UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD AYERS, et al., individually and on behalf of others similarly situated,

Plaintiffs,

v.

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

Defendants.

03 CV 9078 (RMB)(RLE)

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFFS' OPPOSITION TO DEFENDANTS MOTIONS TO DECERTIFY AND FOR PARTIAL SUMMARY JUDGMENT

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The Defendants (collectively "SGS") are subsidiaries of SGS, a large Swiss multinational corporation. The Plaintiffs are inspectors that worked for SGS around the United States. As part of their jobs, Plaintiffs were required to work extraordinarily long hours, regularly more than 100 hours in a week and, at times, 24 hours in a day. SGS' pay scheme was such that while the Plaintiffs worked long hours, their hourly wage diminished with each overtime hour they worked. In its zeal to squeeze out the most work for the least pay, SGS violated the spirit of the Fair Labor Standards Act ("FLSA") by using payment practice designed to end run the FLSA's overtime requirements. Its pay practices also violated the letter of the FLSA by not paying overtime wages when they were due and by not paying the overtime earned.

As a matter of company policy, SGS's pay practices violated the FLSA. It did not pay Plaintiffs overtime wages as soon as practicable. Instead, it regularly withheld overtime wages for more than a month after they were earned. SGS paid many Plaintiffs overtime under a method it called "Chinese Overtime." *See January 29, 1991Bloom Memo. "Chinese Overtime," Ex.1.* The method violated the FLSA in several fundamental ways. *See, e.g., Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 6A, at 77-82), *Ex.2* (finding that SGS' "Chinese Overtime" method violates the FLSA overtime requirements). It paid other Plaintiffs under an incentive system that actually resulted in less pay for work performed during overtime hours. With this illegal advantage, SGS ran their business short-staffed, regularly requiring Plaintiffs to work 90, 100, even 120 hours a week. *See Representative OGC Plaintiffs' ADP Payroll Records ("OGC Payroll Records"), Ex.3 (see, e.g.,* pay period January 1, 2003 for Plaintiff Weed). For these long weeks, Plaintiffs regularly earned an additional $2.68 per hour for each hour over 40 worked. Thus, SGS paid a little over $100 for a Plaintiff's 40 overtime hours.

The Fair Labor Standards Act was enacted to prevent just such labor practices. *Barrentine v. Arkansas-Best Freight System, Inc., et al.*, 450 U.S. 728, 739 (1981)("The FLSA was designed to [ensure that employees] would be protected from 'the evil of 'overwork' as well as 'underpay'"). To

prevent unscrupulous employers from forcing employees to work long hours, it requires that employers pay time and one half for each hour of overtime work. 29 U.S.C. §207. Where employers like SGS ignore the law, the FLSA requires them to make up the back pay plus the statutory liquidated damages. 29 U.S.C. 216(b).

FACTS

SGS is a Swiss-based multinational corporation with over $2 billion in revenue in 2005. It is one of the biggest inspection, verification, testing and certification companies in the world. With 43,000 employees, it operates a network of about 1,000 offices and laboratories around the world. *See SGS' 2005 Annual Report at 1, 21, Ex. 4.* It conducts automotive and oil, gas and chemical inspection services in the United States of America. *30(b)(6) Deposition of Donald Milne at 11-13 ("Milne Depo."), Ex.5; 30(b)(6) Deposition of Frank Pompa at 30-37 ("Pompa Depo."), Ex.6.*

All of the Plaintiffs worked for SGS as inspectors. *Defendants' 2nd Amended Answer ¶7, Ex.7.* Plaintiffs' job was to inspect the condition and/or transfer of products in the course of commerce. Plaintiff oil, gas and chemical inspectors ("OGC Plaintiffs") worked the ports and water shipping lanes throughout the U.S. and the Virgin Islands. They provide independent inspection of the transfer of oil, gas and chemicals between ships and shore tanks by gauging, sampling and documenting such movements. *Milne Depo. at 11-13, Ex.5.* Plaintiff automotive inspectors ("Auto Plaintiffs") inspected cars in transit, at auction sites, and at dealerships and lessee's homes. *Pompa Depo. at 30-37, Ex.6.*

Overtime pay was a significant component of Plaintiffs' weekly wages. SGS required Plaintiffs to work overtime hours. *SGS Control Services Inc. Employee Handbook ("OGC Handbook") at 9, Ex.8;*[1] *Auto Handbook at G-8, Ex.10.* OGC inspectors in particular worked extremely long hours. *30(b)(6) Deposition of Gia Plewa at 93:8-22 ("Plewa Depo."), Ex.11.* Accordingly, overtime pay made

[1] SGS revised its OGC Employee Handbook in July 2004. For purposes of this Summary Judgment motion, the substance of the Handbook remains the same. *See Revised SGS Oil. Gas & Chemicals Services Employee Handbook at 19-20. Ex. 9.*

up a substantial part of the OGC Plaintiffs wages. *OGC Employee Handbook p.10, Ex.8.* Auto Plaintiffs were paid a weekly salary of $250 under SGS' pay for performance program. *Pompa Depo. at 74:1-77:9, Ex.6.* Overtime and incentive pay typically made up more than half the Auto Plaintiffs' pay. *See SGS Automotive Services Inc. Off-Lease/GMAC Vehicle Inspection Incentive Program Guidebook ("PFP Employee Guidebook") at 2-6,* Ex. 12.

A. Late Payment of Overtime Wages

SGS regularly paid Plaintiffs' overtime wages a month or more after they were earned, and always withheld the wages for at least 15 days. Plaintiffs were paid on a semi-monthly basis, with payday on the 15th and last day of each month. *Plewa Depo. at 15:23-16:12,* Ex.6*; OGC Handbook at 9, Ex.8; PFP Employee Guidebook at 6, Ex.12; Auto Handbook at G-8, Ex.10.* The semi-monthly paycheck included Plaintiffs' regular pay through the payday. *Id.* Overtime wages and other additional compensation lagged behind at least an entire pay period, *i.e.*, the wages earned in a semi-monthly pay period are not paid until the end of the following pay period. *Plewa Depo. 37:25- 41:1, Ex.11.* Because the pay period was semi-monthly, rather than weekly, each paycheck covered either two or three weeks. *Plewa Depo 37:25-41:3, Ex.11.* Consequently, Plaintiffs regularly had to wait more than a month to receive their overtime pay. *Plewa Depo 40:4-41:1, Ex.11.*

The delay in paying overtime wages was not due to a delay in reporting hours—SGS' central payroll office received the records of Plaintiffs' overtime hours the day after each workweek ended. Plaintiffs' workweek was Monday through Sunday. *Plewa Depo 22:15-18, Ex.11.* SGS' central payroll office in New Jersey processed the payroll for all the Plaintiffs. *Id. at 8:14-17.* Pursuant to company policy, the central payroll office received records of the Plaintiffs' overtime hours on Monday, the day after the workweek ended. *Id. at 23:10—24:5.* SGS' payroll office then compiled the data and transmitted it electronically to ADP, Inc., SGS' payroll processing company. *Id.* at 27:14-34:3. ADP

turned the information around in a single day, sending paychecks to SGS by courier the day after it received the payroll data. *Deposition of ADP ("ADP Depo") at 17:7-22:7; 47:25-48:10, Ex.13.*

ADP can issue checks within a business day of when it receives payroll information. *ADP Deposition at 17:7-22:7; 44:17-45:23; 47:25-48:10, Ex.13.* The only limitation to including overtime wages in the paycheck for the period in which they are earned is the receipt of the information from SGS. *Id. at 39:7-45:11.* Moreover, ADP can process payroll and overtime wages on a weekly basis. *Id. at 57:3-15.* ADP's charge for increasing the frequency of paychecks or for producing overtime checks independently of payroll wages for an employee of SGS is less than $1.20 per pay check, or less than $33.60 per year. *Id. at 62:10-64:2.*[2]

B. Fluctuating Work Week Violations

Under SGS' "Chinese Overtime" pay method, OGC Plaintiffs' hourly wage decreased with each overtime hour they worked. SGS paid OGC Plaintiffs overtime pay under its "Chinese Overtime". *OGC Handbook at 9, Ex.8; Plewa Depo. at 41:12-24, Ex.11.*[3] Under the method, SGS paid Plaintiffs a salary. *OGC Handbook at 10, Ex.8.* For purposes of calculating overtime wages, it 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. *Id.* SGS then paid the Plaintiff ½ that hourly rate for each overtime hour he or she worked. *Id.* 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 the overtime rate became.

The effect of SGS' "Chinese Overtime" was that for 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. *See OGC*

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[2] SGS currently pays $1.18 (80.5% of $1.46) for each paycheck. *ADP Depo at 63:15-64:1.*It currently pays employees on a semi-monthly basis, issuing 24 paychecks per year. Changing to a weekly basis, 52 paychecks per year, would incur an additional annual charge of less than $1.20 per paycheck for an additional 28 paychecks, or less than $33.60.

