

**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. )

ALPHA OB GYN GROUP, P.C. and DR. )  
DANIEL E. MCBRAYE SR., )

Defendants. )

CIVIL ACTION NO.:  
1:12-cv-02621-JOF

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**FIRST AMENDED COMPLAINT**

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PLAINTIFFS CRISTIANO DINIZ and ANTONIO THOMAS (“Plaintiffs”), individually and on behalf of all others similarly situated, hereby file this First Amended Complaint against DEFENDANTS ALPHA OB GYN GROUP, P.C. and DR. DANIEL E. MCBRAYE SR. (collectively “Defendants”) and for this cause of action state the following:

**NATURE OF THE CLAIM**

1. Plaintiffs brings this action individually and on behalf of all others similarly situated – pursuant to the collective action provision of 29 U.S.C. § 216(b) – to redress Defendants’ violations of the Fair Labor Standards Act 29 U.S.C. § 201 *et seq.* (“FLSA”).

2. This action seeks damages for Defendants' retaliatory actions and for unpaid overtime compensation, liquidated damages, expenses of litigation, reasonable attorneys' fees, and other relief under the FLSA, on the grounds set forth below.

### **JURISDICTION AND VENUE**

3. This Court has subject-matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States. Subject-matter jurisdiction is also conferred upon this Court by 28 U.S.C. § 1337 because this action arises under Acts of Congress regulating commerce. Additionally, Defendants are subject to service in this judicial district; thus, this Court has personal jurisdiction.

4. Under 28 U.S.C. § 1391(b), venue is appropriate in this district because a substantial part of the events or omissions giving rise to the claims at issue occurred in this judicial district.

### **THE PARTIES**

5. Plaintiff Diniz is a resident of Georgia and has been employed by Defendants since September 2003 at Defendants' medical office located in Marietta, Georgia.

6. Plaintiff Thomas is a resident of Georgia and was employed by Defendants from May 24, 2012 until his termination on August 9, 2012.

7. Alpha OB GYN Group, P.C. (“Alpha”) is organized under the laws of the State of Georgia and its principal place of business is located in Marietta, Georgia.

8. Dr. Daniel E. McBrayer Sr. (“McBrayer”) is a resident of Georgia, subject to service at his principal place of business in Marietta, Georgia.

9. At all times relevant to this action, Defendants operated a medical office within this judicial district.

### **FACTUAL ALLEGATIONS**

10. At all times relevant to this action, Defendants were “employers” within the meaning of 29 U.S.C. § 203(d).

11. At all times relevant to this action, Defendants were enterprises engaged in commerce or in the production of goods for commerce within the meaning of the FLSA, because they had employees engaged in commerce and because their annual gross sales volume exceeds \$500,000.

12. At all times relevant to this action, Defendant McBrayer was Alpha’s Chief Executive Officer, acted in the interest of an employer toward Plaintiffs, exercised responsibility and control over Plaintiffs’ compensation and terms of

employment, and was a corporate officer with operational control of a corporation's covered enterprise. Therefore, Defendant McBryer may be held liable in his individual capacity as an "employer" for Alpha's FLSA violations.

13. Each Plaintiff was an "employee" of Defendants within the meaning of 29 U.S.C. § 203(e) within the three years preceding the filing of this Complaint.

14. Defendants employed Plaintiff Diniz as a medical assistant at their medical office in Marietta, Georgia.

15. Defendants employed Plaintiff Thomas as an office assistant at their medical office in Marietta, Georgia.

16. Plaintiffs were non-exempt employees within the meaning of the FLSA throughout their employment with Defendants and were subject to the overtime provisions of the FLSA. Other current and former employees of Defendants performed similar non-exempt duties and were compensated in a manner similar to Plaintiffs.

17. Throughout his employment, Plaintiff Diniz regularly worked hours in excess of 40 hours per workweek for which Defendants failed to compensate him properly. Plaintiff Diniz's supervisor was aware of the hours Plaintiff worked for which he was not properly compensated.

