B. Plaintiffs Cannot Establish the Essential Elements of a Prevailing Wage Claim for Themselves or Any Absent Class Member.

Plaintiffs allege that SimplexGrinnell breached its promises to pay prevailing wages in accordance with the Prevailing Wage Act for work performed on public projects. To establish a *prima facie* case of liability for any particular employee, Plaintiffs must identify, at a minimum, four elements. Each of the elements is cumulative, *i.e.*, Plaintiffs must establish all four elements simultaneously for every claim.

(1) The public project on which the employee performed the work. Because the Prevailing Wage Act does not apply to work performed on private projects, Plaintiffs cannot establish liability unless they can show the aggrieved employees worked on public projects for the State of New York. In addition, because Plaintiffs base their claims on breach of contract, Plaintiffs must be able to show that an employee worked on a site for which they have an actionable contract. Thus, Plaintiffs must establish *where* SimplexGrinnell employees performed their services.

(2) The date the employee performed the work at the public site for which Plaintiffs have an actionable contract. Because SimplexGrinnell's payroll data, which constitutes the system of record for employees' pay, tracks wage payments on a weekly basis (Hext Aff. ¶7.) Plaintiffs must be able to establish when an employee worked at a specific public site for which Plaintiffs have an actionable contract in order to determine how much SimplexGrinnell paid him for that work.

(3) The work performed during a given week at a public site for which Plaintiffs have an actionable contract. As noted above and will be described in additional detail below, New York State's prevailing wage requirement does not apply to all tasks performed by SimplexGrinnell employees. Thus, at a minimum, Plaintiffs must establish the nature of the work

performed during a given week at a specific public site for which Plaintiffs have an actionable contract in order to determine how much SimplexGrinnell should have paid an employee for that work.

(4) The wage rate SimplexGrinnell paid for the work performed at a public site. Liability in this case attaches only where the prevailing wage rate exceeds the actual pay rate for covered work at a public site for which Plaintiffs have an actionable contract. To establish a *prima facie* case that SimplexGrinnell paid less than the prevailing wage to its employees for covered work at a public site for which Plaintiffs have an actionable contract, Plaintiffs must show the rate of pay SimplexGrinnell actually paid its employees for that work. If they cannot make this showing, they cannot establish a prima facie case that SimplexGrinnell underpaid them.

With these essential requirements of a *prima facie* case in mind, SimplexGrinnell issued Interrogatories requiring Plaintiffs to identify, for each employee they contend has suffered damages: (1) the specific public work projects on which they worked when they suffered damages; (2) the dates they 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 at that particular public site. (Capozzola Aff. ¶23 & Ex. 6)

Plaintiffs responded to SimplexGrinnell's Interrogatories in three ways—by citing to thousands of pages of paper records, by citing to certain electronic records, and by citing to Dr. Crawford's report. Subject to an extremely small number of exceptions, none of these responses, individually or collectively, is sufficient to create a prima facie case. Thus, they are insufficient to avoid summary judgment.

First, by letter dated February 8, 2010, Plaintiffs identified 13,456 pages of paper documents which allegedly support their claims. Of the approximately 13,456 pages of paper documents identified by Plaintiffs as supporting their claims, only six categories of documents can possibly assist them in establishing a *prima facie* case: (1) daily and weekly time sheets; (2) service reports; (3) inspection reports; (4) payroll stubs; (5) certified payroll reports; and (6) requests for payment of prevailing wages through a manual override process.[5]

SimplexGrinnell has examined every daily and weekly time sheet, every service report, and every inspection report identified to determine which, if any, of the documents indicate that the employee in question performed work at a public site for which Plaintiffs have an actionable contract. (Capozzola Aff. ¶41) For the timesheets, service reports, and inspection reports that relate to public entities for whom Plaintiffs have an actionable contract, SimplexGrinnell took the final step and compared those records against the pay stubs, certified payroll reports, and requests for manual overrides cited in Plaintiffs February 8, 2010 letter to see if it could match the records by employee and date. Matching these records would produce enough information to evaluate whether an employee received prevailing wages. (Capozzola Aff. ¶41)

For example, Plaintiff Maximo Estrella's Daily Time Logs show that he performed 40 hours of testing and inspection at the Manhattan Psychiatric Center on June 16, 19, 20, 21, & 22, 2006. His pay stub for that week shows that SimplexGrinnell paid him an hourly rate of $14.15. Using these records, Mr. Estrella has all of the information he needs to evaluate his claim. (Capozzola Aff. ¶42)

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[5] SimplexGrinnell's simultaneously filed Daubert Motion to Exclude the Testimony of Plaintiffs' Expert, Dr. David Crawford discusses the manual override process at length.

