

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MICHAEL SCANTLAND, PETER CARTER,
DANIEL LAWRENCE, FREDERICK
HAUSER, III, JOSHUA FARRELL, LEON
SPERRY, PHILLIP ZAPATA, AND
TERRENCE DOWNS, individually and
on behalf of all others similarly
situated,

Plaintiffs,

v.

CASE NO. 8:09-CV-1985-T-17TBM

JEFFRY KNIGHT, INC. d/b/a
KNIGHT ENTERPRISES, INC.,
BRIGHT HOUSE NETWORKS, INC.,
and JEFFRY D, KNIGHT,

Defendants.

_____ /

ORDER

This cause is before the Court on:

Dkt. 39 Second Amended Class Action
Complaint and Jury Demand
Dkt. 62 Motion to Dismiss, to Strike and to Sever
Dkt. 66 Motion to Dismiss
Dkt. 77 Response
Dkt. 78 Response
Dkt. 82 Stipulation
Dkt. 96 Stipulation

The Second Amended Complaint is identified as a class action under Fed.R.Civ.P. 23, and a collective action under the Fair Labor Standards Act, 29 U.S.C. Sec. 216(b). In the Second Amended Class Action Complaint, Plaintiffs include the following claims:

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Count I Failure to Pay Overtime (29 U.S.C. Sec. 207);
Count II Failure to Pay Minimum Wage (29 U.S.C. Sec. 206(a));
Count III Unjust Enrichment (Florida Common Law);
Count IV Conversion (Florida Common Law)
Count V Florida Deceptive and Unfair Trade Practices
 - Damages (F.S.A. Secs. 501.201-501.213);
Count VI Florida Deceptive and Unfair Trade Practices
 - Injunction (F.S.A. Secs. 501.201-501.213);
Count VII Retaliation (29 U.S.C. Sec. 215(a)(3)).

The Court notes that Plaintiffs Peter Carter and Daniel Lawrence are no longer named Plaintiffs in the Second Amended Complaint (Dkts. 82, 96). The Clerk of Court shall amend the style of this case to remove Plaintiffs Carter and Lawrence.

I. Standard of Review

A complaint must be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) if it does not plead enough facts to state a claim for relief that is plausible on its face. In Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260-61 (11th Cir. 2009), the Eleventh Circuit Court of Appeals explains:

Although it must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (noting "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). In evaluating the sufficiency of a plaintiff's pleadings, we make reasonable inferences in Plaintiff's favor, "but we are not required to draw plaintiff's inference." *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir.2005). Similarly, "unwarranted deductions of fact" in a complaint are not admitted as true for the purpose of testing the sufficiency of

plaintiff's allegations. *Id.*; *see also Iqbal*, 129 S.Ct. at 1951 (stating conclusory allegations are "not entitled to be assumed true").

A complaint may be dismissed if the facts as pled do not state a claim for relief that is plausible on its face. *See Iqbal*, 129 S.Ct. at 1950 (explaining "only a complaint that states a plausible claim for relief survives a motion to dismiss"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561-62, 570, 127 S.Ct. 1955, 1968-69, 1974, 167 L.Ed.2d 929 (2007) (retiring the prior "unless it appears beyond doubt that the plaintiff can prove no set of facts" standard). In *Twombly*, *1261 the Supreme Court emphasized a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965. Factual allegations in a complaint need not be detailed but "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555, 127 S.Ct. at 1964-65 (internal citations and emphasis omitted).

More recently, in *Iqbal*, the Supreme Court reiterated that although Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S.Ct. at 1949. A complaint must state a plausible claim for relief, and "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss. *Id.* The well-pled allegations must nudge the claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974.

II. Defendants' Motions

Defendants Jeffrey Knight, Inc. and Jeffrey D. Knight ("Knight Defendants") move to dismiss, strike and/or sever the Second Amended Complaint, pursuant to Rules 12(b)(6) & (2), 12(f) and 21(b). The Knight Defendants incorporate all prior arguments contained in the First Motion to Dismiss (Dkt. 12). Defendants also move to dismiss Plaintiffs' claims of unjust enrichment and conversion. In the alternative, Defendants move to sever the

retaliation claims brought by Plaintiffs.

