

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

BERNAR ESPANOL, *and all others who
are similarly situated and consent to
their inclusion.*

Plaintiffs,

v.

AVIS BUDGET CAR RENTAL, LLC, and
BUDGET RENT A CAR SYSTEM, INC.

Defendants.

Case No. 8:10-cv-944T30
Collective Action Representation

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**PLAINTIFFS' MOTION AND MEMORANDUM OF LAW TO CONDITIONALLY
CERTIFY COLLECTIVE ACTION AND
FACILITATE NOTICE TO POTENTIAL CLASS MEMBERS**

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Before the Honorable James S. Moody, Jr.

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I. PLAINTIFFS' MOTION TO CONDITIONALLY CERTIFY COLLECTIVE ACTION

The Court must now decide whether there may be people “similarly situated” to the Plaintiffs who might benefit from being told about this action. If the answer is “yes,” the Court may allow, under its supervision, for people to receive notice about the pending action and conditionally certify the collective action. The Plaintiffs allege the following key facts:

1. The Plaintiffs claim they were misclassified as managers and exempt because their primary duties were akin to a rental agent and cleaning crew – cleaning, moving and renting out cars – not managing the enterprise.
2. They claim this was not a unique experience either, and that this was the company policy and practice among shift managers at airports.
3. As a result they claim those labeled as “shift managers” were not paid overtime in violations of §207 of the Fair Labor Standards Act.
4. The Plaintiffs have complied with all pleading requirements to assert a collective action under 29 USC §216 and 29 USC 256.
5. Accordingly, the Plaintiffs move this Court to conditionally certify the class under §216(b) of the FLSA.

WHEREFORE, for the reasons more fully discussed in the incorporated Memorandum in Support, the Plaintiffs ask this Court to:

(a) recognize this matter as a collective action under §216(b) of the Fair Labor Standards Act;

(b) to approve the attached proposed Notice and Consent Form to be sent to all potential collective action members;

(c) to order Defendants to produce the names and addresses of potential collective action members,

(d) issue an order prohibiting the Defendant from retaliating against any current or former employee who consents to their inclusion in this action;

(e) order counsel for the parties to confer telephonically or in person within 15 days of the Court's order on a revised case management schedule to allow the parties to seek discovery on a class wide basis¹ and consider any other issues that may need to be addressed given the certification of this action as a collective action; and

(f) appoint Bernar Espanol as the Class Representative to facilitate the negotiations at the parties scheduled mediation(s) before Mediator, James Brown, and to be able to enter into a proposed settlement for all overtime claims that are the subject of this lawsuit for those who opt-in (with any class settlement subject to a Court approval).²

~

¹ To date, the Plaintiffs have asked twice through requests for production and interrogatories for the names of putative class members but the Defendants have objected to providing this information.

² The Court will be asked to approve any settlement under Lynn's Food Stores v. United States, 679 F.2d 1350 (11th Cir. 1982) and attorney's fees. See Toreros v. Tucson Elc. Power Co., 8F.3d 1370, 1376 (9th Cir. 1993) (attorneys' fees are recoverable as a proportion of the class recovery under FLSA cases).

II. MEMORANDUM IN SUPPORT³ OF MOTION TO CERTIFY COLLECTIVE ACTION

1. Facts and Background

1(a): Procedural Posture: Ready for Certification

Plaintiff, Bernar Espanol, filed a lawsuit alleging that the Defendants had violated the FLSA for failure to pay overtime on April 21, 2010.⁴ A witness (an airport manager) confirmed what Espanol claimed was happening to all shift managers. Accordingly, the Plaintiff moved to amend his Complaint on August 2, 2010, seeking to represent all others who wish to opt into the action and opting in himself.⁵ The Court granted the Plaintiff's request on September 16, 2010,⁶ and on September 28, 2010 the Plaintiff opted in and filed his "First Amended Complaint for Violations of the FLSA."⁷

As the Plaintiff continued with his investigation, Blanca Hernandez, asked to become a Plaintiff in this action, claiming that she too had not been paid her overtime. More to the point, she submitted an affidavit turned over to the Defendants that states, in relevant part, that Mr. Espanol's allegations in the First Amended Complaint were accurate, as was the affidavit from Carlos Solis, and that

"shift managers are not managers ... they do not do managerial duties, [t]hey are required to [do] menial task[s] and fill the gaps with the hope that someday they will become real managers with actual managerial responsibility."⁸

She filed a consent notice to become a party plaintiff on February 3, 2011.⁹

³ M.D. Florida Local Rule 3.01 requires that Motions and Memorandum of Legal Authority shall be included in a *single* document not more than 25 pages.

⁴ Complaint - Docket No. 1

⁵ Plaintiff's Motion for Leave to File First Amended Complaint - Docket No. 14.

⁶ Order on Motion for Leave - Docket No. 22

⁷ First Amended Complaint for Violations of the FLSA - Docket No. 23, ¶ 10 (opting-in)

⁸ Declaration of Blanca Hernandez - Exhibit 1

⁹ Blanca Hernandez Consent to Become a Party Plaintiff - Docket No. 30

On February 5, 2011 the parties filed a joint stipulation to substitute party Defendants to ensure the proper defendants were before the Court.¹⁰ As a consequence of the Stipulation and the Court's endorsed ordering granting the Stipulation, the Defendants before this Court are now Avis Budget Car Rental, LLC and Budget Rent a Car System, Inc.¹¹ In May of this year Michael Thebner, Freddy Yaport, Jacqie Smith, Kristen Belanger and Herlande Saintvil all filed consent notices asking to by Party Plaintiffs.¹² The Plaintiffs are now ready to ask the Court to certify the class, and with the Court's permission, notify the class.

