POINT I

PLAINTIFFS NEED NOT EXHAUST THEIR ADMINISTRATIVE REMEDIES BEFORE ATTEMPTING TO OBTAIN THE WAGES DUE TO HIM IN A JUDICIAL FORUM

Defendants argue that the claims of Plaintiffs and the putative class should be dismissed because Plaintiffs have not exhausted their administrative remedies. Def. Mem. at 5-8. In so doing, Defendants incorrectly assert that "the sole remedy for employees seeking to recover prevailing wage underpayments and supplemental benefits under New York Labor Law § 220 is to file a complaint if with the New York State Department of Labor, in order to initiate an administrative hearing and adjudicatory process." Def. Mem. at 6. Defendants then contort Plaintiffs' various causes of action -- including causes of action sounding in breach of contract, quantum meruit, unjust enrichment, fraud, and willful failure to pay wages -- into one global cause of action under Labor Law § 220 -- a cause of action not plead by Plaintiffs in this action.

Defendants' faulty legal analysis and twisted reading of the Complaint are of no import however, as New York law provides that workers have the right to pursue common law claims for unpaid wages without first exhausting administrative remedies. As such, the motion to dismiss must be dented.

There is absolutely nothing contained in the language of Article 8 of the New York Labor Law or in applicable case law which imposes any obligation or restriction on Plaintiffs to pursue their administrative remedies before bringing an action in court based on common law claims for receipt of prevailing wages. Courts have repeatedly held that private construction workers, such as the Plaintiffs here, may pursue common law claims against a contractor for failing to pay prevailing wages without first exhausting administrative remedies. See, e.g., Wright v. Wright Stucco, 72 A.D.2d 959, 960, 422 N.Y.S.2d 253 (4th Dept.1979), rev'd & reinstated for reasons stated in dissent, 50 N.Y.2d 837, 430 N.Y.S.2d 52, 407 N.E.2d 1348 (1980) (holding that, employees of a subcontractor who alleged that they were paid less than the prevailing wage and "sought to enforce their rights as third party beneficiaries of the [public work] contract," could do so without first exhausting administrative remedies);[FN1] Pesantez v. Boyle Environmental Services, Inc., 251 A.D.2d 11, 12, 673 N.Y.S.2d 659, 660 (1st Dept. 1998) (holding that the plaintiff class of subcontractor workers can proceed with common law claims for breach of the public work contract as third-party beneficiaries to recover unpaid prevailing wages and benefits without exhausting administrative remedies); Ortiz v. J.P. Jack Corp., Index No. 6989/98 (Sup. Ct. Queens Co.) (Posner, J.) (April 12, 1999 Order) at 3 (holding that the plaintiff class of electricians who provided labor to the Defendants on public works projects, could maintain causes of action sounding in breach of contract to recover nonpayment of prevailing wages and supplemental benefits, noting that "the Court of Appeals held that the enactment of section 220 of the Labor Law did not extinguish their [the workers']

common taw contractual causes of action") (emphasis added) (Cariello Aff. Ex. A); Samborski v. Linear Abatement Corp. 1998 WL 474069 (S.D.N.Y. Aug. 10, 1998) ("As to the breach of contract claims and the quantum meruit claims, the SCA [School Construction Authority] contracts at issue, which appear to include an 'agreement to pay wages at rates fixed in accordance with the statute and set forth in a schedule of wages annexed to the contract[s]', impose a contractual obligation that 'extends beyond the scope of the statutory obligation'. Fata v. S.A. Healy Co., 289 N.Y. 401, 406, 46 N.E. 2d 339 (1943). Hence, plaintiffs are not constrained by the remedies set forth in §220, but may pursue the common law claims arising from the SCA contracts."). As Justice Crane explained in Andrzejewski, v. Interphase Company, Ltd., Index No. 131657/94 (Sup. Ct. N.Y. Co.) (Crane, J.) (February 15, 1996 Order):

FN1. In so holding, the Court of Appeals in Wright reversed the Fourth Department's decision and adopted the dissent below. That dissent stated:

Section 220 of the Labor Law "has as its entire aim the protection of workingmen against being induced, or obliged, to accept wages below the prevailing rate" and "must be construed with the liberality needed to carry out its beneficent purposes" (Bucci v. Village of Port Chester, 22 N.Y.2d 195, 201, 292 N.Y.S.2d 393, 397, 239 N.E.2d 335, 338). With this in mind, it is incongruous to hold, as the majority does, that this ameliorative statute actually had the effect of removing a remedy which workers had heretofore possessed.

