UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD AYERS, et al.,

Plaintiffs,

- against -

SGS CONTROL SERVICES, INC., et al.,

Defendants.

MEMORANDUM AND ORDER

03 Civ. 9078 (RMB) (RLE)

RONALD L. ELLIS, United States Magistrate Judge:

I. INTRODUCTION

Plaintiffs, individually and on behalf of others similarly situated, brought this collective action pursuant to the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. §§ 203, 207 *et seq.*, and its implementing regulations, alleging that defendants, through their payroll practices, violated the FLSA by failing to pay all overtime wages due its employees in a timely manner. Plaintiffs seek declaratory relief, payment for unpaid wages, liquidated damages, and an award of attorney's fees, costs, and expenses. Defendants have filed a motion for reconsideration of the Court's October 22, 2004 ruling defining the class of similarly situated plaintiffs, authorizing class notice to be sent to persons in that class, and directing defendants to provide plaintiffs with the names and addresses of purported class members.

For the reasons discussed below, defendants' motion is **DENIED.**

II. BACKGROUND

Plaintiffs named in this action are current and former employees of defendants, which are corporations that provide the operation of inspection services for the shipping industry

throughout the United States and the world. As employees, plaintiffs performed inspection services for defendants throughout the United States for the past three years. Defendant SGS North America, Inc. ("SGSNA") is headquartered in Hoboken, New Jersey. Once a distinct and independent corporation, defendant SGS Control Services, Inc. ("SGSCSI") reorganized into SGSNA's Oil, Chemical & Gas Division, whose offices are located in Carteret, New Jersey.

Plaintiffs allege in their second amended complaint that defendants failed to pay premium overtime wages to them on a timely basis and in an amount required by law, in violation of the FLSA and its implementing regulations and therefore caused plaintiffs and similarly situated inspector employees to suffer loss of wages and interest thereon. Accordingly, plaintiffs have sought to send notice to all inspector employees who were subjected to defendants' pay practices.

Defendants have made repeated objections to notice in letters to the Court. In a letter dated April 26, 2004, defendants objected to both the timing and the scope of notification. *See* Letter from Patrick Brophy to the Court, dated April 26, 2004 ("Brophy April 26, 2004 Letter"). First, defendants argued that notice should not be given before dispositive issues concerning the merits of plaintiffs' claims[1] were resolved, in order to obviate the need to unduly burden defendants' employees and disrupt defendants' business. **Id.** at 1. Second, defendants argued that notice should be restricted to inspector employees of SGSCSI, currently the integrated Oil, Gas & Chemical Division of SGSNA, because plaintiffs worked for SGSCSI when the alleged practices occurred. **Id.**

[1] In support of their opposition to notice, defendants argued in effect that their payroll practices comply with the FLSA, and therefore, plaintiffs' claims are without merit. Brophy April 26, 2004 Letter at 2. Notwithstanding their claim of compliance, however, defendants nevertheless argue that any non-compliance was based on good faith and reasonable conduct, that such non-compliance constituted "*de minimus* violations," and accordingly, an award of liquidated damages to plaintiffs would be "grossly unfair and [a] reversibly erroneous exercise of the court's delegated discretion under the Act." **Id.** at 2.

In a letter dated June 29, 2004, defendants argued that deposition testimony from defendants' payroll employees further supported their assertions that their payroll practices are lawful and that plaintiffs' claims are meritless. ***See*** Letter to the Court from Patrick Brophy, dated June 29, 2004 ("Brophy June 29, 2004 Letter"). Therefore, defendants argued that notice should not be authorized until dispositive issues concerning the merits of plaintiffs' claims were "fully briefed, and considered and determined by the Court." Brophy June 29, 2004 Letter at 4. However, their position notwithstanding, defendants proposed a modified notice that included a disclosure about the costs and expenses employees might be responsible for if they chose to join in the lawsuit; a disclosure about the loss of privacy employees might endure concerning their personnel records; a warning that participation in the lawsuit would not shield employees against non-retaliatory disciplinary measures; and instructions prohibiting employees from using defendants' equipment or time to pursue any matter related to the instant litigation. **Id.**

On June 29, 2004, the Court ruled during a status conference that plaintiffs were entitled under the FLSA to send out notice of the action to potential plaintiffs who are "similarly situated." ***See*** 29 U.S.C. § 216(b) (permitting any one or more employees to pursue an action "for and in behalf of himself or themselves and other employees similarly situated"). However, at that time, the Court did not specifically approve either of the parties' proposed form of class notice, although it did indicate that, in general, plaintiffs' proposal appeared reasonable. In particular, the Court noted that 1) any notice should be sent to all of SGSNA's inspector employees, rather than simply to the inspector employees of its Oil, Gas & Chemical Division; 2) language in the notice should be fair and balanced; 3) the notice should inform potential class members about costs they may be required to incur in joining the lawsuit; 4) the notice should

not include language prohibiting employees from using the workplace to contact attorneys about the class action; and 5) no provision in the notice should compromise defendants' company policies.

