

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:09-CV-02632-PAB

**DOUGLAS MCGEE, on behalf of
himself and other similarly situated,**

Plaintiff,

v.

MWH CONSTRUCTORS, INC.,

Defendant

**PLAINTIFF’S MOTION FOR AN ORDER PERMITTING SUPERVISED NOTICE OF
THIS ACTION TO POTENTIAL OPT-IN PLAINTIFFS AND CONDITIONAL
CERTIFICATION OF THIS CASE AS A COLLECTIVE ACTION AND
INCORPORATED MEMORANDUM OF LAW**

Plaintiff, DOUGLAS MCGEE (“Plaintiff”), requests the entry of an Order for conditional certification of this collective action and permitting under supervision, notice to all similarly situated employees who were employed by Defendant, MWH CONSTRUCTORS, INC. (“MWH” or “Defendant”), over the last three (3) years who were subjected to Defendant’s illegal pay practice of failing to pay full and proper overtime compensation for all hours worked in excess of forty (40) in a workweek and states as follows:

**MOTION FOR AN ORDER PERMITTING COURT SUPERVISED NOTICE
TO EMPLOYEES OF THEIR OPT-IN RIGHTS**

1. Section 16(b) of the Fair Labor Standards Act of 1938 (“FLSA”) provides, among other things, that an action to recover unpaid overtime compensation may be maintained against any employer by any one or more employees for and on behalf of himself or themselves and other employees similarly situated. *See* 29 U.S.C. § 216(b).

2. As stated in Plaintiff's Complaint, (Doc. No. 1) Plaintiff was a construction superintendent who received an hourly rate¹ of pay for all hours worked and has brought this action on behalf of all current and former similarly situated construction superintendents who worked overtime hours for Defendant within the last three (3) years and who did not receive full and proper payment of "time and a half" wages for all overtime hours worked.

3. The representative class consists of all current and former construction superintendents who worked for Defendant at any time within the last three (3) years, and who were subjected to Defendant's illegal practice of not paying full and proper overtime compensation for all overtime hours worked. As a result of such compensation practices, each construction superintendent did not receive full and proper payment of time and one half of his/her regular rate of pay for all hours worked over forty (40) in one or more workweeks for Defendant. The named Plaintiff, as well as one additional "opt-in Plaintiff has filed an Affidavit in support of this Motion.

4. Simply put, all other construction superintendents are owed full and proper payment of overtime wages and the right to participate in this litigation. Defendant has acted or refused to act on grounds applicable to construction superintendents, thereby making the identical relief appropriate with respect to their current and former construction superintendents as a whole. And, although the class of current and former construction superintendents is identified and certain, the individual members of the class cannot be completely identified and notified of their right to join this action absent access to Defendant's books and records.

¹ Plaintiff characterizes his pay as hourly. However, it is aware that Defendant disagrees and views the payment method as a salary. As a result, Defendant has alleged that Plaintiff is exempt under various white collar exemptions. Regardless, this distinction has no bearing on the outcome of this motion since Defendant compensates its superintendents by the same common, unified pay practice.

WHEREFORE, Plaintiff respectfully requests that the Court permit and supervise notice to all current and former construction superintendents who did not receive full payment of time and one half wages for all overtime hours worked during his/her employment with Defendant.

MEMORANDUM OF LAW

I. INTRODUCTION

The FLSA authorizes employees to bring an action on behalf of themselves and others similarly situated. *See* 29 U.S.C. § 216(b). The FLSA provides, in part, that:

An action to recover the liability [for unpaid overtime] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other similarly situated. ***No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.***

See id. (emphasis added).

Defendant, MWH, is a company that specializes in water and wastewater engineering, construction and other related services. *See* excerpts from Defendant's website at www.mwhglobal.com attached as Composite Exhibit A at p.1. With nearly 7,000 employees on six continents, it provides services and solutions across a global platform with at least eighty (80) offices in the Americas alone. *Id.* at pp. 2-7. As part of its services, MWH performs construction projects on municipal and private water plants and facilities. *Id.* at pp. 8-9. For example, MWH operated in over **80** separate construction projects for the city of Cape Cora, Florida's wastewater reclamation plants. *Id.* MWH employed, and continues to employ, several hundred construction superintendents to assist in these construction projects nationwide and

across the world. *See generally* Affidavit of Douglas McGee attached as Exhibit “B.” Plaintiff, and those similarly situated to him are those construction superintendents. *See id.* at ¶¶ 29-31.