Wright v. Herb Wright Stucco, Inc., 72 A.D.2d 959, 422 N.Y.S.2d 253 (4th Dep't 1979).

Defendants also argue that this action is premature because plaintiffs have failed to exhaust their administrative remedies. Specifically, defendants contend that plaintiffs must comply with the administrative procedure set forth in Labor Law §220 before bringing an action in this Court.

Section 220(7) provides that workers claiming unpaid prevailing wages or supplements for work performed on a public project may file a verified complaint, thereby initiating an investigation and administrative heating. Defendants argue that filing such a complaint is a condition precedent to bringing this action and that plaintiffs' failure to do so renders this action premature. This is unpersuasive.

Section 220 does not state that it is the exclusive remedy for workers seeking unpaid prevailing wages and supplemental benefits. It merely provides one means by which workers may pursue a remedy.

Moreover, the Court of Appeals has held that a private right of action exists for breach of contract based upon the contract between the employer and the public entity.

Therefore, it cannot be said that here that the plaintiffs' exclusive remedy is to file a complaint under §220, and that the failure to do so renders this action premature.

Andrzejewski at 5, 6 (emphasis added) (Cariello Aff., Ex. B).

In other recent decisions on point with the instant action, Courts have further acknowledged that aggrieved workers are not required to elect between administrative or civil remedies. In Encavnacion v. Gerry's Contracting Company, Inc., Index No. 108026/95 (Sup. Ct. NY. Co.) (July 12, 1996 Order) (Cahn, J.), the court explained that "the Court of Appeals has held that § 220's method of enforcing the statutory wage requirements is not exclusive and a private right of action exists to bring a breach of contract claim based on the employer's contract with the public entity." See Encavnacion at 6 (Cariello Aff., Ex. C). As noted by Judge Patrick Monserrate in Kirk v. DellaPenna Bros., Inc., Index No. 2000-1037 (Sup Ct., Broome Co.) (November 28, 2000 Order) (Monserrate, J.), another case similar to the one at bar:

While there can be no private right of action for underpayment under Labor Law Section 220 until there has been an administrative determination in claimant's favor, plaintiff class can proceed on its breach of contract claims, subject to a set-off for any amounts recovered by the Labor Department.

See Kirk at 8 (Cariello Aff., Ex. D) (emphasis added). Justice Ira Gammerman, in Alvarenga v. Central Absorption, Inc., Index No. 102594/95 (Sup. Ct. N.Y. Co.), also addressed this issue of election of remedies, when he ruled that:

The statute [Labor Law 220] expressly authorizes both a private right of action by workers [Labor Law Section 220(g)] and also grants ... the comptroller the right to pursue an action on behalf of workers. There is no requirement that there be an election and the plaintiffs need not exhaust administrative remedies.

See Alvarenga at 6 (Cariello Aff., Ex. E) (citing Pesantez, 251 A.D.2d 11, 673 N.Y.S.2d 659) (emphasis added).[FN2] Indeed, the Pesantez decision, relied on by Defendant, Def. Mem. at 5, specifically held that the plaintiff class of construction workers there could "proceed on its common-law breach of contract claims for underpayment of wages and benefits" despite not exhausting their administrative remedies. Pesantez, 251 A.D.2d at 12, 673 N.Y.S.2d at 660. As the First Department explained, the only cause of action that plaintiffs could not bring due to their failure to exhaust administrative remedies, was a direct cause of action on Labor Law § 220. See id. Here, Plaintiffs have brought no such cause of action.

