UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ALFRED W. THOMAS, individually and on behalf of all others similarly situated, Plaintiff, v. WASTE PRO USA, INC., and WASTE PRO OF FLORIDA, INC., Defendants.	CIVIL ACTION NO: 8:17-cv-2254-CEH-TBM **SECOND AMENDED COLLECTIVE ACTION COMPLAINT** **JURY TRIAL DEMANDED**

SECOND AMENDED COLLECTIVE ACTION COMPLAINT

Plaintiff Alfred W. Thomas, individually and on behalf of all others similarly situated, by his attorneys, files this Second Amended Collective Action Complaint against Defendants Waste Pro USA, Inc., (hereinafter "Waste Pro USA") and Waste Pro of Florida, Inc., (hereinafter "Waste Pro Florida") (collectively, "Defendants" or "Waste Pro"), seeking all available relief under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201 *et seq*. The following allegations are based on personal knowledge as to Plaintiff's own conduct and are made on information and belief as to others.

NATURE OF THE ACTION

1. Plaintiff brings this action under the FLSA on behalf of all non-exempt "Helpers" and other Helpers, however variously titled, employed by Waste Pro at its locations within the United States at any time from September 28, 2014 and the date of final judgment in this matter who elect to opt-in to this action (the "Collective Action Members"), and who, at any point during this time, were paid a day rate and also worked at a location that had a policy or practice

to either pay a half-day rate or pay non-discretionary bonuses. Waste Pro USA and Waste Pro Florida jointly and severally violated the FLSA by failing to paywaste collection Helpers in Florida the legally required amount of overtime compensation in an amount required by law for all hours worked over forty in a workweek. Waste Pro USA violated the FLSA by failing to pay waste collection Helpers Nationally the legally required amount of overtime compensation in an amount required by law for all hours worked over forty in a work weeks. Plaintiff and the Collective Action Members are entitled to unpaid overtime wages for hours worked above forty in a workweek, and to liquidated damages pursuant to the FLSA.

2. By the conduct described in this Complaint, Defendants violated and continue to violate the FLSA by failing to pay Helpers, and the Collective Action Members, including Plaintiff, proper overtime wages as required by law. Defendants' payroll and compensation policies and practices with respect the collective are uniform.

3. Plaintiff brings this action on behalf of himself and all similarly situated current and former Helpers who elect to opt-in to this action pursuant to the FLSA, and specifically, the collective action provision of 29 U.S.C. § 216(b), to remedy violations of the overtime wage provisions of the FLSA.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. §§ 1331 and 1337.

5. This Court also has jurisdiction over Plaintiff's claims under the FLSA pursuant to 29 U.S.C. § 216(b).

6. Defendants are subject to personal jurisdiction in Florida.

7. Defendants maintain places of business in Florida.

8. Venue is proper in the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. § 1391.

9. A substantial part of the events or omissions giving rise to claims in this Second Amended Collective Action Complaint occurred in this District.

THE PARTIES

Plaintiff

10. Plaintiff Alfred W. Thomas ("Thomas") is an adult individual who is a resident of Panama City, Florida, and, pursuant to 29 U.S.C. § 216(b), has consented in writing to being a Plaintiff in this action.

11. Thomas is a covered employee within the meaning of the FLSA.

12. Thomas has been employed by Defendant, Waste Pro USA as a Helper in Mississippi beginning January 2016 and employed by Defendants, Waste Pro USA and Waste Pro Florida, in Panama City, Florida from April, 2017 to the present.

13. Copies of the Plaintiff's consent to join forms were previously filed with the Court.

Defendants

14. Defendant Waste Pro USA, Inc. is a corporation organized and existing under the laws of the state of Florida. Defendant Waste Pro USA, Inc. is licensed and registered to do business in Florida, with headquarters in Longwood, FL. Defendant Waste Pro USA, Inc. provides garbage and waste removal services throughout the southeastern United States, including Florida, Mississippi, Tennessee, Louisiana, Arkansas, South Carolina, North Carolina, Alabama and Georgia.

15. Defendant Waste Pro Florida, Inc. is a corporation organized and existing under

the laws of the state of Florida. Defendant Waste Pro Florida, Inc. is licensed and registered to do business in Florida, with headquarters in Longwood, FL. Defendant Waste Pro Florida, Inc. provides garbage and waste removal services throughout the state of Florida.

16. Defendants are integrated enterprises engaged in commerce within the meaning of the FLSA because, among other reasons, they have had employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have moved in or were produced for commerce by any person, 29 U.S.C. § 203(s)(1).

17. Throughout the relevant period, Defendants have been covered employers as that term is used within the meaning of the FLSA and all other relevant laws.