Plaintiff is a former construction superintendent who received an hourly wage for the job that he performed. *See* McGee Affidavit at ¶¶ 16-19. Plaintiff, and those similarly situated to him (“plaintiffs”), performed the primary duty of coordinating the various building phases of the construction projects. *See id.* at ¶¶ 4-10. During their employment with Defendant, Plaintiffs regularly worked in excess of forty (40) hours per workweek. *See id.* at ¶¶ 16-28. Notwithstanding the actual overtime hours worked by Plaintiffs, Defendant did not pay full and proper overtime compensation for all overtime hours worked in excess of forty (40) within a workweek. *See id.* at ¶¶ 16-28. Instead, Defendant paid Plaintiffs the same hourly wage (“straight time”) for all hours worked with no provisions for overtime hours worked over forty (40) per week in one or more workweeks. *Id.* Thus, as a result, Plaintiffs did not receive full and proper compensation for all hours worked over forty (40) each workweek.

Plaintiff asserts that Defendant’s compensation policies violate the FLSA’s overtime provisions requiring the payment of time and one half overtime compensation for each hour worked over forty (40) in a workweek. Because Defendant paid hundreds of construction superintendents straight time pay without additional compensation to pay construction superintendents for all hours worked over forty, Plaintiff maintains that such compensation practices demonstrate a common policy that violated the law and adversely affected the rights of each member of this collective action. *See Ayers v. SGS Control Servs., Inc.*, 2004 WL 2978296, at *1, 2004 U.S. Dist. LEXIS 25646 at *4 (S.D.N.Y.2004). *See also Scholtisek*, 229 F.R.D. 381, at 390. (“[w]hat is important is that these employees were allegedly subject to a common practice or scheme on [their employer's] part”). Therefore, Plaintiff seeks this Court’s authorization to

facilitate notice to each of Defendant’s construction superintendents who was subjected to the illegal pay practices described above at any time within the last three (3) years of their rights to opt-in to this litigation by executing an appropriate consent as required by Section 216(b) of the FLSA. Plaintiff’s Affidavit, and the Declaration of the additional “opt-in Plaintiff” who has joined this action since the time it was filed, attest that Defendant’s other construction superintendents had similar duties, were paid in the same manner (i.e., the same hourly wage with no provisions for all overtime hours worked over forty (40) per week and thus, were subjected to Defendant’s illegal pay practices described above. *See* Scott Ryan Declaration attached as Exhibit “C.”

II. APPLICABLE STANDARDS FOR COLLECTIVE ACTIONS

A. Authority to Send Class Notice

FLSA class actions operate much differently than the typical class action suits under Rule 23 of the Federal Rules of Civil Procedure. Under 29 U.S.C. § 216(b) of the FLSA, an employee belonging to a similarly situated class of plaintiffs must “opt-in” to the class by filing a written consent with the Court in order to be bound by the outcome of the case. Without signing and filing such an express consent, employees are not bound by the outcome of the litigation. *See id.*

In *Hoffman-La Roche, Inc. v. Sealing*, 110 S. Ct. 482 (1989), the Court ruled that not only did trial courts have authority to compel defendant-employers to provide names and addresses of potential plaintiffs through the pretrial discovery process, but that this authority also included sending court-authorized consent forms to potential plaintiffs. *See id.* The Court determined that district courts have discretion in appropriate cases to implement 29 U.S.C. §216(b), by facilitating notice to potential plaintiffs. *See id.* at 486. Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite

disposition of the action. *See id.* at 487. Additionally, the benefits of the class action provisions of 29 U.S.C. §216(b), “...depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.” *Id.* at 486.

B. The Tenth Circuit Uses a Two-Tiered Approach

Under 29 U.S.C. § 216(b), plaintiffs ask the Court to conditionally certify a collective action for the purpose of providing notice to putative class members. Section 216(b) provides in part that “[a]n action ... may be maintained against an employer ... by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b). This provision provides the exclusive procedural mechanism for class certification in actions under the FLSA. *Brown v. Money Tree Mortgage, Inc.*, 222 F.R.D. 676, 679 (D.Kan.2004). Though the FLSA does not define the phrase “similarly situated,” the Tenth Circuit has approved an ad hoc approach by which courts determine on a case-by-case basis whether members of a putative class are similarly situated. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir.2001).