FN2. See also Sullivan v. True Plumbing & Heating Corp., Index No. 600409/95 (Sup Ct. N.Y. Co.) (Gammerman, J) at 8 (holding that the plaintiffs, construction workers on public works project seeking recoupment of unpaid prevailing wages, "are not required to exhaust their administrative remedies") (Cariello Aff., Ex. G).

Defendants' reliance on Majstrovic v. R. Maric Piping, Inc., 171 Misc.2d 429, 655 N.Y.S.2d 285 (Sup. Ct. Kings Co., 1997), Cayuga-Onondaga Counties v. Sweeney, 89 N.Y.2d 395, 676 N.E.2d 854, 654 N.Y.S 2d 92 (1996), and Yerry v. Goodsell, 4 A.D.2d

395, 166 N.Y.S.2d 244 (3d Dept.), aff'd, 4 N.Y.2d 999, 177 N.Y.S.2d 514 (1957) is thoroughly misplaced.

As has been discussed, the instant case concerns state and city-funded Public Works Projects. Majstrovic, however, concerned workers on a federally funded project who were not paid prevailing wages and supplemental benefits for work they performed on behalf of the defendant, R. Marie Piping, Inc. The distinction between federal and state funding is critical with respect to a worker's right to bring a civil suit to recover unpaid prevailing wages. While workers employed on state funded projects (subject to Labor Law Section 220) may sue to recover unpaid prevailing wages and benefits, workers employed on federally funded projects (subject to the Davis Bacon Act), do not enjoy a similar right of action.

The Majstrovic court noted that the federally funded public works projects were subject to the Davis-Bacon Act, and therefore preempted N.Y. State Labor Law § 220. See Majstrovic, 171 Misc.2d at 433, 655 N.Y.S.2d at 287. As such the court concluded that there was no private right of action afforded workers based on the Davis-Bacon requirements, see id. at 433-34, 655 N.Y.S.2d at 287-88, or Labor Law § 220. See id. at 434, 655 N.Y.S.2d at 288. The court did not decide, discuss, or otherwise opine on the issue of whether a private-sector employee on a state or city-funded public works project may bring a common law cause of action, such as breach of contract, to recover unpaid prevailing wages and supplemental benefits.

Defendants' reliance on Cayuga-Onondaga Counties v. Sweeney, 89 N.Y.2d 395, 676 N.E.2d 854, 654 N.Y.S 2d 92 (1996), is similarly imprudent. There, petitioner entered into an agreement with a school district to provide the labor for a lighting improvement project. Importantly, Petitioner obtained a civil service classification for its' workers employed on this project. The court's holding was limited to issues involving non-competitive or ungraded government employees, not construction workers employed by a private contractor on a public work site, as in the instant action.

The distinction between construction workers employed by private contractors, and government employees is crucial, as the statutory framework of Labor Law Section 220 governs two very distinct classes of workers, both of whom must be paid “not less than the prevailing wages” and “supplements.” N.Y. Labor Law § 220(3).

The first class of protected workers includes laborers, workmen and mechanics employed by a “contractor, subcontractor or other person” who enters into a “contract” for the construction, reconstruction and repair of “public work”, (such as in the instant action) Id. The second class of workers protected by the statue include laborers, workmen and mechanics employed by the “state, and its' municipal corporations or civil subdivisions” in “ungraded or noncompetitive employment.” See Gaston v. Taylor, 274 N.Y. 359, 9 N.E.2d 9 (1937).

In Gaston, the Court of Appeals recognized this distinction, and commented that the enforcement mechanism under Section 220 differs depending upon a worker's status as a

government employee or as an employee of a private contractor on a public works project. In recognizing the State's obligation to insure payment of prevailing wages to its own employees the Court stated:

[t]he Legislature intended to impose upon the state and its municipal corporations and political subdivisions the same obligations to pay the prevailing rate of wages to laborers, workmen and mechanics upon its 'public' works in "ungraded" and noncompetitive employment in the classified public service, that it imposes upon persons or corporations constructing public works by contract with the state or civil division thereof.