[3] More than half the Plaintiffs in this case were OGC inspectors. SGS paid a handful of OGC Plaintiffs differently. For instance, OGC Plaintiff Jeff Lewis was not paid any overtime at all despite regularly working many overtime hours. *See Depo Jeff Lewis; Ex.14.*

Handbook at 10, Ex.8. Given the incentive of an ever-decreasing hourly wage, SGS required OGC Plaintiffs to work extraordinary amounts of overtime. *Plewa Depo at 93:8-22, Ex.11.* SGS considered OGC Plaintiffs to be on call 24 hours a day, seven days a week. *Id.*; *Milne Depo at 30:10-33:11, Ex.5.* As a result, OGC inspectors work more overtime than inspectors in other areas. *Plewa Depo at 93:16-22, Ex.11.* It was not uncommon for Plaintiffs to work 80 - 100 hours a week, or even more than 120 hours. *See, e.g., OGC Payroll, Ex.3; Plewa Depo. at 93:16-22, Ex.11.*

C. Minimum Wage Violations

Under SGS' "Chinese Overtime", the combination of low salaries, long hours and a shrinking hourly wage resulted in Plaintiffs' salaries regularly falling below the minimum wage for all the hours worked. *See Analysis of Fluctuating Work Week Minimum Wage Violations ("Minimum Wage Summary"), Ex.15*; *Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 6A, at 77-82), Ex. 2. Plaintiffs' salaries were insufficient to meet the minimum wage requirements in 214 of the 230 weeks in the class period, from the last quarter of 2000 until the first quarter of 2005. *See Minimum Wage Summary, Ex.15.* Many individual Plaintiff's salaries fell below the minimum wage more than 20 times during the class period. *See id.* Below-minimum wage salaries for the OGC Plaintiffs were only the tip of the iceberg. Plaintiffs in this case represent only 15% of the entire class of OGC inspectors.[4] The low salaries were not limited to Plaintiffs in this case, non-plaintiff OGC inspectors' salaries also fell below the minimum wage. *See, e.g., Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 6A, at 77-82), *Ex. 2*, (finding that an SGS OGC inspector suffered a below-minimum wage salary in 45% of the pay periods over the course of his employment).

SGS foresaw that salaries would not cover the minimum wage. The OGC Inspectors' Employee Handbook specifically referred to such occurrences. *See OGC Handbook at 10, Ex.8.* When a salary fell below the minimum wage, SGS was supposed to "bump up" the Plaintiff's weekly pay to ensure that it

[4] The 96 OGC Plaintiffs represent only 15% of the more than 640 OGC inspectors that the Defendants' identified as part of the class. See *Defendants' List of OGC inspectors, Ex. 16.*

covered the minimum wage for all hours worked. *Id.* SGS has not provided evidence that the bump ups were paid. Indeed, SGS did not keep track of the minimum wage violations at all. *Defs' 4/17/06 Memo in Resp. to Court's Request for Briefing on Attorney Work Product Excel Spreadsheets, Ayers, et al. v. SGS*, 03 Civ. 9078 (S.D.N.Y. 2003), *Ex.17*; *Long-Daniels 3/27/06 Ltr. to Hon. Ronald L. Ellis, fn 1* ("SGS does not record when [minimum wage] bump ups are given as a matter of course."), *Ex.18*; *see also Plewa Depo. at 90:19:-93:23, Ex.11*; *Deposition of Steven Bloom 2/22/06 ("Bloom 2006 Depo."), Ex.19 at 74:3-79:15*; *Defs' Resp. to Pls. Fifth Req for Prod. Docs, # 7, Ex.20.* As a result, Plaintiffs' salaries regularly fell below the minimum wage. *See Minimum Wage Summary, Ex.15.*

D. Fixed Salary Violations

In addition to salaries, SGS paid OGC Plaintiffs various forms of other straight-time compensation. It paid OGC Plaintiffs additional "sea pay" when they were required to work offshore on a vessel. *Milne Depo. at 45:24 – 46:3,* Ex.5. Sea pay was a fixed amount, not based on the number of hours a Plaintiff worked. *Steve Bloom 11/9/93 Letter to Epstein, Becker & Green ("Bloom Letter to EBG"), Ex.21; Milne Depo. at 45:24 – 46:3, Ex.5.* Nor was it tied a Plaintiff's regular hourly rate. *Id.* SGS also claims that it paid Plaintiffs a "bump up" when they worked so many hours that their salaries did not cover minimum wage for all the hours they worked in a week. *OGC Handbook at 10, Ex.8.* SGS also paid OGC Plaintiffs "day-off pay", a fixed amount paid for working on scheduled days off. *Plewa Depo. at 100:16-101:8, Ex.11; Milne Depo. at 50:20-51:9, Ex.5.* Day-off pay was always the same for an OGC Plaintiff paid under the "Chinese Overtime" method—an extra 8 hours pay at straight-time. *Steve Bloom 3/21/94 Memo, Ex.22.* Day-off pay was not based on a Plaintiff's regular rate of pay, but was calculated by dividing the Plaintiff's weekly salary by 40 hours and then multiplying the quotient by 8 hours. *Steve Bloom 1/1/03 Ltr, Ex. 23* (showing that Plaintiff Ayers received $129.23 (his $646.15 weekly salary divided by 40 and then multiplied by 8) for each day off he worked, regardless of the number of hours worked in a week or on a day off). It was not based on the number of hours that a

Plaintiff actually worked. Rather day-off pay was the same amount whether the Plaintiff worked 1 or 24 hours on their day off, whether the Plaintiff worked 60 or 100 hours that week, and whether the day-off hours were the first 12 hours of the week or the last 12 hours of the week. *Plewa Depo. at 100:16–101:8, Ex.11; Milne Depo. at 50:20-51:9, Ex.5.*

OGC Plaintiffs were regularly required to work on their days off. *Plewa Depo. at 93, Ex.11.* For example, while working for SGS Representative Plaintiff Lowell Lewis worked at least one day off in 105 of his 110 pay periods; Representative Plaintiff Weed worked at least one day off in 56 of his 58 pay periods; Representative Plaintiff Ayers worked at least one day off in 12 of his 19 pay periods; Representative Plaintiff Young worked at least one day off in 8 of his 19 pay periods. *See, e.g., OGC Payroll Records, Ex.3.* (On the ADP payroll records, the code for day-off pay is 75. *ADP Payroll Codes at 5, Ex.24.*)

E. Failure to Include Day-Off Pay in Overtime Calculation

SGS substantially deflated the Plaintiffs' overtime rate by not including day-off pay in its calculation of the Plaintiffs' overtime wages. SGS used only weekly salaries and sea pay as the numerator for the regular rate, which is the basis for the overtime wage rate, with total hours as the denominator. *Bloom Letter to EBG, Ex.21; OGC Handbook at 10 ¶1-6, Ex.8.* By excluding day-off pay in the overtime calculation, SGS lowered the overtime rate it paid to Plaintiffs. *Id.* (like sea pay, adding day-off pay to the weekly earnings would raise the regular and overtime rate).

SGS understood that the FLSA required that payments for straight-time hours, like day-off pay, had to be included in the overtime calculation. *Steve Bloom 7/17/90 Memo to M. Freddo, Comptroller for SGS, Ex.25* ("The law requires that any special bonus, incentive, commission or other payment that is guaranteed be included in total wages for overtime calculation purposes. . . . [Pay must be included in the overtime calculation if] the employee has already been told that he will receive this payment for performing this particular kind of work, and could readily calculate what this payment will be for each

week.") The requirement was reiterated to Mr. Bloom three years later in a letter from outside counsel. *Epstein, Becker & Green 11/29/93 Ltr to Steve Bloom, Ex.26.* Despite the advice from outside counsel, SGS did not change its pay practices to comply with the law. *Bloom 2006 Depo. at 129:11-130:16,* Ex.19.

F. Auto Inspector Incentive Pay

Approximately one-quarter of the Plaintiffs in this action were auto inspectors that were paid under a "Pay for Performance" compensation plan ("PFP"). *See PFP Guidebook, Ex.12.* Under the PFP, SGS paid Auto Plaintiffs a lower incentive for inspections conducted in the overtime hours than for inspections conducted within the first forty hours. *PFP Guidebook at 3,* Ex.12. For example, for certain auto inspections, SGS paid inspectors $10 for all vehicles inspected and an additional $10 for each vehicle over 35 inspected "within the first 40 (forty) hours" [$20 total] but paid only an additional $2 for vehicles inspected in the overtime hours [$12 total]. *Id. at 3.* SGS reduced the rate paid for inspections in overtime hours in each category: FBI, auction, GMAC Dealer, non-GMAC Dealer. *Id. at 3-4.*

ARGUMENT
SUMMARY JUDGMENT STANDARD

Summary judgment is an integral part of the Federal Rules, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex v. Catrett*, 477 U.S. 317, 327 (1986). The Court may render summary judgment on liability even where genuine issues with respect to the amount of damages remain. Fed. R. Civ. P. 56(c). A party is entitled to summary judgment when there is no "genuine issue of material fact" and the undisputed facts warrant judgment for the moving party as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The moving party has the initial burden of demonstrating the absence of a disputed issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has made such a showing, the non-moving party must

present "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The material facts supporting this motion are drawn from SGS' own documents and testimony and are not in dispute.

