UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD AYERS, JOSE ACOSTA, FREDERICK A. BROUSSARD, and JEFFREY W. SCHELL, individually and on behalf of others similarly situated, Plaintiffs, -against- SGS CONTROL SERVICES, INC. and SGS NORTH AMERICA, INC., Defendants.	**DECISION AND ORDER** 03 Civ. 9078 (RMB)

I. Introduction

On November 17, 2001, Plaintiffs Richard Ayers, Jose Acosta, Frederick A. Broussard, and Jeffrey W. Schell filed the instant action individually and on behalf of other "similarly situated" current and former "inspector" employees ("Plaintiffs" or "Class") of defendants SGS Control Services, Inc. ("SGS-CSI") and SGS North America, Inc. ("SGS-NA") (together, "Defendants" or "SGS"), alleging that Defendants violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq., by failing to pay Plaintiffs all overtime wages in a timely manner.[1] (See Second Amended Complaint, dated February 19, 2004 ("Complaint"), ¶¶ 14-22.) Plaintiffs allege three categories of FLSA violations: (1) "SGS unlawfully paid the class overtime on a delayed basis" ("Late Payment Claim"); (2) SGS paid a lower commission rate for automobile inspections conducted during overtime hours at SGS's subsidiary, Automotive Services Inc. ("ASI") ("ASI Bonus Claim"); and (3) SGS "illegally used what it called 'Chinese

[1] The members of the purported Class are employed as "inspectors," performing, for example, car inspections for major car manufacturers and rental car companies, inspecting the transfer of oil, gas and chemicals between ships and shore tanks, etc. (See infra p. 4.)

Overtime'" (also known as the "fluctuating workweek method") to pay inspectors in Defendants' Oil, Gas & Chemical Division, resulting in underpayments ("Fluctuating Workweek Claim"). (Plaintiffs' Memorandum of Law, dated Aug. 8, 2006 ("Pl. Mem."), at 29.) Plaintiffs seek declaratory relief, payment for unpaid wages, liquidated damages, and attorney's fees and expenses. (Compl. at 3-4.)

On October 22, 2004, Magistrate Judge Ronald L. Ellis, to whom this action had been referred, issued an order pursuant to FLSA § 216(b) that preliminarily certified the Class to include "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 forty (40) hours each week," and authorized that notice be sent to the Class. (Order of Magistrate Judge Ellis, dated Oct. 22, 2004, at 3.) On January 26, 2005, this Court affirmed Judge Ellis's Order over Defendants' objections. (See Order, dated Jan. 26, 2005, at 3 (Judge Ellis's Order was "not clearly erroneous or contrary to law.").)[2]

On July 26, 2006, Defendants moved to decertify the Class on grounds that, among other reasons, Plaintiffs "present such a cornucopia of claims and factual situations requiring individualized assessment that they simply cannot be tried collectively." (Defendants' Memorandum of Law, dated July 26, 2006 ("Def. Mem."), at 1.) Defendants also moved for partial summary judgment "dismissing, with prejudice, (1) all claims relating to California-based [and Washington-based] . . . plaintiffs, who are . . . paid under California [or Washington] statute, which is more stringent than the FLSA"; (2) "all claims by six (6) opt-in plaintiffs who

[2] In early 2005, Plaintiffs mailed the authorized notice and the Class, including "opt-in" Plaintiffs, consists of 208 current and former "inspector employees" of SGS. (See Pl. Mem. at 24.)

failed to appear for their duly-noticed depositions"; (3) "all claims relating to SGS-Agri . . . plaintiffs" whose claims have never been "articulated"; (4) all claims by Plaintiffs who were "employed by ASI," an independent corporation that is not a party to this action; and (5) Plaintiffs' ASI Bonus Claim on the merits. (Def. Mem. at 2, 33-35.)[3]

On August 8, 2006, Plaintiffs opposed Defendants' motions to decertify the Class and for partial summary judgment and also cross-moved for partial summary judgment as to liability on Plaintiffs' three principal claims, i.e., (1) the Late Payment Claim, (2) the ASI Bonus Claim, and (3) the Fluctuating Workweek Claim. (See Pl. Mem. at 9-23.) Defendants filed a Reply Memorandum of Law on August 25, 2006 ("Def. Reply"), and Plaintiffs filed a Reply Memorandum of Law on September 18, 2006 ("Pl. Reply").[4] On February 15, 2007, the Court heard oral argument.

For the reasons set forth below, this Court denies Defendants' motion for

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[3] In a letter to the Court, dated August 10, 2006, Defendants requested permission to move to strike as inadmissible certain evidence submitted by Plaintiffs, including an SGS "employee announcement," dated July 2006, and the transcript of the trial judge's decision, dated November 17, 2005, in an action against SGS in the United States District Court for the Middle District of Florida entitled Ferrer v. SGS Control Services, et al., 04 Civ. 0916 (M.D. Fl. 2005) ("Ferrer Decision"). (See Defs' Letter, dated Aug. 10, 2006.) Plaintiffs responded that the evidence was admissible because, among other reasons, the "employee announcement . . . show[s] the feasibility of paying overtime wages with the regular earnings," and the Ferrer Decision was cited for its "clearly correct reasoning," not for purposes of res judicata. (Plaintiffs' Letter, dated Aug. 11, 2006.) A motion to strike is unnecessary at this time because the Court is not relying upon the employee announcement and the Ferrer Decision is a matter of public record (and is not being cited for any preclusive effect).

