IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CRISTIANO DINIZ and ANTONIO THOMAS, individually and on behalf of all those similarly situated,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO.: 1:12-cv-02621-JOF
ALPHA OB GYN GROUP, P.C. and DR. DANIEL E. MCBRAYER SR.,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Cristiano Diniz ("Diniz") and Antonio Thomas ("Thomas") hereby file this Memorandum of Law in Support of their Motion for Partial Summary Judgment as to whether Defendants violated the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. § 201, *et seq.,* when they failed to pay Plaintiffs at a rate of pay not less than one and one half times their regular rate for all work performed in excess of forty hours in a workweek on the regular pay day for the period in which such workweek ends. In support of their Motion, Plaintiffs state as follows:

INTRODUCTION

Pursuant to the FLSA:

> no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. 29 CFR 778.106.

Here, the depositions and documentary evidence clearly show that Defendants violated the FLSA when they paid all employees, including Plaintiffs, straight time for all hours that they worked, including overtime hours, and did not pay them at a rate not less than one and one-half times their regular rate on the regular pay day for the period in which such workweek ends. Accordingly, summary judgment on Plaintiffs' overtime claim is appropriate.

ARGUMENT

I. Summary Judgment Standard.

Summary judgment is appropriate when "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). In considering a summary judgment motion, all evidence is viewed in the light most favorable to the non-movant. *Info. Sys. & Networks Corp. v. City of Atlanta,* 281 F.3d 1220, 1224–25 (11th Cir.2002). Summary judgment is appropriate against a party that "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). Once the moving party requests summary judgment on the absence of necessary evidence, the nonmoving party must "go beyond the pleadings and ... designate specific facts showing that there is a genuine issue for trial." *Id.* at 324, 106 S.Ct. at 2553 (citations omitted). As discussed below, Defendants cannot show that there are genuine issues for trial as to whether they paid overtime compensation when it was owed.

II. There Is No Genuine Issue As To Whether Defendant Paid Its Hourly Employees Time-And-Half For Hours Worked Over Forty In A Workweek On The Regular Pay Day For The Period In Which Such Workweek Ends.

Pursuant to the FLSA, a covered employee who works more than forty hours in a workweek must receive compensation at a rate not less than one and one-half

times the regular rate at which he is employed for all hours worked over forty. 29 U.S.C. § 207(a)(1). The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. 29 CFR 778.106. Here, there is no genuine dispute as to whether Defendants failed to pay Plaintiffs at a rate of pay not less than one and one half times their regular rate for all work performed in excess of forty hours in a workweek, in violation of 29 U.S.C. § 207, on the regular pay day for the period in which such workweek ends.[1]

First, the evidence shows that Plaintiffs were paid on an hourly basis during their employment with Defendants. (Statement of Material Undisputed Facts ("SUMF") ¶¶ 1-2.) Second, the evidence shows that Plaintiffs worked over 40 hours within at least one workweek during their employment with Defendants. (SUMF ¶¶ 3-4.) Third, the evidence shows that Defendants did not pay Plaintiffs at a rate of pay of one and a half times Plaintiffs' regular rates of pay for all work performed in excess of forty hours in those workweeks on the regular pay day for

---

[1] Indeed, despite the clear documentary evidence discussed herein of Defendants' FLSA violations – documents which has been in Defendants' possession at all times – Defendants have put roadblocks before Plaintiffs and denied at every step of this litigation even the most basic facts, including that Plaintiffs were paid on an hourly basis, that they worked forty or more hours in any workweek, and that Plaintiffs were not paid one and a half times his regular rate of pay for all time worked over 40 hours in one or more of those workweeks. (SUMF ¶¶ 8-9.) Defendants' repeated and unwarranted denials of these clearly true facts have caused Plaintiffs and the Court to expend scarce and valuable resources that could have been saved had Defendants simply admitted what their own documents show to be true.

the period in which such workweek ends. (SUMF ¶¶ 5-6.) Indeed, Defendants did not pay *any* of its employees at a rate of pay of one and a half time their regular rate of pay for all work performed in excess of forty hours in a workweek on the regular pay day for the period in which such workweek ends. (SUMF ¶ 7.)

Thus, there is no genuine dispute that Defendants failed to comply with the FLSA when they did not pay Plaintiffs at a rate of pay not less than one and one half times their regular rate for all work performed in excess of forty hours in a workweek on the regular pay day for the period in which such workweek ends. Accordingly, summary judgment is appropriate.[2]

CONCLUSION

WHEREFORE, Plaintiffs respectfully pray that this Court enter an order granting their Motion, along with any further relief that the Court deems just and proper.

[2] Liquidated damages are available under the FLSA to an employee if the employer fails to pay overtime on the regular payment date. *Atlantic Co. v. Broughton,* 146 F.2d 480, 482 (5th Cir. 1945). Other Circuits have reached similar holdings. *See Martin v. Selker Bros., Inc.,* 949 F.2d 1286, 1299 (3d Cir. 1991) (liquidated damages available to employees who are not paid when wages are due*); U.S. v. Klinghoffer Bros. Realty Corp.,* 285 F.2d 487, 491 (2d Cir. 1960) (FLSA requires "prompt" payment of wages). "Such damages are not inflicted as a penalty, but are allowed as compensation for detention of a workman's pay." *Broughton*, 146 F.2d at 482. Additionally, successful plaintiffs are entitled to their attorneys' fees; indeed, the FLSA states that the court "**shall** . . . allow a reasonable attorneys' fee to be paid by the defendant." *See* 29 USC 216(b) (emphasis added).

DATED: January 10, 2014

By: s/ Andrew L. Weiner

Andrew L. Weiner
Georgia Bar No. 808278
aw@andrewweinerlaw.com
THE WEINER LAW FIRM LLC
3525 Piedmont Road
7 Piedmont Center | 3rd Floor
Atlanta, GA 30305
(404) 254-0842 (Tel.)
(866) 800-1482 (Fax)

COUNSEL FOR PLAINTIFFS

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7.1

I certify that this document was prepared in compliance with Local Rule 5.1.

This document was prepared in Times New Roman 14-point font.

By s/ Andrew L. Weiner____________
Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CRISTIANO DINIZ and ANTONIO THOMAS, individually and on behalf of all those similarly situated,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO.: 1:12-cv-02621-JOF
ALPHA OB GYN GROUP, P.C. and DR. DANIEL E. MCBRAYER SR.,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I certify that on January 10, 2014, I electronically filed the foregoing Plaintiffs' Memorandum of Law in Support of their Motion for Partial Summary Judgment with the Clerk of the Court using the CM/ECF system, which will automatically send notice of such filing to the following attorneys of record:

A. Keith Logue, Esq.
LAW OFFICE OF A. KEITH LOGUE
3423 Weymouth Court
Marietta, GA 30062

By s/ Andrew L. Weiner
Counsel for Plaintiffs