FLSA PRINCIPLES

"The principle congressional purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working hours. . . . [and to ensure that employees] would be protected from the evil of 'overwork' as well as 'underpay.'" *Barrentine*, 450 U.S. at 739 (citations omitted). To protect against excessive hours of work, the statute requires that employers pay employees for hours in excess of 40 in a week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

The FLSA was designed "to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' ... Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. " *A.H. Phillips v. Walling,* 324 U.S. 490, at 493 (1945); *see also Powell v. U.S. Cartridge Co.,* 339 U.S. 497 (1950); *U.S. v. Rosenwasser,* 65 S. Ct. 295, 296 (1945)("no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded."). The FLSA's overtime rules, "like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. Such a statute must not be interpreted or applied in a narrow, grudging manner." *Giles v. City of New York*, 41 F.Supp.2d 308, 316 (S.D.N.Y. 1999)(quoting *Tenn. Coal, Iron & R.R. Co., et al. v. Muscoda Local No. 123, et al.*, 321 U.S. 590 (1944)).

POINT ONE
DEFENDANTS' PAY PRACTICES VIOLATE THE FLSA.

SGS's pay policies, documented through its own written policies and 30(b)(6) testimony, violate the FLSA as a matter of law in several respects. First, its late payment of overtime wages violated

FLSA requirements with respect to inspectors generally, including the OGC, Auto and Agricultural Plaintiffs here. Second, its "Chinese Overtime" violated the FLSA rights of OGC Plaintiffs. Finally, its PFP violated the FLSA with respect to Auto Plaintiffs.

A. Late Payment of Overtime Violates the FLSA

Although overtime pay was a significant part of Plaintiffs' wages, SGS withheld their overtime wages for at least one half month and regularly for more than 30 days. The law does not leave the determination as to when overtime wages must be paid to the employer. To do so would permit "employers to withhold overtime compensation for some undefined period of time without incurring any legal liability and employees would be left with no recourse during this delay." *Brooks v. Vill. of Ridgefield Park*, 185 F.3d 130, 135-36 (3d Cir. 1999). Even where the employer makes up the overtime payment late, the employer is subject to a claim for liquidated damages. *Id.* The FLSA requires that:

> [O]vertime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until sometime after the regular pay period, however, the requirement 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. The rule is recognized as the test for when wages become unpaid under the FLSA. *O'Brien, et al., v. Town of Agawam*, 350 F.3d 279, 298 (1st Cir. 2003); *see also Howard v. City of Springfield*, 274 F.3d 1141, 1148 (7th Cir. 2002); *Brooks*, 185 F.3d at 135-36. Employers may not disregard the regulation for their own convenience. *O'Brien*, 350 F.3d at 298; *see, e.g., Rogers v. City of Troy*, 148 F.3d 52, 62 (2nd Cir. 1998) (noting that a change in the established payday would not entitle employers to delay overtime payment) (dissenting).

SGS regularly required Plaintiffs to work overtime hours. *See OGC Handbook at 9, Ex.8* ("The practice of requiring employees to work overtime hours is necessary."); *Auto Handbook at G-8,* Ex.10 (same). Plaintiffs regularly worked overtime, many regularly worked more than 80 hours a week, and

some worked as many as 120 hours in a week. *See OGC Payroll Records, Ex.3.* Accordingly, overtime wages made up a substantial part of the Plaintiffs' pay.

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. *OGC Handbook at 9, Ex.8; PFP Employee Guidebook at 6, Ex.12; Auto Handbook at G-8,* Ex.*10; Plewa Depo. at 37:25- 41:1, Ex.11.* Steve Bloom, SGS' Director of Human Resources, illustrated the practice in his October 1, 2003 letter explaining Plaintiff Ayers' pay. *Steve Bloom October 1, 2003 Letter, Ex.23.* In it, he explains that Ayers received overtime for the week ending 12/1/2002 in the paycheck for the pay period ending 12/31/02. *Id.* The time records attached to Bloom's letter show that Ayers began working overtime hours on November 27, 2002, during the workweek ending December 1, 2002. *Id.* As Bloom's letter shows, Ayers was not paid for those overtime hours until December 31, 2002, 34 days later. *Id.* Similarly, Mr. Ayers was not paid for the 37 hours of overtime he worked during the week ending December 8, 2002 until December 31, 2002, 23 days later. *Id.*

SGS had several simple ways to comply with the FLSA's requirement to pay overtime wages as soon as practicable. First, it could have simply released the overtime wage information to ADP earlier. SGS had the overtime information the day after the work week ended. *Plewa Depo. at 22:7-28:7, Ex.11.* If it had transmitted the overtime information to ADP along with the payroll information, the overtime wages would have been included in the regular paycheck. *ADP Deposition 39:7-45:11, Ex.13.* Second, SGS could have paid overtime wages in a separate payroll check to Plaintiffs as soon as the overtime information was available. ADP's charge for producing an additional paycheck for a Plaintiff is currently less than $1.20. *ADP Deposition 62:10-64:2,* Ex.13. Third, SGS could have used a more frequent pay period. ADP's charge for moving an employee to a weekly pay period is currently less than $33.60 per year. *Id.* The additional costs are a minimal and necessary part of complying with the FLSA.

SGS' failure to pay overtime wages when due was not reasonable. Practicable is an objective standard that is not left solely to employers' discretion. *Brooks*, 185 F.3d at 135-36. In the context of the FLSA's requirement to pay overtime on a timely basis, it does not mean what is convenient for an employer. *O'Brien*, 350 F.3d at 298; *see, e.g.*, *Rogers*, 148 F.3d at 62. Under these circumstances, it is patently unreasonable for SGS to withhold overtime wages for 2, 3 and even more than 4 weeks after they were earned. SGS's delay in paying overtime wages is particularly egregious as the salaries it paid the Plaintiffs were often below the minimum wage. For example, Auto Plaintiffs received $250 per week in salary. *Pompa Depo. at 72:20-77:2, Ex.6.* In a week in which those Plaintiffs worked 49 hours, their salary did not even cover the minimum wage for the hours worked. Similarly, OGC Plaintiffs salaries were insufficient to cover minimum wage 860 times during the class period. *See Min. Wage Summary, Ex.15.* Accordingly, SGS violated the rule that overtime pay "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." 29 C.F.R. §778.106; *O'Brien*, 350 F.3d at 298; *Howard*, 274 F.3d at 1148; *Brooks*, 185 F.3d at 135-36.

Contemporaneous with this summary judgment briefing, SGS has moved to comply with the FLSA. It has moved from a semi-monthly to a bi-weekly pay date. Beginning with the pay week ending July 23, 2006, SGS will now pay overtime pay with the straight-time pay. *HR Talk, July 2006 "Upcoming Change from Semi-Monthly to Bi-Weekly Payroll Processing for Non-Exempt Staff," Ex.27.* That SGS is now able to pay overtime with the straight-time wages shows that such a system was always "practicable."

B. SGS Was Not Entitled to Use the Fluctuating Workweek Method of Calculating Overtime Wages

"[T]he FLSA requires that an employer compensate employees for hours in excess of 40 per week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). Though it complicates overtime calculations, it is permissible for compensation to

be annual or weekly rather than hourly, see 29 C.F.R. § 778.109, because the Supreme Court has held that, for FLSA purposes, "[e]very contract of employment, written or oral, explicitly or implicitly includes a regular rate of pay for the person employed···" *Giles v. City of New York*, 41 F.Supp.2d 308, 316 (S.D.N.Y. 1999).

> Calculation of the correct "regular rate" is the linchpin of the FLSA overtime requirement. The term is significant because under 29 U.S.C. § 207(a)(1), an employee who works overtime is entitled to be paid "at a rate not less than one and one-half times the *regular rate* at which he is employed" (emphasis added). The statute defines the term "regular rate" in § 207(e). Under that provision and the relevant case law and interpretative regulations, the regular rate cannot be stipulated by the parties; instead, the rate must be discerned from what actually happens under the governing employment contract. *See* 29 C.F.R. § 778.108; *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 462-63, 68 S.Ct. 1186, 92 L.Ed. 1502 (1948). The general rule, per the plain text of the FLSA, is that the regular rate "shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee." § 207(e). The statute includes a list of exceptions to this rule, *see* § 207(e)(1)-(e)(8), but the list of exceptions is exhaustive, *see* § 778.207(a), the exceptions are to be interpreted narrowly against the employer, *see Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295-96, 79 S.Ct. 756, 3 L.Ed.2d 815 (1959), and the employer bears the burden of showing that an exception applies, *see Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 209, 86 S.Ct. 737, 15 L.Ed.2d 694 (1966).

O'Brien, 350 F.3d at 294.

Interpreting this statutory requirement, the Department of Labor has approved two methods of calculating overtime for salaried employees.

> "The first is the "fixed weekly salary" method, which governs employees who receive a fixed salary that is intended to compensate a specific number of hours of labor (*e.g.*, $400 for 40 hours). 29 C.F.R. § 778.113(a). The other is the fluctuating workweek method, which applies when an employee "is paid a fixed weekly salary regardless of how many hours the employee may work in a given week." 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...."

O'Brien, 350 F.3d at 287 (citations omitted).