[4] On December 5, 2006, the Court ordered that this action ("Ayers Action") be "consolidated for all purposes" with a related FLSA overtime action against SGS entitled Ferry v. SGS Control Services, Inc., 06 Civ. 7111 ("Ferry Action"). (Order, dated Dec. 5, 2006.) And, on January 4, 2007, the Court so-ordered the parties' stipulation that "[t]he decision(s) of the Court in Ayers with respect to the Defendants' motions to decertify and for partial summary judgment and Plaintiffs' motion for partial summary judgment will apply with equal force and legal effect to Ferry." (Stipulation and Order, dated Jan. 4, 2007.)

decertification of the Class, grants in part and denies in part Plaintiffs' cross-motion for partial summary judgment, and denies Defendants' motion for partial summary judgment.

II. Background

Defendants provide "inspection and testing" services throughout the United States and the world. ASI, a wholly-owned subsidiary of SGS-NA, is a leader in car inspections serving major car manufacturers and rental car companies, and "inspect[ing] cars in transit, at auction sites, and at dealerships, and lessee's homes." (Plaintiffs' Rule 56.1 Statement of Material Facts, dated Aug. 8, 2006 ("Pl. 56.1"), ¶ 8; Defendants' Response Statement Pursuant to Rule 56.1, dated Aug. 25, 2006 ("Def. 56.1 Response"), ¶ 8.) Defendant SGS-CSI was reorganized into SGS-NA's Oil, Gas & Chemical Division ("OGC"), and its inspectors "provide independent inspection of the transfer of oil, gas and chemicals between ships and shore tanks by gauging, sampling and documenting such movements." (Pl. 56.1 ¶ 7; Def. 56.1 Response ¶ 7.) OGC ship inspectors' duties include, among other things, drawing samples from gas tanks and determining the temperature and volume in the tanks and the amounts pumped. (Def. Mem. at 11.)

Most, if not all, of Plaintiffs were paid twice-monthly, i.e., on the 15th and last day of each month. (Pl. 56.1 ¶ 14; Def. 56.1 Response ¶ 14 ("Some Auto plaintiffs are paid on a bi-weekly basis.").) The "semi-monthly paycheck included the Plaintiffs' regular pay through the payday" (Pl. 56.1 ¶ 15; Def. 56.1 Response ¶ 15), but "overtime pay [was] paid on the next payday after the pay period in which it was earned" (Def. 56.1 Response ¶ 16). As a result, Plaintiffs sometimes had to wait up to a month to receive their overtime pay. (Pl. 56.1 ¶ 18; Def. 56.1 Response ¶ 18.) According to Defendants, the extra "time was needed to properly process overtime," and "SGS's payroll processing costs alone would more than double if weekly paychecks [including overtime] were required." (Def. Reply at 8-9.)

SGS utilized a "fluctuating workweek" payroll method, also referred to as the "Chinese Overtime" or the "coefficient overtime" method, which is described in SGS's "Employee Handbook." (See Ex. 8: SGS-CSI Employee Handbook, Revised 12/01/06 ("SGS Employee Handbook"), at 9-10.) "For purposes of calculating overtime wages, [SGS] determined an OGC Plaintiff's hourly rate of pay for a week, the 'regular' rate,' by dividing the weekly salary by the number of hours the Plaintiff worked that week. SGS then paid the Plaintiff 1/2 that hourly rate for each overtime hour he or she worked. Because the hourly rate SGS used to calculate overtime was a function of the salary spread over the total hours worked, the more hours a Plaintiff worked, the lower his or her overtime rate became." (Pl. 56.1 ¶ 28; see also Def. 56.1 Response ¶ 28.)[5] As a result, OGC Plaintiffs' regular base salaries sometimes initially fell below the minimum wage (Pl. 56.1 ¶ 34; Def. 56.1 Response ¶ 34), and, in such instances, SGS's payroll system automatically "bumped up" wages to meet the minimum wage.[6] "[A] formula for bump ups was . . . automatically programmed into the payroll system to make any necessary adjustments to OGC inspectors' earnings." (Def. 56.1 Response ¶ 41 (citing Freyer Dep.)); see

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[5] "Payment for overtime hours at one-half [the regular] rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement." 28 C.F.R. § 778.114(a). "In other words, the fixed sum represents the employee's entire straight-time pay for the week, no matter how many hours the employee worked; the employer need only pay the 50% overtime premium required by the FLSA for hours after 40." O'Brien v. Town of Agawam, 350 F.3d 279, 287-88 (1st Cir. 2003).

[6] For example, if a Plaintiff's base salary were $400 per week, and he worked 100 hours in a particular week, his base hourly pay for "straight time" work would be $4 per hour (compared to the minimum wage of $5.15 per hour). SGS would automatically "bump up" the Plaintiffs' straight time pay for the first 40 hours of work from $4 to the minimum wage of $5.15, and the remaining 60 hours of (time and a half) overtime would be paid at $7.725 per hour (the minimum wage of $5.15 multiplied by 1.5). (See Ex. HH: Deposition of SGS's Payroll Manager, Lynn Freyer, dated Feb. 14, 2006 ("Freyer Dep."), at 42-45; Ex. EE.)

id. ¶ 34.)

According to Defendants, in the relevant time period, seven OGC Plaintiffs fell below the minimum wage (requiring "bump ups") in 20 or more weeks, 43 OGC Plaintiffs fell below minimum wage in five or fewer weeks, and 33 OGC Plaintiffs did not fall below the minimum wage at all. (Def. 56.1 Response ¶¶ 35-36.) Defendants also assert that "OGC inspectors were permitted to record (and were paid for) hours in excess of those which they actually worked, including long periods of unworked pumping time." (Id. ¶¶ 33, 35.)

"It was SGS's policy to pay OGC Plaintiffs a salary plus sea pay when they worked offshore, plus day-off pay when they worked on their day off and plus a minimum wage bump up when their salary did not meet the minimum wage." (Pl. 56.1 ¶ 42; Def. 56.1 Response ¶ 42.) "Sea pay is additional compensation given for inspectors that are required to attend an offshore assignment on a vessel . . . ." (Ex. 5: Deposition of Donald Milne, Dated Feb. 23, 2006 ("Milne Dep."), at 45-46.) OGC inspectors paid under the fluctuating workweek method who work offshore are paid either a predetermined "partial day amount" or a predetermined "full day amount." (Id. at 46-49.)