1(b): Ravenell v. Avis is similar to this Case and the Court should consider the findings and evidence that Judge Townes considered granting the Motion to Certify the Ravenell Class.

Ravenell et. al. v. Avis Budget Car Rental, LLC and Avis Rent A Car System, LLC Docket No. 08-CV-2113(SLT)(ALC) is a similar but not identical case which is being litigated in the Eastern District of New York. Some of the facts asserted in this Motion come from the Ravenell case. The cases are similar because both deal with exemption issues concerning the Defendants lowest level of managers called "Shift Managers." Both cases allege that the primary duties of the "managers" at issue are cleaning, renting, and moving cars, not managing people or the enterprise.

The Ravenell case is useful here, but the two cases are not duplicative. The two cases involve different dates.¹³ The Ravenell case focuses on the entire 1100 plus city, suburban and airport Avis locations,¹⁴ while this case is only asking to certify a class of

¹⁰ Joint Stipulation to Substitute Party Defendants - Docket No. 31

¹¹ See Court's Endorsed Order in Notes at Docket Entry No. 32.

¹² Consents to Opt-In Filed by Blanca Hernandez, Freddy Yaport, Jacqie Smith, Mike Thebner, Kristen Belanger, Herlande Saintvil, and Bernar Espanol – Exhibit 17.

¹³ The Ravenell case was filed May 23, 2008 and seeks a class starting in May 22 2005, whereas the Espanol case was filed in 2010 and seeks a class starting in 2007.

¹⁴ See July 19, 2010 Order Granting Motion to Certify Class Ravenell v. Avis - Exhibit 2

shift managers that worked at 82 Budget and Avis locations at the country's largest airports.¹⁵ To avoid overlap, the class definition excludes those covered by Ravenell.¹⁶

The Court should look to the Ravenell case as a useful precedent for granting certification here.

1(c): General information about Avis and its management structure¹⁷

Avis operates approximately 1,000 rental car facilities in the United States, about 200 of which are airport locations.¹⁸ Budget operates approximately 800 rental car facilities in the U.S., 185 of which are airport locations.¹⁹ In company's corporate hierarchy, shift managers are the lowest level of management, with airport managers, district managers, branch managers, station managers, production managers, distribution managers, and city managers above them in the management chain.²⁰ The company also employs customer service agents, customer sales agents, and other hourly workers, all of whom are subject to the overtime provisions of the FLSA.²¹ There are approximately 1,100 Avis shift managers nationwide.²² The Plaintiffs believe there are over 500 Budget shift managers nationwide. The Defendants have a fleet of more

¹⁵ See Section 6 of this Memorandum for the Class Definition and Exhibit A for the list of the 82 airports referenced.

¹⁶ See Section 6 of this Memorandum for the Class Definition excluding Ravenell opt-ins.

¹⁷ Some of the facts presented here are facts that were gathered from the evidence in the Ravenell case or the findings of fact from the Ravenell Order Granting Motion to Certify the Class. See Exhibit 2.

¹⁸ See Deposition Transcript of Elaine Vitello - Exhibit 3 at 13; See also July 19, 2010 Order Granting Motion to Certify Class Ravenell v. Avis - Exhibit 2 pg. 1

¹⁹ Budget Company Fact Sheet - Exhibit 18

²⁰ Deposition Transcript of Elaine Vitello - Exhibit 3 at 33-36; 62-63, 67-68. See also July 19, 2010 Order Granting Motion to Certify Class Ravenell v. Avis - Exhibit 2 pg. 1-2. Additionally see Shift Manager Job Description Produced by Defendants - Exhibit 16 (see upper right hand corner of first page)

²¹ Deposition Transcript of Elaine Vitello - Exhibit 3 at 64-65. See also July 19, 2010 Order Granting Motion to Certify Class Ravenell v. Avis - Exhibit 2 pg. 1-2

²² July 19, 2010 Order Granting Motion to Certify Class Ravenell v. Avis - Exhibit 2 pg. 2

than 345,000 vehicles; they completed more than 22 million transactions in 2010; and had revenues of nearly \$4 billion.²³

2. The Eleventh Circuit takes a Two-Tiered Approach – The First Step is a “Conditional” Certification Review.

Section 16(b) of the FLSA allows private civil actions to be maintained "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."²⁴ As this Court in its 2008 decision in White v. Subcontracting Case No. 8:8-CV-620-T-30TGW; 2008 U.S. Dist. LEXIS 96252 (emphasis added).²⁵

The Eleventh Circuit has recommended a **two-tiered** procedure for district courts to follow in determining whether to certify a collective action under § 216(b).²⁶ In Cameron-Grant, the Eleventh Circuit discussed this approach as follows:

The first determination is made at the so-called "**notice stage**." At the notice stage, the district court makes a decision-usually based only on the pleadings and any affidavits which have been submitted-whether notice of the action should be given to potential class members.

Because the court has minimal evidence, **this determination is made using a fairly lenient standard, and typically results in "conditional certification"** of a representative class. If the district court "conditionally certifies" the class, putative class members are given notice and the opportunity to "opt-in." The action proceeds as a representative action throughout discovery.

