UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

BRIAN FERRY, individually and on behalf
of others similarly situated,

Plaintiff,

v. C.A. No. 3:06-cv-00379

SGS CONTROL SERVICES, INC. and
SGS NORTH AMERICA, INC.,

Defendants.

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BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO CONDITIONALLY CERTIFY FAIR LABOR STANDARDS ACT OPT-IN CLASS AND TO ISSUE NOTICE

Plaintiff, through his undersigned attorneys, files this brief in support of his motion to conditionally certify this action as a Fair Labor Standards Act (FLSA) collective action and to authorize notice to be issued to all similarly-situated employees of Defendants defined as:

> All present or former Oil, Gas, and Chemical Inspectors employed by SGS Control Services, Inc. or SGS North America, Inc. at any time during the period _____[date three years prior to date of notice]___, 2003 and ____[date of notice] ____, 2006.
>
> Oil, Gas, and Chemical Inspectors who signed "Agreements" with SGS to settle overtime claims may join this case without penalty and without having to pay back any money they received.[1]

[1] This second clause is added pursuant to Plaintiff's Emergency Motion for Protective Order filed September 2, 2006, to correct any misunderstanding caused by SGS' improper

I. STATEMENT OF THE CASE AND MOTION

This is a Fair Labor Standards Act (FLSA) case for unpaid overtime. Plaintiff, Brian Ferry, alleges that Defendants (hereafter referred to as "SGS") failed to pay its Oil, Gas and Chemical (OGC) inspectors overtime in compliance with the FLSA. Specifically, Plaintiff challenges three SGS policies applicable to all OGC inspectors and that Plaintiff contends resulted in overtime violations for all inspectors: (1) SGS' policy of using the fluctuating work week method of calculating overtime when it was not entitled to use that method; (2) SGS' policy of paying overtime to inspectors long after the pay period in which it was earned; and (3) SGS' policy of prohibiting inspectors from claiming more than 16 hours of overtime per week when they, in fact, worked more than 16 hours. Whether the first two policies violate the FLSA turns largely on legal questions with respect to the interpretation of the relevant FLSA regulations.

The instant motion seeks conditional certification of this action as a collective action and Court approval of notice to be issued to similarly situated OCG inspectors. In addition, as explained in Plaintiff's Emergeny Motion for Protective Order, Sanctions, and Corrective Notice, Docket No. 28, Plaintiff urges that the notice inform inspectors that the Settlement Agreement recently offered by SGS is null and void and in no way bars inspectors from participating in this action.

II. STATEMENT OF FACTS

Defendant SGS Control Services, Inc. provided oil, gas and petroleum inspection services to the shipping industry throughout the United States and the world. *See SGS' 2005 Annual Report*

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contacts with potential class members. The proposed class is not intended to include inspectors who have already opted into the FLSA suit in *Ayers v. SGC Control Services,* No. 03-civ-9078 (RMB)(RLB) (S.D.N.Y.). *See Section V, infra p. 12-14.*

at 1, 21, Ex. A . Its inspection operations have now been merged into SGS North America, Inc. *Answer* ¶¶*13, Ex. B.* The two defendants are hereafter collectively referred to as "SGS".

Plaintiffs Brian Ferry and opt-in Plaintiffs Houston Ervin, Brian Ferry, Russell Freese, Christopher Gassaway, Kevin Mitchell, Warren Moore, and Rene Rendon are or were oil, gas and petroleum inspectors ("OGC Inspectors") employed by SGS. *Declarations of Ervin, Ferry, Freese, Gassaway, Mitchell, Moore, and Rendon.* Plaintiff Ferry worked for SGS in its Freeport, Texas office from September 2002 to the present. *Declaration of B. Ferry,* ¶¶1-3; opt-in Plaintiff Ervin worked for SGS in its Bridgeport, New Jersey, Baltimore, Maryland, Norfolk, Virginia, St. Croix, U.S. Virgin Islands offices from October 1997 to May 2004, *Declaration of Ervin,* ¶¶1-3; opt-in Plaintiff Freese worked for SGS in its Baytown and Pasadena, Texas offices from March 2004 to the present, *Declaration of Freese,* ¶¶1-3*;* Opt-in Plaintiff Gassaway worked for SGS in its Bayport, Texas office from August 2004 to May 2006, *Declaration of Gassaway,* ¶¶1-3; opt-in Plaintiff Mitchell worked for SGS in its Deerpark, Baytown, Channelview, and Pasadena, Texas offices from August 1997 to the present, *Declaration of Mitchell,* ¶¶1-3*;* opt-in Plaintiff Moore worked for SGS in its Deerpark and Jacinto Port, Texas offices from September 1986 to the present, *Declaration of Moore,* ¶¶1-3*;* opt-in Plaintiff Rendon worked for SGS in its Pasadena, Texas office from August 2004 to May 2006, *Declaration of Rendon,* ¶¶1-3*;* (Plaintiff Ferry and the opt-in Plaintiffs are hereafter referred to collectively as "Plaintiffs").