After considering the oral and written submissions of the parties, the Court issued an order dated October 13, 2004, defining the class of similarly situated plaintiffs to be "all 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 per week," and directing defendants to provide plaintiffs with the names and addresses of such similarly situated employees by October 29, 2004.

In response to the October 13 order, defendants wrote to the Court, claiming that plaintiffs failed to meet their burden to show that similarly situated persons exist and that plaintiffs' unilateral definition of the plaintiff class "invites a fishing expedition," which is inconsistent with the intentions of the FLSA. Letter from Patrick Brophy to the Court, dated October 19, 2004 ("Brophy October 19, 2004 Letter.") at 1, n.1. Notwithstanding these claims and without waiving their objections to the outstanding order pursuant to Rule 72(a), Federal Rules of Civil Procedure, defendants asked the Court to issue a revised order referring to "inspector employees," rather than simply to "employees" in defining similarly situated persons. **Id.** at 2. In addition, defendants claimed that four plaintiffs who recently joined in the lawsuit are not similarly situated class members because they work either for SGS Automotive Services, Inc. ("SGS Automotive"), a subsidiary of SGSNA, or for SGSNA's Oil, Gas & Chemical Division in California. **Id.** Therefore, as a preferable alternative to the Court merely revising the October 13 order, defendants asked the Court to rescind the order in its entirety and hold another

conference to discuss the matter. Finally, defendants requested that a revised order extend the date by which defendants had to submit the balance of outstanding discovery to plaintiffs from October 22, to October 29, 2004.

The Court issued a corrected order on October 22, 2004 ("Corrected Order"), which included the modifier "inspector" to describe employees in the plaintiff class and extended the compliance date to October 29, 2004. On October 27, 2004, defendants advised the Court of its objections to the Corrected Order, claiming, *inter alia,* that plaintiffs failed to meet their burden to demonstrate that a similarly situated plaintiff class existed; that the Court did not sufficiently examine plaintiffs' definition of a similarly situated plaintiff class; and that the proposed class was not in fact similarly situated. Letter from Patrick Brophy, dated October 27, 2004 ("Brophy October 27, 2004 Letter"). In response to defendants' letter, the Honorable Richard M. Berman ordered defendants to seek reconsideration from the undersigned, and on October 29, 2004, defendants submitted their motion for reconsideration pursuant to Rule 59(e), Federal Rules of Civil Procedure and Rule 6.3 of the Local Civil Rules.

In their motion for reconsideration, defendants argue that plaintiffs have failed to meet their burden in demonstrating not only that current or former field inspectors of defendants are similarly situated to plaintiffs, but also that the individually named plaintiffs are similarly situated to each other. Defendants' Motion for Reconsideration ("Mot. for Recon.") at 1, 3. Defendants insist that should the Corrected Order be permitted to stand, "manifest injustice will result," **id.** at 1, as notice of the collective action will be disseminated to hundreds of past and present field inspectors, "many of whom are not similarly situated to each other or to Plaintiffs, inviting them to opt into this action." **Id.** at 2. In support of their position, defendants offer the

declaration of Steve Bloom ("Bloom"), Director of Human Resources of SGSNA, in which he states that "injury to morale, employer/employee relations, productivity, and retention and recruitment of capable inspectors and other employees, resulting from the dispatch of the prescribed Notice to the many disparate and not similarly situated inspectors throughout SGSNA, would be certain and significant in impact and duration." Declaration of Steve Bloom in Support of Defendants' Motion for Reconsideration ("Bloom Decl.") ¶ 19. In addition, Bloom declares that any money damages would be impossible to quantify and any award would be burdensome on defendants and injurious to the employer/employee relationship. **Id.** Defendants offer no other evidence, however, to support these assertions.