SimplexGrinnell found hundreds of instances where the named Plaintiffs had enough pay and work records to determine whether they had valid claims for unpaid prevailing wages.[6] For the rest of the putative class, however, it found only 78 instances where Plaintiffs had collected enough information to determine whether SimplexGrinnell paid them the prevailing rate. (Capozzola Aff. ¶43)

Second, Plaintiffs listed hundreds of electronic files produced over the course of the discovery process. As set forth in the Affidavit of Christie Hext (attached as Exhibit 36 to Capozzola Affidavit), the files listed generally fell into two categories: (1) documents relating to SimplexGrinnell's State-Wide Self-Audit, performed during 2007 and 2008; (2) and files relating to local audits SimplexGrinnell has performed or evaluations of one-off inquiries from SimplexGrinnell employees.

Although Dr. Crawford had access to all of the cited documents relating to the State-Wide Self-Audit, he failed to match the project, date, work performed, and pay rate received for any employees. (Crawford Dep. 2, p. 515:24-520:10) The remaining electronic documents similarly cannot be used to establish the elements of a claim. (Hext Aff. ¶¶15-17.) Given the methods SimplexGrinnell used to conduct local audits and one-off evaluations, the electronic data did not contain enough information to permit an employee to establish the four elements described in the Interrogatories. Notably, SimplexGrinnell frequently reviewed company records and documents shown to it by the employees, and it conducted employee interviews, in an effort to determine whether it had properly paid its employees. (Hext Aff. ¶ 18.)

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[6] The ability of the named Plaintiffs to establish their individual claims is not at issue in this motion. If the Court denies class certification, SimplexGrinnell will file a separate summary judgment motion regarding their individual claims, as this Court authorized it to do at a Hearing on January 11, 2010.

Third, Plaintiffs also referenced testimony from the depositions of all fifteen named Plaintiffs. The generalized discussion provided during these depositions did not provide the specificity Interrogatories 9-12 required. (Capozzola Aff. ¶45)

Finally, Plaintiffs relied on Dr. Crawford's report. This report cannot satisfy even one of the required four elements needed for a *prima facie* case, much less all four. Dr. Crawford's report:

- Did not identify a single project on which any putative class member worked;
- Did not identify a single date on which a putative class member allegedly performed prevailing wage work but was not properly paid;
- Did not identify the type of work for which the putative class member allegedly did not receive the proper prevailing wage; and
- Did not provide any information on the pay that any putative class member received for work on any date or at any specific public site.

(Crawford Dep. 2, p. 515:24-520:10)

Subject to the extremely limited exceptions above based on paper records, Plaintiffs cannot prevail on any of their claims or the claims of the putative class at trial. The Court should dismiss these claims from the FAC.

C. The Court Should Dismiss All Claims Based on Time Spent Performing Code-Driven Testing And Inspection.

As described above, in December, 2008, the Bureau of Public Work concluded that routine testing and inspection work was not covered by the prevailing wage requirement. Also as noted above, on December 31, 2009, after reconsidering whether code-driven testing and inspection required the payment of prevailing wages, the New York Department of Labor issued an opinion letter to SimplexGrinnell announcing that it "now" believed that code-driven testing and inspection required the payment of prevailing wages. (Zammitti Aff. Ex. 2) This opinion

letter explicitly states that it 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 wages for testing and inspection. (*Id.*) SimplexGrinnell has examined all of the twenty-nine contracts which Plaintiffs possess, and not one of them specifically requires the payment of prevailing wages for code-related testing and inspection. (Capozzola Aff. ¶22)

As the agency charged with the enforcement and interpretation of the New York Prevailing Wage Act, the DOL receives substantial deference form state and federal courts concerning the proper application of the Prevailing Wage Act. *GE v. N.Y. State Dep't of Labor*, 551 N.Y.S.2d 966, 968, 154 A.D.2d 117, *aff'd*, 563 N.Y.S.2d 764, 565 N.E.2d 513 (1990) ("'trade or occupation' classifications for work embraced by Labor Law § 220 are a matter given to the expertise of the Department and courts are strongly disinclined to disturb them") (citations omitted); *Nelson's Lamp Lighters, Inc. v. Roberts*, 523 N.Y.S.2d 643, 645, 136 A.D.2d 810 ("Whether a particular undertaking constitutes electrician's work is a matter within the expertise of [the Department of Labor]."); *Matter of Howard v. Wyman*, 28 N.Y.2d 434, 438, 322 N.Y.S.2d 683, 271 N.E.2d 528 (1971) ("[C]onstruction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld.").

Prior to January 1, 2010, according to the DOL's policy interpretation, New York State's prevailing wage law did not require SimplexGrinnell to pay prevailing wages for code-driven testing and inspection except in those limited circumstances where there was an explicit contractual provision containing that requirement. None of the twenty-nine contracts on which Plaintiffs can rely contain such an explicit provision. (Capozzola Aff. ¶22) Thus, the Court should grant summary judgment on all testing and inspection claims prior to January 1, 2010.