Throughout the period covered by this lawsuit – *i.e.*, June 9, 2003 through the present – SGS employed more than 600 OGC Inspectors at various locations throughout the United States. *See,*

Defendants' List of OGC Inspectors provided in the *Ayers v. SGS* case, 03 Civ. 9078 (S.D.N.Y. 2003, Judge Richard M. Berman), *Exhibit C.*

The duties of SGS's OGC Inspectors, including Plaintiffs, generally involved inspecting the transfer of products in the course of commerce, usually to and from ships and shore tanks. They worked at shipyards and on ships inspecting products, and documenting the transfer of product between ships and shore tanks. OGC Inspectors were required to track the progress of ships, travel to shipyards, physically measure shore and ship tanks, take product samples and deliver them to the SGS' laboratories, maintain equipment, and write and submit detailed reports regarding the transfer of product. *See 30(b)(6) Deposition of Donald Milne in Ayers v. SGS, 03 Civ. 9078 (S.D.N.Y 2003)(Judge Richard M. Berman) at 11-13 ("Milne Depo."), Ex. D; Plaintiffs Declarations* ¶¶3 & 4.

SGS' OGC Inspectors, including Plaintiffs, routinely work in excess of 40 hours per week *Plaintiffs' Declarations* ¶¶*7-8; SGS Control Services Inc. Employee Handbook ("OGC Handbook") at 9, Ex. E*; *30(b)(6) Deposition of Gia Plewa in Ayers v. SGS, 03 Civ. 9078 (S.D.N.Y 2003)(Judge Richard M. Berman) at 93:8-22 ("Plewa Depo."), Ex. F.* SGS pays its inspectors overtime using the fluctuating work week ("FWW") method of payment, sometimes referred to as "Chinese Overtime". *Id.; OGC Handbook at 9, Ex. E; Plewa Depo. at 41:12-24, Ex. F; January 29, 1991, Bloom Memo Re "Chinese Overtime" ("Bloom Memo"), Ex. G.* Pursuant to this method, SGS pays OGC Inspectors a base salary per week which is divided by the total number of hours an inspector works in a week to calculate the hourly rate of pay for that week. OGC Inspectors are then paid an overtime premium equal to 50% of that calculated hourly rate for each hour in excess of forty that they work

during the work week. *OGC Handbook at 10, Ex. E*. As a result of this method of calculation, an inspector's hourly rate and overtime premium varies from week to week depending on the number of hours the inspector works; the more hours an inspector works in a week, the lower his or her calculated hourly rate is and, consequently, the lower his hourly overtime premium. Moreover, because of the high number of hours inspectors work each week and the low level of their salaries, OGC Inspectors frequently do not earn the minimum wage when their salaries are divided by the weekly hours of work. *See, e.g.*, *Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 6A, at 77-82), *Ex. H*. SGS knew that inspectors' wages would fall below minimum wage, *OGC Handbook at 10, Ex. E,* and, as a matter of policy, authorized inspectors to be paid an additional amount of "bump-up" pay to bring their calculated hourly rate up to the minimum wage level whenever it fell below that level. *OGC Handbook at 10*, *Ex. E*.