18. Throughout the relevant period, Defendants' annual gross volume of sales made or business done was not less than $500,000.

19. At all relevant times, Defendants have employed and/or jointly employed Plaintiff and the similarly situated employees.

20. Waste Pro USA's website advertises that it operates from more than 75 locations across the Southeast. See www.wasteprousa.com/the-waste-pro-way/.

21. Waste Pro USA's website does not differentiate between different Waste Pro entities, but promotes Waste Pro USA's services as one common business purpose across the states in which it does business.

22. Defendants do business under the brand, trade name or mark of "Waste Pro".

23. Upon information and belief, Waste Pro Florida is a subsidiary of Waste Pro USA.

24. Upon information and belief, Defendants share the same management and executive offices.

25. Upon information and belief, Defendants administers their human resources functions using the same personnel at their executive offices.

26. In Florida, each Defendant employed or acted in the interest of an employer towards Plaintiff and other similarly situated current and former Helpers and, directly or indirectly, jointly and severally, including without limitation, directly or indirectly controlling and directing the terms of employment and compensation of Plaintiff and other similarly situated current and former Helpers. Upon information and belief, Defendants operate in concern in a common enterprise and through related activies, so that the actions of one may be imputed to the other and/or so they operate as joint employers within the meaning of the FLSA.

27. In Florida, Waste Pro Florida and Waste Pro USA each had the power to control the terms and conditions of employment of Plaintiff and other similarly situated current and former Helpers including, without limitation, those terms and conditions related to the claims alleged herein, and outside of Florida Waste Pro USA had such power and control.

28. In Florida, Waste Pro Florida and Waste Pro USA maintained control and oversight over Plaintiff and similarly situated employees including timekeeping, payroll, and the other employment practices, and outside of Florida, Waste Pro USA maintained such control and oversight.

29. Defendants applied the same employment policies, practices and practices to all Helpers inside and outside of Florida, including policies, practices and procedures with respect to compensation and overtime.

30. Upon information and belief, Defendants' business is a centralized, top-down

operation controlled by Defendants.

31. All of the work that Plaintiff and the Collective Action Members performed has been assigned by Defendants and/or Defendants have been aware of all of the work that Plaintiff and the Collective Action Members have performed.

COLLECTIVE ACTION ALLEGATIONS

32. Plaintiff brings FLSA claims on behalf of himself and the National Collective Action Members who have worked for Defendant Waste Pro USA as Helpers, however variously titled, anywhere in the United States, between September 28, 2014 and the date of final judgment in this matter who elect to opt-in to this action and who, at any point during this time, were paid a day rate and also worked at a location that had a policy or practice to either pay a half-day rate or pay non-discretionary bonuses.

33. Plaintiff brings FLSA claims on behalf of himself the Florida Collective Action Members who have worked for Defendants, Waste Pro USA and Waste Pro Florida, as joint employers in Florida, as Helpers, however variously titled, in Florida, between September 28, 2014 and the date of final judgment in this matter who elect to opt-in to this action and who, at any point during this time, were paid a day rate and also worked at a location that had a policy or practice to either pay a half-day rate or pay non-discretionary bonuses.

34. Thus, both Defendants are emloyers and joint employers of Plaintiff and the Collective Action Members in Florida, and Defendant Waste Pro USA is the employer at issue of the Collective Action Members outside of Florida.

35. Defendants are liable under the FLSA for, *inter alia*, failing to properly compensate Plaintiff and the Collective Action Members. The FLSA claims in this lawsuit should be adjudicated as a collective action. Upon information and belief, there are thousands of

similarly situated current and former employees of Defendants within Florida and nationally, who have been underpaid in violation of the FLSA who would benefit from the issuance of a court-supervised notice of the present lawsuit and the opportunity to join the present lawsuit. Those similarly situated employees are known to Defendants, are readily identifiable, and can be located through Defendants' records. Notice should be sent to the Collective Action Members pursuant to 29 U.S.C. § 216(b).

PLAINTIFF'S FACTUAL ALLEGATIONS

36. Plaintiff and the Collective Action Members regularly worked more than 40 hours per work week as Helpers.

37. Plaintiff and the Collective Action Members are paid bi-weekly.

38. Plaintiff and the Collective Action Members are paid a flat rate for a day's work, but that rate is cut in half or converted to an hourly rate if they work less than four hours in a day.

39. For example, during the two week pay period of August 28, 2016 to September 10, 2016, instead of receiving his day rate of $100 for all days worked during the pay period, Plaintiff received $50 for one day of work in which he worked less than 4 hours during that day.