OGC inspectors who were paid under the fluctuating workweek method and who worked on a scheduled "day off" received pay for the number of hours they actually worked plus an automatic payment of eight hours of "straight pay," regardless of the numbers of hours worked. (Milne Dep. at 51-54; Deposition of Gia Plewa, dated May 17, 2004, at 100-101; Ex. 22: SGS Memo, dated March 21, 1994.) "SGS did not include day-off pay in its calculation of the Plaintiffs' overtime wages." (Pl. 56.1 ¶ 51; Def. 56.1 Response ¶ 51.) "[I]n determining the regular rate for calculating the overtime wage rate," "SGS used only weekly salaries and sea pay as the numerator . . . with total hours as the denominator." (Pl. 56.1 ¶ 52; Def. 56.1 Resp. ¶ 52.)

The parties appear to agree that ASI's auto inspectors "were paid under a 'Pay for Performance' compensation plan," as follows: "[i]n addition to receiving a base salary with benefits and production bonuses for every vehicle they inspect whether inspected within or after the first 40 hours of the workweek, ASI inspectors [were] given an additional incentive bonus (the 'accelerated' bonus) for every vehicle inspected after a set minimum number." (Def. Mem. at 33.) "For example, for certain auto inspections, SGS paid inspectors $10 for [each] vehicle[] inspected and an additional [accelerated bonus of] $10 for each vehicle over 35 inspected 'within the first 40 (forty) hours' [i.e., $20 total] but [paid] only an additional $2 for vehicles inspected in the overtime hours [i.e., $12 total]." (Pl. 56.1 ¶ 58; Def. 56.1 Response ¶ 58.) On top of base pay and bonuses, all inspectors also received overtime pay at "time and a half," and the "regular hourly rate upon which coefficient overtime pay [was] based" was calculated by adding together "base pay, ['Pay for Performance' compensation] (including accelerated bonus) and [other remuneration]." (Def. Mem. at 33-34.)

III. Legal Standard

Summary Judgment

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Yourman v. Giuliani, 229 F.3d 124, 131 (2d Cir. 2000). The moving party bears the burden of informing the district court of the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[O]nly disputes over facts that might affect the outcome of the suit under

the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. "[A]ll reasonable inferences must be drawn against the [moving] party," and summary judgment may not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121 (2d Cir. 2001); accord Hale v. Mann, 219 F.3d 61, 66 (2d Cir. 2000).

The same standard applies where, as here, the parties file cross-motions for summary judgment. Id. "[E]ach party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." Id.

FLSA

"Generally, courts proceed in two stages in determining whether a matter should be certified as a FLSA collective action." Torres v. Gristede's Operating Corp., 2006 WL 2819730, at *7 (S.D.N.Y. Sept. 29, 2006) "In the first stage, . . . if the plaintiff satisfies 'the minimal burden of showing that the similarly situated requirement is met,' the court certifies the class as a collective action." Id. (citation omitted). "At the second stage, the court examines the record again, with the benefit of discovery, and revisits the question of whether plaintiffs are similarly situated." Torres, 2006 WL 2819730, at *7. "[T]he burden is on the Plaintiff to prove that other employees are similarly situated." Harrison v. McDonald's Corp., 411 F. Supp. 2d 862, 870 (S.D. Ohio 2005). "The second stage is usually precipitated by a defendant's motion for decertification of the class, and involves 'a higher standard' in analyzing the 'similarly situated' issue." Torres, 2006 WL 2819730, at *7 (citation omitted). "[P]laintiffs need show only that their positions are similar, not identical, to the positions held by the putative class members." Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996). "[T]he 'similarly situated' requirement of 29 U.S.C. § 216(b) is considerably less stringent than the requirement of

Fed.R.Civ.P. 23(b)(3) that common questions 'predominate.'" Rodolico v. Unisys Corp., 199 F.R.D. 468, 481 (E.D.N.Y. 2001) (citation and internal quotations omitted).

III. Analysis

A. Motion to Decertify the Class

Defendants argue that "plaintiffs' claims . . . require individualized inquiry and cannot be decided on a class-wide -- or even a sub-class-wide -- basis" because, among other reasons: "[t]he work performed by ASI and OGC inspectors is as different as night is from day, and even within each corporation, inspectors' job duties differ dramatically" (Def. Mem. at 27); Plaintiffs "work in different physical locations all across the country in different management regions for different supervisors," and "[e]ach of plaintiffs' supervisors has his/her own management practices," such that "each of the plaintiffs tells a different story about what he was (or was not) told by his supervisor" (id.); Plaintiffs' "differences give rise to varying SGS defenses against individual plaintiffs," including for example, that "some plaintiffs admit falsifying time sheets or overstating their hours" and "[s]ome plaintiffs claim that they did unrecorded administrative work at home. . . ." (Def. Reply at 4); and "[t]here can be no claim of efficiency where individualized inquiry is required into each plaintiff's actual hours of work and method of pay as well as a comparison between what the FLSA requires to be paid and what was actually paid" (id. at 3).

Plaintiffs counter that, among other things, "[t]he collective action process is far more efficient than 208 separate suits around the United States" (Pl. Mem. at 24); "plaintiffs here challenge . . . not a series of individualized or isolated examples of failure to pay properly," but rather SGS's "company-wide policies . . . set forth in the employment manual" (id. at 24, 28); "numerous courts have noted that mere differences in locations, damages, positions or job duties

do not justify decertification, when there are policy, pattern or practices at issue susceptible to generalized proof" (id. at 28); and "[a]lternatively, the opt-in[] claims can be severed into OGC inspectors and auto inspectors . . . for trial purposes" (id. at 31).