Defendant Bright House Networks, LLC joins in Defendants' Motions to Dismiss and/or Strike Plaintiff's Second Amended Complaint, and incorporates all factual and legal arguments contained in the Knight Defendants' Motions. Defendant Bright House Networks also raises additional arguments to dismiss the Second Amended Complaint and to strike the FDUPTA claims for damages.

III. Discussion

In the Second Amended Class Action Complaint, Plaintiffs seek certification of several classes of individuals:

1) as to claim for overtime, those who have performed installation, repair, construction, quality control, and similar duties for Defendant Knight Enterprises on behalf of Defendant Bright House's customers, and who have been classified as independent contractors instead of as employees, pursuant to 29 U.S.C. Sec. 216(b);

2) as to claims for failure to pay the minimum wage, those who have performed installation, repair, construction, quality control, and similar duties for Defendant Knight Enterprises on behalf of Defendant Bright house's customers, and who have been classified as independent contractors instead of as employees, pursuant to 29 U.S.C. Sec. 216(b) and have not been paid for hours spent in training during the last three years;

3) As to the common law and FDUPTA claims, those who have performed installation, repair, construction, quality control and

supervisory services for Defendant Knight Enterprises on behalf of Defendant Bright House's customers, and who have been classified as independent contractors instead of as employees, pursuant to Fed.R.Civ.P. 23.

In Count I (overtime claims), Plaintiffs seek to proceed as a collective action under 29 U.S.C. Sec. 216(b). In Count II (failure to pay minimum wage), Plaintiffs seek to proceed as a collective action for the failure to pay for required training sessions, under 29 U.S.C. Sec. 206(a).

In Counts III (unjust enrichment) and IV (conversion), Plaintiffs seek to proceed as a class action for failure to pay Plaintiffs wages due them for time spent performing repair work on prior job assignments, as well as improper deductions from pay and from the retainer provided to Knight Enterprises.

In Count V (FDUPTA-Damages) and Count VI (FDUPTA-Injunction), Plaintiffs seek to proceed as a class action for misclassifying Plaintiffs as independent contractors rather than employees, requiring Plaintiffs to suffer deductions and incur expenses that Plaintiffs would not have incurred if Plaintiffs had been properly classified as employees. Plaintiffs allege that the services Plaintiffs provide constitute "trade or commerce" under FDUPTA, that the actions of Defendants in misclassifying Plaintiffs as independent contractors even though Defendants know that Plaintiffs have no real proprietary interest and are entirely dependent upon Defendants for their income, are unlawful, and the nature of the relationship should be treated as master-servant rather than as company-subcontractor. Plaintiffs allege that this constitutes an unconscionable act or practice

and/or deceptive act or practice in the conduct of trade or commerce, in violation of the FDUPTA.

Plaintiffs allege that this action is brought on behalf of all class plaintiffs who performed contractor work for Defendants Knight Enterprises and Bright House in Florida. Plaintiffs further allege that: 1) the class is so numerous as to make joinder of (all members) impractical; 2) the claims of the named Plaintiffs are common and typical of the claims of the class as a whole; 3) Counsel for the named Plaintiffs can fairly and adequately represent the interest of the class; and 4) maintaining this action as a class action is the most appropriate and feasible way for this action to proceed.

In Count VII, Plaintiffs allege that Plaintiffs' termination and promulgating a list identifying Plaintiffs as participants in this lawsuit to other telecommunications companies constitutes unlawful retaliation in violation of 29 U.S.C. Sec. 215(a)(3).

The issues raised by Defendants include:

1. State Law Wage Class Claims Violate The Rules Enabling Act Because They Abridge The Substantive Rights Conferred by Section 216(b) of the FLSA;
2. State Law Wage Class Claims Are Preempted by Federal Law;
3. An Opt-Out Class Action Under Rule 23 Is Not Superior to Other Available Methods for Adjudication;.
4. In the Alternative, The Court Should Decline To Exercise Supplemental Jurisdiction Over State Law Claims;

5. Plaintiffs Lack Standing To Seek Declaratory and Injunctive Relief (Count VI);
6. Counts III and IV (FDUPTA) Fail to State A Claim Upon Which Relief Can Be Granted (now Counts V and VI);
7. Count III (Unjust Enrichment) and Count IV (Conversion) Fail to State A Claim Upon Which Relief Can Be Granted;
8. Plaintiffs' Retaliation Claims Arise Out of Separate Facts From the Other Claims and Must Be Severed;
9. Plaintiffs Lack Standing to Assert FDUPTA Claims;
10. Plaintiffs' FDUPTA Claims for Damages Should Be Stricken.