The second determination is typically precipitated by a motion for "decertification" by the defendant usually filed after discovery is largely complete and the matter is ready for trial. At this stage, the court has

²³ About Avis Budget Group, Inc. write up from internet search on 5/14/11 available at <http://avisbudgetgroup.com/about/> – Exhibit 14 See also Avis Fact Sheet – Exhibit 19

²⁴ An action to recover [unpaid minimum wage or overtime compensation] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. See 29 USC Sec. 216(b)

²⁵ See also Judge Whittemore's summary in Barten v. KTK & Associates, Inc., 2007 U.S. Dist. LEXIS 54068 (M.D. Fla. 2007). (Courts utilize a two-tiered approach and the determination is made using a fairly lenient standard). And see Hipp v. Liberty National Life Ins. Co., 252 F.3d 1208,1219 (11th Cir. 2001) (describing the two-tiered approach as "an effective tool for district courts to use in managing" collective actions and recommending that the this approach be adopted by the district courts).

²⁶ Cameron-Grant v. Maxim Healthcare Systems, 347 F.3d 1240, 1242 (11th Cir. 2003)(citing Hipp v. Liberty National Life Insurance Co., 252 F.3d 1208, 1216 (11th Cir. 2001))

much more information on which to base its decision, and makes a factual determination on the similarly situated question. If the claimants are similarly situated, the district court allows the representative action to proceed to trial. If the claimants are not similarly situated, the district court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice. The class representatives-i.e. the original plaintiffs-proceed to trial on their individual claims.

Conditional certification furthers the FLSA's "broad remedial purpose,"²⁷ and is justified by the court's "managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way."²⁸ The benefits of a Section 216(b) collective action "depend[] on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate."²⁹

3. Conditional Certification Tier One: the first step is the Plaintiffs must demonstrate they are similarly situated – a flexible and relaxed standard.

To conditionally certify a class, the Plaintiffs are to demonstrate they are "similarly situated."³⁰ As the Eleventh Circuit recognized in Grayson, "similar" does not mean "identical" to the positions held by the potential plaintiffs.³¹ As the Middle District of Florida said (granting conditional certification to low level managers in the rental car industry), in Harrison v. Enterprise Rent-A-Car, this is "a determination that individuals 'are similarly situated' with respect to their job requirements and with regards to their

²⁷ Braunstein, 600 F.2d at 336; *accord Hoffman.*, 982 F. Supp. at 262-63 (citing cases); Garner, 802 F. Supp. at 422.

²⁸ Hoffman-LaRoche, 493 U.S. at 170-71

²⁹ Hoffman-LaRoche, 493 U.S. at 170

³⁰ Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1217 (11th Circuit, 2001)

³¹ Butler-Jones v. Sterling Casino Lines, L.P., 2008 U.S. Dist. LEXIS 115206 *13 (M.D. Fla. Oct. 20, 2008), citing Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. Ga. 1996). See also Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1217 (11th Circuit, 2001), Sperling v. Hoffman-La Roche, Inc., 118 F.R.D. 392, 407 (D.N.J. 1988), *aff'd in part and appeal dismissed in part*, 862 F.2d 439 (3d Cir. 1988), *aff'd*, 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)).

pay provisions."³² Defenses, exemptions, or a judgment on the merits does not take place during this stage.³³

The second tier, which takes place *after* notice has been sent to potential plaintiffs, involves a more fact intensive review to determine whether the original and opt-in plaintiffs are indeed similarly situated. This usually comes in the form of a motion to decertify the class where additional evidence can be reviewed by the court and the matter is largely ready for trial.³⁴

"[T]he similarly situated requirement is not very stringent in this circuit."³⁵ As the Eleventh Circuit in Hipp v. Liberty Nat'l Life Ins. Co. said in 2001, "[t]his Court expressed its view of the similarly situated requirement in Grayson: 'The 'similarly situated' requirement of § 216(b) is more elastic and less stringent than the requirements found in *Rule 20* (joinder) and *Rule 42* (severance)."³⁶ The plaintiffs may meet this burden, which is not heavy, by making allegations of class-wide discrimination, that is, detailed allegations supported by affidavits which successfully engage defendants' affidavits to the contrary.³⁷ In fact, "a unified policy, plan, or scheme of discrimination may not be required to satisfy the more liberal 'similarly situated' requirement of § 216(b)."³⁸

³² Harrison v. Enterprise Rent-A-Car Co., 1998 U.S. Dist. LEXIS 13131 *5 (M.D. Fla. July 1, 1998),

citing, Tucker v. Labor Leasing, Inc., 872 F. Supp. 941, 947 (M.D. Fla. 1994) (quoting Dybach, 942 F.2d at 1567).

³³ Krueger v. New York Tel. Co., 1993 U.S. Dist. LEXIS 9988, 1993 WL 276058 at *2 (S.D.N.Y. July 21, 1993) ("Even if plaintiffs' claims turn out to be meritless or, in fact, all the plaintiffs turn out not to be similarly situated, notification at this stage, rather than after further discovery, may enable more efficient resolution of the underlying issues in this case.") The merits of the claims "need not be evaluated nor discovery be completed in order for such a notice to be approved and disseminated." Realite, 7 F. Supp.2d at 308; Ingram v. Coach USA, Inc., 2008 U.S. Dist. LEXIS 5935 at *16 (D.N.J. 2008) (quoting Aquilino v. The Home Depot, 2006 U.S. Dist. LEXIS 66084 at *2 (D.N.J. Sept. 7, 2006)).