After January 1, 2010, according to the same DOL interpretation, code-driven testing and inspection requires the payment of prevailing wages only on contracts put out to bid after January 1, 2010 or on earlier contracts which specifically mandated the payment of prevailing wages for code-driven testing and inspection. Plaintiffs have no such contracts. (Capozzola Aff. ¶22)

Plaintiffs have alleged numerous claims for damages arising from code-driven testing and inspection performed before January 1, 2010, and they continue to seek damages for code-driven testing and inspection performed after January 1, 2010 on contracts put out to bid before January 1, 2010, and which did not specifically mandate the payment of prevailing wages for code-driven testing and inspection. Because the New York Prevailing Wage Act did not require the payment of prevailing wages for any of these claims, SimplexGrinnell respectfully submits that the Court should dismiss them from the FAC.

D. The Court Should Dismiss All Claims Arising from Other Non-Covered Job Tasks.

As noted above, not all work performed on public work facilities requires the payment of prevailing wages.

Consistent with this long-standing authority, the Bureau of Public Work issued matrices in December, 2008 that carved out tasks regularly performed by Fire Alarm and Sprinkler employees which do not require the payment of prevailing wages. (Alund Dep. 129:11-130:21; Zammitti Aff. Ex. 1) With the exception of code-driven testing and inspection, the Labor Commissioner's December 31, 2009 Opinion Letter did not change the application of the prevailing wage law to any of the job tasks addressed in the Bureau of Public Work's matrices. (Zammitti Aff. Ex. 2) Consequently, according to the matrices adopted by the Bureau of Public Work the Prevailing Wage Act does not apply to any of the following tasks:

Tasks Performed On Fire Alarm Systems	Tasks Performed On Sprinkler Systems
• Re-set system without service or maintenance; • Re-program without service or maintenance; • Supervision including meetings and paperwork; • 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, • Delivery/return of material or parts; and • Off-site fabrication (only if work is customarily done off-site).	• Service fire extinguishers and tanks; • Supervision including meetings and paperwork (Service/Maintenance); • Sales/design/engineering; • Supervision including meetings and paperwork (Installation); • Technical support including advice, monitor system performance, and customer training; • Delivery/return of material or parts; and • Off-site fabrication (only if work is customarily done off-site).

(Zammitti Aff. Ex.1)

Plaintiffs' broad claims seek damages for *all* time SimplexGrinnell's field employees spent on public work projects, regardless of the nature of the task. Because the Prevailing Wage Act does not apply to the tasks set out above, SimplexGrinnell could not have breached any promises to comply with the Prevailing Wage Act with respect to those tasks. Accordingly, the Court should dismiss all claims for damages arising from the performance of tasks that do not require the payment of prevailing wages.

E. The Court Should Dismiss the Claims of All Persons Who Have No Damages.

Table 2 of Dr. Crawford's narrative report, entitled "Damages and Interest Due Individual Class Members," shows the "damages and interest for each individual employee," as estimated by Dr. Crawford (Capozzola Aff. Ex. 37, ¶60) This report lists Dr. Crawford's calculations for 613 employees. (Capozzola Aff. ¶46)

According to Dr. Crawford's Report, 120 of these employees, including plaintiff Agban Agban, have suffered no damages at all. (Capozzola Aff. ¶47 & Ex. 38) Because these individuals have suffered no damages, SimplexGrinnell respectfully submits that the Court should dismiss their claims.

F. The Court Should Dismiss the Claims for Unpaid Prevailing Wages on Testing and Inspection Projects Where the Employees Incurred No Damages.

As noted above, Dr. Crawford separated his analysis into two categories. (Crawford Dep. 1, p. 59:8-23; Crawford Dep. 2, pp. 279:13-282:1; 284:15-23; and 432:23-433-8) One category includes all testing and inspection performed on state public work projects in the State of New York. The other category includes all work on state public work projects except the testing and inspection work described in the first category. *Id.*

In addition to the 120 employees who have no damages whatsoever, Dr. Crawford identified an additional 145 employees who have incurred no damages arising from the first category of claims, *i.e.*, testing and inspecting (Capozzola Aff. ¶48, Ex. 39) This list includes named Plaintiffs Rafiu Owolabi and Rogelio Smith. Because Plaintiffs admit these employees have incurred no damages based on this category of work, any breach of contract claims they may have based on such work must fail, and the Court should dismiss all of these claims.

G. The Court Should Dismiss the Claims for Unpaid Prevailing Wages on Non-Testing and Inspection Projects Where the Employees Incurred No Damages.