In addition to "bump up" pay, SGS paid inspectors various other forms of compensation in addition to their base salary. As a matter of policy, SGS paid inspectors "sea pay" when they were required to work offshore on a vessel. *Milne Depo. at 45:24-46:3, Ex. D*. SGS also paid inspectors a fixed additional amount called "day-off pay" when they had to work on their days off – something that occurred frequently. *Plewa Depo at 100:16-101:8, Ex. F; Milne Depo at 50:20-51:9, Ex. D.* As a matter of policy, applicable to all inspectors, SGS did not include "day off pay" when calculating the overtime premium to be paid to inspectors. *OGC Handbook at 10*, *Ex. E*; *Steve Bloom 11/9/93 Letter to Epstein, Becker & Green ("Bloom Letter to EBG"), Ex. I.*

SGS also did not pay OGC Inspectors for all the hours they worked. SGS had a policy that

prohibited OGC Inspectors from reporting more than 16 hours of work in a day, regardless of the number of hours they worked. *See Ferry Declaration* ¶9; *Freese Declaration* ¶¶9-11; *Gassaway Declaration* ¶¶9-11; *Mitchell Declaration* ¶¶9-11; *Moore Declaration* ¶¶9-11; *Rendon Declaration* ¶¶9-10; see also *March 8, 1991 Dennis Grew Memo to Regional Heads re Operation Issues, Work Hours section*, *Ex. J*; *April 16, 2003 California Premium Pay Memo, Ex. K*; *Bloom Memo, Ex. G*. Because they could not report those hours, OGC Inspectors were not paid for them. *Freese Declaration* ¶¶9-11; *Gassaway Declaration* ¶¶9-11; *Mitchell Declaration* ¶¶9-11; *Moore Declaration* ¶¶9-11.

Finally, as a matter of policy SGS did not pay inspectors their overtime premium until one or two pay periods after the pay period in which they received their straight-time pay. *OGC Handbook* at 9, *Ex. E; Plewa Depo at 37:25-41:1, Ex. 6*. This policy was changed in July of 2006. *HR Talk, July 2006 "Upcoming Change from Semi-Monthly to Bi-Weekly Payroll Processing for Non-Exempt Staff," Ex. L.*

Plaintiffs allege that these policies of SGS, which were applicable to all inspectors, violated the Fair Labor Standards Act in three ways. First, SGS' policy decision to set salaries at a level that was insufficient to ensure that all inspectors earned the minimum wage, its policy of paying varying amounts each week due to additions for bump-up pay, sea-pay and day-off pay, its policy to not include day-off pay in the calculation of the over time premium, and/or its policy to not pay OGC Inspectors for hours over 16 in a day preclude SGS from using the fluctuating workweek method of overtime payment. As a result of these policies, applicable to all inspectors, Plaintiff contends that

he and other inspectors are entitled to back overtime calculated according to the usual "fixed weekly salary" method, which treats the fixed salary as payment for the first 40 hours and requires payment of "time and a half" for all hours over forty. Second, SGS' policy prohibiting OGC Inspectors from reporting more than 16 hours of work in a day resulted in their not being paid for those hours, in violation of the FLSA. Third, SGS' policy, in effect from prior to 2003 until July 2006, of paying overtime weeks after the overtime was earned violated the FLSA and entitles Plaintiff and other inspectors to liquidated damages for the late payments of overtime.

III. LEGAL STANDARDS GOVERNING FLSA COLLECTIVE ACTIONS

Section 16(b) of the FLSA provides that a person may maintain an action on "behalf of himself . . . 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 the action is brought." 29 U.S.C. 216(b). The usual Rule 23 requirements for class certification do not apply to FLSA collective actions. *Guzman v. Varco Int'l. Inc.,* 2002 WL 32639237 at *2 (S.D.Tex. 2002); *Crain v. Hemerich and Payne Int'l Drilling Co.,* 1992 WL 91946 *2 (E.D. La. 1992). Rather, to proceed as a collective action, the Plaintiff need only demonstrate that there are other employees who are "similarly situated." *See Mooney v. Aramco Services Co.,* 54 F.3d 1207, 1212 (5th Cir. 1995). Any such employee must consent in writing to take part in the suit. This latter requirement means that a collective action follows an "opt-in" rather than an "opt-out" procedure. *Id.* When employees are shown to be similarly situated, the district court has the discretion to implement the collective action procedure by authorizing notice to be issued to potential

plaintiffs informing them of their right to opt-into the action. *See Hoffmann-La Roche Inc. v. Sperling,* 493 U.S. 165, 172 (1989). Notice should be "timely, accurate, and informative." *Id.*