Gaston v. Taylor, 274 N.Y. 359, 362, 9 N.E.2d 9, 10 (1937).

Similarly the court in Yerry v. Goodsell, 4 A.D.2d 395, 166 N.Y.S.2d 224, another case cited by Defendants that is wholly inapplicable to the instant action, ruled that the administrative remedy set forth in Article 8 of the Labor Law had to be initially utilized to determine the proper rate and trade classification to be assigned to civil servants for work which they had not yet performed. Unlike the workers in this case who performed construction work as employees of a private contractor and now seek to pursue common law remedies to recover prevailing wage underpayments based on the published prevailing wage rates, the workers in Yerry were employees of the City of Kingston's Board of Education seeking to establish the prevailing wages to be paid for performing construction work.[FN3] The distinction between the remedies available to public employees versus those remedies available to construction workers employed by private contractors was specifically noted by the Court of Appeals in Wright v. Herb Wright Stucco, Inc., 50 N.Y.2d 837, 407 N.E.2d 1348, 430 N.Y.S.2d, when it reversed the Fourth Department's decision and adopted the dissent below, which stated:

FN3. In Yerry, the court ruled that the administrative remedy set forth in Article 8 of the labor Law had to be initially utilized lo determine the proper rate and trade classification to be assigned to civil servants for work which they had not yet performed. See Yerry v. Goodsell, 4 A.D. 395 (3d Dept. 1957). Here, Plaintiffs are private construction workers. Consequently, Yerry does not apply. See Mercado v. Esco Construction, Index 602877/00 (May 6, 2002 Order) (Cahn, J.) at 5 (Cariello Aff. Ex. F) ("Defendants' cited authorities are not on point. The plaintiffs in those cases were not laborers on public works projects, and, as such, they did not enjoy a similar protection of Section 220 of the Labor Law.... Yerry v. Goodsell, 4 A.D. 395 (3d Dep't 1957).").

Since public employees had no contractual common law rights because they were not third party beneficiaries to a contract, this legislation [Article 8] established the sole and exclusive remedy for public employees not in the graded service of the competitive class of civil service.

Wright, 72 A.D.2d 959, 960; 422 N.Y.S.2d 253, 255 (emphasis added).

This conclusion was most recently addressed by Justice Herman Cahn, in a case on point with the instant action, when he noted that Yerry had no application to a prevailing wage

case, brought by private construction workers who worked on publicly funded projects for private construction companies, because “the plaintiffs in [that] case were not laborers on public works projects, and, as such, they did not enjoy a similar protection.” Mercado v. Esco Construction, Index No. 602877/00 (Sup. Ct. N.Y. Co.) (May 6, 2002 Order), at 5 (Cariello Aff. Ex. F). As such, the holding of Yerry has no application to the matter before this Court.

Simply stated, Defendants have failed to cite any controlling legal authority including a case on point or a provision in Section 220, that obligates an aggrieved private sector construction worker (such as the Plaintiffs), to pursue administrative remedies before or at the expense of pursuing civil remedies. Plaintiffs do not claim to have a private right of action against Defendants based on Labor Law § 220. On the contrary, the instant action has as its sole purpose the enforcement of Plaintiffs' contractual and common law rights to receive prevailing wage rates and supplemental benefits for work preformed on public works projects. Nothing in the language of Section 220 provides that the administrative procedures for remedying Section 220 violations must even be pursued, much less exhausted, before a civil suit may be commenced.