As noted immediately above, Dr. Crawford created a separate category (non-TI) for damages incurred on New York public projects for work other than testing and inspection. In addition to the 120 employees who have no damages at all, Dr. Crawford's Report identifies 61 employees whom he claims suffered no damages from the second category of work. (Capozzola

Aff. ¶49, Ex. 40) This list includes named Plaintiffs Nacim Bennekaa and Breno Zimerer. Because Plaintiffs admit that these employees suffered no damages, any breach of contract claims they may have based on this category of work must fail. SimplexGrinnell respectfully submits that the Court should dismiss these claims as well.

H. Plaintiffs' Evidence Establishes That They Have No Claims for Testing and Inspection in New York City for the Period February 6, 2001 to June 30, 2005.

Dr. Crawford's Report also states that Plaintiffs and the putative class incurred *no damages* for testing and inspection work at public facilities in New York City for the entire period February 6, 2001 through June 30, 2005, with the single exception of employee Robert Klawans on June 30, 2005. (Crawford Dep., 2, p. 461:16-463:8; Capozzola Aff. ¶50) Accordingly, the Court should dismiss all claims based on this category of work for employees in the New York City District Office from February 6, 2001 through June 29, 2005.

I. The Court Should Dismiss All Claims Arising from the Alleged Failure to Pay the Prevailing Wage Rate for Installation Work in New York City and Long Island.

In the seven counties that comprise New York City and Long Island, the prevailing wage schedules for electricians and sprinkler fitters contain multiple journeymen rates for each type of work. (Hext Aff. ¶8; Capozzola Aff. Ex. 43-45) For electricians in New York City, the New York Department of Labor recognizes an "A" rate, which tracks the pay rates contained in the collective bargaining agreement for IBEW Local 3A, and an "H" rate, which tracks the pay rates in the IBEW Local 3H collective bargaining agreement. (Hext Aff., ¶8; Capozzola Aff. Ex. 43) A similar structure applies to electricians in Long Island, due to collective bargaining agreements involving the IBEW Local 25, Divisions A and M. (Hext Aff. ¶ 8)

In New York City and Long Island, the Department of Labor generally applies the "A" rate to tasks connected to the installation of fire alarm systems, such as laying conduit and pulling wire. (Hext Aff. ¶9; Capozzola Aff. Ex. 44) The Department generally applies the "H" and "M" rates to service-related tasks. (Hext Aff. ¶ 9)

A similar structure exists in these counties in the sprinkler industry. In the counties that make up New York City and Long Island, collective bargaining agreements involving Local 638, Divisions A and B, have created a multi-tiered pay structure. (Hext Aff. ¶10; Capozzola Aff. Ex. 36) The Department of Labor generally applies the 638A rate to the installation of sprinkler systems, and the 638B rate to service and repair. (Hext Aff. ¶ 10)

Dr. Crawford made no effort to isolate the claims of employees who performed fire alarm or sprinkler installation work subject to the higher prevailing wage rates (*i.e.*, the "A" rates) in New York City or Long Island. (Crawford Dep. 1, p. 19:22-20:9; 203:4-207:19; 211:25-213:18; Crawford Dep. 2, p. 428:19-437:5; Capozzola Aff. Ex. 37, ¶¶53 & 54, p. 15) On the contrary, as Dr. Crawford explains, whenever more than one rate potentially applied, he always used the lowest rate available. (*Id.*) He further admitted that because he had "no way to be sure when a higher rate should have been applied, [he had] no way to identify when that higher rate was not paid." (Crawford Dep. 2, p. 445:10-24;449:15-22; Crawford Dep. 1:210:10-211:4) Thus, because he could not "identify any of the times when employees on public projects did . . . installation work, [he] had no way to determine whether they were being properly paid" for that work. (Crawford Dep. 1, p. 118: 1-7)

In short, Plaintiffs have no way to establish entitlement to the A rate for themselves or for putative class members. Hence, the Court should dismiss all claims by New York City and Long Island employees for the A rate.

J. The Court Should Dismiss the Claims of Employees Belonging to Approved Apprenticeship Programs Whose Pay Matched or Exceeded the Rates Established in Those Programs.

The New York Prevailing Wage Act permits employers to pay apprentice rates where the employees belong to an apprenticeship program duly registered with the Department of Labor. N.Y. Lab. Law § 220(3). Indeed, the Department's prevailing wage schedules specifically carve out lower rates for apprentices. (Hext Aff. ¶11; Capozzola Aff. Ex. 45) For example, the Steamfitters Local 638A, to which numerous SimplexGrinnell employees belong, has an apprenticeship program registered with the Department. (*Id.*) The current prevailing wage schedules correspondingly provide separate wage rates for Local 638A apprentices, stated as percentages of the Journeymen's wage. (*Id.*)

	1st year Apprentices	2nd year Apprentices	3rd year Apprentices	4th year Apprentices	5th year Apprentices
Wages	40%	50%	65%	80%	85%

(Capozzola Aff. Ex 36)

Pursuant to this regulatory framework, the New York Prevailing Wage Law permits SimplexGrinnell to pay its Local 638A apprentices the lower apprentice rates for covered work, rather than the full journeymen rates set forth in the prevailing wage schedules. At his deposition, Dr. Crawford admitted that he did not consider the apprenticeship rates for any of the employees in his analysis. (Crawford Dep. 2, p. 559:16-24) He used only the full journeymen rates contained in the prevailing wage schedules. (Crawford Dep. 2, p. 559:16-24) To the extent Plaintiffs have raised claims for damages where they or the putative class members belonged to Local 638A's registered apprenticeship program, SimplexGrinnell respectfully submits that the Court should dismiss those claims.