The Court finds that the Class should not be decertified, i.e., "on balance, the differences among the plaintiffs do not outweigh the similarities in the practices to which they claim to have been subjected," Wilks v. Pep Boys, No. 3:02-0837, 2006 WL 2821700, at *5-6 (M.D. Tenn. Sept. 26, 2006); see Hill v. Muscogee County School Dist., No. 4:03-CV-60, 2005 WL 3526669, at *2-*4 (M.D. Ga. Dec. 20, 2005); Moss v. Crawford & Co., 201 F.R.D. 398, 410 (W.D. Pa. 2000), for the reasons that follow.

In determining whether a putative class of plaintiffs is "similarly situated," court review several factors, including "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations." Torres, 2006 WL 2819730, at *9.

Having conducted such a review, the Court concludes that Plaintiffs have established (by a preponderance of the evidence) that "their claims may be supported by generalized proof." Scott v. Aetna Services, Inc., 210 F.R.D. 261, 265 (D. Conn. 2002); see Wilks, 2006 WL 2821700, at *3 ("One of the factors material to many courts' analysis of the plaintiffs' factual and employment settings is whether they were all impacted by a 'single decision, policy, or plan.' The existence of this commonality may assuage concerns about plaintiffs' otherwise varied circumstances."); Moss, 201 F.R.D. at 410. Plaintiffs' three principal claims -- Late Payment, ASI Bonus, and Fluctuating Workweek Claims -- all derive from "company-wide policies," allegedly "'a common practice or scheme' that violated the law." Torres, 2006 WL 2819730, at *9-10 (citations omitted); Sheffield v. Orius Corp., 211 F.R.D. 411, 413 (D. Or. 2002). And,

while certain individual issues may arise with respect, for example, to the Fluctuating Workweek Claim, the common questions of Defendants' use of the fluctuating workweek methodology predominate.[7]

Second, some of the defenses relate to the number of overtime hours reported by Plaintiffs. (See Def. Reply at 2.) For example, Defendants assert that "many, if not all, of the OGC inspectors recorded pumping times as hours worked even though they were 'on call' and completely free from any work responsibilities." (Def. Reply at 8.) At the same time, it is somewhat unclear whether Defendants may now contest certain reported hours, if, for example, SGS and the Plaintiffs agreed that pumping time constituted hours worked; SGS management reviewed the hours and approved them as hours worked; and SGS paid these hours at overtime rates. (See Milne Dep. at 25-26.) In any event, to the extent Defendants present individual defenses, "the Court may grant collective action and bifurcate trial, as necessary, to address those defenses." Torres, 2006 WL 2819730, at *11; accord Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1106-07 (10th Cir. 2001) (individualized "defenses would not become the focal point until the second stage of trial and could be dealt with in a series of individual trials, if necessary"); Moss, 201 F.R.D. at 410; see also Jankowski v. Castaldi, 2006 WL 118973, at *2-4 (E.D.N.Y. Jan. 13, 2006); Wilks, 2006 WL 2821700, at *7.

Third, in determining "fairness and procedural considerations," courts consider whether a collective action would "lower costs to the plaintiffs through the pooling of resources," "efficiently resolve[] common issues of law and fact," and "coherently manage the class in a

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[7] If need be, the Court can create subclasses by, for example, separating OGC and ASI employees, or by creating subclasses by claim or subclaim. See Wilks, 2006 WL 2821700, at *7; see also Takacs v. Hahn Auto. Corp., No. C-3-95-404, 1999 WL 33127976, at *1-*3 (S.D. Ohio Jan. 25, 1999).

manner that will not prejudice any party." Moss, 201 F.R.D. at 410. Because common questions predominate and individual issues may be resolved separately, "[t]he Court finds that, on balance, the policy objectives of reducing cost and increasing efficiency are best furthered by granting collective action without undue prejudice to any party." Torres, 2006 WL 2819730, at *11; see Wilks, 2006 WL 2821700, at *8. "In sum, all three factors weigh in favor of one FLSA collective action rather than [208] separate actions. This lawsuit will be a more effective use of the Court's and parties' resources." Torres, 2006 WL 2819730, at *11.

Although Plaintiffs' papers are somewhat unclear, they appear to assert an additional claim -- i.e., that certain Plaintiffs were pressured by their supervisors to underreport their overtime hours or that their reported overtime hours were (for some other reason) inaccurate. (See Pl. Mem. at 31.) The Court will define the Class (or sub-classes) to exclude such a claim because, among other reasons, Plaintiffs have not asserted, much less established, that the claim is the product of a "company-wide policy." Torres, 2006 WL 2819730, at *9-10; see Fed.R.Civ.P. 23(c)(4); Lundquist v. Security Pacific Automotive Financial Services Corp., 993 F.2d 11, 14 (2d Cir. 1993); Robidoux v. Celani, 987 F.2d 931, 937 (2d Cir. 1993); 5 Moore's Federal Practice, § 23.23[3] (3d ed.).

B. Plaintiffs' Motion for Partial Summary Judgment

(1) Late Payment Claim

Plaintiffs assert that Defendants' late payment of overtime violated the FLSA because, among other reasons: the FLSA requires that payment be made "as soon after the regular pay period as is practicable"; and "SGS withheld Plaintiffs' overtime wages at least 15 days and regularly more than a month after they were earned, despite the ability to pay the wages on time." (Pl. Mem. at 10-11.) Defendants counter that "SGS paid overtime in the check following the pay

period in which it was earned and that such time was needed to properly process overtime"; the FLSA does not require weekly payments, but only that "the employer pays the . . . overtime compensation as soon after the regular pay period as is practicable"; and "payroll processing costs alone would more than double if weekly paychecks were required." (Def. Reply at 8-9.)

The parties agree that resolution of this issue hinges upon an "interpretive bulletin" issued by the United States Department of Labor ("DOL") which provides, in relevant part:

> When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, . . . the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made.