Under this approach, the Court engages in a two-step process. First, the Court makes an initial “notice stage” determination which requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan. *Id.* at 1102 (*quoting Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 678 (D.Colo.1997)). The Court decides whether a collective action should be certified for purposes of sending notice of the action to potential class members. *Brown*, 222 F.R.D. at 679. This initial step creates a lenient standard which typically results in conditional certification of a representative class. *Gieseke v. First Horizon Home Loan Corp.*, 408 F.Supp.2d 1164, 1166 (D.Kan.2006).

Under the second step which occurs at the close of discovery, the Court utilizes a stricter standard which requires evaluation of several factors, including (1) disparate factual and employment settings of individual plaintiffs; (2) the various defenses available to defendants which appear to be individual to each plaintiff; and (3) fairness and procedural considerations. *Thiessen*, 267 F.3d at 1102-03. Plaintiffs can show that they and putative class members are similarly situated by demonstrating that they were all subject to a *common policy or plan*. *Brown*, 222 F.R.D. at 679 (conditional certification requires only substantial allegations that putative class members were subject to a single policy or plan).

C. Courts Focus on a Common Scheme or Plan and do not Require Many Opt-ins to Have Already Joined When Determining Whether to Grant Notice

1. Common Scheme or Plan

In determining whether to grant notice of a collective action, Courts focus on whether Plaintiffs were victims of a common scheme or plan that violated the law. Plaintiff need not conclusively demonstrate that he and the other putative class members are, in fact, similarly situated. Rather, he must show that he “and potential plaintiffs together were victims of a common policy or plan that violated the law.” *See e.g. Renfro v. Spartan Computer Servs., Inc.*, 243 F.R.D. 431, 433-34 (D.Kan.2007) (*citing Brown*, 222 F.R.D. at 681)(generally, where putative class members employed in similar positions, allegation that defendants engaged in pattern or practice of not paying overtime sufficient to allege plaintiffs were victims of single decision, policy or plan). Here, Plaintiff has met that burden by showing that Defendant pays hundreds of construction superintendents in a uniform manner: an hourly rate with no additional pay for hours worked over forty based on its alleged belief that its superintendents are “exempt” from overtime across the board. *See Defendant’s Answer*, Doc. 9 at. p. 5.

2. Number of Opt-In Plaintiffs Required

In determining whether to grant a Motion for Class Notice, typically Courts do not require a high number of Opt-in Plaintiffs to have already joined the case. *See McCaffrey v. Mortgage Sources, Corp.*, 2009 WL 2778085 (D.Kan. 2009)(Granting Motion for Class Notice based on declaration of Plaintiff and **one (1)** Opt-in Plaintiff; *See also Courtright v. Bd. of County Comm'rs of Payne County, Okla.*, No. CIV-08-230-D, 2009 WL 1076778, *3 (W.D.Okla., Apr. 21, 2009)(Granting Motion for Class Notice based on single affidavit of **Plaintiff alone**); *Wood v. Sundance Professional Services, LLC*, 2009 WL 484446 (D.Kan. 2009)(Granting Motion for Class Notice based on single affidavit of **two** Plaintiffs); *See e.g., Dietrich v. Liberty Square*, 230 F.R.D. 574, 579 (N.D. Iowa 2005)(**two (2)** affidavits provide sufficient factual basis for similarly situated inquiry); *See also Beck v. Desoto Health and Rehab*, case No.: 2:06-CV-226-FTM-34DNF, at Docs. 23, 34 (M.D. Fla. Jan. 24, 2007)(Granting Class Notice Motion with only **one (1)** opt-in); *Larry Guerra v. Big Johnson Concrete Pumping, Inc.*, CASE NO.: 05-14237 (S.D. Fla. May 17, 2006)(Granting Class Notice Motion where there was only **one (1)** Opt-in Plaintiff).