K. Section 301 of the National Labor Relations Act Preempts Plaintiffs' Claims Pertaining to Work in New York City, Long Island and All Other Counties with Multiple Rates for Fire Alarm and Sprinkler Work.

Federal labor law, embodied in the Labor-Management Relations Act, 29 U.S.C. § 141, *et seq.*, preempts *any state law claim* that is "substantially dependent on analysis of a collective bargaining agreement." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987) (quoting *Electrical Workers v. Hechler*, 481 U.S. 851, 859, n.3 (1987)). As the United States Supreme Court has explained,

> when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a [LMRA §] 301 claim, see *Avco Corp. v. Aero Lodge* 735, 390 U.S. 557 (1968), or dismissed as pre-empted by federal labor-contract law.

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985).

The Prevailing Wage Act defines the "prevailing rate of wages" as the rate of wage paid under collective bargaining agreements to at least thirty percent of those employed "in the same trade or occupation" in a given locality. N.Y. Lab. Law § 220(5)(a); *GE v. N.Y. State Dep't of Labor*, 551 N.Y.S.2d 966, 968, 154 A.D.2d 117, *aff'd*, 563 N.Y.S.2d 764, 565 N.E.2d 513 (1990). One cannot always readily discern, however, whether certain employees work "in the same trade or occupation." As the New York Court of Appeals recognized in 1965,

> [I]t is clearly recognized that individuals, although in the same generic employment, may not be in the same "trade or occupation." The pivotal question is the nature of the work actually performed (see *Matter of Flannery v. Joseph*, [300 N. Y. 149, 89 N.E.2d 869 (N.Y. 1949)]) which leads to the **factual determination** of whether persons employed to do similar work but in different fields are engaged in the same "trade or occupation."

Kelly v. Beame, 15 N.Y.2d 103, 109, 204 N.E.2d 491 (N.Y. 1965) (emphasis added).

In New York City and Long Island, some of the employees who work on fire alarms and sprinkler systems earn the "A" rates, while others earn the "H," "M," or "B" rates. The

prevailing wage schedules do not delineate where "H," "M," or "B" work ends and "A" work begins. (Capozzola Aff., Ex. 43-44.) How then can this Court make the "factual determination" necessary to establish which rate applies to which specific tasks?

For example, the Bureau of Public Work's Fire Alarm matrix reprinted above indicates that relocation of components, devices, or equipment is a task for which SimplexGrinnell must pay prevailing wage. But in New York City, Long Island, and other counties with multiple rates, which prevailing wage rate applies? Are employees entitled to the "A" rate for relocating components, devices or equipment? One can match the correct rate to specific tasks only by interpreting the scope of work covered by the various collective bargaining agreements. For New York City fire alarm employees, that process would involve interpreting the Local 3H and Local 3A collective bargaining agreements.

Thus, Mr. Alund indicated that he "would look to the collective bargaining agreements" to determine whether those tasks fell within in the agreement. (Alund Dep. 183:2-9) In practice, that happens routinely on an informal basis. Named Plaintiff Rogelio Smith, for example, indicates that he knows when to claim the "A" rate based on guidance obtained from the IBEW union steward about the scope of the IBEW Local 3A collective bargaining agreement. (Deposition of Rogelio Smith, 104:25-108:17; 113:20-118:5) SimplexGrinnell staff in the New York City office also allocate tasks to the "A" rate based on guidance from the IBEW about the scope of the Local 3A collective bargaining agreement. (Love Dep., 79:17-24; Deposition of William Roberts, 57:20-59:15)

Hence, in order to assign covered tasks to the proper prevailing wage rate in new York City and Long Island, and other counties with multiple rates, the Court must *interpret* the source of the rates—the applicable collective bargaining agreements—to determine their scope. Thus,

because the claims in New York City and Long Island are "substantially dependent on analysis of [] collective bargaining agreement[s]," the Labor Management Relations Act preempts all of these claims. *Allis-Chalmers Corp.*, 471 U.S. at 220 (1985).

II. If the Court Excludes Plaintiffs' Expert Report, the Breach of Contract Claims of the Putative Class Fail Because Plaintiffs Have No Evidence Showing That SimplexGrinnell Is Liable to Absent Class Members.