29 C.F.R. § 778.106. Whether SGS paid overtime "as soon after the regular pay period as [was] practicable" and whether SGS delayed payment "for a period longer than [was] reasonably necessary" are factual questions best left to the trier of fact. See Cahill v. City of New Brunswick, 99 F. Supp. 2d 464, 474-75 (D.N.J. 2000) ("[T]he fact-finder will have to evaluate evidence relevant to when the [defendant] was first able to 'compute and arrange for' payment of the correct amount of extra-duty overtime compensation; the period of time 'reasonably necessary' to do so; . . . and generally whether the delay in payment was due to neglect by the [plaintiffs] or by the defendant . . . .").

(2) ASI Bonus Claim

Plaintiffs argue that SGS violated the FLSA by paying ASI auto inspectors "a lower incentive [bonus] for inspections conducted in the overtime hours than for inspections conducted within the first forty hours." (Pl. Mem. at 8.) Defendants counter that the lower bonus does not violate the FLSA because, among other reasons: "[t]he FLSA does not prohibit differential wage

rates"; inspectors received overtime pay at time and a half "for all hours worked after 40 in a workweek" (Def. Mem. at 33); and "[s]ince all inspector remuneration," including base pay and bonuses, "is used to determine the employee's regular hourly rate upon which coefficient overtime pay is based, . . . inspectors are paid lawfully in accordance with the FLSA." (Id.)

> An Interpretive Bulletin issued by the Department of Labor provides, in relevant part:
>
> While it is permissible for an employer and an employee to agree upon different base rates of pay for different types of work, it is settled under the Act that where a rate has been agreed upon as applicable to a particular type of work the parties cannot lawfully agree that the rate for that work shall be lower merely because the work is performed during the statutory overtime hours, or during a week in which statutory overtime is worked.

29 C.F.R. § 778.316; see Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (interpretative bulletins constitute a "body of experience and informed judgment to which courts and litigants may properly resort for guidance"). SGS's policy of paying a smaller "accelerated bonus" for cars inspected during overtime hours than during regular hours violates the prohibition against "agree[ing] that the rate for the work shall be lower merely because the work is performed during the statutory overtime hours," disadvantaging employees for not completing work during the regular 40-hour workweek. 29 U.S.C. § 207(g)(2) (overtime rate must be computed at one and one-half times the rate "applicable to the same work when performed during nonovertime hours"); see also Onque v. Cox Comm's Las Vegas, Inc., No. 2:04-CV-588, 2006 WL 2707466, at *3 (D. Nev. Sept. 19, 2006) (correct formula for calculating overtime pay is a legal issue for the Court to decide); Wisnewski v. Champion Healthcare Corp., 2000 WL 1474414, at *5 (D.N.D. Jan. 11, 2000), aff'd, 258 F.3d 720 (8th Cir. 2001).[8]

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[8] This conclusion also resolves Defendants' motion for summary judgment as to the same claim. (See infra Section III.C.5.)

(3) Fluctuating Workweek Claim

a. Fixed Weekly Salary

Plaintiffs argue that a"fundamental requirement of the [fluctuating workweek] method of paying overtime is that the employee be paid a 'fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many,' exclusive of overtime payments." (Pl. Mem. at 18 (quoting 29 C.F.R. § 778.114(a)).) In Plaintiffs' view, sea pay, day-off pay, and minimum wage "bump ups" each violate the rule that employees under the fluctuating workweek method must be paid a "fixed amount as straight time pay." (Id.) Defendants counter that the "fact that [OGC inspectors] are paid additional amounts as Sea Pay or Day Off Pay does not contradict the fact that they are paid a fixed amount as straight time pay for all their work hours." (Def. Reply at 5.) Defendants also assert that "Day Off Pay constitutes a 'statutory exclusion' that must be excluded from the regular rate pursuant to 29 U.S.C. § 207(e)(6)." (Id. at 5 n.2.)

The "fluctuating workweek" method applies when an employee "is paid a fixed weekly salary regardless of how many hours the employee may work in a given week." Valerio v. Putnam Associates Inc., 173 F.3d 35, 39 (1st Cir. 1999); see 29 C.F.R. § 778.114(a). This method is intended to cover cases in which "a salaried employee whose hours of work fluctuate from week to week [reaches] a mutual understanding with his employer that he will receive a fixed amount as straight-time pay for whatever hours he is called upon to work in a workweek, whether few or many . . . ." Condo v. Sysco Corp., 1 F.3d 599, 601 (7th Cir. 1993).

> When the fluctuating workweek method applies, the employee's "regular rate" for FLSA purposes is calculated anew each week by dividing the actual number of hours worked that week into the fixed salary amount. This calculation produces a straight-time hourly rate, which is then multiplied by 50% to produce the overtime rate that must be paid for every hour worked beyond 40 that week. . . . "Payment for overtime hours at one-half [the

> regular] rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement." § 778.114(a). In other words, the fixed sum represents the employee's entire straight-time pay for the week, no matter how many hours the employee worked; the employer need only pay the 50% overtime premium required by the FLSA for hours after 40.

O'Brien v. Town of Agawam, 350 F.3d 279, 287-88 (1st Cir. 2003) (footnote omitted).

The fluctuating workweek method may not be employed unless "five discrete criteria" are satisfied:

> (1) the employee's hours fluctuate from week to week; (2) the employee receives a fixed weekly salary which remains the same regardless of the number of hours the employee works during the week; (3) the fixed amount is sufficient to provide compensation at a regular rate not less than the legal minimum wage; (4) the employer and the employee have a clear mutual understanding that the employer will pay the employee a fixed salary regardless of the number of hours worked; and (5) the employee receives a fifty percent (50%) overtime premium in addition to the fixed weekly salary for all hours worked in excess of forty (40) during the week.