Although the Fifth Circuit has not endorsed a particular method for determining whether employees are sufficiently "similarly situated" to proceed with an FLSA collective action, *Mooney*, 54 F.3d at 1216, lower courts in the Fifth Circuit have unanimously adopted a "two-step" approach to certifying FLSA collective actions.[2] In the first step the district court conditionally certifies the action as a collective action for purposes of issuing notice to the allegedly similarly situated employees. This conditional certification must be made early in the litigation because, unlike Rule 23 class actions, the statute of limitations is not tolled for putative class members simply by filing a collective action complaint. Rather limitations continues to run against each putative class member until he or she receives notice and affirmatively opts-into the action. *See Hoffman v. Sbarro, Inc.,* 982 F.Supp. 249, 260 (S.D.N.Y. 1997). Because of this, the decision to conditionally certify an action for purposes of issuing notice is typically made early in the case based only on "the pleadings and any affidavits which have been submitted." *Mooney,* 54 F.3d at 1213-1214; *Guzman,* 2002 WL 32639237 at *3. A "fairly lenient standard" is used to make the similarly situated determination and

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[2] E.g. *Dudley v. Texas Waste Systems, Inc.*, 2005 WL 1140605, at *1 (W.D.Tex. May 16, 2005); *Clarke v. Convergy's Customer Management Group, Inc.,* 370 F.Supp.2d 504, 509 (S.D.Tex.2005); *Aguilar v. Complete Landsculpture, Inc.,* 2004 WL 2293842 (N.D. Tex. 2004); *Baroni v. Bellsouth Telecommunications, Inc.,* 2004 WL 1687434, at *10 (E.D.La. July 27, 2004); *Basco v. Wal-Mart Stores, Inc.,* 2004 WL 1497709, at *4 (E.D.La. July 2, 2004); *Donohue v. Francis Serv., Inc.,*2004 WL 1161366, at *1 (E.D.La. May 24, 2004); *Jackson v. City of San Antonio,* 220 F.R.D. 55, 62 (W.D.Tex.2003); *Villatoro v. Kim Son Restaurant, L.P.,* 286 F.Supp.2d 807, 810 (S.D.Tex.2003); *Guzman,* 2002 WL 32639237.

it "typically" results in conditional certification and issuance of notice to the putative class members. *Mooney,* 54 F.3d at 1214. "At the notice stage, courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination." *Id.* at 1214 n. 8. The action then proceeds as a representative action throughout discovery. *See Mooney,* 54 F.3d at 1214.

The lenient standard used in the first-step is appropriate because the conditional certification decision is only preliminary. *Masson v. Ecolab,* 2005 WL 2000133, *13-14 (S.D.N.Y. 2005). A second determination, which is typically precipitated by a motion for "decertification" filed by the defendant, is made after discovery is largely complete and the matter is ready for trial. *Mooney,* 54 F.3d at 1214. At this stage, the court has much more information on which to base its decision, and makes a factual determination of the similarly situated question. *Id. See, e.g. Thiessen v. General Electric Capital Corp.,* 267 F.3d 1095 (10th Cir. 2001) (discussing the second stage decertification standard while overturning the district court's decertification of an opt-in class). 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. *Mooney,* 54 F.3d at 1214. The class representatives--*i.e.*, the original plaintiffs--proceed to trial on their individual claims. *Id.* at 1214.

As noted above, the reason for this two-step process with its relatively liberal standard for issuing the notice of the right to opt-in (followed by more rigorous analysis after discovery) arises from the fact that the statute of limitations is not tolled for putative members of an FLSA class until

they affirmatively opt into the action. **Thus it is critical that notice of the right to opt-in issue promptly after the filing of the case.** *See Hoffman v. Sbarro, Inc.,* 982 F.supp. 249, 260 (S.D.N.Y. 1998).