³⁴ Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214 (5th Cir. Tex. 1995)

³⁵ Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218-1219 (11th Circuit, 2001). The lenient standard for conditional certification is also supported the Eleventh Circuit's recognition that unlike FRCP 23, overtime collective actions (governed by §216(b) of the FLSA) are opt in cases where the statute of limitations runs against anyone who would want to join, but doesn't affirmatively opt into the case. In other words, without being able to tell people about this action through formal supervised notice, people may lose their ability to even have a chance at recovering what is due to them because the statute will run until they tell this Court they want any wages that the law requires be paid.

³⁶ 79 F.3d at 1095.

³⁷ 79 F.3d at 1097 (internal citations and quotation marks omitted).

³⁸ 79 F.3d at 1095.

4. The Company Policy of Not Paying Overtime to “Shift Managers” and the Plaintiffs Proof of Being Similarly Situated

4(a): Shift managers are similar because they primarily Rent, Clean, and Move Cars – All Non-exempt Work.

The Putative Class members are similarly situated because they were primarily engaged in non-exempt work. Shift managers predominantly rent, clean, or move cars.³⁹ They tend to work in three areas: the check-in area, the rental counter, or the preferred customer area.⁴⁰

A shift manager or superior will determine what area needs more workers and the shift manager(s) will go there and perform non-exempt work.⁴¹ This practice is sometimes referred to as “*filling in the gaps*.”⁴² The problem is that gap filling work takes up 80 percent of their day.⁴³

“Management” (in terms qualifying under the FLSA executive or administrative exemption) is not looking around the operations and deciding which type of hourly non-exempt work to spend the majority of the day doing. As the Eleventh Circuit noted in Morgan v. Family Dollar Stores:

“As to the time-spent-on-exempt-work factor, the overwhelming evidence at trial showed Plaintiff store managers spent 80 to 90% of their time performing nonexempt, manual labor, such as stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors, and bathrooms. Conversely, Plaintiff store managers spent only 10 to 20% of their time

³⁹ Declaration and Cosent by Bernanr Espanol – Exhibit 15 at ¶15

⁴⁰ Deposition Transcript of Adeel Tahir- Exhibit 9 at 30

⁴¹ Deposition Transcript of Mohammad Zishan – Exhibit 10 pg. 69

⁴² Deposition Transcript of Bernar Espanol – Exhibit 6, pg. 199 (“There’s times in operation where you have to fill in the gaps. You’re going to be cleaning cars and doing everything else ...”) Id., pg 231. (“The only involvement I had with any schedule is when Carlos was doing a shift bid and he wanted advice on if they were gaps in the shift bid.”) Id. at pg. 116 (“We were filling in gaps of the operation and the airport manager was a manager. The real manager on duty who instructed us where to go and which position needed to be filled.”). See also Declaration of Blanca Hernandez dated 2/2/2011 – Exhibit 1, Sec. 3

⁴³ Declaration and Cosent by Bernanr Espanol – Exhibit 15 at ¶15; Deposition Transcript of Adeel Tahir – Exhibit 9, pg. 138-140; Deposition of Kenneth E. Mitchell – Exhibit 11 at pg. 98-100; Affidavit of Carlos Solis dated 07/30/2011 – Exhibit 12, Secs. 3 - 4

performing exempt work, a far cry from the DOL's 50% guideline for management tasks. See 29 C.F.R. § 541.700(b) (2006); 29 C.F.R. § 541.103 (2003).⁴⁴

Here, shift managers spend the majority of their day doing any of the Defendant's three main non-exempt tasks: renting, cleaning, or moving cars. This can be gleaned from the attached depositions, affidavits and declarations:

- As former shift manager **Bernar Espanol**⁴⁵ testified to defense counsel's question: "the *primary* duties of the shift managers [were] renting, cleaning, [and] moving cars around."⁴⁶ "I got tired of the repeat culture of just shift manager doing the same thing of coming in, renting cars, cleaning cars, and doing everything else but managing."⁴⁷
- As former shift manager **Matthew Ravenell** testified: "my responsibility was on having clean cars ready and ready to rent."⁴⁸ "I thought it [referring to a shift manager's duties] was going to be more of the operation, more of the reports, more of the development and training of employees, interviewing employees, and that wasn't the case. I was told specifically to do the cleaning and preparation of cars."⁴⁹ "[W]e would have to move a whole bunch of cars."⁵⁰
- As current shift manager **Muhammed Bashir** said, "I'm there most of the time moving vehicles ...and clean car[s] also."⁵¹ Bashir said he parks and cleans cars every day. When asked by defense counsel how often does he get calls from the renting desk requesting help he responded "every second."⁵²
- As former rental agent, shift manager and now current Washington Dulles airport manager **Adeel Tahir** testified: In his ten hour day he would spend 5 to 6 hours cleaning cars a day.⁵³ He would spend an hour to thirty minutes moving cars.⁵⁴ And he would spend 1 hour renting cars.⁵⁵ In other words, of

⁴⁴ *Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1269 (11th Cir. Ala. 2008)

⁴⁵ Mr. Espanol worked in the West Palm Beach, Tampa and Miami International airports during his time spent with the Company.

⁴⁶ Deposition Transcript of Bernar Espanol – Exhibit 6, pg. 76, see also 14-15, 32, 75, 144, 230, 249, 143 ("But most of the time the response was, well, I guess you're cleaning cars, I guess you're renting cars, I guess you're moving cars."), 220 ("Most of the day's work would be renting cars, cleaning cars, moving cars, dispatching cars, driving cars ...") 59 ("manager were at the counter most of the time renting cars"), 79 ("shift managers were at the counter renting cars the majority of the time"), 198-199, 216, 260 (it was seeing the repeat pattern of renting cars again and getting into the same old culture that we did before, the shift managers)

⁴⁷ Deposition Transcript of Bernar Espanol – Exhibit 6, pg. 249

⁴⁸ Deposition Transcript of Matt Ravenell - Exhibit 7 at 67

⁴⁹ Deposition Transcript of Matt Ravenell - Exhibit 7 at 122, See also Id. at 127, 172-173 ("I was always cleaning cars ... Cars were non-stop returning and being rented).