Further several district courts in the Tenth Circuit have expressly held that there is no need for a Plaintiff to show that other putative plaintiffs have expressed an interest in joining this case. *See e.g. Courtright v. Bd. of County Comm'rs of Payne County, Okla.*, No. CIV-08-230-D, 2009 WL 1076778, *3 (W.D.Okla., Apr. 21, 2009)(This Court concludes that the Tenth Circuit would not require a showing of additional plaintiffs as a pre-condition to “notice stage” certification and that Plaintiff’s substantial allegations of class-wide policies and practices in this case are sufficient); *Reab v. Elec. Arts, Inc.*, 214 F.R.D. 623, 629 (D.Colo.2002); *McCafrey*, 2009 WL 2778085 at p.4.

Here, Defendant employed hundreds of construction superintendents in thirty different states. It has numerous communities throughout these states that usually consist of several construction superintendents at each site. *See* McGee Affidavit at ¶¶ 7, 31-28 (Plaintiff personally attests that there are five (5) to six (6) construction superintendents per jobsite, including Florida, Louisiana, South Carolina, and Georgia). Plaintiff's Affidavit demonstrates that between five (5) to (6) construction superintendents worked at the multiple locations of MWH across several states, totaling hundreds of construction superintendents over the last three (3) years. *Id.* Defendant currently has at least twenty (20) separate operations in multiple states as we speak. *See* Exh. A. at pp. 10-11. During different times over the last three (3) years, each of these construction superintendents coordinated construction projects for MWH. *See* McGee Affidavit at ¶ 5. These construction superintendents were paid an hourly wage for all hours worked, and regularly worked more than forty (40) hours per workweek. *Id.* at ¶¶16-28. Notwithstanding the overtime hours worked by the construction superintendents, Defendant did not properly compensate them for overtime. *Id.* Instead, Defendant refused to pay Plaintiffs time and a half for all overtime hours worked. *Id.*

Based upon a review of the affidavit from the named Plaintiff and Ryan declaration, specific facts based on personal observation have been provided to support their belief that other employees are interested in opting in. *See Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1097 (11th Cir. 1996). In addition, allowing class notification to a potential class as large as several hundred plus class members will definitely avoid multiple lawsuits where numerous employees have allegedly been harmed by the same violation. *See Prickett v. Dekalb County*, 349 F.3d 1294, 1297 (11th Cir. 2003).

Here, a collective action is sought as the Defendant has acted or refused to act on grounds generally applicable to the class (Defendant's construction superintendents who were subjected to Defendant's alleged misclassification of them as exempt from overtime), thereby making appropriate the same relief with respect to the class as a whole. Thus, a collective action is superior to other available methods for the fair and efficient adjudication of this controversy.

D. Numerous Courts Have Granted Collective Actions in Similar Cases

Applicable FLSA jurisprudence demonstrates recent precedence for conditional certification of collective actions based on failure to pay construction superintendents overtime pay who were classified as exempt from overtime. *See Ballew v. Lennar*, Case No.: 2:08-cv-13-FTM-99SPC, Docs. 153, 183 (M.D. Fla. 2008)(Approving Motion for Class Certification of class of construction superintendents); *See also Simpkins v. Pulte Home Corporation*, 2008 WL 3927275 (M.D. Fla. 2008)(Report and Recommendations Approving Motion for Class Certification of class of superintendents); *Reina v. Avatar Properties, Inc.*, Case No.:6:08-cv-02000-MSS-KRS, Doc. 34 (M.D. Fla. Aug. 31, 2009, Orl. Div.)(Order Granting Motion to Certify Class of construction superintendents (unopposed)); *Uken v. David Weekly Homes, L.P.*, American Arbitration Association Case No.:70 160 00360 08 (Order dated January 9, 2009 Granting Conditional Certification and Supervised Notice) Order attached as Exhibit "D."