Teblum v. Eckerd Corp. of Fla., Inc., No. 2:03CV495, 2006 WL 288932, at *3 (M.D. Fla. Feb. 7, 2006); accord O'Brien, 350 F.3d at 288.

Each employee must be paid a "fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many," except that employees may also receive "overtime premiums." 29 C.F.R. § 778.114(a); see O'Brien, 350 F.3d at 288. In other words, regardless of the number of hours worked in a particular week, the employee's "straight time pay" cannot change, although overtime premiums are not included in "straight time pay." "[B]y the plain text of § 778.114, it is not enough that the [employees] receive a fixed minimum sum each week; rather, to comply with the regulation, the [employer] must pay each [employee] a 'fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many.'" O'Brien, 350 F.3d at 288.

The parties appear to agree that the meaning of the term "straight time pay" in 29 C.F.R. §

778.114(a) hinges upon the definition of "regular rate of pay" contained in 29 U.S.C. § 207(e). (See Pl. Mem. at 19; Def. Reply at 5 & n.2.) But see Dooley v. Liberty Mut. Ins. Co., 369 F. Supp. 2d 81, 85-86 (D. Mass. 2005) (Section 778.114(a) "refer[s] to exclusion only of 'overtime premiums' and not 'premium pay' generally"). The "regular rate of pay" is "the rate to which the FLSA's time-and-a-half overtime multiplier is applied." O'Brien, 350 F.3d at 283-84; see 29 U.S.C. § 207(a) (overtime compensation must be paid "at a rate not less than one and one-half times the regular rate at which [the employee] is employed"). Section 207(e) defines "regular rate . . . to include all remuneration for employment paid to, or on behalf of, the employee," 29 U.S.C. § 207(e), but also lists several ("exhaustive") exceptions to the rule -- i.e., amounts that should be excluded from the "regular rate of pay." See § 207(e)(1)-(e)(8). These exclusions "are to be interpreted narrowly against the employer . . . and the employer bears the burden of showing that an exception applies." O'Brien, 350 F.3d at 294. One of these exclusions, § 207(e)(6), provides that the term "regular rate" shall not include "extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days." 29 U.S.C. § 207(e)(6). However, DOL interpretative regulations limit the reach of the § 207(e)(6) exclusion:

> [S]ince any extra compensation in order to qualify as an overtime premium must be provided by a premium rate per hour . . . lump sum premiums which are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate.

29 C.F.R. § 778.207(b).

Thus, any Plaintiff who received sea pay or day-off pay did not have "fixed" weekly

straight time pay, in violation of 29 C.F.R. § 778.114(a). See O'Brien, 350 F.3d at 288 (finding violation of fluctuating workweek method where, among other things, each employee who was "required to work a nighttime shift" received a "$10 shift-differential payment added to his check for the week," such that straight time "compensation varie[d] from week to week" in violation of 29 C.F.R. § 778.114(a)); Dooley, 369 F. Supp. 2d at 86. That is, because both sea pay and day-off pay are "lump sum premiums which are paid without regard to the number of hours worked," they "are not overtime premiums and must be included in the [§ 207(e)] regular rate." 29 C.F.R. § 778.207(b). And, because such payments are included in the § 207(e) "regular rate" of pay, they must be included in (and increase) the Plaintiffs' total "straight time pay" under 29 C.F.R. § 778.114(a). As noted above (see page 6), OGC inspectors who work offshore are paid either a predetermined "partial day amount" or a predetermined "full day amount" as "sea pay." Similarly, Plaintiff who works on a scheduled day off receives regular pay for the hours worked along with a lump sum payment of "eight hours of straight time," regardless of whether the Plaintiff works 40 hours in the week and regardless of how many hours the Plaintiff works on the day off (i.e., he receives the same lump sum whether he works one hour or 24 hours).

b. Minimum Wage

Plaintiffs argue that by "requiring long hours of work and paying low salaries, SGS violated one of the core requirements of the [fluctuating workweek method] – that the fixed salaries always are sufficient to cover the minimum wage for all hours worked in all weeks." (Pl. Mem. at 15.) Specifically, "[b]ecause the hourly rate SGS used to calculate overtime was a function of the salary spread over the total hours worked, the more hours a Plaintiff worked, the lower the overtime rate became. The effect . . . was that . . . working more than 100 hours in a week, OGC Plaintiffs were paid as little as $2.68 per hour for each of their overtime hours." (Id.

at 4-5.) Plaintiffs contend that "SGS' violations of the minimum wage requirement were not aberrations – they were regular and the foreseeable result of SGS' low salaries," and that "[b]ump ups [to minimum wage] are not a permissible means of complying with the [fluctuating workweek method] requirements" (id. at 16-17).

Defendants counter that, among other things: employees' "regular rates" never fall below the minimum wage because SGS's payroll computer system automatically adds "bump ups" to minimum wage where necessary (Def. Reply at 5); under the FLSA, "bump ups are permissible" to avoid minimum wage violations (id. at 6); "as many as 5 bump ups per year are insufficient to invalidate the [fluctuating workweek] method for the employee at issue," and the determination of whether the number of bump ups is excessive is "fact-specific" (id.); an "employer can simply reach a new understanding with the employee to pay the minimum wage where the regular rate would otherwise fall below it," and "SGS already has such an understanding with its OGC inspectors," as evidenced by the SGS Employee Handbook (id. at 7); "[s]ince all inspectors in this case were paid at least minimum wage, none has any backpay damages to claim" (id.); and "Plaintiffs cite no authority for their unstated assumption that invalid use of the [fluctuating workweek] method with respect to one inspector precludes its use for all inspectors" (id.).