A. Rules Enabling Act

Defendants argue that permitting the state law wage claims (Counts III, IV, V, VI), to proceed as a class action would abridge or modify the substantive rights of absent collective action members who do not elect to affirmatively opt-in to the action.

Plaintiffs respond that, while the facts upon which the state law claims are based are similar to the facts underlying the FLSA claims, the remedy sought and the violation alleged are entirely separate. Plaintiffs argue that any substantive right to litigate overtime and minimum wage claims only against individuals who opt-in to an action cannot possibly be abridged or modified by allowing a Rule 23 opt-out class to proceed which seeks only straight time unpaid wages owed to Plaintiffs. The claims for unpaid wages are based on Plaintiffs' time for repair work for which Plaintiffs were not compensated.

Based on the difference in the relief sought, the Court **denies** the Motions to Dismiss as to this issue.

B. Implied Preemption

Defendants argue that the FLSA 216(b) collective action impliedly preempts Plaintiffs' state law class claims for unpaid wages.

Plaintiffs respond that Plaintiffs' unpaid wages claims are not duplicative of, or based upon, Plaintiffs' FLSA claims. Plaintiffs respond that other courts have found only a procedural conflict between the Section 216(b) and Rule 23 mechanisms, which does not defeat supplemental jurisdiction, and have permitted hybrid class actions. Lindsay v. Government Employees Insurance Co., 448 F.3d 416 (C.A.D.C. 2006).

After consideration, the Court **denies** the Motions to Dismiss as to this issue.

C. Class Action Not Superior Means of Adjudication

Defendants argue that the Court may certify a class under Rule 23(b)(3) only if it finds that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Defendants argue that, as a matter of law, an opt-out class action is not superior to the FLSA's opt-in method of adjudication.

Plaintiffs respond that Defendants' arguments are premature.

The Court agrees that it is premature to determine that a class action is not superior to other available methods for the fair and efficient adjudication of this case. The Court will consider this issue when a motion to certify class under Fed.R.Civ.P. 23 is ruled on. The Court **denies** the Motions to Dismiss without prejudice as to this issue.

D. Supplemental Jurisdiction

Defendants argue that the Court should decline to exercise supplemental jurisdiction over Plaintiff's state law claims. Defendants argue that Plaintiffs' state law claims substantially predominate over Plaintiffs' FLSA claim. Defendants further argue that the inherent conflict between parallel opt-in FLSA claims and opt-out Rule 23 claims provides a compelling reason for the Court to decline to exercise its supplemental jurisdiction.

Plaintiffs respond that the constitutional "case or controversy" standard confers supplemental jurisdiction over all state claims which arise out of a common nucleus of operative fact with a substantial federal claim. Tamiami Partners Ltd. V. Miccosukee Tribe of Indians, 177 F.3d 1212 (11th Cir. 1999). Claims which arise from a "common nucleus of operative fact" necessarily involve "the same witnesses, presentation of the same evidence, and determination of the same, or very similar facts." Palmer v. Hospital Authority of Randolph County, 22 F.3d 1559, 1563-64 (11th Cir. 1994).

In the event that, at the dispositive motion stage, the federal claims in this case are resolved, the Court will consider whether the exercise of supplemental jurisdiction is appropriate. Without more information about any class certified on the state law claims, the Court cannot determine whether those claims predominate over the FLSA claims. Therefore, the Motions to Dismiss are **denied without prejudice** as to the exercise of supplemental jurisdiction.

E. Count III - Unjust Enrichment

Failure to State a Claim

Defendants argue that the Second Amended Complaint contains allegations that the parties had agreements with respect to pay and the deductions in question. Defendants argue that, where an express contract exists, a claim for breach of an implied-in-law contract fails. See Cross v. Strader Construction Corp., 768 So.2d 465 (Fla. 2d DCA 2000) ("quasi-contract damages cannot be awarded when an enforceable contract exists"). Defendants argue that this is not a pleading defect that can be corrected through amendment, since the existence of agreements between Plaintiff and Knight permeate the allegations of the complaint. Defendants argue that this is not a case of alternative pleading, since the allegations of an express agreement permeate the equitable claims.