⁵⁰ Deposition Transcript of Matt Ravenell - Exhibit 7 at 135

⁵¹ Deposition Transcript of Muhammed Basher- Exhibit 8 at 36

⁵² Deposition Transcript of Muhammed Basher- Exhibit 8 at 16

⁵³ Deposition Transcript of Adeel Tahir – Exhibit 9, pg. 138

⁵⁴ Deposition Transcript of Adeel Tahir – Exhibit 9, pg. 139

his ten hour day, about 80 percent would be spent renting, cleaning, or moving cars. Should he stay more than 10 hours in a day, it was to perform “the same task that an hourly employee would do.”⁵⁶

- As current shift manager **Mohammad Zishan** testified: “[a manager] has to pretty much cover everything, at the pumps or renting cars.”⁵⁷ “Because when you’re at Budget you’re just basically cleaning cars most of the time on your shift.”⁵⁸ “[M]ost of the time, I’m unable to do it because I’ve got to start moving.”⁵⁹ “Most of the time I just can’t do it [referring to monitoring employees] because ... you know, doing a lot of other stuff, cleaning cars, moving cars.”⁶⁰
- As current shift manager **Kenneth Mitchell** testified about his average day: “[I was] just constantly clean[ing] the cars. At least six hours, six hours of my shift.”⁶¹ Six hours cleaning cars, two hours moving – well, if I was renting – two hours moving cars.”⁶² This was the same whether working at the Avis or Budget branded locations.⁶³
- As former shift manager (and opt-in to this suit) **Blanca Hernandez** said: “shift managers are not ‘managers’ as one would think; they do not do managerial duties. They are required to [do] menial task[s] and fill the gaps with the hope that someday they will become real managers with actual managerial responsibility.”⁶⁴
- As former shift manager and airport manager in Miami **Carlos Solis** said: “Mr. Espanol regularly, and more than 80% of his time conducted menial and/or manual work that didn’t involve managerial involvement, and was work that was not of significant importance. Frankly, he did not manage anything or anyone. ... In fact, based off my observations, understanding and experiences the same can be said for all Shift Managers at Avis. What I did see, observe, and understand is that Shift manager, including Mr. Espanol, regularly clean cars, rent cars, move cars from one location to another ... and otherwise fill in areas of the operation.”⁶⁵

⁵⁵ Deposition Transcript of Adeel Tahir – Exhibit 9, pg. 137-138

⁵⁶ Deposition Transcript of Adeel Tahir – Exhibit 9, pg. 140

⁵⁷ Deposition Transcript of Mohammad Zishan – Exhibit 10 pg. 55

⁵⁸ Deposition Transcript of Mohammad Zishan – Exhibit 10 pg. 55

⁵⁹ Deposition Transcript of Mohammad Zishan – Exhibit 10 pg. 69

⁶⁰ Deposition Transcript of Mohammad Zishan – Exhibit 10 pg. 84.

⁶¹ Deposition of Kenneth E. Mitchell – Exhibit 11 at pg. 98

⁶² Deposition of Kenneth E. Mitchell – Exhibit 11 at pg. 98-99

⁶³ Deposition of Kenneth E. Mitchell – Exhibit 11 at pg. 99-100

⁶⁴ Declaration of Blanca Hernandez dated 2/2/2011 – Exhibit 1, Sec. 3

⁶⁵ Affidavit of Carlos Solis dated 07/30/2011 – Exhibit 12, Secs. 3 - 4

4(b): They are similarly situated in pay, advertising, training, evaluations and job descriptions too

Aside from the primary duties being the same or similar, Shift Managers receive the same pay, use the same type of advertising materials, go through the same basic training, are evaluated on the basis of the same criteria, work more than 40 hours, receive their pay via salary, have a core set of basic duties, and have the same job description.

- Pay. As the Defendant's Corporate Representative Vitello testified Shift managers were a pay grade of 9 and 10.⁶⁶ They are also all able to participate in the same benefit programs (*i.e.* the Budge Avis 401K, health plan, and ESOP).⁶⁷ They are salaried and not paid overtime.⁶⁸
- Evaluation. Shift Managers were evaluated by the same types of people (specifically their immediate supervisor like the airport manager) and it was done using an online system that has specific instructions and criteria.⁶⁹
- Collective Bargaining. There are no shift managers subject to collective bargaining agreements.⁷⁰
- Hours. Shift managers are told when they are hired they are salaried and they will work typically 10 hours a day.⁷¹ The schedule is generally assigned by either the airport or district manager.⁷²
- Tasks. Shift managers are responsible for the same "*basic daily duties*" as set forth in the materials that each Shift Manager gets.⁷³ "I'm sure everyone [shift manager] would have to count the amount of cars they need for the day."⁷⁴ They also would check the daily manifests and equipment.⁷⁵

⁶⁶ Deposition Transcript of Elaine Vitello - Exhibit 3 at 67, 102-103. Shift Manager Job Description Produced by Defendants - Exhibit 16 (see upper left hand corner of first page)