In sum, Plaintiff has the right to pursue his common law claims for underpayment. The Department of Labor and the New York City Comptroller retain the exclusive right to investigate the worker's employer, determine if that employer has willfully violated Section 220 and thereafter determine if the employer should be debarred from working on public works contracts in the future. These rights are neither mutually exclusive nor otherwise conflicting. Consequently, Defendants' Motion to Dismiss the Complaint for failure to exhaust administrative remedies must be denied.[FN4]

FN4. Although this Department has not specifically ruled on the issue of whether there is a private right of action on Labor Law § 220, Plaintiff is aware of precedent in the First Department and elsewhere, that there can be no private right of action based on Labor Law § 220. As such, Plaintiffs have not brought any cause of action on Labor Law § 220. In addition, in light of this precedent involving Labor Law § 220, Plaintiffs voluntarily withdraw their cause of action bated on a private right of action based on the New York State Constitution, Art. 1, Sec. 17, although no court, to Plaintiff's knowledge, has ruled that such a cause of action does not exist

POINT II

PLAINTIFFS HAVE ADEQUALTY PLEAD A CAUSE OF ACTION FOR BREACH OF CONTRACT

Defendants next argue that Plaintiffs cannot maintain a breach of contract claim against Defendants as a third-party beneficiary of the prevailing wage provision of Defendants' Public Works Contract, because Plaintiff is not an intended beneficiary of the prevailing wage provision of the contract mandating payment of said wages.[FN5] Def. Mem. at 11-12. In making its case, Defendants ignores long-settled case law that holds that private workers on public works projects may maintain such causes of actions. As such, this Court must deny Defendants' motion.

FN5. Defendant also argues that "Plaintiff's breach of contract claim is similarly flawed in that it is inextricably tied to Plaintiffs' Section 220 claim, which cannot be considered." Def. Mem. at 11. As discussed in Point I, infra, Plaintiffs common law claims are separate and distinct from any claim based on Labor Law § 220. Further, numerous courts have permitted plaintiffs and class claimants to bring causes of action for unpaid prevailing wages and supplemental benefits, based on common law theories of liability. See Point I, infra; see, e.g., Pesantez v. Boyle Environmental Services, Inc., 251 A.D.2d 11, 12, 673 N.Y.S.2d 659, 660 (1st Dept. 1998) (holding plaintiff construction workers may bring a cause of action for unpaid prevailing wages and supplemental benefits under common law theories of liability, while noting that the plaintiffs did not have a private right of action based on Labor Law § 220).

The New York Court of Appeals, in a case which is squarely on point with the instant action, Wright v. Herb Wright Stucco, Inc., 50 N.Y.2d 837, 407 N.E.2d 1348, 430 N.Y.S.2d 52 (1980), overruling and adopting dissent, 72 A.D.2d 959, 422 N.Y.S.2d 253 (4th Dept. 1979), held that underpaid workers are third party beneficiaries of a public work contract calling for payment of prevailing wages and may assert a claim for breach of said contract against the prime contractor who entered into the agreement. In Wright, just as here, employees of a contractor brought suit alleging that they were paid less than the prevailing wage and "sought to enforce their rights as third party beneficiaries of the [public work] contract" between the prime contractor and the public agency. Wright, 72 A.D.2d 959, 422 N.Y.S.2d 253. Just as here, the prime contractor moved to dismiss the workers' breach of contract claim alleging the subcontractor's workers were not third-party beneficiaries of the public works contract.

While the court below in Wright held that the workers had no common law breach of contract claim against the prime contractor, on appeal the Court of Appeals ruled that a subcontractor's employees may recover unpaid prevailing wages from the prime contractor as third party beneficiaries of the public work contract between the prime contractor and the public agency without regard to the level of specificity in the public work contract of the prevailing wage rate to be paid. See Wright, 50 N.Y.2d 837, 407 N.E.2d 1348, 430 N.Y.S.2d 52. The Court of Appeals in Wright reversed the Fourth Department's decision and adopted the dissent below. That dissent stated:

Section 220 of the Labor Law "has as its entire aim the protection of workingmen against being induced, or obliged, to accept wages below the prevailing rate" and "must be construed with the liberality needed to carry out its beneficent purposes" (Bucci v. Village of Port Chester, 22 N.Y.2d 195, 201, 292 N.Y.S.2d 393, 397, 239 N.E.2d 335,

338). With this in mind, it is incongruous to hold, as the majority does, that this ameliorative statute actually had the effect of removing a remedy which workers had heretofore possessed.