Defendants note that SGSNA employs approximately 1,500 inspectors throughout its divisions and subsidiaries to serve the inspection and testing requirements of customers in a variety of industries. **Id.** at ¶¶ 5, 11; Mot. to Recon. at 2. The nature of the inspection business and the varied localities in which inspection services occur does not provide for uniformity of work hours, workweek schedules, or days off for inspectors. Bloom Decl. ¶ 12; Mot. to Recon. at 2. Moreover, defendants claim that several factors, including whether inspectors' workweeks fluctuate in hours; the state in which they work; and the division to which they are assigned contribute to the different pay plans to which inspectors are subjected. Bloom Decl. ¶ 12; Mot. to Recon. at 4. Given these differences among the opted-in plaintiffs and persons within the purported class, defendants suggest that the Corrected Order's definition of similarly situated employees is overbroad. In addition, defendants claim the order is not based on what is legally required for class certification in an FLSA action, as "[p]laintiffs have failed to provide the Court with a single piece of evidence showing the existence of similarly situated employees." Mot. to

Recon. at 4. Specifically, defendants note plaintiffs' failure to submit evidence concerning "other employees' job duties, hours worked, job locations, work schedules, time of employment or pay provisions." **Id.** at 9. They assert that plaintiffs have failed to address the relationship between an inspector's pay plan and his work schedule and location. **Id.** In sum, defendants argue that plaintiffs have failed to demonstrate that a factual nexus exists between their situation and that of other current and former inspectors, and that this failure precludes a collective action and notice thereof under the FLSA. **Id.** at 4, 9. Accordingly, defendants insist that "manifest injustice" will result should the Corrected Order be affirmed. **Id.** at 10.

III. DISCUSSION

A. Standard of Review

The decision whether to grant or deny a motion for reconsideration pursuant to Rule 59(e), Federal Rules of Civil Procedure, is within the sound discretion of the court. **Ursa Minor Ltd. v. Aon Financial Products, Inc.**, 2000 WL 1279783, at *1 (S.D.N.Y. Sept. 8, 2000). The standard is strict (***see*** Local Civil Rule 6.3), and such motion "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked–matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." **Shader v. CSX Transp., Inc.**, 70 F.3d 255, 257 (2d Cir. 1995). "[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." **In re Health Mgmt. Sys. Inc. Sec. Litig.**, 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000) (citations omitted).

In their motion for reconsideration, defendants make claims they previously argued before the Court. ***See, e.g.,*** Brophy April 26, 2004 Letter; Brophy June 29, 2004 Letter; Brophy October

19, 2004 Letter; Brophy October 27, 2004 Letter. Then as now, defendants' arguments do not reflect that the Court overlooked "controlling" evidence that requires a change in its prior decision.

B. Standard for a Collective Action Notice

Section 216(b) provides, in pertinent part:

> An action to recover [] liability [for violation of § 207 of the FLSA][2] may be maintained against any employer . . . 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 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. 29 U.S.C. § 216(b).

Therefore, "to be bound by the judgment" or "benefit from it," potential plaintiffs must "opt-in" to an FLSA collective action, and only by "opting-in" can potential plaintiffs' claims be tolled. **Hoffmann v. Sbarro**, 982 F. Supp. 249, 260 (S.D.N.Y. 1997). A district court has the power to direct that notice be sent to potential class members under § 216(b) of the Act, and notice at an early stage of litigation is appropriate to further the FLSA's broad remedial goals and to promote efficient case management. **Hoffmann-La Roche v. Sperling**, 493 U.S. 165, 169-171 (1989); **Braunstein v. Eastern Photographic Labs, Inc.**, 600 F.2d 335, 336 (2d Cir. 1978) (notification of putative plaintiffs "comports with the broad remedial purpose of the Act, which should be given a liberal construction, as well as with the interest of the courts in avoiding multiplicity of suits").

In addition, the strict requirements of Rule 23 of the Federal Rules of Civil Procedure do

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[2] This section sets forth the maximum number of regular hours an employee may work before receiving overtime compensation and provides the standards for determining regular pay rates and overtime compensation.

not apply to FLSA collective actions, and thus, no showing of numerosity, typicality, commonality, and representativeness is required. **Id.** at 263. Instead, the only threshold requirement plaintiffs must meet is to demonstrate that potential class members are "similarly situated." **Id.** at 261. While the FLSA does not define the term "similarly situated," plaintiffs need only satisfy the requirement "by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." **Id.** at 261. Plaintiffs' burden is relatively light, considering the determination of whether potential plaintiffs are "similarly situated" is merely preliminary. **Id.** at 261.

Accordingly, substantial allegations by plaintiffs that defendants' actions violated the FLSA, as well as an admission by defendants that such actions reflect a company-wide policy, sufficiently demonstrate a factual nexus between plaintiffs' situation and other potential class members, and therefore, will support a finding that plaintiffs and class members are similarly situated for purposes of sending an FLSA notice. **Id.** at 261-62. However, the Court will not find that putative class members are similarly situated based solely on plaintiffs' allegations that defendants committed widespread wrongdoing if there is a total lack of factual support for those allegations. **Id.** at 262.