The fixed salary method is consistent with the FLSA's intention of creating a disincentive to excessive hours by requiring a premium hourly rate at time and one half for hours over forty. *Barrentine*, 450 U.S. at 739. It is the FLSA's default position. *Dingwall v. Friedman Fisher Assocs.*

P.C., 3, F.Supp.2d 215, 221 (N.D.N.Y. 1998) ("[The fluctuating workweek] method is an exception to the normal rights of the employee and thus the employer bears the burden of proving that all the requirements for applying the method are present."); *accord Yourman, et al. v. Dinkins, et al.*, 865 F.Supp. 154, 165 (S.D.N.Y. 1994) *rev'd on other grounds*. Under the FLSA, "[t]here is a rebuttable presumption that a weekly salary covers 40 hours." *Giles v. City of New York*, 41 F.Supp.2d 308, 317 (S.D.N.Y. 1999)(collecting cases); *accord Estanislau v. Manchester Developers, LLC*, 316 F.Supp.2d 104, 108 (D. Conn. 2004); *Moon v. Kwon*, 248 F.Supp. 2d 201, 207-09 (S.D.N.Y. 2002).

With the fluctuating workweek ("FWW") , an employer need only pay ½ of the regular rate for each additional hour over forty and the regular rate is determined by dividing the weekly fixed pay by all hours worked. In practice, the FWW can be contrary to the spirit of the FLSA. It allows an employer to pay less for each overtime hour the more hours the employee is required to work. 29 C.F.R. §778.114; *Yourman*, 865 F.Supp at 163, fn. 15. The results can be drastic for employees required to work substantial amounts of overtime. *See, e.g., Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 6A, at 77-82) *Ex. 2* (finding that, SGS, the same defendant in this case, used the FWW in a way that regularly reduced inspectors' hourly wage below the minimum wage.). For example, an employee paid a $450 weekly salary working 80 hours would only get an additional $112.50 for the forty hours of overtime work using this method ($2.81 per hour).

Because the FWW can undermine the FLSA's remedial nature, an employer must meet each of its predicate requirements to enjoy its benefits. 29 C.F.R. §778.114; *O'Brien*, 350 F.3d at 288 ("For obvious reasons, an employer may not simply elect to pay the lower overtime rate under §778.114. The regulation requires that [its] conditions be satisfied before an employer may do so."); *Yourman*, 865 F.Supp at 164-65. The FWW has five independent requirements: (1) the employee's hours must fluctuate from week to week; (2) the employee must receive a fixed amount as straight-time pay that does not vary with the number of hours worked during the week (excluding overtime premiums); (3)

the fixed amount must be sufficient to provide compensation every week at a regular rate that is at least equal to the minimum wage; (4) the employer and employee must share a clear mutual understanding that the employer will pay that fixed amount regardless of the number of hours worked; (5) and the employee receives extra compensation for each overtime hour at a rate not less than one-half his or her regular rate. 29 C.F.R. §778.114(a), (c); *O'Brien*, 350 F.3d at 288.

Although SGS claims that its "Chinese Overtime" is consistent with the FWW requirements, it fails to meet 4 of the 5 requirements of the FWW method: (1) the salaries that SGS paid the Plaintiffs regularly were insufficient to meet the minimum wage; (2) SGS did not pay Plaintiffs a fixed amount as straight-time pay for all hours worked; (3) the Plaintiffs did not have a clear mutual understanding that they would receive a fixed amount as straight-time pay for all hours worked; and (4) SGS did not pay extra compensation for all overtime hours worked at a rate not less than one-half the regular rate of pay. The failure to meet any prerequisite alone violates the FLSA. Taken together, SGS' failure to meet 4 of the 5 prerequisites created an overtime regime inimical to the spirit and the letter of the FLSA.

1. SGS Regularly Violated the FWW's Minimum Wage Requirement

Through a combination of requiring long hours of work and paying low salaries, SGS violated one of the core requirements of the FWW—that the fixed salaries always are sufficient to cover the minimum wage for all hours worked in all weeks. 29 C.F.R. 778.114(a),(c). Indeed, SGS has already been adjudicated in violation of this requirement. *See Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 6A, at 77-82), *Ex.2*.

"The '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)(emphasis added). The regulation's mandate is clear—unless the fixed salary is sufficient to "provide compensation to the employee at a rate of not less than the applicable minimum wage rate for

every hour worked in those workweeks in which the number of hours he works is greatest" an employer may not use the FWW method of calculating overtime. 29 C.F.R. §778.114(a). Although some jurisdictions allow a *de minimis* exception to the rule, it is axiomatic that foreseeable or frequent violations of the requirement will prohibit use of the FWW. *See Ayers v. SGS*, 2006 WL 618786 (Magistrate Ellis' decision on SGS' discovery obligations); *Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 6A, at 77-82) *Ex.2*; *U.S. Dep't of Labor Opinion Letter, February 6, 1969, 1969 DOLWH Lexis 19 ("DOL Opinion Letter No. 945"), Ex.28.*

SGS' "Chinese Overtime" frequently violated the FWW's minimum wage requirement with respect to the OGC Plaintiffs. In 214 of the 230 weeks from the last quarter of 2000 until the first quarter of 2005, the Plaintiffs' fixed salaries were insufficient to cover the minimum wage for all hours worked in a week. *See Minimum Wage Analysis, Ex.15.* Two-thirds of the Plaintiffs suffered FWW minimum wage violations during that period, many regularly. *Id.* For instance, Representative Plaintiff Weed's salary did not cover the minimum wage in 35 weeks during his tenure with SGS, and Representative Plaintiff Lowell Lewis' salary violated the minimum wage requirement 32 times. *See OGC Payroll Records, Ex.3.* Many others suffered violations with similar and even greater frequency. *See Minimum Wage Analysis, Ex.15.*

SGS' violations of the minimum wage requirement were not aberrations—they were regular and the foreseeable result of SGS' low salaries. The OGC Plaintiffs' salaries were insufficient to meet the minimum wage 860 times from the last quarter of 2000 until the first quarter of 2005. *See id.* The violations with respect to the Plaintiffs are only the tip of the iceberg, as the Plaintiffs represent only 15% of the entire class of OGC inspectors.[5] Non-plaintiff OGC inspectors also regularly suffered minimum wage violations. *See, e.g., Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 6A, at 77-82) *Ex.2* (finding that an SGS OGC inspector suffered minimum wage violations in

[5] The 96 OGC Plaintiffs represent only 15% of the more than 640 OGC inspectors that the Defendants' identified as part of the class.

45% of the pay periods over the course of his employment). SGS even acknowledged that such violations would occur in the employee handbook. *See OGC Handbook at 10 ¶6, Ex.8.* Violations that occur virtually every week were foreseeable.

When Plaintiff's fixed salaries fell below the minimum wage for all hours worked in a week, SGS took no action to ensure that did not occur again. SGS did not even keep track of when the violations occurred. *Long-Daniels 3/27/06 Ltr to Hon. Ronald L. Ellis, fn 1, Ex.18* ("SGS does not record when [minimum wage] bump ups are given as a matter of course."); *Defs' Resp to Pls Fifth Req for Prod of Docs, Request 7, Ex.20.* The lack of attention is apparent in the regularity and volume of the minimum wage violations that took place.

Instead of complying with the FWW requirements, SGS claims to have given Plaintiffs "bump ups", *i.e.*, token, one-time adjustments to a particular week's pay when minimum wage violations occurred.[6] Bump ups are not a permissible means of complying with the FWW requirements. The regulation's bright line rule that the FWW may be used only where the fixed salary always covers the minimum wage. 29 C.F.R. §778.114(a),(c). Some jurisdictions have allowed a *de minimis* exception to the rule. But where violations are frequent or foreseeable, like here, the employer must prevent future violations. *See, e.g., Ayers*, 2006 WL 618786*1(Ellis, J.); *Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 6A, at 77-80) *Ex.2*; *DOL Opinion Letter No. 945,* Ex.28. Rather than prevent future violations, SGS' system of bump ups both anticipated that minimum violations would occur and preserved the impermissibly low salary levels and long work weeks so that the violations could and did occur, again and again. The bump ups as used here cannot comply with the FWW requirements. *Id.*

[6] Despite SGS' claims that it paid the minimum wage bump ups, it has not offered evidence of payment. On the contrary, it claims that it did not keep track of when they occurred. *Long-Daniels March 27, 2006 Letter to Honorable Ronald L. Ellis, fn 1,* Ex.18 ("SGS does not record when [minimum wage] bump ups are given as a matter of course."); *see also Plewa Depo, Ex. 11, at. 90:19:-93:23; Bloom Depo. Ex.19 at 74:3-79:15; Defendants' Response to Plaintiffs Fifth Request for Production of Documents, Request 7, Ex.20.*

Having frequently and foreseeably violated the minimum wage requirement, SGS was not entitled to calculate overtime via the FWW method. 29 C.F.R. §778.114(c); *Ayers v. SGS*, 2006 WL 618786*1. SGS' bump ups do not save it. Indeed, the U.S. District Court for the Middle District of Florida has already declared that SGS's bump up practice, even if actually implemented, does not comply with the FLSA and renders SGS's "Chinese Overtime" method unlawful. *See, e.g., Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 6A, at 77-82).

2. OGC Plaintiffs Did Not Receive a Fixed Amount as Straight-time Pay for All Hours Worked

Another fundamental requirement of the FWW 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. 29 C.F.R. §778.114(a); *O'Brien*, 350 F.3d at 288. "Straight-time pay" under 29 C.F.R. §778.114 includes all compensation that is included as part of the regular rate under the FLSA. 29 C.F.R. §778.114(a) ("Since the salary in such a situation is intended to compensate the employee at straight-time rates for whatever hours are worked in the workweek, the regular rate of the employee . . . is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week."); *O'Brien*, 350 F.3d at 288-89 (1st Cir. 2003) (the fixed amount requirement is not that "an employee receive a fixed *minimum* sum each week; rather to comply with the regulation, [the employer] must pay [the employee] a fixed amount."); *Dooley v. Liberty Mutual Ins. Co.*, 369 F.Supp.2d 81, 85-86 (D. Mass. 2005).