III. FACTORS IRRELEVANT TO THE COURT'S CONSIDERATION

A. The "Merits" of Plaintiff's Claim are not Considered When Determining Whether to Grant Notice

Plaintiff anticipates Defendant will argue notice should not proceed based upon the only possible defense it may have to this action – that Plaintiff and his co-employees are somehow exempt from the overtime requirements of the Fair Labor Standards Act. Although Plaintiff

believes this defense will ultimately fail based upon the facts that will emerge during discovery, such arguments regarding the factual nature of Plaintiff's claims and Defendant's defenses thereto are *irrelevant* at this stage of the notification process. At this "conditional certification" stage, courts *do not weigh the merits* of the underlying claims in determining whether potential opt-in plaintiffs may be "similarly situated." *See McCaffrey, at p.4* (The Court will not reach the merits of plaintiffs' claims on the motion for conditional certification, particularly when defendant's argument is more appropriately raised in a motion to dismiss or a motion for summary judgment); *citing Renfro v. Spartan Computer Services, Inc.*, 243 F.R.D. at 435 (D.Kan. 2007); *Gipson v. Southwestern Bell Telephone Co.*, 2009 WL 1044941 (D.Kan. 2009)(Defendant's arguments directed at the merits of Plaintiffs' claims, on the disparate employment settings, such as organizational differences between call centers, and defenses against particular plaintiffs are more appropriate to be considered at the second stage of the ad hoc analysis upon completion of discovery).

B. Courts do not Consider the Need for Discovery During Stage I

It has been consistently recognized that discovery at the first notice stage is unnecessary for the similarly situated determination. *See Grayson*, 79 F.3d at 1099 (holding that a district court *may*, but its not required to hold an evidentiary hearing prior to making its section 216(b) decision particularly where the Defendant's rights are not substantially affected) (emphasis added); *Lloredo v. Radioshack Corp.*, 2005 WL 1156030, at *1 (S.D. Fla. May 12, 2005) (refusing to examine discovery in making its first stage similarly situated determination); *see also Harrison v. Enterprise Rent-A-Car Co.*, 1998 U.S. Dist. LEXIS 13131, at *13 (July 1, 1998) (holding that the fact that subsequent discovery may prove the original plaintiffs and the opt-in plaintiffs are not after all "similarly situated" does not defeat conditional class certification);

Schwed v. Gen. Elec. Co., 159 F.R.D 373, 375 (N.D.N.Y. 1995) (“Even where later discovery proves the putative class members to be dissimilarly situated, notice . . . prior to full discovery is appropriate as it may further the remedial purpose of the [FLSA]”).

An examination of discovery is not appropriate because at this stage the Court is not making a *factual determination* regarding whether the putative class members are similarly situated. *Brown v. Money Tree Mortgage, Inc.*, 222 F.R.D. 676, 682 (D. Kan. 2004) (“[T]he court will examine the individual plaintiffs’ disparate factual and employment setting, as well as various defenses available to the defendant which appear to be individual to each plaintiff, during the ‘second stage’ analysis after the close of discovery.”); *Goldman v. Radioshack Corp.*, 2003 WL 21250571, at *8 (E.D. Pa. Apr. 16, 2003) (“A fact-specific inquiry is conducted only after discovery and a formal motion to decertify the class is brought by the defendant.”).

Moreover, discovery is not necessary because courts at this stage do not resolve factual disputes or make credibility determinations. *See Scott v. Heartland Home Finance*, 2006 WL 1209813, at *3 (N. D. Ga. May 3, 2006) (*citing Severtson v. Phillips Beverage Co.*, 141 F.R.D 276, 279 (D. Minn. 1992)); *Camper v. Home Quality Mgmt., Inc.*, 200 F.R.D. 516, 520 (D. Md. 2000) (“Factual disputes do not negate the appropriateness of court facilitated notice.”). In *Scott*, the court held that it was not appropriate for the court to address the merits of plaintiffs’ claims or weigh evidence and thus refused to consider the Defendant’s arguments regarding the variation in specific job duties, locations, working hours, or the availability of various exemptions. 2006 WL 1209813, at *3; (*citing Pendelbury*, 2005 WL 82500, at *3 (factual matters regarding the applicability of exemptions to employees not appropriate at notice stage); *Moss v. Crawford & Co.*, 201 F.R.D. 398, 410 (W.D. Pa. 2000) (“[V]ariations in the plaintiffs’

duties, job locations and hourly billing rates do not differentiate the collective class to the extent that it defeats the primary objectives of a section 216(b) action.”).

Through the allegations in the Complaint, and the Affidavit/Declaration submitted to this Court, Plaintiff has provided sufficient evidence to warrant notice of this lawsuit be sent to all other construction superintendents for Defendant around the country. Because the “similarly situated” determination at the notice stage is preliminary, Defendant will not be prejudiced by the facilitation of notice because they can later argue that Plaintiff and the putative class members are not in fact “similarly situated” enough to proceed collectively to trial. Accordingly, Plaintiff’s Stage I Motion should be granted at this time.