Wright, 72 A.D.2d 959, 422 N.Y.S.2d 253.

Thus, the Court of Appeals has rejected the precise argument made by Defendants here; namely, that an underpaid employee of a contractor may not bring a claim for breach of a public works contract as a third-party beneficiary thereof. In Wright, the Court of Appeals reinstated the breach of contract claim brought by underpaid employees of a subcontractor against the prime contractor on the ground that the employees were third-party beneficiaries of the pubic work contract insofar as it required payment of prevailing wages to all workers. Indeed, Wright renders Defendants' arguments to the contrary untenable.

More recently, the New York Supreme Court, Appellate Division, First Department confirmed in Pesantez, 251 A.D.2d 11, 673 N.Y.S.2d 659, that a plaintiff class of workers can proceed with common law claims for breach of the public work contract to recover unpaid prevailing wages and benefits. In Pesantez, another case exactly on point with the instant action, employees sought recovery of unpaid prevailing wages from the Defendants as third-party beneficiaries of the public works contract between the prime contractor and the New York City School Construction Authority, in reaching its decision, the First Department relied on the Court of Appeals' unanimous decision in Fata v. Healy, 289 N.Y. 401 (1943), wherein the Court of Appeals expressly held that workers can pursue a breach of contract claim against the prime contractor as third party-beneficiaries of the prime contractor's agreement with the public entity. In so holding, the Court explicitly rejected the lower court's determination to the contrary and recognized that:

the statutory mandate that a contractor must pay laborers upon public works wages at least at the prevailing rate was intended for the direct benefit of the laborers ... It cannot be doubted that provisions requiring the contractor to pay such wages are also inserted in the contract, whether voluntarily or under compulsion of the statute, for the benefit of the laborers.

Fata, 289 N.Y. at 405.

Application of New York law on the issue of who qualifies as an “intended beneficiary” of a contract underscores the correctness of the Court of Appeals' decision in Wright. The New York Court of Appeals has adopted the test set forth in Section 302 of the Restatement (Second) of Contracts:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstance indicate that the promisee intended to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Fourth Ocean Putnam v. Interstate Wrecking, 66 N.Y.2d 38, 45, 495 N.Y.S.2d 1, 5 485 N.E.2d 208 (1985) (quoting Restatement (Second) of Contracts § 302 (1979)). Under this standard, a nonparty to a contract may sue for breach of contract if he is an intended beneficiary thereof. Id.

All public work contracts are required by law to contain a provision requiring that all workers furnishing labor pursuant to the contract are to be paid prevailing wages. See N.Y. Labor Law § 220 (McKinney 1999); E. Williamson Roofing and Sheet Metal Co., Inc. v. Town of Parrish, 139 A.D.2d 97, 102, 530 N.Y.S.2d 720, 724 (4th Dept. 1988) ("All contracts within the section's scope must contain provisions concerning the maximum hours of labor per week and requiring contractors or employers to pay prevailing wages and fringe benefit supplements to those workers."). Thus, applying the standard set out above, and the principles established by the Court of Appeals in Wright and Fata, each Plaintiff and putative class member is an intended third-party beneficiary of the public work contract because: (1) recognition of that right effectuates the intent of the contracting public agency, (2) payment of prevailing wages satisfies the obligation of the contracting agency to enforce the prevailing wage law (and the obligation of the contracting prime contractor to comply with Article 8 of the Labor Law), and (3) the circumstances obviously indicate that the parties to the contract intended to give the workers the benefit of performance.