18. Throughout his employment, Plaintiff Thomas regularly worked hours in excess of 40 hours per workweek for which Defendants failed to compensate him properly. Plaintiff Thomas's supervisor was aware of the hours Plaintiff worked for which he was not properly compensated.

19. Plaintiffs were deprived of compensation to which they are entitled through Defendants' custom, policy, and/or practice of failing to compensate non-exempt employees at the overtime rate – *i.e.*, a rate of pay equal to one and one-half times their regular rate – for all hours worked over 40 within each workweek in violation of the FLSA.

20. Additionally, Plaintiffs were deprived of compensation to which they are entitled through Defendants' custom, policy, and/or practice of failing to credit and pay non-exempt employees for all time worked – specifically, Defendants' custom and/or practice of routinely requiring non-exempt employees to perform compensable work during meal breaks for which time was automatically deducted.

21. As a result of these customs, policies, and/or practices, Defendants failed to credit and pay Plaintiffs properly for all overtime hours they worked – *i.e.*, all hours worked over 40 within each workweek – in violation of the FLSA.

22. Defendants have willfully and intentionally failed and/or refused to compensate Plaintiffs and other current and former non-exempt employees in accordance with the FLSA.

23. To avoid suspicion and inquiry by employees regarding their entitlement to overtime compensation for hours worked over 40 within each workweek, Defendants willfully and intentionally misrepresented to Plaintiffs and other current and former non-exempt employees their entitlement to overtime compensation and failed to post the required notice informing employees of their overtime pay rights. Plaintiffs and similarly situated current and former employees reasonably relied upon Defendants' misrepresentations and because of those misrepresentations were unable to determine their entitlement to overtime pay and the proper compensation owed to them in accordance with the FLSA through the exercise of reasonable diligence.

24. As a result of Defendants' actions in fraudulently concealing their employees' entitlement to overtime compensation, the applicable statute of limitations is tolled for as long as Defendants engaged in the fraudulent and misleading conduct set forth above, which is a period of at least nine years. Defendants are estopped from raising such statute of limitations as a bar.

25. On July 27, 2012, Plaintiff Diniz filed the original Complaint (the “Complaint”) in this action. [D.E. 1.]

26. Plaintiff Diniz alleged in the Complaint that he and others similarly situated were deprived of compensation to which they are entitled through Defendants’ custom, policy, and/or practice of failing to compensate non-exempt employees at the overtime rate – *i.e.*, a rate of pay equal to one and one-half times their regular rate – for all hours worked over 40 within each workweek in violation of the FLSA.

27. On July 31, 2012, Plaintiff Thomas filed his opt-in consent form to join this action. [D.E. 3.]

28. On August 3, 2012, Plaintiff Diniz attempted to serve his Summons and Complaint on Defendants. When the process server arrived at Defendants’ medical office, Defendants threatened Plaintiff Diniz in the presence of several other employees and told him that he would be fired if he did not tell the process server that he was not going forward with the lawsuit. Not wanting to lose his job, Plaintiff Diniz told the process server that he was not going forward with the lawsuit. Thus, service of the Summons and Complaint was unsuccessful. Plaintiff Diniz did not, however, withdraw his lawsuit.

29. On August 7, 2012, Plaintiff Diniz's attorney wrote a letter to Defendants concerning their retaliatory threats. Plaintiff Diniz's attorney also informed Defendants in the letter that Plaintiff Thomas had filed his opt-in consent to join this action. The letter was delivered to Defendants on August 8, 2012.

30. On August 9, 2012, in the presence of at least one co-worker, Defendant McBrayer asked Plaintiff Diniz if he was moving forward with his lawsuit. Plaintiff Diniz responded affirmatively and Defendant McBrayer told Plaintiff Diniz that because he was not withdrawing the lawsuit, Plaintiff Diniz "would need to find a new ride home." Defendant McBrayer was referring to the fact that Plaintiff Thomas typically drove Plaintiff Diniz home from work.