Assuming that the Court excludes Dr. Crawford's report, Plaintiffs will be left only with paper records as a basis to establish a *prima facie* case. As discussed above, the paper records possessed by Plaintiffs can support a *prima facie* case for only a miniscule number of claims. The Court should therefore dismiss all claims except the handful previously noted. *See Fernandez v. Cent. Mine Equip. Co.*, 2009 U.S. Dist. LEXIS 109388, at *26 (granting summary judgment after dismissing plaintiff's expert report under Rule 702); *Mannix v. Chrysler Corp.*, 2001 U.S. Dist. LEXIS 4641, at *13-14 (E.D.N.Y. Mar. 14, 2001) (same); *Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (same).

III. The Court Should Grant Summary Judgment on Plaintiffs' Equitable Claims for Quantum Meruit and Unjust Enrichment.

As alternatives to their Breach of Contract claims, Plaintiffs have alleged claims for Quantum Meruit and Unjust Enrichment. As the Second Circuit has observed, these do not constitute separate claims, and courts may analyze them together as a single quasi-contract claim. *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 175 (2d Cir. 2005) (citing *Seiden Assoc., Inc. v. ANC Holdings, Inc.*, 768 F. Supp. 89, 96 (S.D.N.Y. 1991) (explaining that "quantum meruit and unjust enrichment are not separate causes of action," and that "unjust enrichment is a required element for an implied-in-law, or quasi contract, and quantum meruit, meaning 'as much as he deserves,' is one measure of liability for the breach of such a contract")). Plaintiffs' quasi-contract claims arise from the same factual allegations that

support their breach of contract claims, namely, that SimplexGrinnell "entered into certain contracts . . . with certain government agencies," (FAC, ¶14), that "in furtherance of the public works contracts entered into by [SimplexGrinnell], plaintiffs and other members of the putative class performed various types of electrical and sprinkler related work," (FAC, ¶18) and that SimplexGrinnell subsequently breached those contracts by allegedly failing to pay prevailing wages. (FAC, ¶19; *see also id.*, ¶¶26, 29 (incorporating factual allegations contained in paragraphs 1-25 into claims for Quantum Meruit and Unjust Enrichment))

As set forth below, Plaintiffs' quasi-contract claims fail as a matter of law because written contracts governing the relationships between SimplexGrinnell and the relevant New York state agencies preclude recovery in quasi-contract. In any event, Plaintiffs have no evidence to support their quasi-contract claims.

A. Plaintiffs' Quantum Meruit and Unjust Enrichment Claims Fail Because Plaintiffs Improperly Base Their Claims on Promises Allegedly Contained in Express Contracts.

A quasi-contract claim "is an obligation the law creates in the absence of any agreement." *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 572 (2005). "[W]hen a valid and enforceable written contract governs a given subject matter, recovery in quasi-contract is precluded." *Jara v. Strong Steel Door, Inc.*, Kings Cty. Case No. 14643/05, 2008 WL 3823769, at *11 (N.Y. Sup. Ct., Aug. 15, 2008) (citing *Goldman*, 5 N.Y.3d at 572) (dismissing claims for unpaid prevailing wages. "In this case it is undisputed that contracts existed for all four public works projects. Therefore, plaintiffs' quasi-contract claims, the thirteenth cause of action for quantum meruit and the fourteenth cause of action for unjust enrichment, must be dismissed.")

Plaintiffs' quasi-contract claims are identical to the claims the New York Court of Appeals addressed in *Cox v. NAP Constr. Co., Inc.*, 10 N.Y.3d 592, 891 N.E.2d 271 (2008).

There, the court affirmed the dismissal of the plaintiff's quasi contract claims for unpaid prevailing wages on the ground that "a party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter." *Id.* at 607, 891 N.E.2d at 278 (citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388, 516 NE2d 190, 521 NYS2d 653 (1987)). Similarly, in *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 804 N.Y.S.2d 58, 22 A.D.3d 404 (2005), the court dismissed the plaintiffs' quasi-contract claims for unpaid prevailing wages, holding:

> The court properly dismissed the third and fourth causes of action for quantum meruit and unjust enrichment. The existence of an enforceable written contract covering the matter at issue precludes recovery for causes of action sounding in quasi contract.

Id. at 60, 22 A.D.3d at 405.

The FAC plainly shows that Plaintiffs' quasi-contract claims arise from SimplexGrinnell's alleged failure to comply with promises contained in *contracts* between SimplexGrinnell and various state agencies. (FAC, ¶31 ("Upon information and belief, when SG entered into the public works contracts, it agreed to pay the required prevailing wage, overtime and supplemental benefit rates of pay to plaintiffs and members of the putative class."); *see also* FAC, ¶¶26-33) Because Plaintiffs cannot bring quasi-contract claims to enforce the contracts between SimplexGrinnell and the relevant state agencies, the Court must dismiss Plaintiffs' quasi-contract claims. *Cox*, 10 N.Y.3d at 607, 891 N.E.2d at 278.