⁶⁷ Deposition Transcript of Elaine Vitello - Exhibit 3 at 120-121, 122, 122-123

⁶⁸ Deposition Transcript of Elaine Vitello - Exhibit 3 at 128-129; Shift Manager Job Description Produced by Defendants - Exhibit 16 (see upper right hand corner of first page)

⁶⁹ Deposition Transcript of Elaine Vitello - Exhibit 3 at 111-114

⁷⁰ Deposition Transcript of Elaine Vitello - Exhibit 3 at 123

⁷¹ Deposition Transcript of Elaine Vitello - Exhibit 3 at 128-129; Deposition Transcript of Muhammed Basher- Exhibit 8 at 16; Deposition of Kenneth E. Mitchell - Exhibit 11 at pg. 19

⁷² Deposition Transcript of Elaine Vitello - Exhibit 3 at 148-149

⁷³ Deposition Transcript of Elaine Vitello - Exhibit 3 at 136-137

⁷⁴ Deposition Transcript of Elaine Vitello - Exhibit 3 at 137, 138 (also noting how each has to pull daily manifests)

⁷⁵ Deposition Transcript of Elaine Vitello - Exhibit 3 at 138

- Hiring & Firing. Shift managers don't have the inherent authority to hire or fire employees.⁷⁶
- Exempt v. Nonexempt. "All managers are in an exempt status" says Corporate Representative Vitello.⁷⁷ This is regardless of their time with the company, geographic location, or volume of cars rented.⁷⁸ This is also confirmed by their job description produced by the Defendants.⁷⁹
- Limited Discretion. Shift managers couldn't discount cars for customers complaining more than \$100 without the approval of a superior.⁸⁰ They also had to seek guidance and permission for written warnings to other employees.⁸¹
- Mandatory Training. When a shift manager is hired, you attend a multi-day shift manager training seminar.⁸² This is for all shift managers.⁸³ The materials for these seminars are handed out to all shift managers.⁸⁴
- Job Descriptions and Advertising. When the company advertises for shift managers the description is the same for all shift managers. Corporate Representative said Vitello.⁸⁵ This can also be confirmed by running a quick search on the Defendants' career webpage where a 5 minute search revealed shift manager positions sought with indistinguishable job descriptions in the following airport locations: Honolulu, Savannah, Milwaukee, Detroit, Raleigh, Los Angeles, Baltimore, Regan, Dulles, San Jose, and Boise.⁸⁶

In light of the above evidence, deposition testimony, affidavits, and declarations, the Plaintiffs have met the light burden that the individuals are similarly situated in their job requirements and pay provisions.⁸⁷ In other words, the Plaintiffs have made more than

⁷⁶ Deposition Transcript of Elaine Vitello - Exhibit 3 at 149-150 (further noting that the Defendant conduct progressive discipline); Deposition Transcript of Matt Ravenell - Exhibit 7 at 107; Deposition Transcript of Bernar Espanol - Exhibit 6, pg. 126

⁷⁷ Deposition Transcript of Elaine Vitello - Exhibit 3 at 154

⁷⁸ Deposition Transcript of Elaine Vitello - Exhibit 3 at 154

⁷⁹ Shift Manager Job Description Produced by Defendants - Exhibit 16 (see upper right hand corner of first page)

⁸⁰ Deposition Transcript of Muhammed Basher- Exhibit 8 at 67. See also: Deposition Transcript of Bernar Espanol - Exhibit 6, pg. 161 "We did have a credit to give up to 100. ... anything over a hundred you need to let your airport manager know..."

⁸¹ Deposition of Kenneth E. Mitchell - Exhibit 11 at pg. 98

⁸² Deposition Transcript of Adeel Tahir - Exhibit 9, pg. 148

⁸³ Id.

⁸⁴ Deposition Transcript of Adeel Tahir - Exhibit 9, pg. 149

⁸⁵ Deposition Transcript of Elaine Vitello - Exhibit 3 at 93, 95, 96.

⁸⁶ Indistinguishable job descriptions for a shift manger print outs in the following airport locations: Honolulu, Savannah, Milwaukee, Detroit, Raleigh, Los Angeles, Baltimore, Regan, Dulles, San Jose, and Boise - Exhibit 13
See also Shift Manager Job Description Produced by Defendants - Exhibit 16

⁸⁷ See Harrison v. Enterprise Rent-A-Car Co., 1998 U.S. Dist. LEXIS 13131 *5 (M.D. Fla. July 1, 1998) and Tucker v. Labor Leasing, Inc., 872 F. Supp. 941, 947 (M.D. Fla. 1994). See also, Goldman, 2003 U.S. Dist. Lexis 7611 *27

the “*modest factual showing*” that the similarly situated requirement is satisfied.⁸⁸ As the standard in Hipp set forth: at the notice stage, the district court makes a decision, “usually based only on the pleadings and any affidavits which have been submitted – whether notice of the action should be given to potential class members.”⁸⁹

5. Interest in this action is obvious given the Ravenell case.

While other courts hold differently,⁹⁰ this Court has in the past inquired as to whether there is any interest or reasonable basis to believe that there are others out there who desire to opt-in this litigation.⁹¹

The logic of this was articulated in Tyler v. Payless Shoe Source, Inc., where Judge Fuller noted: “The court recognizes that the FLSA has a broad remedial purpose, but, as the Brooks⁹² court noted, ‘courts, as well as practicing attorneys, have a responsibility to avoid the “stirring up” of litigation through unwarranted solicitation.’”⁹³ Evidence of interest can be based upon affidavits, consents to join the lawsuit, or expert evidence on the existence of other similarly situated employees.⁹⁴

(E.D. Pa. April 16, 2003) (“During this first-tier inquiry, we ask only whether the plaintiff and the proposed representative class members allegedly suffered from the same scheme.”)