31. Approximately five minutes after Defendant McBrayer made this assertion, Plaintiff Thomas, in the presence of Plaintiff Diniz, was presented with a termination notice. The termination notice indicated that Plaintiff Thomas's employment was terminated effective immediately, but did not provide a reason for the termination. Plaintiff Thomas asked Defendant McBrayer why he was being fired and Defendant McBrayer responded that he did not have a reason.

32. Plaintiffs have retained The Weiner Law Firm LLC to represent them in this action and accordingly have incurred and will continue to incur attorneys' fees and costs, which are a proper portion of the relief sought in this action.

### COLLECTIVE ACTION ALLEGATIONS

33. Numerous current and former employees of Defendants exist who are similarly situated to Plaintiffs, were denied proper compensation in violation of the FLSA, and who would benefit from issuance of Court-supervised notice of this lawsuit. Those similarly situated current and former employees are known to Defendants and are readily identifiable and locatable through Defendants' records.

34. Those current and former employees similarly situated to Plaintiffs include all individuals employed by Defendants in non-exempt positions including, but not limited to, medical assistants, office assistants, and similar positions<sup>1</sup> at Defendants' medical office in Marietta, Georgia who worked in excess of 40 hours during one or more workweeks during any pay period falling within three chronological years immediately preceding the filing of the Complaint and continuing thereafter through the date on which final judgment is entered in this action.

35. Plaintiffs have consented to participate in this action. [D.E. 1-1, 3.]

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<sup>1</sup> Upon information and belief, Defendants did not provide many of their employees with formal job titles.

**COUNT 1**

**(Overtime Compensation Due Under 29 U.S.C. § 207 On Behalf Of Plaintiffs  
And All Others Similarly Situated)**

36. Plaintiffs re-allege paragraphs 1 through 35 above and incorporate them here by reference.

37. By engaging in the conduct described above, Defendants failed to pay Plaintiffs and all similarly situated individuals 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.

38. Specifically, Defendants failed to properly compensate Plaintiffs and similarly situated current and former employees for all overtime hours worked through their custom, policy, and/or practice of failing to compensate non-exempt employees at the overtime rate – *i.e.*, a rate of pay equal to one and one-half times their regular rate – for all hours worked over 40 within each workweek in violation of the FLSA.

39. Additionally, Defendants failed to properly compensate Plaintiffs and similarly situated current and former employees for all overtime hours worked through their custom, policy, and/or practice of routinely requiring non-exempt employees to perform compensable work during meal breaks for which time was automatically deducted.

40. Defendants' actions in failing to compensate Plaintiffs and persons similarly situated in accordance with the FLSA were willful, within the meaning of 29 U.S.C. § 255(a), and committed with a conscious disregard for the rights of Plaintiffs and similarly situated individuals.

41. As a result of Defendants' violation of the FLSA, Plaintiffs and all similarly situated individuals are entitled to recover their unpaid overtime compensation and an equal amount as liquidated damages, as well as prejudgment interest, reasonable attorneys' fees, and costs of suit, pursuant to 29 U.S.C. § 216(b), all in amounts to be determined at trial.

## **COUNT 2**

### **(Retaliation Under 29 U.S.C. § 215 On Behalf Of Plaintiff Thomas)**

42. Plaintiffs re-allege paragraphs 1 through 35 above and incorporate them here by reference.

43. This claim arises from Defendants' unlawful and willful retaliation against Plaintiff Thomas in violation of the FLSA.

44. On August 9, 2012, Defendants retaliated and discriminated against Plaintiff in violation of 29 U.S.C. § 215(a)(3) when they terminated his employment in response to his attempt to assert his rights to overtime

compensation under the FLSA by filing his consent to join this action and because he would testify against Defendants in these proceedings.