IV. PLAINTIFF’S NOTICE IS ACCURATE AND SHOULD BE POSTED AT ALL OF DEFENDANT’S LOCATIONS NATIONWIDE

Plaintiff’s proposed judicial notice is “timely, accurate, and informative.” *See Hoffmann-La Roche*, 493 U.S. at 172. Plaintiff also requests that, in addition to permitting Plaintiff to notify the potential class members by mail, this notice be posted at each of Defendant’s locations at which construction superintendents are employed to further the broad remedial purpose of the FLSA. *See Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 493 (E. D. Cal. Apr. 19, 2006)(finding that first class mail, combined with posting provided for the “best notice practicable” to the potential class); *Veliz v. Cintas Corp.*, 2004 WL 2623909, at *2 (N.D. Cal. Nov. 12, 2004) (requiring employer to post notice and consent forms in all of its work sites); *Johnson v. Am. Airlines, Inc.*, 531 F. Supp. 957, 961 (N.D. Tex. 1982) (finding direct mail and posting on company bulletin boards reasonable).

V. LIMITED DISCOVERY OF NAMES AND ADDRESSES OF THE PUTATIVE CLASS IS NECESSARY TO CARRY OUT NOTICE

The opt-in provision of the FLSA requires some procedure for identifying and notifying potential class members. *Morden v. T-Mobile USA, Inc.*, 2006 WL 1727987, at *3 (W. D. Wash. June 22, 2006)(compelling the defendant to produce the names and addresses of potentially similarly situated employees despite the fact that no conditional class certification motion was pending before the court). As such, early discovery of a mailing list is routinely disclosed in FLSA collective actions because the lists are necessary to facilitate notice. See *Hoffmann-La Roche*, 493 U.S. at 165; *Gieseke v. First Horizon Home Loan Corp.*, 408 F. Supp. 2d 1164, 1169 (D. Kan. Jan. 10, 2006). Thus, if Plaintiff's Motion is granted, the Defendant should likewise be ordered to provide Plaintiff with a list of all putative class members' names and addresses to carry out notice.

VI. PROPOSED REGION FOR NOTICE

Plaintiff proposes that the Court-supervised notification include any MWH sites for the **entire nation**. Plaintiff has demonstrated that there are several hundred similarly situated construction superintendents that were paid on a similar basis.

Plaintiff seeks an Order requiring:

(1) Defendant produce to Plaintiff a list of all similarly situated construction superintendents who were paid by the job performed from November 10, 2006 through the present within thirty (30) days;

(2) the proposed "Notification" letter, attached as Exhibit "E", to be sent to all similarly situated employees in the nation and posted at all MWH offices where construction superintendents are present; and

(3) the proposed "Notice of Consent to Join" form, attached as Exhibit "F", which similarly situated employees can complete, sign, and filed with the Court within sixty (60) days of receipt of list of all similarly situated construction superintendents from Defendant.

VII. CONCLUSION

Plaintiff has met his burden to facilitate notice to potential class members under Tenth Circuit precedent. Accordingly, Plaintiff respectfully requests that this Court permit and supervise notice as mentioned above.

CERTIFICATE OF GOOD FAITH

Pursuant to **Local Rule 7.1**, Plaintiff's counsel conferred with Defendant's counsel in an effort to resolve this Motion prior to its filing, but the parties were unable to resolve same.

Respectfully submitted this 4th day of March, 2009.

/s/ CARLOS V. LEACH

Carlos V. Leach, Esquire

FBN 0540021

Morgan & Morgan, P.A.

20 N. Orange Ave., 16th Floor

P.O. Box 4979

Orlando, FL 32802-4979

Telephone: (407) 420-1414

Facsimile: (407) 425-8171

Email: CLeach@forthepeople.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

IN HEREBY CERTIFY that the above and foregoing of Plaintiff, Plaintiff, has been served to all parties using the CM/ECF filing system, which I understand will send a notice of electronic filing this 4th day of March 2010.

/s/ CARLOS V. LEACH

Carlos V. Leach