⁸⁸ See Dybach v. Florida Dep’t of Corrections, 942 F.2d 1562, 1567-68 (11th Cir. 1991).

⁸⁹ Hipp 252 F.3d 1208

⁹⁰ See Amendola v. Bristol-Myers Squibb Co., 558 F. Supp. 2d 459, 466 (S.D.N.Y. 2008) stating: “FLSA plaintiffs are not required to show that putative members of the collective action are interested in the lawsuit in order to obtain authorization for notice of the collective action to be sent to potential plaintiffs. See Neary v. Metro. Prop. & Cas. Ins. Co., 517 F. Supp. 2d 606, 622-23 & n.7 (D. Conn. 2007). There are many reasons why current employees of BMS might hesitate to join a lawsuit against their employer. The cases on which BMS relies in support of its argument are neither controlling nor persuasive, particularly in light of the “broad remedial purpose of the [FLSA], which should be given a liberal construction.” Braunstein v. E. Photographic Labs., Inc., 600 F.2d 335, 336 (2d Cir. 1978) (per curiam). See also Neary v. Metro. Prop. & Cas. Ins. Co., 517 F. Supp. 2d 606, 623 (D. Conn. 2007) concluding that the cited language in Dybach v. State of Florida Department of Corrections, 942 F.2d 1562 (11th Cir. 1991) that discusses interest by Plaintiffs is dicta

⁹¹ David v. Associated Out-Door Clubs, Inc., 2010 U.S. Dist. LEXIS 50507 (M.D. Fla. Apr. 27, 2010). See also Rodgers v. CVS Pharmacy, Inc., 2006 U.S. Dist. LEXIS 23272, 2006 WL 752831 at *3 (M.D. Fla. 2006)

⁹² Brooks v. BellSouth Telecomm., Inc., 164 F.R.D. 561, 566 (N.D. Ala. 1995).

⁹³ Citing Holt, 333 F. Supp. 2d at 1275

⁹⁴ See Davis v. Charoen Pokphan (USA), Inc., 303 F. Supp. 2d 1272, 1277 (M.D. Ala. 2004)

Here the fear of stirring up litigation can be easily dismissed because the Defendants are already dealing with similar litigation and have provided notice to shift managers.

Further, there is no doubt that there is interest in the litigation otherwise **200** plus former or current shift managers would not have asked the Eastern District of New York to join the Ravenell lawsuit.⁹⁵ Likewise, if there was no interest in this case, Consents to Opt-In would not have been filed by **Blanca Hernandez, Freddy Yaport, Jacqie Smith, Mike Thebner, Kristen Belanger and Herlande Saintivil.**⁹⁶ Similarly, it is important to note plaintiff's counsel has not advertised this lawsuit to potential class members in any way, and his requests in discovery for information about and the names and address of putative class members have been denied by defense counsel.

Given the holding in the Middle District's 2006 decision Robbins-Pagel v. WM. F. Puckett, Inc.,⁹⁷ that three affidavits (one from the plaintiff and two from former employees of defendant alleging claims for unpaid overtime) was enough evidence to establish other similarly situated individuals may be interested in joining the action, the six opt-in's in this lawsuit, along with the 200 plus individuals demonstrating interest in the Ravenell case confirms there is interest in this case.

6. The class definition comports with the Defendants' arguments of who is most similar.

The Plaintiffs believe that work performed by shift manager regardless of their location is similar. However, work performed by shift managers at medium to large airports is either identical or nearly identical. Accordingly, the Plaintiffs seek to

⁹⁵ The undersigned last counted 208 plaintiffs in the Ravenell case. See Ravenell Docket Report

⁹⁶ Consents to Opt-In Filed by Blanca Hernandez, Freddy Yaport, Jacqie Smith, Mike Thebner, Kristen Belanger, Herlande Saintivil, and Bernar Espanol – Exhibit 17.

⁹⁷ 2006 U.S. Dist. LEXIS 85253 **6-7 (M.D. Fla. November 22, 2006).

conditionally certify a class defined as (see *Exhibit 18 to this Motion and incorporated Memo for complete proposed Notice*):

All persons who are or were formerly employed by Defendants in the United States at an Avis or Budget airport location listed in Exhibit A at any time since April 20, 2007 to the date of trial in this case who were employed as a "Shift Manager" and who were not paid overtime for work performed over 40 hours in a one week period and have not filed a claim for wages in the Ravenell et. al. v. Avis Budget Car Rental, LLC and Avis Rent A Car System, LLC Docket No. 08-CV-2113(SLT)(ALC) that would be completely duplicative.