SGS did not pay OGC Plaintiffs a fixed amount as straight-time pay for all the hours they worked. SGS varied OGC Plaintiffs' straight-time pay with additional "sea pay" and "day-off pay" based on the type of work the Plaintiff performed and the hours the Plaintiff worked each week. Straight-time pay further varied with the regular minimum wage bump ups that SGS claims it paid because Plaintiffs' salaries were too low to cover the minimum wage. Because the straight-time pay

varied from week to week, SGS did not meet the fixed amount requirement of the FWW, and it was not entitled to use the FWW method to calculate overtime. 29 C.F.R. §778.114(a); *O'Brien*, 350 F.3d at 288-90; *Dooley*, 369 F.Supp.2d at 86.

Both sea pay and day-off pay are part of OGC Plaintiffs' regular rate of pay. The regular rate is defined at 29 U.S.C. 207(e), and it includes any lump sum payments which are paid without regard to the actual number of hours worked.[7] 29 C.F.R. §778.207(b); *O'Brien*, 350 F.3d at 296. Both sea pay and day-off pay were lump sum payments, not dependent on the actual hours a Plaintiff worked. *See Bloom Letter to EBG,* Ex.21; *Bloom March 21, 1994 Memo,* Ex.22; *Plewa Depo. at 100:16-101:8,* Ex.11; *Bloom October 1, 2003 Letter,* Ex.23. As such they must be included in the regular rate. 29 C.F.R. §778.207(b). Moreover, sea pay and day-off pay must be treated as part of the regular rate because they are additional wages paid "because of undesirable hours [day-off work] or disagreeable work [offshore work]". *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 468-69 (1948); *accord O'Brien*, 350 F.3d at 288-90, 294-97. As part of the regular rate, both are part of the Plaintiffs' straight-time pay, and as they varied from week to week, so did the straight-time pay. 29 C.F.R. §778.114(a).

The amount that OGC Plaintiffs received each week for straight-time pay further varied with SGS' "bump ups". *See* Section B.1 *supra.* The bump up, if actually paid, was additional compensation intended to raise the Plaintiffs' regular rate of pay in a week in which it fell below the minimum wage. *OGC Handbook at 10,* Ex.8. As such, it was part of Plaintiffs' regular rate of pay, 29 C.F.R. §778.200(c), and part of the amount that Plaintiffs received as straight-time pay. 29 C.F.R. §778.114(a); *O'Brien*, 350 F.3d at 288.

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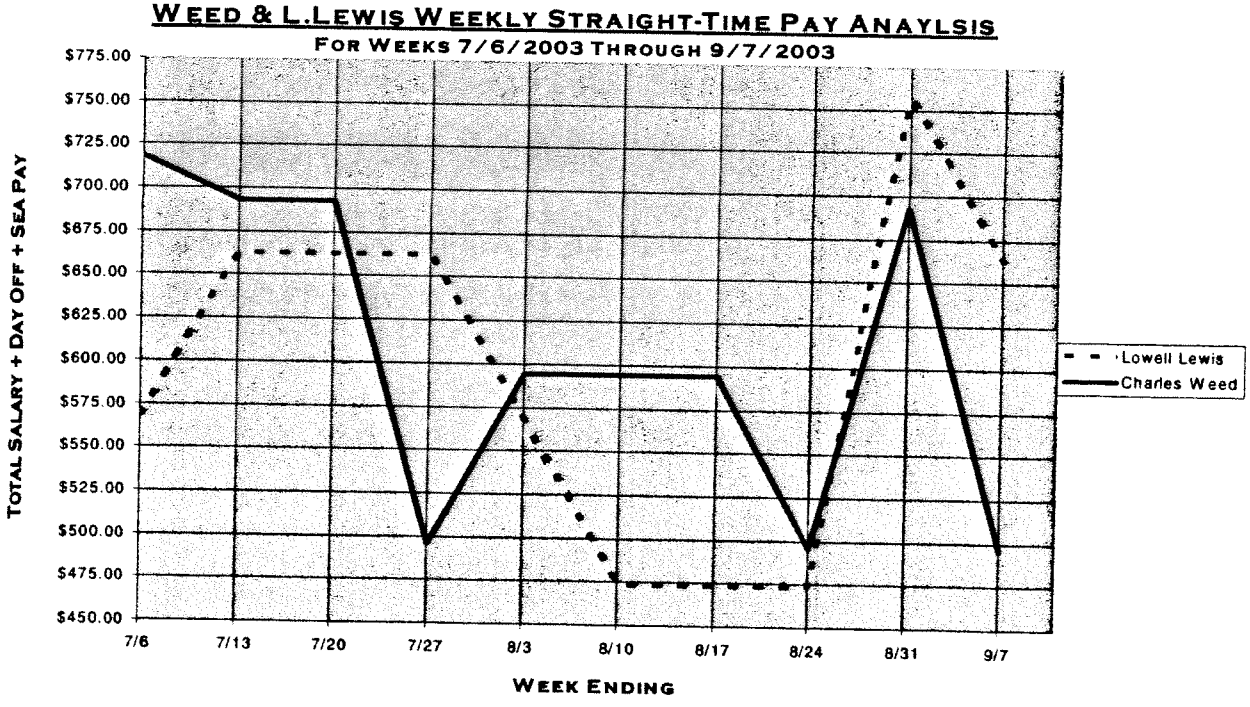
[7] 29 U.S.C. §207(e)(5-7) exempts from the regular rate only certain "extra compensation provided by a *premium rate.*")(emphasis added). Accordingly, lump sum payments such as sea pay and day-off pay must be included in the regular rate calculation because they are not calculated from the hours a Plaintiff actually works. 29 C.F.R. §778.207(b)("[L]ump sum premium which are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate."); *O'Brien,* 350 F.3d at 296. Indeed, SGS acknowledged that sea pay was part of the Plaintiffs' regular rate by including it in the calculation of overtime pay. *Bloom Letter to EBG,* Ex.21. As part of the Plaintiffs' regular rate, sea pay and day-off pay are part of their straight-time pay under the FWW.

SGS knew as early as 1993 that varying straight-time pay violated the FWW requirements. Legal counsel advised them that paying sea pay and other additional straight-time pay could be said to violate the FWW. *See EBG Letter to Bloom at 1, Ex.21.* Counsel advised that it had to do further research on whether the additional payments could be acceptable under the FWW. *See id.*; *EBG April 27, 1994 Letter to Bloom*, Ex.29. But SGS ignored counsel's advice, did not authorize the further research, and did not change its practices. *Bloom Depo. at 108:13-16, 102:21–128:4 Ex.19.*

SGS is not entitled to the benefits of the FWW method of calculating overtime because it violated the fixed straight-time pay requirement. 29 C.F.R. §778.114(a). It does not matter whether the variance was due to sea pay, day-off pay or the minimum wage bump up. *O'Brien*, 350 F.3d at 288-89 (finding that even a small variance in straight-time pay from week to week vitiates application of the FWW method). Indeed, between the three types of additional compensation, straight-time pay was variable more than fixed. For example, over an 8-week period, straight-time pay for Representative Plaintiff Weed varied intermittently from $495 to $594 to $693 to $718. During the same period, Representative Plaintiff Lowell Lewis' pay varied intermittently from $473 to $567 to $662 to $756.



See Weed & L. Lewis Weekly Straight-Time Pay Analysis, Ex.30. Compliance with the FWW requirements would show a flat line on the chart above for straight-time pay, rather than this highly variable line. Failure to pay a fixed wage precludes the use of the FWW method.

3. The OGC Plaintiffs Did Not Have an Understanding that SGS Would Pay Them a Fixed Amount as Straight-time for Whatever Hours They Worked.

To enjoy the benefits of the FWW method of calculating overtime, the employer and employee must have an understanding 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." 29 C.F.R. §778.114(a); *O'Brien*, 350 F.3d at 290.

OGC Plaintiffs could not have understood that they would receive a fixed amount as straight-time pay because, in fact, they were not paid a fixed amount. On the contrary, it was SGS' policy to pay 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. *Milne Depo at 45:22-46:3, 51:2-9,73:9-74:2, Ex.5; Plewa Depo. at 90:19-93:7, Ex.11;OGC Handbook at 10, Ex. 8.* SGS' pay policies are contrary to the FWW's clear mutual understanding requirement. Therefore, SGS was not entitled to pay Plaintiffs overtime via the FWW method. *O'Brien*, 350 F.3d at 294-97.

4. OGC Plaintiffs Did Not Receive Extra Compensation for Each Overtime Hour at a Rate Not Less than ½ His or Her Regular Rate.

Employers may only use the FWW method of calculating overtime where an employee receives extra compensation "for all overtime hours worked at a rate not less than one-half his regular rate of pay." 29 C.F.R. §778.114(a). The regular rate includes pay for undesirable hours and disagreeable work, *Bay Ridge*, 334 U.S. at 468-69; *O'Brien*, 350 F.3d at 288-90, and pay for lump sum payments. 29 C.F.R. §778.207(b); *O'Brien*, 350 F.3d at 296.