40. When Plaintiff worked overtime hours, Defendants calculated his regular rate by dividing his total pay for the two-week pay period by the total number of hours worked and paying overtime wages at a half time rate.

41. For example, during the two week pay period of January 31, 2016 to February 13, 2016, Plaintiff worked 10 days and a total of 97.42 hours. Defendants divided his regular pay of $1,000 (10 days at $100 per day) by 97.42 and came up with a regular rate of $10.26 per hour. Defendants then paid ½ that rate ($5.13) for the 17.42 hours of overtime ($89.41).

42. The day rate that Defendants paid Plaintiff and the Collective Action Members appears to be intended to pay them for a normal work day of 8 hours.

43. The "day rate" is cut in half when they work less than 4 hours.

44. A day rate plan requires a flat sum for a day's work without regard to the number of hours worked in the day. 29 C.F.R. §778.112. Plaintiff and the Collective Action Members were not paid a flat sum for a day's work without regard to the number of hours worked in the day in violation of the day rate provisions of the FLSA.

45. Because Defendants violated the day-rate method of paying wages and overtime compensation by not paying Plaintiff and Collective Action Members a full day rate when they work less than 8 hours in a day, Defendants violated the FLSA and must pay overtime wages at time and one-half for all overtime hours worked by Plaintiff and Collective Action Members.

46. When Helpers take sick or vacation time their banks of time are reduced by 8 hours for each day they take. For example, during the two week pay period from May 8, 2016 to May 21, 2016, Defendants took "8.00" hours of "sick" time out of Plaintiff's bank because he took one day off due to illness.

47. Because Defendants' day rate pay practice violated the FLSA, Defendants should have calculated Plaintiff's regular rate by dividing the half day rate of $50 by 4 (the maximum number of hours that half day rate was intended to compensate) or his full day rate of $100 by 8 (the number of hours the day rate was intended to compensate) or his full week's pay by 40 (the number of hours that 5 day's pay was intended to compensate). Such a calculation would have equaled $12.50 for Plaintiff's regular hourly rate of pay. Defendants should then have paid Plaintiff's overtime at 1.5 times that rate or $18.75. Defendants should have paid Plaintiff $326.63 for the pay period January 31, 2016 to February 13, 2016..

48. Because of its improper calculation of overtime, Defendants underpaid Plaintiff in that week by $237.21 ($326.63 - $89.41).

49. The "days" that Plaintiff works are counted by the Defendants as shifts.

50. In addition to paying the foregoing compensation to Plaintiff and Collective Action Members, Defendants also pay safety bonuses in the amount of $50 or $100 per week and help bonnuses (or "bump pay").

51. Safety bonuses are not discretionary in nature under 29 C.F.R. § 778.211 because they are promised to Plaintiff and other putative Collective Action Members for performing work without any safety infractions, and for working complete workweeks without missing any days.

52. These safety bonuses are "additional compensation" that violate the FLSA's day rate regulation and are not in compliance with the day rate provision of 29 C.F.R. § 778.112

53. Help bonuses are not discretionary in nature under 29 C.F.R. § 778.211 because they are promised to Plaintiff and other putative Collective Action Members for assisting on additional shifts.

54. Help bonuses are "additional compensation" that violate the FLSA's day rate regulation and are not in compliance with the day rate provision of 29 C.F.R. § 778.112.

55. For example, on: August 5, 2017; October 2, 9, and 16, 2017; November 20, 24, and 27, 2017; December 1, 4, 8, and 11, 2017; January 2, 8, 12, and 29, 2018; and June 2, 2018, Plaintiff was paid "bump pay" for assisting on additional routes in the amount of $50 per instance.

56. The unlawful policies described in this Complaint applied to Plaintiff and all other Collective Action Members.

57. The unlawful policies described above include Defendants not paying a true day rate as Defendants required a certain number of hours to be worked on a given day in order to pay the full day's wage, and Defendants' additional non-discretionary compensation violates the day rate provisions, and Defendants' payment of only half-time for overtime hours violates the FLSA.

FIRST CAUSE OF ACTION
Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*.
On behalf of Plaintiff and the Florida Collective Action Members against Waste Pro USA and Waste Pro Florida, jointly and severally

58. Plaintiff reasserts and re-alleges allegations 1 – 57 herein.

59. Defendants, in failing to pay Plaintiff and the Florida Collective Action Members time and a half overtime premium pay when they work more than forty hours per week, have violated the FLSA.