The "similarly situated" determination does not require the plaintiffs and the putative class members to show that they are identically situated. *Crain v. Helmerich & Payne Int'l Dirlling Co.,* 1992 WL 91946 *2 (E.D.La. April 16, 1992) (Feldman, J.). Rather, FLSA collective action treatment is appropriate when there is a "demonstrated similarity among the individual situations . . . some factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged [policy or practice]." *Crain v. Helmerich & Payne Int'l Dirlling Co.,* 1992 WL 91946 *2 (E.D.La. April 16, 1992). Generally this means that the potential class members should be similarly situated "with respect to job requirements and with regard to pay provisions."*Aguilar v. Complete Landsculpture, Inc.,* 2004 WL 2293842 at *2 (N.D. Tex. 2004). Collective action certification is not precluded by the fact that the putative plaintiffs performed various jobs in different departments and locations. *Id.* at * 4 (N.D. Tex. 2004) (including foremen and laborers in same collective action); *Heagney v. European American Bank,* 122 F.R.D. 125, 127 (E.D.N.Y.1988); *Burt v. Manville Sales Corp.,* 116 F.R.D. 276, 277 (D. Colo. 1987). As long as the alleged FLSA violation occurs as a result of some generally applicable rule, policy, or practice, rather than as a result of circumstances that are purely personal to the plaintiff, collective action treatment is appropriate. *Aguilar,* 2004 WL 2293842 at * 4; *Kenyata-Bean v. Housing Authority of New Orleans,* 2005 WL 3543793 *7 (E.D. La. 2005).

IV. THIS CASE MEETS THE STANDARD FOR CONDITIONAL NOTICE.

As set forth in their declarations, Plaintiffs are among the more than 600 OGC Inspectors employed by Defendants over the past three years. All of these inspectors were assigned the same general job duties; all routinely worked in excess of 40 hours per week; and, most importantly, all were subject to SGS' challenged pay practices – *i.e.,* all OGC Inspectors were paid on a fluctuating work week method, all were subject to SGS' policy of adding "bump-up pay," "sea pay" and "day-off pay," to their base salaries, and all were subject to SGS' policy of not counting "day-off pay" when calculating overtime premiums. Finally all inspectors employed prior to July 2006 were subject to SGS's policy of not paying overtime promptly after it was earned.

Because all of the challenged policies are common to the class, the legal questions presented by this action are also common to the class members. These questions include: (1) whether the failure to pay salaries sufficiently high to ensure payment of minimum wage without "bump-up" pay precludes SGS from relying upon the fluctuating work week method of calculating overtime pay; (2) whether the periodic payment of salary supplements such as "bump-up pay," "sea pay," and "day-off pay" precludes SGS from relying upon the fluctuating work week method of calculating overtime pay; (3) whether the failure to include "day-off pay" in the calculation of the overtime premium precludes use of the fluctuating work week overtime method; and (4) whether the payment of the overtime premium in pay periods subsequent to the pay period in which the base pay is paid violates the FLSA.

In these circumstances, where plaintiffs have come forward with pleadings and affidavits and

other evidence to show that they and the putative class members were together the victims of a single policy or practice of the Defendants, and the legal issues presented by those common policies are also common to the members of the class, conditional certification of the class is appropriate. *Mooney,* 54 F.3d at 1214; *Aguilar,* 2004 WL 2293842 at *2. Indeed, Plaintiff in this case has offered far more evidence of the uniform policies that he is challenging than is typical in a motion for conditional certification of an FLSA collective action. *See, e.g., Neagley v. Atacosta Co. EMS,* 2005 WL 354085 (W.D. Tex. 2005) (certifying collective action on basis of pleadings alone without any affidavits); *Guzman,* 2002 WL 32639237 at *3 (certifying collective action based on affidavit of plaintiff and two opt-ins); *Schaffner v. Cash Register Sales and Service,* 2006 WL 1007542 (S.D. Tex. 2006) (two opt-ins in addition to plaintiff is "persuasive evidence" that putative class exists).