B. Plaintiffs' *Quantum Meruit* and Unjust Enrichment Claims Also Fail Because Plaintiffs Cannot Show that SimplexGrinnell Failed to Pay Them Reasonable Value for Their Services or that SimplexGrinnell Was Unjustly Enriched at Their Expense.

Even if Plaintiffs could bring quasi-contract claims against SimplexGrinnell, their claims would still fail because they cannot demonstrate an equitable basis for disgorging revenue from SimplexGrinnell. SimplexGrinnell *always* paid Plaintiffs and the putative class reasonable value

for their services. At all relevant times, SimplexGrinnell's policy required that it pay its hourly employees at least their regular rate of pay for any of the work that they perform, and at least time-and-one-half for all hours worked over forty in a week. (Hext Aff. ¶6)

IV. The Court Should Dismiss Plaintiffs' Overtime Claims Because New York Law Requires Employees Seeking Unpaid Overtime Prevailing Wages to Follow the Administrative Process Established by the Prevailing Wage Act and Because They Have No Evidence to Support Their Claims.

Plaintiffs' fourth claim for relief alleges, in relevant part:

> SG violated New York Labor Law Sec. 655 and 12 NYCRR 142-3.2 by failing to pay plaintiffs and the other members of the putative class overtime compensation for work they performed in furtherance of the public works contracts.

(FAC, ¶35) Plaintiffs do not contend that SimplexGrinnell failed to pay them at least one and one-half times their regular rates of pay for 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, their claim seeks to recover the margin between the overtime rates they received based on their regular rates of pay and the overtime rates they claim they should have received based on the prevailing wage rate.

This claim fails for two reasons. First, because Plaintiffs seek to recover "prevailing" overtime wages, this claim is subject to the administrative process set forth in Labor Law Section 220. Second, even if Plaintiffs could bring a private action to collect the margin between the regular and prevailing wage overtime rates, Plaintiffs lack the evidence needed to prove their claims.

A. The Exclusive Statutory Remedy for Unpaid Prevailing Overtime Wages Lies in the Administrative Process Set Forth in New York Labor Law § 220.

Section 220 of the Prevailing Wage Act permits employees to recover prevailing wages, at the regular *and overtime* rates, through the administrative process set forth in the statute. N.Y. Lab. Law § 220(2),(7)-(8); *Marangos Constr. Corp. v. New York State Dep't of Labor*, 216 A.D.2d 758, 759, 628 N.Y.S.2d 451 (1995) (enforcing Labor Commissioner's determination that employer owed overtime compensation to employees). This process requires employees to seek an administrative determination from the Labor Commissioner before filing a civil action. N.Y. Labor Law § 220(7)-(8); *Marren v Ludlam*, 14 AD3d 667, 669, 790 N.Y.S.2d 146 (2005) ("[N]o private right of action . . . exists under Labor Law § 220 until an administrative determination in the employee's favor has been made and has gone unreviewed or has been affirmed."). Plaintiffs apparently believe they can bring statutory claims to collect unpaid *overtime* prevailing wages without first exhausting the administrative remedies in the Prevailing Wage Act. The applicable statutes and case law offer Plaintiffs no support.

In *Brown v. Tom-Cat Electrical Security, Inc.*, Case No. 03-cv-5175(FB)(JO), 2007 U.S. Dist. LEXIS 63542, (Aug. 27, 2007), as here, the plaintiffs brought claims to collect the difference between the overtime rates they received based on their regular rate of pay and the overtime rates they claimed they should have received for performing prevailing wage work. Citing the administrative process set forth in Section 220 of the Prevailing Wage Act, the Court properly declined to exercise supplemental jurisdiction over any claims for prevailing wages, overtime or otherwise. *Id.* at *10, 14. The Court reasoned:

> The Court's research has revealed no case confronting such "hybrid" claims combining elements of both overtime and prevailing wage claims; however, the Second Circuit's opinion in *Grochowski* [*v. Phoenix Constr.*, 318 F.3d 80, 87 (2d Cir. 2003)] provides some guidance. There, plaintiffs sought unpaid overtime for work on federal construction projects and argued that overtime should be

> calculated based on prevailing wage rates because the federal Davis-Bacon Act ("DBA"), 40 U.S.C. § 276a, required payment of prevailing wages on federal projects. *See* 318 F.3d at 87. Noting that the DBA provided a specific administrative procedure for recovery of prevailing wages, the circuit court rebuffed the plaintiffs' attempt to import the requirements of the DBA into an FLSA overtime claim: "[T]he district court properly limited the plaintiffs' claims under the FLSA for unpaid overtime compensation to one-and-a-half times the hourly rates actually paid." *Id.* (emphasis added).
>
> Guided by *Grochowski*, the Court holds that even though the third category of plaintiffs' pre-January 2002 claims deals with overtime payments, it must be deemed a prevailing wage claim and, therefore, subject to the administrative process set forth in § 220.