Plaintiffs respond that courts will not dismiss a claim for unjust enrichment where the existence or validity of a contract is disputed. See In re Burton Wiand Receivership Cases, 2008 WL 818504 at *7 (M.D. Fla. 2008).

In the Second Amended Complaint, Plaintiffs allege:

13. Defendant Knight Enterprises, is a telecommunications company that contracts with Bright House and other cable companies to install, repair, or construct the facilities for high-speed internet, cable television, and telephone service for Bright House and other such cable television companies.

14. Knight Enterprises, with the knowledge and approval of Bright House, purports to contract with individuals to perform such installation, repair, construction, and supervisory work associated with monitoring such quality of those services. The defendants purport to call these individuals "independent contractors", not employees, thereby avoiding any obligation to pay payroll taxes, workers' compensation insurance, health insurance, unemployment insurance, overtime and other such benefits.

Plaintiffs argue that Plaintiffs' allegations do not mention an express contract between Plaintiffs and Defendants, and the above allegations, by means of the phrase "purports to contract" establish that the existence of an express contract is disputed. The Court understands this phrase to mean that the parties entered into some agreement that may have facial validity but which may be legally invalid and unenforceable.

In order to state a cause of action for unjust enrichment, Plaintiffs must plead facts showing that: 1) Plaintiffs conferred a benefit on Defendants; 2) Defendants had knowledge of the benefit; 3) Defendants accepted or retained the benefit conferred; and 4) circumstances are such that it would be inequitable for Defendants to retain the benefit without paying

fair value for it. Plaintiffs have alleged that Plaintiffs spent time performing repair work on prior job assignments without being paid, and monies were improperly deducted from Plaintiffs' paychecks and retainers.

At this point, it is unclear whether each Plaintiff entered into an express contract with Defendants. Plaintiffs should know whether or not Plaintiffs signed an express written contract. If Plaintiffs did so, the provisions of the individual contracts have not been provided to the Court. Other factual allegations in the Second Amended Complaint establish that some Plaintiffs performed services and received compensation from Defendants for an extended period of time. From those allegations, the Court infers that there was some understanding between Plaintiffs and Defendants. It would assist the Court to know the date when each Plaintiff commenced performing services for Defendants in exchange for compensation, whether a written agreement was executed, when any such agreement was executed, and the terms within any such agreement.

The Court recognizes that the proof of an express contract between parties to a contract defeats a claim for unjust enrichment. In this case the existence and validity of the contract between Plaintiffs and Defendants are at issue. Plaintiffs contend Plaintiffs are really "employees" and not "independent contractors" although their contracts may facially designate Plaintiffs as "independent contractors." Until an express contract is proven, under which an adequate remedy at law is available, a motion to dismiss a claim for unjust enrichment is premature. The Court therefore **denies** Defendants' Motions to Dismiss as to Count III.

F. Count IV - Conversion
Failure to State A Claim

Under Florida law, conversion is an intentional tort consisting of an unauthorized act which deprives another of his property, permanently or for an indefinite time. Senfield v. Bank of Nova Scotia Trust Co. (Cayman, Ltd.), 450 So.2d 1157, 1160-61 (Fla. 3rd DCA 1984). The essence of the tort is not the acquisition of the property; rather, it is the wrongful deprivation of the property. Star Fruit Co. V. Eagle Lake Growers, Inc., 33 So.2d 858 (1948). Defendants argue that Plaintiffs' conversion claim is for recovery of an ordinary debt based on an agreement. Defendants argue that a mere obligation to pay money may not be enforced by a conversion action. See Belford Trucking Co. v. Zagar, 243 So.2d 646 (Fla. 4th DCA 1970); Schere v. Laborers' Int'l. Union, 746 F.Supp. 73, 84 (N.D. Fla. 1988).

Plaintiffs respond that Florida courts have recognized that employees claiming they are owed unpaid wages may bring common law claims such as conversion. See Short v. Bryn Alan Studios, Inc., 2008 WL 2222319 (M.D. Fla. 2008); Edwards v. Niles Sales & Serv., Inc., 439 F.Supp.2d 1202, 1208 (S.D. Fla. 2006); Ocean Club Community Association, Inc. v. Curtis, 935 So.2d 513, 515-16 (Fla. 3rd DCA 2006).

The Court notes that there is authority for a conversion claim relating to unpaid wages. Where neither the pleadings nor proof describe or identify specific money, a claim for conversion cannot succeed. At this time, only the allegations of the Second Amended Complaint are available to the Court. After

consideration, the Court **denies** the Motions to Dismiss as to the conversion claim.