Applying these principles, I find that plaintiffs are entitled to send notice to the class of individuals described in the Corrected Order. Plaintiffs have made substantial allegations to the Court that defendants improperly calculate overtime compensation and remit such compensation in an untimely manner. The four individually named plaintiffs in the lawsuit submitted affidavits[3] clearly stating that they regularly worked more than forty (40) hours per week. *See*

[3] Plaintiffs' affidavits are attached to the Letter from Dan Getman to the Court, dated April 29, 2004.

Acosta Aff. ¶ 5; Roenne Aff. ¶ 5; Brossard Aff. ¶ 5; Ayers Aff. ¶ 5. Moreover, plaintiffs stated that they were paid those excess hours according to a fluctuating workweek method[4] rather than by time and one half at a fixed hourly rate. ***See*** Acosta Aff. ¶ 7; Roenne Aff. ¶ 7; Brossard Aff. ¶ 7; Ayers Aff. ¶ 7. The affidavits further state that defendants improperly computed plaintiffs' overtime compensation by failing to include all wages earned as part of the regular rate upon which overtime is calculated. The affidavits also state that plaintiffs were not paid overtime at the same time in which their regular earnings were paid, but were paid in the following pay period or a subsequent pay period. Consequently, plaintiffs were not paid their overtime hours sometimes until almost a full month later than the hours worked. Acosta Aff.¶ 10; Roenne Aff. ¶ 10; Brossard Aff. ¶ 10; Ayers Aff. ¶ 10. Finally, the affidavits declare that defendants' payroll practices applied to all other inspector employees who performed the same work as plaintiffs, thereby suggesting such practices were applicable pursuant to a wide-spread company policy. **See** Acosta Aff. ¶¶ 11-12; Roenne Aff. ¶¶ 11-12; Brossard Aff. ¶¶ 11-12; Ayers Aff. ¶¶ 11-12.

Plaintiffs expounded on the allegations in their amended complaint and affidavits in letters to the Court. ***See, e.g.,*** Letter from Dan Getman to the Court, dated April 29, 2004 ("Getman April 29, 2004 Letter"); Letter from Dan Getman to the Court, dated June 29, 2004 ("Getman June 29, 2004 Letter"); Letter from Dan Getman to the Court, dated October 20, 2004 ("Getman October 20, 2004 Letter"). While defendants have sought to raise new issues and brief

[4] Under the FLSA, the fluctuating workweek method of compensation applies to employees whose work hours fluctuate from one week to the next. 29 C.F.R. § 778.114(a). An employee receives a fixed salary, regardless of the number of hours he works in a given week. **Id.** However, the FLSA permits this compensation method only "if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he worked is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay." **Id.**

the merits of plaintiffs' claims each time they object to notice, plaintiffs have consistently responded with the same claims: 1) defendants impermissibly use the fluctuating workweek method to calculate overtime, 2) they fail to pay plaintiffs' overtime wages together with their regular wages, or as soon as practicable thereafter, and 3) they fail to include all wages earned as part of the regular rate upon which defendants calculate overtime. **Id.** In sum, defendants' payroll practices have resulted in both miscalculated and delayed overtime wages due plaintiffs and all other inspectors who perform similar work as they perform. **Id.** Moreover, as such practices reflect wide-spread company policies, all SGSNA inspector employees in plaintiffs' purported class raise the same claim of improper calculation and unlawfully and unreasonably delayed remittance of overtime wages. **Id.**

Plaintiffs' allegations are bolstered by deposition testimony from defendants' payroll manager, Gia Plewa ("Plewa"). For example, Plewa testified that with the exception of the Minerals Division, SGSNA handles payroll for all its divisions and subsidiary corporations in the United States, St. Croix, St. Eustatius, and Crucell out of its New Jersey headquarters and uses the same payroll practices . Transcript of Deposition of Gia Plewa ("Tr.") at 8-9; 44-45; 88-90; ***see also*** Getman October 20, 2004 Letter. In addition, she stated that 1) these payroll practices operate pursuant to guidelines found in the company's employee handbook (Tr. at 11); 2) Bloom and the Vice President of Finance for SGSNA set the payroll policies for the company (**id.** at 14); 3) all employees subject to the payroll practices are paid semi-monthly (**id.** at 15-16; 89-90); 4) there is a single payroll cycle for all of SGSNA (**id.** at 15-17; 89-90); and 5) payroll checks are cut from a single site. **Id.** at 18.

