs identified a total of thirty-nine purported contracts. (Capozzola Aff. ¶¶8-13) Twenty-nine of these contracts require SimplexGrinnell to pay prevailing wages in accordance with New York law. The other ten documents are inapposite. (Capozzola Aff. ¶¶14-22)