G. Count V - FDUPTA - Damages

1. Standing

Defendants argue that Plaintiffs do not have standing to assert FDUPTA claims because Plaintiffs are providers of services and not a consumer who has purchased goods or services. Defendants argue that Plaintiffs therefore do not have standing to assert a FDUPTA claim. See Kertesz v. Net Transactions, Ltd., 635 F.Supp.2d 1339 (S.D. Fla. 2009).

Plaintiffs contend Plaintiffs have standing to sue under the FDUPTA.

The Court notes the discussion in Kelly v. Palmer, Reifler & Associates, P.A., 681 F.Supp.2d 1356 (S.D. Fla. 2010), supporting a broadening of the statute beyond individual consumers and businesses. After consideration, the Court **denies** the Motions to Dismiss as to standing.

2. Failure to State a Claim

Defendants argue that Defendants are not aware of any case which would support a determination that the misclassification of a person was a deceptive and/or unfair practice. Defendants further argue that Plaintiffs were never in a consumer relationship with Defendant Knight.

Plaintiffs respond that other courts have held that an employer's conduct can give rise to claims of both misclassification and unfair trade practices. See In re FedEx Ground Package System, Inc. Employment Practices Litigation, 2009 WL 2242231, *24-25 (N.D. Ind. 2009). Plaintiffs further argue that, under Florida law, actions that offend established public policy can constitute unfair trade practices under FDUPTA. Samuels v. King Motor Co. Of Fort Lauderdale, 782 So.2d 489, 499 (4th DCA 2001).

Defendant Bright House argues that Plaintiffs cannot allege or show any contract with Bright House that would subject Defendant Bright House to a claim for FDUPTA damages; Defendant Bright House argues that Plaintiffs allege only that Plaintiffs worked for Defendant Jeffrey Knight, Inc. in conjunction with its work for Bright House.

To state a claim for violation of FDUPTA, Plaintiffs must allege: 1) a deceptive act or unfair practice; 2) causation; and 3) actual damages. A deceptive practice is one that is likely to mislead consumers, and an unfair practice is one offends established published policy, "or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." Rollins, Inc. v. Butland, 950 So.2d 850, 869 (Fla. 2d DCA 2006). The Court has considered what acts of Defendants in "trade or commerce" would constitute a deceptive or unfair practice as to Plaintiffs. It is fair to assume that the Knight Defendants advertised for "independent contractors" to provide services in exchange for money, and allegedly exerted actual control over Plaintiffs.. Plaintiffs have further alleged that all Defendants required Plaintiffs to perform repair services

without compensating Plaintiffs.

As to Defendant Bright House, in the Second Amended Complaint Plaintiffs allege that "Defendant Knight Enterprises, with the knowledge and approval of Bright House, purports to contract with individuals to perform such installation, repair, construction and supervisory work associated with monitoring such quality of those services. The defendants purport to call these individuals "independent contractors", not employees, thereby avoiding any obligation to pay payroll taxes, workers' compensation insurance, health insurance, unemployment insurance, overtime and other such benefits." (Dkt. 39, p. 4). Plaintiffs further allege that Defendant Bright House requires Plaintiffs to correct deficiencies and make repairs without being paid for the time, and in the event Defendant Bright House decides that a job was not correctly completed, Defendant Knight Enterprises makes deductions from retainers held for Plaintiffs by Defendant Knight Enterprises. After consideration, the Court finds that Plaintiffs have sufficiently alleged the direct participation of Defendant Bright House (Dkt. 39, p. 6).

After consideration, the Court **denies** the Motions to Dismiss as to the FDUPTA claim.

3. Damages

Defendants argue that the damages sought by Plaintiffs are not damages allowed by FDUPTA, which defines "actual damages" as "the difference in market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered." Defendants

argue that "actual damages" do not include actual consequential damages. Orkin Exterminating Company v. DelGuidice, 790 So.2d 1158, 1162 (Fla. 5th DCA 2001), review denied, 821 So.2d 294 (Fla. 2002).