Id. at *14-15. Similarly, because Plaintiffs did not exhaust the administrative remedies available under Labor Law Section 220, this Court should reject Plaintiffs' statutory overtime claims.

Plaintiffs cite the applicable overtime regulation, 12 N.Y.C.R.R. § 142-3.2, in support of their claims. (FAC, ¶35) This regulation derives its statutory authority from Article 19 of the Labor Law (the Minimum Wage Act, N.Y. Lab. Law §§ 650-665). *See* N.Y. Lab. Law § 655(5)(c); 12 N.Y.C.R.R. § 142-3.2. That Article authorizes civil actions only to enforce violations of **Article 19**. *See* N.Y. Lab. Law § 663 ("If any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of **this article**, he or she may recover in a civil action the amount of any such underpayments . . . .") (emphasis added). It does not authorize civil actions to enforce violations of Article 8 (the Prevailing Wage Act, N.Y. Lab. Law §§ 220, *et seq.*) *Id.*

Article 19's implementing regulations do not address prevailing wage rates at all. They require only that employers pay overtime "at a wage rate of one and one-half times the employee's **regular rate**." 12 N.Y.C.R.R. § 142-3.2 (emphasis added). Plaintiffs have no claims under Article 19, because they cannot dispute that SimplexGrinnell always pays its employees at least one-and-one-half times the regular rate of pay for all hours over forty. To the degree SimplexGrinnell may have improperly failed to pay one and one-half times the "prevailing" rate

of pay, the New York Legislature has created a separate remedial scheme for addressing those claims in Article 8 of the New York Labor Law. *See* N.Y. Lab. Law § 220(7)-(8). Plaintiffs cannot remedy such violations through Article 19.

B. Even if New York Law Authorized Plaintiffs' Overtime Claims, They Have No Evidence to Support Their Claims or the Claims of the Putative Class.

As set forth earlier, Plaintiffs cannot prove when and where they and other putative class members were improperly paid for work performed on public work projects, nor can they establish the work performed or the actual wage rates paid for any of the work they performed. Accordingly, for the same reasons set forth above, Plaintiffs cannot prove any entitlement to additional overtime compensation for work performed on these projects.

V. Plaintiffs' Statutory Claim for "Failure to Pay Wages" Must Be Dismissed.

Plaintiffs' fifth claim for relief alleges that "by failing to pay plaintiffs and other members of the putative class the required wage and overtime compensation . . . [and] the agreed upon benefits and/or wage supplements owed to them," SimplexGrinnell violated Sections 190, 191 and 198-c of the Labor Law. (FAC, ¶¶40-41) In essence, Plaintiffs seek to recover liquidated damages and attorneys' fees by recasting their common law claims for unpaid prevailing wages as statutory wage claims enforceable under Article 6 (§§ 190-199a) of the Labor Law.

The Appellate Division of the Supreme Court faced this same issue in *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 804, N.Y.S. 2d 58, 60-61, 22 A.D.3d 404 (2005), and it rejected the plaintiffs' bid to recover statutory remedies in connection with their breach of contract claims for unpaid prevailing wages.

> The fifth cause of action for willful failure to pay prevailing wages was also properly dismissed. The statutory remedies of an award of attorneys' fees and liquidated damages which plaintiffs seek "are limited to actions for wage claims founded on the substantive provisions of Labor Law article 6" and are not recoverable, as here, in a common-law contractual remuneration action.

Id.; *see also Jara v. Strong Steel Door, Inc.*, 872 N.Y.S.2d 691, 20 Misc. 3d 1135A ("To the extent that prevailing wages are sought to be recovered, Labor Law § 191 is an inappropriate vehicle for such recovery. . . . Rather, Labor Law § 220 is the appropriate statutory provision applicable to plaintiffs' claims regarding prevailing wages. However, plaintiff does not bring a cause of action pursuant to Labor Law § 220, presumably because such claims would be precluded in the first instance due to plaintiffs' failure to exhaust their administrative remedies as required under Labor Law § 220. . . . The motion to dismiss is granted")

Accordingly, because Plaintiffs' claims for unpaid prevailing wages are not founded on the substantive provisions of Article 6, the Court should dismiss their claims for violations of Section 190, 191, and 198-c.

CONCLUSION

Plaintiffs failed to obtain the information necessary to prove their claims, and thus, they cannot possibly prevail at trial on the claims alleged in their Complaint. SimplexGrinnell respectfully submits that the Court should dismiss this case in its entirety, or at a minimum, grant partial summary judgment for the numerous reasons provided above.

Respectfully submitted,

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