Indeed, as the Court of Appeals held in Fata "[i]t cannot be doubted that provisions requiring the contactor to pay such [prevailing] wages arc also inserted in the contract, whether voluntarily or under compulsion of the statute, for the benefit of the laborers as well as for the benefit of the public body which is a party to the contract." Fata, 289 N.Y. at 405, 46 N.E.2d at 341; accord Wright, 72 A.D.2d at 959, 422 N.Y.S.2d at 255 (citations omitted) ("[although at one time there may have been speculation that this statutory remedy superseded and extinguished private employees' common law contractual causes of action, such view as the Court of Appeals has stated, 'cannot be read into the statute by any reasonable construction.' ").[FN6] In fact, every court to consider this issue has recognized the right of a subcontractor's employees to seek recovery of unpaid prevailing wages from the prime contractor. See, e.g. Ortiz at 3 (Cariello Aff. Ex. A); Sullivan v. True Plumbing & Heating Corp., Index No. 600409/95 (Sup Ct. N.Y. Co.) (Gammerman, J) at 7 (Cariello Aff., Ex. G); Filipowitz v. Northern Valley Contracting, Inc., Index No. 604405/97 (Sup Ct. N.Y. Co.) (December 7, 1998) (Gammerman, J.) at 2 (Cariello Aff. Ex. H).

FN6. In Wright the Court of Appeals held that the public work contract need not name the workers nor specify the exact prevailing wage rate to be paid. See Wright, 50 N.Y.2d 837, 407 N.E.2d 1348, 430 N.Y.S.2d 52 (1980). It is enough that the public work contract merely requite the payment of prevailing wages and benefits to all who furnish labor thereunder, as all public work contracts must by law.

In Ortiz. v. J.P. Jack Corporation, Index No. 6989/98 (Sup. Ct. Queens Co.) (April 12, 1999 Decision) (Posner, J.) at 4 (Cariello Aff. Ex. A), affirmed, 729 N.Y.S.2d 912, 913 (2d Dept. 2001), the Court, relying on Wright, found that employees of a subcontractor on a public works project had standing to sue prime contractors as third-party beneficiaries to recover prevailing wages. See Ortiz at 4 (Cariello Aff. Ex. A) (" '[W]e have emphasized when upholding the third party's right to enforce the contract that no one other than third party can recover if the promisor breaches the contract.' The plaintiffs herein [private construction workers suing to recoup unpaid prevailing wages], clearly intended beneficiaries under the public works contracts, are the only ones who could recover if prevailing wages were not paid.") (quoting Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc., 66 N.Y.2d 38, 45, 495 N.Y.S.2d at 2). Moreover, as explained by Judge Chin in Samborski v. Linear Abatement Corp. 1998 WL 474069 (S.D.N.Y. 1998) another case similar to the instant action:

As to the breach of contract claims and the quantum meruit claims, the... contracts at issue, which appear to include an agreement to pay wages at rates fixed in accordance with the statute and set forth in a schedule of wages annexed to the contracts, impose a contractual obligation that extends beyond the scope of the statutory obligation of §220, but may pursue common law claims arising from the ... contracts.

Samborski, 1998 WL 474069 at *3.

The lone authority cited by Defendant, Fourth Ocean Putnam Corp. v. Interstate Wrecking, 66 N.Y.2d 38, 495 N.Y.S.2d 1 (1985), is, simply put, blatantly mischaracterized and misapplied by Defendant. There, the Court of Appeals found that plaintiff property owner did not possess a third-party beneficiary claim based on a contract between the Village of Atlantic Deach and Interstate Wrecking Co., a contractor hired to demolish plaintiff's fire-damaged hotel. See Fourth Ocean Putnam Corp., 66 N.Y.2d at 40, 495 N.Y.S.2d at 2. Contrary to Defendants' patently false assertion that "[i]n Fourth Ocean, the party seeking to enforce a wage claim was simply not an intended third party beneficiary of the contract", Def. Mem. at 12, Fourth Ocean Putnam had absolutely nothing to do with the payment of wages of any sort. Fourth Ocean's claim was based on the alleged failure of Interstate Wrecking to adequately demolish plaintiff's hotel, as per Interstate's contract with the Village. The case has nothing do with this matter factually.