In sum, Plaintiffs have made more than the requisite "substantial allegations," *Mooney,* 54 F.3d at 1214 n. 8, that the FLSA violations at issue here are the result of regular policies and practices of SGS generally applicable to the class members. They are clearly not the result of specific circumstances personal to the Plaintiff. *Aguilar,* 2004 WL 2293842 at * 4; *Kenyata-Bean v. Housing Authority of New Orleans,* 2005 WL 3543793 *7 (E.D. La. 2005). Conditional certification is, therefore, appropriate.

V. THE EXISTENCE OF A RELATED CASE DOES NOT PRECLUDE CONDITIONAL CERTIFICATION

Ayers v. SGS Control Services, Inc, et al., No. 03Civ.9078 (RMB)(RLE) (S.D.N.Y. filed 2003), is a related FLSA case challenging the same pay practices of SGS that are challenged in this case. On October 13, 2004 the *Ayers* case was conditionally certified as an FLSA collective action

on behalf of "all inspector employees who have worked for defendants at any time within the past three (3) years for any work they performed in excess of 40 hours per week." SGS provided the *Ayers* Plaintiffs with a list of the inspectors who were to receive notice on December 23, 2004. Thus the *Ayers* action notice was provided to inspectors employed between January 19, 2002 and December 23, 2004. Depending on when the Court approves the issuance of notice in this case and the length of the opt-in period, the proposed class in this case will cover the period fall 2003 through late 2006. Thus, while there is some overlap between the potential class members in this case and in *Ayers,* none of the inspectors hired subsequent to December 23, 2004 has ever received notification or had an opportunity to opt-into an FLSA action. Those workers are clearly entitled to notice.

Inspectors hired prior to December 23, 2004 should also receive notice. Some of those inspectors simply may not have received the notice issued in the *Ayers* case. *See, e.g., Ferry Declaration* at 20 (stating that he did not receive the *Ayers* notice). Others who did receive notice may not have joined *Ayers* because concerns about retaliation, but be interested in joining this case now that their circumstances have changed.[3] *See, e.g., Gassaway Declaration,* ¶¶ 21-22 ("In several conversations regarding the Ayers case, my supervisor, Frank Boos, told me that 'Texas is a right to hire, right to fire state, so you should think about signing a consent to sue in that case.' Based on

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[3] Fear of retaliation by SGS was not unfounded. In another case in the Federal Court *Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005), a jury found that SGS violated the FLSA by retaliating against an OGC Inspector for complaining about his overtime pay. *Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 7, at 104), *Ex. M.*

those remarks and others in the office, I understood that if I joined the suit, my job could be in jeopardy. . . Now that I have left SGS, I believe I am safe from retaliation); *Evin Declaration* ¶ 19 (didn't join *Ayers* because of concerns about joining lawsuit when he had just started a new job).

Whatever the reason that inspectors may not have joined the *Ayers* case, their claims remain live claims and the public interest, as well as the Court's interest in the efficient adjudication of controversy's counsel's in favor of affording them the opportunity to join this action rather than leaving them to file multiple individual actions. *Braunstein v. Eastern Photographic Laboratories, Inc.,* 600 F.2d 335, 336 (2nd Cir. 1978) (court-authorized notice in an appropriate case "comports with the broad remedial purpose of the [FLSA], . . . as well as with the interests of the courts in avoiding multiplicity of suits."). And, as noted above, those inspectors that did not receive notice of a pending FLSA action – whether because they were hired after December 2004 or because they never actually received the *Ayers* notice – are clearly entitled to notice of this action.

VI. CONTENTS OF NOTICE TO CLASS MEMBERS

1. Notice Form

Notice should be "timely, accurate, and informative." *Hoffman-La Roche Inc.,* 493 U.S. at 172. A copy of the notice the Plaintiffs propose to send to the class members is attached to the motion as Exhibit A. Plaintiffs propose an opt-in period of 60 days. This is well within the norm. *Recinos-Recinos v. Express Forestry,* 233 F.R.D. 472, 482-483 (E.D. La. 2006) (180 days to respond to notice); *Jackson v. City of San Antonio,* 200 F.R.D. 55, 63-64 (W.D. Tex. 2003) (90 days);

Goldman v. RadioShack, Corp., 2003 WL 21250571 (E.D. Pa. 2003) (75 days); *Barnett v. Countrywide Credit Industries,* 2002 WL 1023161 at * 2 (N.D.Tex. 2002) (70 days).