Plewa also testified that a single payroll system program automatically calculates

overtime for all inspector employees, **id.** at 88, and that all these employees are subject to the same payroll policy concerning the time frame in which they are paid overtime. **Id.** at 89. In addition, for those inspector employees who are subject to the fluctuating payment method and whose pay rate falls below minimum wage, the company's payroll system program automatically adds a sufficient dollar amount to the employees' pay to make up the difference. **Id.** at 91. There is no way to identify which individual employees have received this "buildup" pay in a given pay period, however. **Id.** at 92-93. Furthermore, despite the fact that sometimes inspector employees (both who are subject to and not subject to the fluctuating workweek payment method) who work overtime in one pay period do not receive their overtime wages until the following one or two pay periods (***see*** Tr. at 89, 98; Brophy June 29, 2004 Letter at 2), the record indicates that defendants could actually pay the employees far earlier than they do. ***See*** Tr. at 77-78 (stating that overtime payments could be made to employees as soon as four or five days followng the end of the week in which overtime hours are performed, using approximately eight additional hours of staff time to process each transaction). The record also demonstrates that defendants pay inspectors who are subject to the fluctuating workweek method differently depending on the days of the week they work. ***See*** Tr. at 99 (affirming that an inspector who works on weekdays and then has days off on weekends would effectively be paid more money than someone who worked on the weekend and had days off during the week, even though the number of days worked for either individual would be the same).

Defendants' focus on the merits is misplaced at this stage. Evaluation of the merits of plaintiffs' claims is unnecessary to determine whether notice is appropriate to the defined similarly situated class. **Realite v. Ark Restaurants Corp.**, 7 F. Supp. 2d 303, 308 (S.D.N.Y.

1998); *see also* **Krueger v. New York Telephone Co.**, 1993 WL 276058, *2 (S.D.N.Y. July 21, 1993) (determinations of notice at the early stages of litigation is still appropriate even if further discovery reveals plaintiffs' claims to be meritless); **Hoffmann-La Roche, Inc.**, 493 U.S. at 174 (warning that when determining issues concerning notice of joinder, trial courts must "avoid even the appearance of judicial endorsements of the merits of the action."). Indeed, the Court need not actually hold that all class members to whom notice will be sent are, in fact, similarly situated to plaintiffs. The preliminary discovery that has been exchanged so far, plus the lower burden plaintiffs must meet for notice purposes, compared to the higher burden they must meet for purposes of Rule 23 class certification, does not make such a determination appropriate. *See* **Realite**, 7 F. Supp. 2d at 308. Furthermore, should further discovery demonstrate that plaintiffs in the purported class are not in fact similarly situated or that only some of them meet the standard, it may be necessary to subdivide the class or decertify it altogether. **Id.** At this early stage of the litigation process, however, principles of efficiency and judicial economy, as well as the liberal remedial purpose of the FLSA, support broad notice of joinder. **Id.** (*citing* **Krueger**, 1993 WL 276058, at *2).

Finally, both defendants' insistence that '[p]laintiffs have not presented ***any*** evidence" to demonstrate a similarly situated class, and their cries that recently opted-in plaintiffs are not similarly situated class members because they are employed either by SGS Automotive or by the Oil, Gas & Chemical Services Division in California are unfounded. As previously discussed, plaintiffs have made substantial allegations about defendants' pay schedule and its impact on inspector employees within the proposed class, regardless of where or for what division and subsidiary they work. More significantly, defendants' own employees have supported those

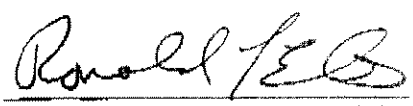
allegations. The record, therefore, belies defendants' bald assertions, and instead, supports authorization of notice. *See* **Hoffmann**, 982 F. Supp. at 261-62 (defendants' admission that some employees were subjected to a company-wide policy in alleged violations of the FLSA supports a preliminary finding that other employees also may have been subject to such policy and should receive notice accordingly).

In consideration of the foregoing, I find that plaintiffs have shown a factual nexus between their situation and that of defendants' other inspector employees. Thus, plaintiffs have satisfied their burden of demonstrating that a similarly situated plaintiff class exists and that notice to such class is appropriate.

IV. CONCLUSION

For the reasons discussed, the Court authorizes plaintiffs to send notice of the pending collective action to the class of individuals proposed by plaintiffs, and previously sanctioned in the October 22, 2004 court order. Moreover, defendants are ordered to provide plaintiffs with the names and addresses of the defined similarly situated employees **by December 23, 2004.**

SO ORDERED this 16th day of December.
New York, New York



The Honorable Ronald L. Ellis
United States Magistrate Judge