Further, even excusing Defendants' reckless mischaracterization of Fourth Ocean Putnam Corp., Defendants misapplies the case to the facts at bar as well. In the instant action, Plaintiffs for themselves and on behalf of the putative class worked on Public Works Projects for a private construction company, have brought suit as the intended

beneficiaries of the prevailing wage provision included in the all of the Public Work Contracts entered into by Defendant, for all Public Works Projects worked on by Plaintiffs. See, e.g., Fata, 289 N.Y. at 405, 46 N.E.2d at 341 ("It cannot be doubted that provisions requiring the contactor to pay such [prevailing] wages are also inserted in the contract, whether voluntarily or under compulsion of the statute, for the benefit of the laborers as well as for the benefit of the public body which is a party to the contract.").

Fourth Ocean Putnam Corp. holds nothing to the contrary. The main holding of Fourth Ocean Putnam Corp. is that only intended beneficiaries may sue for breach of contract as third-party beneficiaries. Indeed, Ortiz, a lower court decision affirmed by the Second Department, specifically relied on Fourth Ocean Putnam Corp. when it approved of a third-party beneficiary cause of action, on behalf of construction workers seeking to recover unpaid prevailing wages, based on a public works contract. See Ortiz at 4 (Cariello Aff. Ex. A).

In conclusion, Plaintiffs have an unequivocal right to sue as a third-party beneficiary of the Public Works Contracts to recoup any unpaid prevailing wages and supplemental benefits owed to him. Sixty years of New York State case law has held as such. Further, Defendants offers no support for a contrary position. Consequently, Defendants' motion on this point must be denied.

POINT III

PLAINTIFFS HAVE ADEQUALTY PLEAD CAUSES OF ACTION BASED ON UNJUST ENRICHMENT AND QUANTUM MERIUT

At the outset, Plaintiffs note that the quantum meruit and unjust enrichment claims are plead, in the alternative to the contract claims. Plaintiff is well aware that recovery on such causes of action would be improper if recovery was had on the third-party beneficiary cause of action.

On the merits, however, Plaintiffs have sufficiently alleged that Defendants were unjustly enriched. To make a claim under implied contract theories, Plaintiffs must show that (1) Defendants benefited, (2) such benefit was derived at Plaintiffs' expense, and (3) that equity and good conscience require restitution. See Kaye v. Grossman, 202 F.3d 611, 616 (2d Cir. 2000). Here, Caddell benefited (1) from Plaintiffs' below-cost labor and (2) insofar as Caddell factored the payment of prevailing wages into its winning bids for the relevant public work contracts, Caddell received a contract sum that reflected its legal obligation to insure payment of prevailing wages to all workers on the project, thus resulting in greater profits for Caddell when Caddell failed to pay prevailing wages and

supplemental benefits to Plaintiffs. In sum, Caddell was enriched not only because of Plaintiffs' work, but because the work was performed for less than the prevailing wage.

Contrary to Defendants' lone argument on this point, Plaintiffs' implied contract claims are not "basing [these] claims on an assertion that they were not paid the prevailing rate of wages." Def. Mem. at 12. Simply stated, Plaintiffs' were not paid for the reasonable value of their services. To the extent that section 220 of the Labor Law support Plaintiffs' claim, it does so only insofar as it provides a specific measure the reasonable value of Plaintiffs' labor.

Not surprisingly, in addition to affirming a worker's right to sue under contractual theories to recover unpaid prevailing wages, a number of courts have specifically noted that plaintiffs may bring implied contract claims to recover unpaid prevailing wages for work performed on public works projects. See, e.g., Samborski, 1998 WL 474069 at *3 ("As to the breach of contract claims and the quantum meruit claims ...[P]laintiffs are not constrained by the remedies set forth in § 220, but may pursue the common law claims"); Mercado at 6 (Cariello Aff. Ex. F) (court would not dismiss unjust enrichment and quantum meruit claims, based on Defendants allegedly benefiting from billing government agencies under public works contracts for labor at prevailing wage rate, although Defendants allegedly paid lower, non-prevailing wages).

In any event, these claims are plead in the alternative to the cause of action sounding in breach of contract. As such, Defendants' arguments must be disregarded and the motion to dismiss must be denied.