SGS paid OGC Plaintiffs an overtime rate that was less than one-half Plaintiffs' regular rate of pay. SGS excluded day-off pay in determining the overtime wage rate, even though it was part of Plaintiffs' regular rate of pay. *OGC Handbook at 10*, Ex. 8; *Bloom Letter to EBG*, Ex.21. Plaintiffs' hourly overtime rate should be one-half the regular rate, but SGS established that rate by dividing the weekly salary by the total number of hours worked in a week. *Employee Handbook at 10*, Ex. 8; *Plewa Depo. at 103:17-23*, Ex.11. By illegally excluding day-off pay from the regular rate calculation, SGS reduced the numerator in the equation (the straight-time pay), thereby guaranteeing a lower overtime rate per hour for OGC Plaintiffs, and guaranteeing itself a lower payroll. Because it did not pay Plaintiffs at least ½ their regular rate for all overtime hours, SGS was not entitled to use the FWW. *O'Brien*, 350 F.3d at 288.

5. OGC Plaintiffs' Overtime Pay Must Be Calculated on a 40-Hour Work Week.

If an employer fails to meet the requirements of the FWW method, overtime must be calculated on the fixed weekly salary method. *Yourman*, 865 F.Supp at 164-65 ("[Where the Court is unable to apply the FWW method because it is contrary to the law] the solution must be to fall back on FLSA's default position, which is to calculate hourly and overtime rates based on a regular workweek consisting of a fixed number of hours."); *accord O'Brien*, 350 F.3d at 288; *see also, Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 6A, at 77-82), *Ex.2* ("[T]he Defendant was not properly applying the fluctuating work week . . . and as a matter of law, they're not entitled to benefit in terms of overtime. Time and half will apply in this case."); *Dingwall*, 3 F.Supp.2d 215, 221 (N.D.N.Y. 1998).

Under the fixed weekly salary method, the law provides a rebuttable presumption that a salary is for 40 hours of work per week where the parties have not agreed upon some other fixed number of hours. *Giles v. City of New York*, 41 F.Supp.2d 308, 317 (S.D.N.Y. 1999)(collecting cases); *accord Estanislau v. Manchester Developers, LLC*, 316 F.Supp.2d 104, 108 (D. Conn. 2004); *Moon v. Kwon*, 248 F.Supp. 2d 201, 207-09 (S.D.N.Y. 2002) (citations omitted). In this case, the Parties had not agreed

that the salary would cover a fixed number of hours. Quite the contrary, Plaintiffs and SGS expected the hours of work to fluctuate each week. Employee Handbook at 10. The legal presumption, therefore, is that Plaintiffs' salaries compensated them for 40 hours in a week. *Id.*

In its zeal to squeeze the most work out of their employees for the least amount of pay, SGS repeatedly violated the FWW's strict requirements. Therefore, it cannot claim the benefit of the FWW method and OGC Plaintiffs' damages are to be calculated at time and one-half for all hours more than 40 worked in a week based on a regular rate of their straight-time pay (weekly salary plus sea pay, day-off pay and any minimum wage bump ups actually paid) divided by 40 hours. 29 C.F.R. 778.113; *O'Brien*, 350 F.3d at 287-90; *Moon*, 248 F.Supp. 2d at 207-09; *Giles*, 41 F.Supp.2d at 317; *Yourman*, 865 F.Supp at 164-65.

C. SGS' Lower Payment for Auto Inspections Conducted in Overtime Hours Is Flatly Illegal under the FLSA.

The overtime law requires payment at a minimum of time and half for hours over forty. 29 U.S.C. §207. SGS attempts to defeat this clear mandate by establishing a lower commission rate for inspections conducted in the overtime hours than for inspections conducted within the first forty hours. *PFP Employee Guidebook at 3, Ex.12.*[8] The FLSA does not reward this kind of evasive creativity. In fact, DOL regulations make clear that this attempt to pay lower rates when overtime is worked is not legal:

> § 778.316 **Agreements or practices in conflict with statutory requirements are ineffective.** 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*

[8]For example, for FBI auto inspections, defendants pay inspectors $10 for all vehicles inspected and an additional $10 for each vehicle over 35 inspected "within the first 40 (forty) hours" [$20 total] but pay only an additional $2 for vehicles inspected in the overtime hours [$12 total]. *PFP Employee Guidebook* at 3, Ex.12. Defendants utilized this reduced rate for inspections in overtime hours in all inspection categories, FBI, auction, GMAC Dealer, non-GMAC Dealer. Id. at 3-4. The clear purpose of this structure is to reduce overtime liability and also to create an incentive for employees to not report overtime hours, however that issue is not raised on this motion.

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.

(emphasis added). *Schneider v. City of Springfield,* 2000 WL 988279 (S.D. Ohio 2000) ("29 C.F.R. § 778.316 . . . recites the proposition that an employer may not set one hourly rate for the first 40 hours of work and a lower hourly rate for statutory overtime hours, nor provide no pay for overtime hours.")

SGS' practice of setting a lower rate for inspections conducted in overtime hours runs afoul of the FLSA. 29 U.S.C. §207; 29 C.F.R. §778.316.

POINT II
SGS's MOTION TO DECERTIFY THE CLASS SHOULD BE DENIED.

There are two overriding concerns of the Federal Rules, fairness and efficiency. Fed.R.Civ.P. Rule 1. Neither would be served by dismissing the claims of 208 party plaintiffs who have collectively litigated this case here for the last three years and forcing them each to start from scratch in a multiplicity of other courts. Dismissing the claims of the opt-in plaintiffs here would also be directly contrary to the expansive remedial purpose of the FLSA which encourages individuals who have similar claims to litigate those claims "collectively" against their employer. 29 U.S.C. §216(b). The plaintiff inspectors collectively challenge SGS's pay practices, set forth in the employment manual, under which SGS pays its inspectors unlawfully low overtime rates and also pays overtime late. The collective action process is far more efficient than 208 separate suits around the United States with the certainty of duplication of judicial effort and the attendant risk of inconsistent adjudications.

A. The FLSA is a Remedial Statute to be Given Broad Application.

In *A.H. Phillips v. Walling,* 324 US 490, 65 S.Ct. 807 (1945) the Supreme Court noted that,

> The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' ... Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress.

65 S.Ct. at 808. The Supreme Court has routinely noted the importance and breadth of the FLSA overtime protections. "Breadth of coverage was vital to [the FLSA's] mission....Where exceptions were made, they were narrow and specific." *Powell v. U.S. Cartridge Co.*, 339 US 497, 70 S.Ct. 755 (1950). *See also U.S. v. Rosenwasser*, 323 U.S. 360, 65 S. Ct. 295, 296 (1945)("no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded."); *Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27, 107 S.Ct. 2694 (1987)("In the past, the Court has refused '[to] extend an exemption to other than those plainly and unmistakably within [the FLSA's] terms and spirit.'") The Second Circuit is similarly inclined: "Above and beyond the plain language, moreover, the remedial nature of the [FLSA] further warrants an expansive interpretation of its provisions so that they will have "the widest possible impact in the national economy." *Herman v. RSR Sec. Services Ltd.*, 172 F.3d 132 (2d Cir. 1999), *citing Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir.1984).

B. The Collective Action Process Furthers the FLSA's Remedial Purpose.

Title 29 U.S.C. §216(b) states that,

> An action to recover [overtime]. . . 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 such action unless he gives his consent in writing to become such a party . . . .

This District has strongly endorsed the remedial purposes of the FLSA by encouraging collective actions. Because FLSA claims are often small and because it is frequently difficult for individual employees to raise claims against the superior resources of the employer corporation and to risk retaliation, the FLSA allows claims to be brought "collectively." 29 U.S.C. §216(b). As this Court wrote in *Masson v. Ecolab, Inc.*, 2005 WL 2000133 at *14 (S.D.N.Y. 2005) "Sending a collective action notice to similarly situated individuals "comports with the broad remedial purpose of the [FLSA], ··· as well as with the interest of the courts in avoiding multiplicity of suits." *citing Braunstein*

v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir.1979); *see also Hoffman v. Sbarro, Inc.*, 982 F.Supp. 249, 262 (S.D.N.Y.1997).[9]

C. The FLSA's Collective Action Process is Designed to Encourage Participation By All Employees Who Challenge Unlawful Wage and Hour Employment Practices.

The FLSA does not set forth the mechanisms of collective actions. The Southern District of New York in *Masson v. Ecolab, Inc.*, 2005 WL 2000133, *13-14 (S.D.N.Y. 2005) formally adopted the two-stage certification/decertification process that evolved in other districts. As to the second "decertification" inquiry stage, the Court wrote:

> The second phase of an FLSA collective action inquiry occurs after discovery is largely complete and 'is typically precipitated by a motion for "decertification" by the defendant.' At that stage, the "similarly situated" issue must be revisited, based on the record produced through discovery. If it is found that the claimants are similarly situated, the collective action may proceed to trial.

Thus the only determination is again whether the plaintiffs are "similarly situated." *Id.* There is no "heightened" review at the second stage, merely review under the same standard, but based on the discovery to date. *Id.*

This Court has not formally defined the phrase "similarly situated" but notes it must be defined with respect to the remedial purposes of the Act. "Neither the FLSA nor its implementing regulations define the term "similarly situated." However, courts have held that plaintiffs can meet this burden by . .