"[T]he 'fluctuating workweek' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act . . . ." 29 C.F.R. § 778.114(c). This regulation addresses the problem that under the fluctuating workweek method, although base salary does not change, the total hours worked in a particular week can increase significantly so that an employee's hourly base salary (i.e., base weekly salary divided by total hours worked that week) can fall below the minimum wage. (See

supra pp. 5-6.)

The employee's base salary, without "bump ups," must be "'reasonably calculated to provide' an average hourly rate at least equal to the applicable minimum wage," and the fluctuating workweek payment method may be used only if a particular employee's base salary is high enough that any minimum wage bump ups are both "infrequent" and "unforeseeable." Cash v. Conn Appliances, Inc., 2 F. Supp. 2d 884, 894 (E.D. Tex. 1997) (citation omitted); see Ferrer Decision at 80. In other words, the fluctuating workweek method may be used only if, given the range of hours the employee ordinarily works each week, the employee's base salary by itself satisfies the minimum wage, such that any minimum wage bump ups are "infrequent" and "unforeseen." See Aiken v. County of Hampton, S.C., 977 F. Supp. 390, 398 (D.S.C. 1997) ("this court determined that the frequency with which [defendants] 'had to apply a minimum wage adjustment to Plaintiffs' salary to bring it up to the minimum wage amount for the number of hours worked,' indicated that Plaintiffs' salaries were not reasonably calculated to provide for the statutory minimum wage amount"), aff'd, Aiken v. County of Hampton, 172 F.3d 43 (Table), at *5 (4th Cir. Sept. 28, 1998); Opinion Letter No. 945, Wages-Hours Lab. L. Rep. (CCH) ¶ 30,957 (Feb. 6, 1969) ("Opinion Letter 945") (fluctuating workweek method "would be inapplicable where the employer could have foreseen or anticipated that the salary would be insufficient to yield the minimum wage even in a nominal number of workweeks such as five in an annual period"); Ex. BB: Opinion Letter No. 896, dated Dec. 2, 1968 ("Opinion Letter 896").[9]

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[9] Some authorities have stated that if "bump ups" become (too) common, the employer may continue to use the fluctuating workweek method if the employer "reach[es] a new understanding" with the employee. See Davis v. Friendly Exp., Inc., No. 02-14111, 2003 WL 21488682, at *2 & n.3 (11th Cir. Feb. 6, 2003) (dicta). Defendants would have the burden of establishing any such "new understanding" (which is an exception to the rule), and they have offered no such evidence here.

On a number of occasions, SGS made adjusting "bump ups" in certain OGC inspectors' pay in order to avoid minimum wage violations. (See supra pp. 5-6.) There remain, however, genuine issues of material fact foreclosing summary judgment, including, among other things, whether a particular employee's "bump ups" were sufficiently "infrequent" and "unforeseeable" to satisfy 29 C.F.R. § 778.114(c). See Opinion Letter 945 (such determinations should be made "on an ad hoc basis, based upon all the facts and circumstances in a particular case"); see also Opinion Letter 896.

c. Clear Mutual Understanding

Plaintiffs argue that SGS and Plaintiffs could not have had "a clear mutual understanding that the [SGS would] pay [each Plaintiff] a fixed salary regardless of the number of hours worked" because, "in fact, [the OGC Plaintiffs] were not paid a fixed amount." (Pl. Mem. at 21.) In other words, Plaintiffs argue that all Plaintiffs lacked a "clear understanding" because SGS's payment method – as described in the Employee Handbook and as applied in practice – did not satisfy the "fixed salary" requirement. Defendants do not appear to respond to this argument.

Plaintiffs' theory would require the Court to hold that no employee could have had a "clear understanding" of Defendants' fluctuating workweek program as long as the program violated any aspect of the FLSA's fluctuating workweek regulations. Plaintiffs' main authority, O'Brien v. Town of Agawam, 350 F.3d 279, 290 (1st Cir. 2003), apparently involved an employer's attempt to avoid liability for overtime violations by characterizing the payroll method as "fluctuating workweek" after the fact, and even though the method had little in common with the fluctuating workweek method. Id. By contrast, it appears that SGS's employees knew ("understood") that they were paid under the fluctuating workweek method. (See Employee Handbook at 10.)

d. Overtime Premium

Plaintiffs argue that, in alleged violation of the FLSA's fluctuating workweek requirement that each employee must receive "a fifty percent (50%) overtime premium in addition to the fixed weekly salary for all hours worked in excess of forty (40) during the week," SGS "excluded day-off pay in determining the overtime wage rate." (Pl. Mem. at 22.) Defendants counter that "Day Off Pay constitutes a 'statutory exclusion' that must be excluded from the regular rate pursuant to 29 U.S.C. § 207(e)(6)." (Def. Reply at 5 n.2.)

FLSA regulations provide that an employer may not use the fluctuating workweek payroll method unless each employee receives an "overtime premium in addition to the fixed weekly salary for all hours worked in excess of forty (40) during the week." Teblum., 2006 WL 288932, at *3. The overtime rate is based upon the "regular rate of pay," which is defined in 29 U.S.C. § 207. As noted (see supra Section III.B.3.a), SGS's payments of "day-off pay" do not appear to qualify as exceptions to the "regular rate of pay" under 29 U.S.C. § 207(e)(6). Thus, SGS should have (but did not) included day-off pay in the "regular rate of pay" when calculating overtime rates. That is, SGS underpaid overtime to any Plaintiff who worked on a day-off in a week in which he also received overtime. This appears to be a violation of the rule that the fluctuating workweek method may not be utilized unless each "employee receives a fifty percent (50%) overtime premium in addition to the fixed weekly salary for all hours worked in excess of forty (40) during the week," Teblum, 2006 WL 288932, at *3 (although the parties have not submitted relevant authorities).

e. Remedy For Violations of the Fluctuating Workweek Rules

The parties have not sufficiently briefed the question of the appropriate remedy for these violations and the Court will not, therefore, address the question of remedies at this time.