Exhibit A to the Proposed Notice to Class Members

(Exhibit A is a list of 82 airports with an average volume of more than 1 million or more passengers. Each Airport contains a Budget or Avis office either on the airport property or nearby)

The Court can find Exhibit A in Exhibit 20 to this Memorandum

The Defendants will undoubtedly argue that even among airports, shift managers duties vary and thus are not similarly situated, but their admissions and arguments in the Ravenell case, draw a dividing line supporting the fact shift managers at larger airport locations have the most similar duties. As the Defendants argued in the Motion Opposing the Ravenell Class Certification:

- "To the extent [they]⁹⁸ appear to be similarly-situated ... is not all that surprising given that they all worked primarily at very similar airport locations..."⁹⁹
- Avis rental locations "range from large and small U.S. Airport rental operations ... to off-airport location local neighborhood market stores located in cities or suburban markets."¹⁰⁰
- "generally, at *an airport location*, the most senior manager at the location is an airport manager, and there could be one to three airport managers"

⁹⁸ Discussing individuals in the Ravenell case

⁹⁹ Defendants November 11, 2009 Memorandum of Law in Opposition to Plaintiffs' Motion for Conditional Certification in the Ravenell case - Exhibit 4 pg. 7-8 footnote

¹⁰⁰ Defendants November 11, 2009 Memorandum of Law in Opposition to Plaintiffs' Motion for Conditional Certification in the Ravenell case - Exhibit 4 pg. 3

compared to “at *off-airport* locations in particular, shift managers are often the only managers onsite at these locations.”¹⁰¹

- The game plans shift managers develop vary depending upon: “whether they work at an off-airport location or a small, medium or large airport location....”¹⁰²

The Plaintiffs contend that those who work at any airport location (as opposed to those who work at a suburban/city location) are similarly situated; but among those that work at airports with a volume of about a million or more passengers (as the proposed class definition incorporates through Exhibit A) are essentially indistinguishable. And the more volume simply means the more of the same type of work.¹⁰³

This class definition is more specific and narrower than the one approved by the Ravenell case. There is more factual support on point and even the Defendants acknowledge the differentiating lines the Plaintiffs draw.

7. An Order Prohibiting Retaliation or Coercion is Necessary for Justice and Peace of Mind

Despite laws prohibiting retaliation and corporations that adhere to the spirit of those laws, people still fear being fired because they stepped forward and identified themselves as having an issue with the company. As current Airport Manager Adeel Tahir testified when asked if he felt pressure giving a declaration to the Avis lawyers that interviewed him: “to some extent, yes, I did feel intimidated...”

¹⁰¹ Defendants November 11, 2009 Memorandum of Law in Opposition to Plaintiffs’ Motion for Conditional Certification in the Ravenell case - Exhibit 4 pg. 4 citing to Deposition Transcript of Elaine Vitello - Exhibit 3 at 33.

¹⁰² Defendants Sur-Reply in Response to Ravenell’s Reply Brief - Exhibit 5, pg. 3

¹⁰³ Deposition Transcript of Bernar Espanol – Exhibit 6, pg. 72, (Question: And how did that change things for you ... as a shift manager when you’re in a larger airport where there’s more volume; and what the difference in your job if there’s more volume? Answer: Cleaning more cars, running more cars, working longer hours, having no breaks because we’re backed up on productivity. Just a lot more volume in the car production and in customers coming in.)

Bernar Espanol also had employees express the same concerns to him. “I can also tell you that from my experiences in talking with current employees there is a strong fear of retaliation by the company. I too had the fear when working for the company.”¹⁰⁴

The Plaintiffs are not accusing the Defendants of any retaliation, but to ensure justice can have its chance and allow individuals to step forward, the Plaintiffs request an order prohibiting the Defendants from retaliating against anyone receiving Notice of this action and who decide to opt-in. The Plaintiffs request this order be a simple one page order that may be included in the Notice that will be mailed out.

III. Conclusion and Requested Relief

For the reasons more fully discussed above, the Plaintiffs ask this Court to:

(a) recognize this matter as a collective action under §216(b) of the Fair Labor Standards Act;

(b) to approve the attached proposed Notice and Consent Form to be sent to all potential collective action members;

(c) to order Defendants to produce the names and address of potential collective action members,

(d) issue an order prohibiting the Defendant from retaliating against any current or former employee who consents to their inclusion in this action;

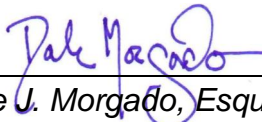
(e) order counsel for the parties confer telephonically or in person within 15 days of the Court’s order on a revised case management schedule to allow the parties to seek discovery on a class wide basis¹⁰⁵ and consider any other issues that may need to be addressed given the certification of this action as a collective action; and

¹⁰⁴ Declaration and Cosent by Bernanr Espanol – Exhibit 15 at ¶6

¹⁰⁵ To date, the Plaintiffs have asked twice and in two different forms for the names of putative class counsel but the Defendants have objected to have not provided such information. See also, Hipp 252 F.3d 1214, 1218 holding that

(e) appoint Bernar Espanol as the Class Representative to facilitate the negotiations at the parties scheduled mediation(s) before Mediator, James Brown, and to be able to enter into a proposed settlement for all overtime claims that are the subject of this lawsuit for those who opt-in (with any class settlement subject to a Court approval).¹⁰⁶

Respectfully filed this 23rd day of May, 2011



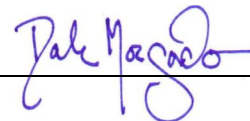
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on May 23, 2011, I electronically filed the foregoing with the clerk of the Court by using the *CM/ECF* system which will send a notice of an electronic filing to all parties.

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after the initial certification of a class, a collective action should “proceed as a representative action through discovery.”

¹⁰⁶ The Court will be asked to approve any settlement under *Lynn’s Food Stores v. United States*, 679 F.2d 1350 (11th Cir. 1982) and attorney’s fees. See *Toreros v. Tucson Elc. Power Co.*, 8F.3d 1370, 1376 (9th Cir. 1993) (attorneys’ fees are recoverable as a proportion of the class recovery under FLSA cases).