45. As a direct result of Defendants' retaliatory and discriminatory actions alleged herein, Plaintiff Thomas suffered and will continue to suffer mental anguish, emotional distress, humiliation, embarrassment, pain and suffering, loss of the enjoyment of life, and loss of pay and benefits, both past and future.

46. Plaintiff Thomas is entitled to back and front pay, liquidated damages, compensatory damages including mental anguish, emotional distress, attorneys' fees, costs of suit, and all other damages available at law or in equity.

### **COUNT 3**

#### **(Retaliation Under 29 U.S.C. § 215 On Behalf Of Plaintiff Diniz)**

47. Plaintiffs re-allege paragraphs 1 through 35 above and incorporate them here by reference.

48. This claim arises from Defendants' unlawful and willful retaliation against Plaintiff Diniz in violation of the FLSA.

49. On August 3, 2012, Defendants retaliated and discriminated against Plaintiff Diniz when they threatened him with termination in response to his filing of the Complaint. On August 9, 2012, Defendants again retaliated and discriminated against Plaintiff Diniz in violation of 29 U.S.C. § 215(a)(3) when

they terminated his partner, Plaintiff Thomas, in response to Plaintiff Diniz's filing of the Complaint that seeks overtime compensation under the FLSA on behalf of himself and others similarly situated.

50. As a direct result of Defendants' retaliatory actions alleged herein, Plaintiff Diniz suffered and will continue to suffer mental anguish, emotional distress, humiliation, embarrassment, pain and suffering, and loss of the enjoyment of life.

51. Plaintiff Diniz is entitled to compensatory damages including those for mental anguish and emotional distress, attorneys' fees, costs of suit, and all other damages available at law or in equity.

**PRAYER FOR RELIEF**

WHEREFORE, with respect to Count 1, Plaintiffs respectfully pray that this Court award Plaintiffs and all similarly situated individuals:

- i. damages in the amount of their respective unpaid overtime wages pursuant to the FLSA;
- ii. an equal amount as liquidated damages pursuant to 29 U.S.C. § 216(b);
- iii. prejudgment interest;

- iv. costs of suit, including expenses incurred herein, pursuant 29 U.S.C. § 216(b);
- v. reasonable attorneys' fees pursuant to 29 U.S.C. § 216(b); and
- vi. such other and further relief as this Court may deem just and proper.

With respect to Count 2, Plaintiffs respectfully pray that this Court award Plaintiff Thomas:

- i. back and front pay, liquidated damages, compensatory damages including those for mental anguish and emotional distress, and all other damages available at law or in equity;
- ii. prejudgment interest;
- iii. costs of suit, including expenses incurred herein, pursuant 29 U.S.C. § 216(b);
- iv. reasonable attorneys' fees pursuant to 29 U.S.C. § 216(b); and
- v. such other and further relief as this Court may deem just and proper.

With respect to Count 3, Plaintiffs respectfully pray that this Court award Plaintiff Diniz:

- i. compensatory damages including those for mental anguish and emotional distress, and all other damages available at law or in equity;
- ii. costs of suit, including expenses incurred herein, pursuant 29 U.S.C. § 216(b);
- iii. reasonable attorneys' fees pursuant to 29 U.S.C. § 216(b); and
- iv. such other and further relief as this Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

**Plaintiffs hereby demand a jury trial on all claims for which they have a right to a jury.**

DATED: August 10, 2012

By: s/ Andrew L. Weiner  
Andrew L. Weiner  
Georgia Bar No. 808278  
aw@andrewweinerlaw.com  
Stacy L. Rushing  
Georgia Bar No. 557370  
rushing@atlantaemployeelawyer.com  
THE WEINER LAW FIRM LLC  
3525 Piedmont Road  
7 Piedmont Center  
3<sup>rd</sup> Floor  
Atlanta, GA 30305  
(404) 254-0842 (Tel. & Fax)

COUNSEL FOR PLAINTIFFS