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[9]The FLSA uses a class structure similar to Rule 23, but requires each individual to opt-in by filing a "Consent to Sue" with the Court. This collective action process was designed in 1947 to allow employees to bring their claims collectively but without allowing union-led representative actions. The legislative history and Congressional intent behind the opt-in and "collective action" amendments to the FLSA are explained in detail in *Arrington v. National Broadcasting Co., Inc.*, 531 F.Supp. 498, 500-503 (D.D.C. 1982). In short, Congress intended to bar unions from engaging in "representative" wage actions akin to class actions that might cripple industry at the expense of union power, but to allow groups of employees to sue "collectively" on their own behalf through the opt-in procedure. *Id.*; *United Food & Commercial Workers Union, Local 1564 of New Mexico v. Albertson's, Inc.*, 207 F.3d 1193, 1200-1201 (10th Cir. 2000)("The conclusion of the *Arrington* court has since been embraced by all courts confronting the issue in published opinions, save for the United States District Court for the District of Colorado.").

> Congress's aim in adding the "opt-in" language to § 216(b) was to " 'prevent[ ] large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit.' "The 'consent in writing' requirement ··· [sought] to eradicate the problem of totally uninvolved employees gaining recovery as a result of some third party's action in filing suit." . . . Thus, in contrast to Rule 23 class actions, the existence of a collective action under § 216(b) does depend on the active participation of other plaintiffs.

Cameron-Grant v. Maxim Healthcare Services, Inc., 347 F.3d 1240, 1248 (11 Cir. 2003)(cites omitted).

. showing . . . that they and potential plaintiffs together were victims of a common policy or plan that violated the law." *Hoffmann v. Sbarro, Inc.*, 982 F.Supp. 249, 261 (S.D.N.Y.,1997).

Moreover, it is clear that similar does not mean "identical." "It is unnecessary to show that putative class members share identical positions." *Schwed v. General Electric Co.*, 159 F.R.D. 373, 375 (N.D.N.Y. 1995); *Moss v. Crawford & Co.*, 201 F.R.D. 398, 409 (W.D. Pa 2000)(differences in job duties, geographic assignments, and hourly billing rates did not warrant decertification, and fact that employer would raise exemption and statute of limitation defenses did not warrant decertification.)

While this District routinely directs that actions proceed collectively, it apparently has never "decertified" a collective action. Nevertheless, other courts have applied a variety of considerations at the second-stage determination. *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001), is the leading decertification decision. There, the Circuit reversed a decertification decision and attempted to define a standard for decertification questions:

> Congress clearly chose not to have the Rule 23 standards apply to class actions under the ADEA, and instead adopted the "similarly situated" standard. To now interpret this "similarly situated" standard by simply incorporating the requirements of Rule 23 (either the current version or the pre 1966 version) would effectively ignore Congress' directive. . . .All [decertification] approaches allow for consideration of the same or similar factors, and generally provide a district court with discretion to deny certification for trial management reasons.

267 F.3d at 1105.[10] In *Thiessen,* the Court found decertification inappropriate because the plaintiffs were not merely raising a collection of individual claims but in effect challenged company-wide policies applicable to the class.[11] *See also Bradford v. Bed Bath & Beyond, Inc.*, 184 F.Supp.2d 1342, 1352 (N.D. Ga. 2002)("Plaintiffs have made substantial allegations, supported by evidence, that Defendant failed to comply with the FLSA by failing to pay overtime compensation to non-exempt employees on a class-wide basis. Since Plaintiffs are similarly situated, they should be afforded the

[10]The ADEA utilizes the FLSA's "collective action" provision, 29 U.S.C. §216(b).

[11]"If plaintiffs were simply attempting to collectively assert their individual claims of discrimination, the decision to decertify would appear to be entirely proper. The problem, however, is that plaintiffs were asserting a pattern-or-practice claim . . . .

opportunity to prove these claims collectively. Accordingly, Defendant's Motion To Decertify Putative Collective Action is hereby DENIED.")

In *Scott v. Aetna Services, Inc.*, 210 F.R.D. 261, 265 (D.Conn. 2002), the Court similarly denied decertification because the claims were susceptible to "generalized proof.":

> The determination of whether an employee is properly exempt from the overtime compensation requirements of the FLSA is "necessarily fact intensive" and "turn[s] on a careful factual analysis of the full range of the employee's job duties and responsibilities." . . . Here, the plaintiffs have established that their claims may be supported by generalized proof.

Id. Collective actions are appropriate where claims can be shown by generalized proof. *Id.*

D. The Plaintiffs' Claims are Appropriate For Collective Action.

The plaintiffs here challenge company-wide policies, not a series of individualized or isolated examples of failure to pay properly. *OGC Handbook*, Ex.8; *Auto Handbook*, Ex.10; *PFP Employee Guidebook*, Ex.12. The policies challenged are SGS's late payment of the overtime wages, illegal use of the FWW method for the OGC division and illegal use of a lower pay rate for overtime work for the auto inspectors.

SGS's argument is premised on identifying every single difference it can find between the different employees who have opted into this collective action. For example, SGS explicates at length the differences in the opt-ins' job duties. But those facts are entirely irrelevant because SGS has not here litigated any "duties test" exemptions to the FLSA for any inspectors. SGS's decertification brief fails to mention its own pay policies as expressed in its employment manuals, policies which are the common policies at issue in the case. Further, 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. *Scott v. Aetna Services, Inc.*, 210 F.R.D. 261, 265 (D.Conn. 2002); *Gregory v. Home Depot U.S.A., Inc.*, 3:01CV372(AWT) (slip op. D. Conn. July 3, 2001) (holding that "although there are differences among the situations of the members of the proposed class," the defendant's failure to pay overtime "is common to all of the members of the

proposed class and dominates each of their claims")(internal quotations omitted); *Moss v. Crawford & Co.*, 201 F.R.D. 398 (W.D. Pa.2000) (holding that differences among class members' job duties, geographic assignments, and hourly billing rates did not warrant de-certification); *Kelley v. SBC*, No. 97-CV-2729 CW, 1998 WL 928302 (N.D. Cal.1998) (finding sufficient commonality among employees with different job functions to support class certification).

Nor does the need for individualized damages calculations justify decertification as this does not even bar class certification. *See e.g., In re Visa Check/Mastermoney Antitrust Litigation*, 280 F.3d 124, 139 (2d Cir. 2001); *see also, Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 796-798 (10th Cir.1970) ("The fact that there may have to be individual examinations on the issue of damages has never been held, however, a bar to class actions."); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir.1975) ("The amount of damages is invariably an individual question and does not defeat class action treatment."); 4 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 18.27, at 18-89 (3d ed.1992) ("A particularly significant aspect of the Rule 23(b)(3) approach is the recognition that individual damages questions do not preclude a Rule 23(b)(3) class action when the issue of liability is common to the class").

The illegal pay practices which are challenged on the accompanying motion for summary judgment are the very company-wide policies which differentiate this action from a mere agglomeration of variegated individualized claims. SGS unlawfully paid the class overtime on a delayed basis that violates the FLSA. SGS also illegally used what it called "Chinese Overtime" to pay the OGC inspectors and set overtime pay rates below regular pay rates for auto inspectors. These practices are company-wide. No difference in damages calculations overrides the inherent benefit of litigating the class issues in one and only one forum.

The discovery period has not yielded any evidence that the company-wide practices at issue in this litigation are so unwieldy that they simply could not be addressed in this case.

E. Decertification Would Defeat the FLSA's Goal of Fair and Efficient Determination of Plaintiffs' Overtime Claims.

Efficiency is a key goal of both the Federal Rules and §216(b). Trying this action in a single proceeding advances that goal. While hearing collective claims can be more complex than hearing a single claim, wrapping 208 claims into a single action here simply cannot be more complex than hearing 208 claims in many different courts. Unlike a Rule 23 class, each plaintiff here has personally asserted and litigated their own claim. The opt-in plaintiffs in this case have been litigating their claims since 2003. If they must re-commence their suits individually against their employer in countless other jurisdictions -- in effect starting over again -- defendants clearly hope, indeed they know, that some will simply abandon otherwise meritorious claims. William E. Gladstone's caution that "justice delayed is justice denied" was never more apt. However, the legality of SGS's policies can easily be tried in this action without prejudice to SGS.

A Court may decertify a class due to trial management difficulties. *Thiessen, supra.* However, a decision to decertify the plaintiffs' collective claims here would effectively cause some plaintiffs to lose their claims through lack of resources or dismay.[12] Most claims, however, will be brought by current counsel for opt-ins in a proliferation of other cases around the country raising identical claims.[13] This would be entirely contrary to the purposes behind the FLSA collective action procedure and would cause both parties and the Courts to expend significant resources adjudicating claims that can be brought here. There will be a significant risk of inconsistent adjudications and significant wasting of judicial resources in trying identical actions in multiple courts.

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[12]While dismissal of claims here will likely cause many plaintiffs to forego further actions, most will be litigated by current counsel in the various fora, with the attendant duplication of effort by counsel and the judiciary.