60. While dividing total pay by total hours worked, whatever their number, may be permissible for true "day rate" employees, Defendants do not pay a true "day rate." Defendants do not pay a "flat sum for a day's work or for doing a particular job, ***without regard to the number of hours worked in the day or at the job***…" 29 C.F.R. § 778.112. (emphasis added). Instead, Defendants pay one-half of their alleged "day rate" when Plaintiff and other Florida Collective Action Members work between zero and four hours in a day. Accordingly, Defendants should have divided Plaintiff's total pay by forty (40) hours to determine the regular rate of pay and paid for all overtime hours worked at time and a half of the regular rate of pay.

61. In the alternative, Defendants have also violated 29 C.F.R. § 778.112 because they paid ostensible "day rate" compensation in addition to the non-discretionary safety bonuses while only paying a half-time overtime premium.

62. 29 C.F.R. § 778.112 provides as follows:

> If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, ***and if he receives no other form of compensation for services,*** his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

Id. (emphasis added).

63. Defendants have violated by the FLSA by paying an ostensible "day rate" and a half-time premium while also paying non-discretionary safety bonuses which are another form of compensation.

64. Defendants' failure to pay a time and a half overtime premium has been willful in that they knew that they were not paying a true and proper "day rate" as defined by 29 C.F.R. § 778.112 and yet used the half-time rate of overtime calculation nonetheless.

65. As a result of Defendants' violations of the FLSA, Plaintiff and the Florida Collective Action Members have suffered damages and are entitled to recovery of such damages, liquidated damages, attorneys' fees, costs.

SECOND CAUSE OF ACTION
Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*.
On behalf of Plaintiff and the National Collective Action Members against Defendant, Waste Pro USA

66. Plaintiff reasserts and re-alleges allegations 1 – 57 herein.

67. Defendant, Waste Pro USA, in failing to pay Plaintiff and the National Collective Action Members time and a half overtime premium pay when they work more than forty hours per week, have violated the FLSA.

68. While dividing total pay by total hours worked, whatever their number, may be permissible for true "day rate" employees, Defendant Waste Pro USA, did not pay a true "day rate." Defendant Waste Pro USA do not pay a "flat sum for a day's work or for doing a

particular job, ***without regard to the number of hours worked in the day or at the job***…" 29 C.F.R. § 778.112. (emphasis added). Instead, Defendant Waste Pro USA pid one-half of their alleged "day rate" when Plaintiff and other National Collective Action Members work between zero and four hours in a day. Accordingly, Defendant Waste Pro USA should have divided Plaintiff's total pay by forty (40) hours to determine the regular rate of pay and paid for all overtime hours worked at time and a half of the regular rate of pay.

69. In the alternative, Defendant Waste Pro USA has also violated 29 C.F.R. § 778.112 because it paid ostensible "day rate" compensation in addition to the non-discretionary safety bonuses while only paying a half-time overtime premium.

70. 29 C.F.R. § 778.112 provides as follows:

> If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, ***and if he receives no other form of compensation for services,*** his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

Id. (emphasis added).

71. Defendant Waste Pro USA has violated by the FLSA by paying an ostensible "day rate" and a half-time premium while also paying non-discretionary safety bonuses which are another form of compensation.

72. Defendant Waste Pro USA's failure to pay a time and a half overtime premium has been willful in that it knew that it was not paying a true and proper "day rate" as defined by 29 C.F.R. § 778.112 and yet used the half-time rate of overtime calculation nonetheless.

73. As a result of Defendant Waste Pro USA's violations of the FLSA, Plaintiff and the National Collective Action Members have suffered damages and are entitled to recovery of such damages, liquidated damages, attorneys' fees, costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all other similarly situated persons, pray for the following relief:

A. That, at the earliest possible time, Plaintiff be allowed to give notice of this collective action to the Florida Collective Action Members, and the National Collective Members, or that the Court issue such notice, to all persons who are presently, or have at any time during the three years immediately preceding the filing of this suit, been employed by Waste Pro Florida and/or Waste Pro USA as Helpers, however variously titled, subjected to the same or similar compensation practice and also worked at a location that had a policy or practice to either pay a half-day rate or pay non-discretionary bonuses. Such notice shall inform them that this civil action has been filed, of the nature of the action, and of their right to join this lawsuit if they believe they were denied proper wages;

B. Unpaid overtime under the FLSA;

C. Liquidated damages permitted under the FLSA;

D. Attorneys' fees and costs of suit, including expert fees; and

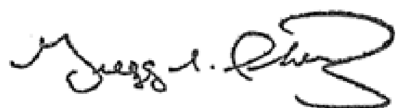
E. Such other relief as the Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demand a trial by jury on all questions of fact raised by the Second Amended Complaint.

Dated: June 15, 2018
Boca Raton, Florida

Respectfully submitted,



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