C. Defendants' Motion for Partial Summary Judgment

(1) California and Washington-Based Plaintiffs

Defendants argue that OGC and ASI inspectors based in California and Washington are not paid under the fluctuating workweek method; rather, they are paid under California and Washington state law, "which requires that non-exempt employees be paid time-and-a-half for hours worked over eight (8) in a day . . . ." (Def. Mem. at 33.) Plaintiffs counter that, because the "California and Washington based inspectors who opted into this action receive their overtime pay on a delayed basis" and "SGS did not pay them for all the hours they worked," their claims "should not be dismissed . . . regardless of whether or not [SGS] paid them consistent with its state law obligations." (Pl. Mem. at 31-32.)

Defendants' motion is denied because, regardless of whether the California and Washington-based Plaintiffs were paid consistent with state law, there are genuine issues of material fact as to whether these Plaintiffs were paid overtime "on a delayed basis" in violation of the FLSA. (See supra Section III.B.1, re: Late Payment Claim.)

(2) Plaintiffs Who Failed to Appear for Depositions

Defendants argue that "all claims by no-show deponents" Robert Anderson, Robert Fryer, Sedrick Ned, Israel Hernandez, Steven Baker, and Kenya Tolliver "should be dismissed with prejudice." (Def. Mem. at 34; Def. Reply at 10.) Plaintiffs counter that "there was never a judicial warning that dismissal could result from failure to attend," and Defendants have not been prejudiced as "Plaintiffs offered to make other opt-ins available in stead of these opt-ins and in fact, defendant did take advantage of this offer . . . ." (Pl. Mem. at 33-34.)

In order to dismiss a plaintiff's claim under Fed.R.Civ.P. 37(d) for failure to appear at a deposition, the court "must: (1) find willfulness, bad faith, or fault on the part of the party

refusing discovery, and (2) give notice . . . that violation of the court's order will result in dismissal of the case with prejudice." Connell v. City of New York, 230 F. Supp. 2d 432, 436 (S.D.N.Y. 2002). The court must also find that "Defendants were seriously prejudiced by [Plaintiffs'] actions . . . ." Shamis v. Ambassador Factors Corp., 34 F. Supp. 2d 879, 887 (S.D.N.Y. 1999). The Court declines to levy the "extreme sanction" of dismissal because, among other reasons: (1) there is no admissible (sworn) evidence that the opt-in Plaintiffs were all notified that failure to appear for a deposition would result in dismissal with prejudice; and (2) there is no evidence that Defendants were unfairly prejudiced, as they were apparently satisfied with the depositions of other opt-in Plaintiffs and have not requested additional discovery.[10]

(3) SGS-Agri Plaintiffs

Defendants argue that "all claims by SGS-Agri inspectors should be dismissed with prejudice" because "no claim against SGS has been alleged by, or on behalf of, these inspectors, nor have plaintiffs produced any evidence supporting any claim . . . ." (Def. Mem. at 34.) Plaintiffs counter that "Plaintiffs working in the agricultural division were subject to the same late payment and Chinese Overtime as the OGC Plaintiffs . . . ." (Pl. Mem. at 35.)

Defendants' motion is denied, among other things, based upon the testimony of Plaintiff Lowell Lewis that his "work as an agri inspector [is] paid by -- the same method as [his] work as an oil, gas and chemical [OGC] inspector." (Ex. 42: Deposition of Lowell Lewis, dated March 7, 2006, at 43.) This testimony raises a genuine issue of material fact whether Agri Division employees were paid under the fluctuating workweek method.

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[10] In the event that Defendants still wish to depose the no-show deponents, the issue of the need for further discovery will be referred to Magistrate Judge Ellis.

(4) ASI Employees

Defendants argue that all claims by the "Auto Inspector" opt-in Plaintiffs should be dismissed with prejudice because, among other reasons: they "are or were employed by ASI, and not by defendants SGS-NA or SGS-CS"; "as a matter of law a parent corporation is not liable for the acts of its subsidiaries"; and Plaintiffs "have never attempted to amend their Second Amended Complaint to name ASI as a defendant." (Def. Mem. at 34-35.)

Plaintiffs counter that, among other reasons: "SGS should be estopped from now contending that it is not the employer when its prior position and conduct of this litigation established that it was"; "SGS North America and SGS Auto are a single integrated enterprise"; "SGS controls the labor relations for SGS Auto, [and] creates and operates its unlawful payroll practices"; and, if necessary, "plaintiffs should be permitted to amend the complaint to name the subsidiary as a defendant." (Pl. Mem. at 32-33.)

Without passing upon the merits of Plaintiffs' estoppel and veil-piercing arguments, the Court will grant Plaintiffs' application to amend the Complaint on or before March 12, 2007, to add a claim against ASI, because Defendants have "failed to show how [they] will be materially prejudiced by the amendment." Zomba Recording Corp. v. MP3.Com, Inc., 2001 WL 770926, at *1 (S.D.N.Y. July 10, 2001); see Fed.R.Civ.P. 15(a), 16(b); Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2000).

(5) ASI Bonus Claim

As noted above in Section III.B.2, the Court has granted summary judgment in Plaintiffs' favor as to the ASI Bonus Claim. (See supra p. 14 n.8.)

V. Conclusion and Order

For the foregoing reasons, Defendants' motion [129] to decertify the Class is denied, Plaintiffs' cross-motion [142] for partial summary judgment is granted in part and denied in part, and Defendants' motion [129] for partial summary judgment is denied.

Counsel and principals are directed to participate in a trial scheduling/settlement conference on Wednesday, March 21, 2007, at 2:00 p.m., in Courtroom 14A, 500 Pearl Street, New York, New York. **The parties are directed to engage in good faith settlement negotiations prior to the conference.**

Dated: New York, New York
February 26, 2007

RICHARD M. BERMAN, U.S.D.J.