Plaintiffs respond that the diminished value of what one receives as a result of an unfair trade practice may be considered actual damages. Plaintiffs argue that Plaintiffs were led to believe by Knight and Bright House that they would be entering into an independent contractor relationship, but were actually entering into an employment relationship. Plaintiffs contend Plaintiffs suffered actual damages from the diminished value of the relationship Plaintiffs were allowed to enter into. Plaintiffs argue that Plaintiffs were required to use equipment specified by Knight and Bright House, were required to work under a time schedule set by Knight and Bright House, and to maintain their equipment in a manner specified by Knight and Bright House.

In the alternative, Plaintiffs argue that Knight Defendants and Bright House prevented Plaintiffs from entering into an employment relationship, by forcing Plaintiffs to work as independent contractors, which diminished the value of the relationship Plaintiffs entered into.

Plaintiffs further argue that it is too early to determine whether Plaintiffs' damages are actual or consequential.

The Court has no specific information about the damages sought by each Plaintiff at this time. After consideration, the Court **denies** the Motions to Dismiss as to this issue.

H. Count VI - FDUPTA - Injunction
Standing

Defendants argue that Plaintiffs do not have standing to seek an injunction under FDUPTA. Defendants argue that Plaintiffs must establish: 1) an injury in fact, which is concrete and particularized and actual or imminent; 2) a causal connection between the injury and the causal conduct; and 3) a substantial likelihood that a favorable decision will redress the injury. Defendants argue that Plaintiffs' injuries, if proven, are compensable with damages. Declaratory and injunctive relief will not redress the injury.

Plaintiffs argue that at the time the Complaint was filed, Plaintiff Dan Lawrence and Plaintiff Phillip Zapata were still employed by Defendants, and this fact is sufficient to establish standing.

Plaintiffs further argue that other courts have held that FDUPTA allows any person, regardless of a showing of an ongoing practice, to seek injunctive relief.

The Court notes the discussion in Galstaldi v. Sunvest Communities, LLC, 637 F.Supp.2d 1045 (S.D. Fla. 2010). The statute provides that anyone aggrieved may seek an injunction. The Court finds that Plaintiffs have sufficiently alleged facts which establish Article III standing. A declaration that Defendants' conduct violates the FDUPTA would prevent Defendants from continuing any conduct which violates the FDUPTA in the future.

After consideration, the Court **denies** the Motions to Dismiss as to this issue.

I. Count VII - Retaliation

In the Second Amended Complaint, Plaintiffs allege that shortly after the filing of this action, Defendants terminated Plaintiffs Daniel Lawrence and Phillip Zapata.

Pursuant to Fed.R.Civ.P. 21, Defendants move to sever the retaliation claim because it arises out of separate facts from the other claims in this action. Defendants argue that Plaintiffs do not allege the decisions in question were made at the same time, for the same reasons, and were decided by the same decisionmaker. Defendants further argue that the Second Amended Complaint contains no allegations that the other named Plaintiffs were subject to similar actions. Defendants argue that Plaintiffs' retaliation claim does not meet the requirements for permissive joinder in that the factual allegations are based on separate acts of Defendants with respect to each Plaintiff, and there are no common questions of law or fact.

Plaintiffs respond that the retaliatory misconduct alleged in the Second Amended Complaint arises as a direct result of this lawsuit, and Plaintiffs' retaliation claim is inextricably intertwined with the facts of this case. Plaintiffs further argue that unless Plaintiffs are found to be employees, the retaliation claim is not available to Plaintiffs.

In order to prove the retaliation claim, Plaintiffs must prove that they: 1) engaged in activity protected under the FLSA;


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2) subsequently suffered adverse action by the employer; and 3) a causal connection existed between their protected activity and the adverse employment action. See Wolf v. Coca-Cola Co., 200 F.3d 1337, 1342-1343 (11th Cir. 2000).

Permissive joinder requires that a claim arise out of the same transaction or occurrence, or series of occurrences, along with common questions of fact or law. The retaliation claims asserted do not arise out of the same facts as the other claims, although the claim is not completely unrelated. After consideration, the Court **denies** the Motion to Sever without prejudice. The Court will evaluate severance after the close of discovery. Accordingly, it is

ORDERED that Defendants' Motions to Dismiss, Motion to Strike and Motion to Sever (Dkts. 62, 66) are **denied**. The Clerk of Court **shall amend** the style of this case to remove Plaintiffs Peter Carter and Daniel Lawrence.

29th **DONE and ORDERED** in Chambers, in Tampa, Florida on this day of September, 2010.



ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record