[13]Indeed, it can hardly be doubted that SGS's very purpose in seeking to decertify is to make bringing such claims procedurally difficult and prohibitively expensive to these hard-working blue-collar plaintiffs. Making them proceed individually instead of collectively will give SGS a variety of advantages over its employees. First, it will substantially delay claims, requiring plaintiffs to start all over again. Second, it will undoubtedly cause certain plaintiffs to simply give up. Third, it will increase costs for each plaintiff who will be required to commence his or her own litigation. Fourth, it will cause plaintiffs to fear a greater likelihood of retaliation if they must act individually against their employer. All of these effects will cause some plaintiffs to simply forego their rights.

Interestingly, as is more fully described below, SGS has already been adjudicated to be unable to use the fluctuating work week method of paying overtime in another federal District Court decision. *Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005) (trial transcript volume 6A, at 77-82). And SGS has settled other such claims. *See Haisen and Ngo Settlement Agreements*, Ex.31. Nevertheless, SGS refuses to apply the lessons of these other litigations across the board to its inspectors. Instead, it attempts to force each new employee plaintiff to file claims separately, while SGS continues to reap the financial windfall of paying its entire class of inspectors unlawfully low wages.

F. Alternatively, Claims Can be Severed and Consolidated.

Alternatively, the opt-ins claims can be severed into OGC inspectors and auto inspectors and this Court could consolidate those claims for trial purposes. However, to dismiss the claims would prejudice the plaintiffs, burden the judiciary and unfairly allow defendants to continue to reap the windfall from using pay practices which it knows to be unlawful.

POINT III
SGS's MOTION TO DISMISS SHOULD BE DENIED.

SGS moves for partial summary judgment to dismiss claims, however it has failed to supply a Rule 56.1 Statement supplying uncontested facts justifying dismissal for the opt-in plaintiffs to be dismissed.

A. California and Washington-Based Inspectors' Claims Include the Claim for Late Payment and Should Not Be Dismissed.

The California and Washington based inspectors who opted into this action also received their overtime pay on a delayed basis. *Deposition of William Venable ("Venable Depo."), Ex.32 at 67:13-14; Deposition of Sherri Roberts ("Roberts Depo."), Ex.33 at 10:13-24.* Moreover, these Plaintiffs claim that SGS did not pay them for all the hours they worked. *Venable Depo. at 16-19, Ex.32; Roberts Depo. at 16, Ex.33; Deposition of Plaintiff Noe Nodalo ("Nodalo Depo."), Ex.34 at p. 9.* SGS has not provided evidence that it met its FLSA obligations, regardless of whether or not it paid them consistent

with its state law obligation. Their claims arise from the same unlawful SGS pay practice as their fellow inspectors and factual issues remain to be resolved. Therefore, their claims should not be dismissed.

B. Auto Inspectors' Claims Should Not Be Dismissed Because of Defendants' Claim that Its Subsidiary is the Proper Employer.

Defendant SGS North America contends that its wholly owned subsidiary SGS Automotive Services, Inc. ("SGS Auto") is the auto inspector's employer not SGS North America. However, SGS supplied the names of the auto inspectors to plaintiffs for class notice and the opportunity to opt in to this case in response to the Order of Judge Ellis for the names of "all inspector employees who have worked for defendants at any time within the past three years ..." Order, October 22, 2004; Order December 23, 2004 (reaffirming prior Order). SGS North America supplied the names of these inspectors and did not raise any claims that these inspectors worked for a different employer at the time. Indeed, to supply names of employees of another corporation would have been a violation of the Order. 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.

Further, defendant SGS North America and SGS Auto are a single integrated enterprise and as such are liable for employing the auto inspectors. *See, e.g., Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235 (2d Cir. 1995). In *Cook,* the Second Circuit held that four factors are relevant to determining whether two related companies are a "single integrated enterprise" so that both are liable for any employment violation: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. All factors, including centralized control of labor relations, apply here to SGS and the auto inspector plaintiffs.

SGS North America and SGS Auto are interrelated. SGS North America administers payroll for Auto as well as the OGC inspectors with one set of staff at one physical location at SGS North America's corporate headquarters in Rutherford, New Jersey. *Plewa Depo. at 8-9, Ex.11; Freyer Depo, at 9-10, Ex.35.* Steve Bloom, the Director of Human Resources for SGS NA consults with SGS Auto

on setting its employee pay practices. *Bloom 2006 Depo, at 8, Ex 19.* The overtime practices for all of SGS North America (including Auto) are set by Steve Bloom. *Id., pp.8-11.* SGS does not contend there is separate control of payroll or hours recording.

As stated above, the ownership of both corporations is identical: SGS wholly owns SGS Auto. Auto inspections are one of SGS North America's "business lines." *See SGS US Website, Ex.36.* Under *Cook, supra,* defendant SGS controls the labor relations for SGS Auto, creates and operates its unlawful payroll policies and is legally responsible for its unlawful pay practices. *Cook, supra.* SGS North America pays auto inspectors using the same unlawful late payment of overtime practices that it uses for OGC inspectors. *Auto Handbook at G-8, Ex.10; Plewa Depo. at 15:23-16:12, Ex.11; Plewa Depo. at 37:25-41:3, Ex.11.*

If this Court believes that SGS Auto is the sole proper defendant, plaintiffs should be permitted to amend the complaint to name the subsidiary as a defendant, rather than dismiss the claims. Fed. R. Civ. P. Rule 15(c); *VKK Corp. v. National Football League*, 244 F.3d 114, 128 (2d Cir. 2001).

C. Opt-Ins Should Not Be Dismissed For Failure to Attend Depositions.

SGS moves to dismiss several opt-ins because they did not appear for depositions. Certain individuals were requested to appear, but either were unreachable or failed to make themselves available. However, dismissal is not favored in such circumstances, except as a last resort. In *Bobal v. Rensselaer Polytechnic Inst.*, 916 F.2d 759, 764 (2d Cir.1990), the Second Circuit stated,

> dismissal with prejudice is a harsh remedy to be used only in extreme situations, *Theilmann v. Rutland Hospital, Inc.*, 455 F.2d 853, 855 (2d Cir.1972), and then only when a court finds "willfulness, bad faith, or any fault" on the part of the prospective deponent. *See Salahuddin v. Harris*, 782 F.2d at 1132 (citation omitted). In *Sieck* we specifically noted that the district court order "included the warning that a default judgment in the full amount sought by plaintiff could be entered against any defendant who did not appear [for the scheduled deposition]." 869 F.2d at 133. In *Schenck v. Bear, Stearns & Co.*, 583 F.2d 58, 59 (2d Cir.1978), this court reversed a district court's dismissal for failure to prosecute, noting that "there had been no ··· judicial participation indicating that a dismissal might be in the offing." *See also Jones v. Niagara Frontier Transportation Authority*, 836 F.2d 731, 734 (2d Cir.1987) . . . .

916 F.2d at 764. This is not an "extreme situation" justifying dismissal of opt-ins; this is a collective action and any evidence SGS wanted from the noticed opt-ins could have been, and indeed was, obtained through other parties. SGS did not identify any specific evidence it sought that could be learned only from these opt-ins. Further, there was never a judicial warning that dismissal could result from failure to attend.

Judge Ellis gave SGS and the plaintiff the opportunity to conduct 15 depositions each. Each party took its full complement of depositions.[14] There is no prejudice to SGS in that it took the depositions it was allowed, regardless of these particular individuals not testifying. Plaintiff Fryer's son was suffering from heart disease and his family was in considerable stress because of impending heart surgery. *Getman Decl.* Others were unreachable or chose not to respond. *Id.* Plaintiffs offered to make other opt-ins available in stead of these opt-ins and in fact, defendant did take advantage of this offer and took depositions of the other opt-ins. SGS has not been prejudiced in any way. *Id.*

Finally, there can be no prejudice to SGS from the individuals not testifying because representative evidence will suffice to prove liability and damages on a class-wide basis in FLSA cases. *Reich v. Gateway Press*, 13 F.3d 685, 702 (3d Cir. 1994); *Secretary of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988); *Donovan v Williams Oil Co.*, 717 F.2d 503, 505 (10th Cir. 1983); *Donovan v. New Floridian Hotel*, 676 F.2d 468, 472 (11th Cir. 1982); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973).

There is no reason that the non-cooperative opt-ins cannot have their claims determined on the same basis as the other opt-in class members, based on the paper discovery of defendant's pay records and class wide policies. SGS has not been prejudiced in any way by the failure of these individuals to attend depositions.

[14]SGS took 14 of the 15 allotted but elected not to take the remaining deposition.

D. Agricultural Division Opt-ins Should Not be Dismissed.

Plaintiffs working in the agricultural division were subject to the same late payment and Chinese Overtime as the OGC Plaintiffs and should not be dismissed from the case. For example, Representative Plaintiff Lowell Lewis worked in the agricultural division. SGS paid him for his work as an agricultural inspector in the same manner as his work as an OGC inspector. Deposition of Lowell M. Lewis at 41:14-43:10, Ex. 42.

CONCLUSION

Summary judgment should be granted to plaintiffs declaring that SGS violated the FLSA by 1) failing to pay its inspectors on time as required by the FLSA; 2) using a "Chinese Overtime" policy that does not comply with the FLSA's fluctuating work week requirements; and 3) paying auto inspectors at one rate for work during regular time and a lower rate for overtime. SGS's motions to decertify the class and dismiss certain plaintiffs should be denied.

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Respectfully Submitted,

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