2. The Notice Should Clearly Inform Potential Class Members That SGS' Settlement Agreements With Inspectors Are Null and Void.

As explained in Plaintiff's Emergency Motion for Protective Order, Sanctions and Corrective Notice filed simultaneously with this motion, SGS has recently engaged in a campaign to obtain "agreements" from OGC inspectors which purport to waive their FLSA rights. These "agreements" are null and void and are clearly designed for the sole purpose of discouraging inspectors from opting- into this action. In order to correct the misleading impression that SGS' "agreements" have created, the notice to potential class members should contain a strongly worded statement indicating that these "agreements" are null and void and do not in any way preclude an inspector from participating in this action. The notice should also indicate that inspectors who signed the form do not need to return the money they received from SGS.[4] Finally, given the coercive circumstances under which SGS sought to obtain these "agreements," the notice should also include a clear statement that retaliation for participation in this action is forbidding by law. Proposed language to

[4] It is likely that many inspectors who signed the Agreements have already spent the money they received and forcing them to return the money would effectively preclude their joining the suit even if they wanted to. That would allow SGS to accomplish its improper purpose – discouraging participation in the suit – despite the fact that SGS and its lawyers knew, or certainly should have known, that the settlements void at the time the money was paid. SGS should not be allowed to benefit in this way from its improper conduct. If SGS wants to plead and prove that the monies paid should be an offset to any damages awarded to class members who signed the agreements it is free to do so.

accomplish these ends is included in Plaintiff's proposed notice. Ex. A

3. Information Which Must Be Provided By SGS To Facilitate Notice

In order to facilitate mailing of the notice, Plaintiffs request that the Court order Defendants to provide Plaintiffs' counsel with the last known addresses, telephone numbers, and dates of birth of all members of the class. Plaintiff also seeks an order requiring Defendants to provide Plaintiff with the social security numbers of those class members whose addresses are no longer valid.[5] Plaintiffs seek the social security numbers for these individuals as that is the only way to obtain a valid current address for them. Such information is routinely ordered produced in collective actions. *Blake v. Colonial Savings,* 2004 WL 1925535 at * 2 (S.D. Tex. 2004) (ordering production of telephone numbers and social security numbers); *Patton v. Thomson Corp.,* 364 F.Supp.2d 263, 268 (E.D. N.Y. 2005) (telephone numbers and social security numbers); *Dietrich v. Liberty Square, LLC,* 230 F.R.D. 574, 580-581 (N.D. Iowa 2005) (telephone numbers); *Scholtisek v. Eldre Corp.,* 229 F.R.D. 381, 395 (W.D. N.Y. 2005) (same)*; Geer v. Challenge Finance Investors Corp,* 2005 WL 2648054 at *5 (D. Kan. 2005) (same); *Bell v. Mynt Entertainment, LLC,* 223 F.R.D. 680, 683 (S.D. Fla. 2004) (same); *De La Rosa Ortiz v. Rain King, Inc.,* 2003 WL 23741409 at * 1 (S.D. Tex. 2003); *Bailey v. Ameriquest Mortgage Co.,* 2002 WL 100388 (D. Minn. 2002) (same). Plaintiff's counsel will bear the cost of mailing the notices.

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[5] Plaintiff will provide the Defendants with a list of class members whose notices are returned as undeliverable. Plaintiff requests that Defendants be ordered to provide the social security numbers for those individuals only.

CONCLUSION

For all of the foregoing reasons, this Court should (1) conditionally certify this action as a representative action on behalf of similarly situated inside salespersons employed by Regency Conversions; (2) order Defendants to provide plaintiff with the last known addresses, telephone numbers and dates of birth of potential class members (and social security numbers of class members for whom no valid address is available); and (3) authorize Plaintiff to issue the notice attached to Plaintiff's motion.

Respectfully submitted,

/s/

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