No.

IN THE

Supreme Court of the United States

FTS USA, LLC and UNITEK USA, LLC,

Petitioners,

v.

EDWARD MONROE,
FABIAN MOORE, and TIMOTHY WILLIAMS, individually and on behalf of all other similarly situated individuals,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A divided panel of the Sixth Circuit held that a handful of employees may litigate a collective action for overtime wages under the Fair Labor Standards Act on behalf of hundreds of employees across the country, despite wide variations in the theories of liability asserted by the witnesses. Expressly disagreeing with a decision of the Seventh Circuit on nearly identical facts, *see Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), the panel held that the Act is "less demanding" than Federal Rule 23's standard for certifying class actions, and is satisfied by common legal theories "even if the proofs of these theories are inevitably individualized and distinct." The panel also rejected the Seventh Circuit's view, which multiple federal and state courts have held is grounded in the constitutional guarantee of due process, that unless the sample is shown to be representative based on statistical methods or a similar showing, collective actions cannot be tried based on testimony from a sample of class members handpicked by the plaintiffs' counsel. Finally, without any jury finding that the witnesses who testified were in fact representative, and in conflict with Fifth and Second Circuit authority, the panel held that the court could take the question of damages away from the jury and determine damages itself.

The questions presented are:

1. Whether the Fair Labor Standards Act and the Due Process Clause permit a collective action to be certified and tried to verdict based on testimony from a small subset of the putative plaintiffs, without either any statistical or other similarly reliable showing that the experiences of those who testified are typical and can reliably be extrapolated to the

entire class, or a jury finding that the testifying witnesses are representative of the absent plaintiffs.

2. Whether the procedure for determining damages upheld by the Sixth Circuit, in which the district court unilaterally determined damages without any jury finding, violates the Seventh Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners FTS USA, LLC ("FTS") and UniTek USA, LLC ("UniTek") were defendants-appellants below.

Respondents Edward Monroe, Fabian Moore, and Timothy Williams were plaintiffs-appellees below. Respondents filed suit on behalf of themselves and other similarly situated technicians employed by FTS at 30 field offices across the country.

The district court conditionally certified a collective action into which the following plaintiffs each opted in: Terry Thornton, Xavier Becton, Bryant Burks, Jarius Nelson, Jr., Darrick Malone, Carl Brantley, Randy Davis, Joshua Haydel, Richard Hunt, Justin Brazzell, Michael Lundgren, Jason Williams, Pentcho Kurktchiyski, David Bearse, Christopher Reed, Michael Huston, Lashon Miller, Daniel Nicholas, Matthew Sanders, Jerry Smith, Eric Taylor, Andre Williams, Andre Allison, Joshua Anderson, Jose Bacalski, Roman Bublik, Paul Crossan, John Cuccia, Richard Dabbs, Daler Dos Santos, James Davis, Nasar El-Arabi, Treginald Ford, Aleksandar Gadzhev, William Gresham, Elijah Jackson, Keith Marshall, Andrew Nelson, Prince Nix, Alex Pantoja (Guzman), Richard Partridge, Joshua Ritchey, Kendrick Smith, Alfred Anderson, Randy Bell, Christopher Sweet, Travis Buckingham, Donzell Jackson, Marcus Jones, James Lawrence, Matthew Lindeman, Lloyd Maxwell, Calvin McNutt, Louis Medeiros, Thomas North, George Patterson, Ryan Silkwood, John Simon, David Young, Berran Barnes, Carlos Boykins, Stephen Fischer, Damian Fuller, Mario Gomez, Christopher Huggins, Walter

Huggins, Bobby Jarrett, Roger Mallette, Dobby Pichon, Antonio Richardson, Earvin Ruffin, Ivan Saldivar, Shane Tinker, Marlon Westbrook, Shawn Wiley, Edward Barriero, Jarrick Buckhanan, Jeffrey Burns, Joel Cobb, John Evans, Evan Gary, Aseiko Gilbert, Michael Green, Deonka Hawkins, Christopher Jones, Michael Langdon, Brian Pelletier, Monfrea Perry, Jared Petersen, Orlando Rowser, Frederick Smith, Tarvis Smith, Jason Taylor, Gary Ward, Cory Warren, Gary Whitmore, Charles Romano, John Wiechmann, George Aviles, Charles Hervey, Donte James, Corren Melancon, Shane Sturgess, Elias Daconto, Adam Davis, Jeffrey Boling, Christopher Bryant, Michael Colucci, Dennis Colvin, David Duhon, Waheed Fazli, Robert Gagnon, Andre Geiger, Duffy Hall, Jerry Hart, Aaron Harton, Terrell Hill, Jonathan Holladay, James Holland, Jimmy Howard, Michael Kelley, Carlton Malone, Ronnie Morton, Samuel Oddo, Phillip Petty, Jr., Christopher Sides, Jonathan Woodruff, Theresa Tucker, Christian Borne, Christopher Bratton, Danny Dowdy, David Parker, Anthony Priddy, David Graham, Nathan Hale, Joan Vargas, Wayne Atwood, Byron Gonzalez, Sr., Elroy Haba, Robert Hite, Jackson Moore, Calvin Knight, William Henderson, Isaac Vazquez, Kennieth Williams, Jacob Howard, Jeremy Lonix, Jose Albino, Tyrus Boone, Michel Chahini, Joel Foxworth, Michael Garcia, Joseph Ledbetter, Williams Meek, Christopher Vance, Timothy Finch, Corey Jenkins, Robert Baughman, Tony Mendez, Michael Acosta, James Adams, Dwayne Agnew, Melvin Armour, Jr., Burt Athey, Brad Austin, Joshua Ayers, Robert Baker, Brandon Baldy, Andrew Banks, Anne Barnett, Kristopher Battle, Buddy Bellhouse, John Bennett, David Berger, Aaron Boatright, Mario Bolanos,

Brandon Bowen, Larry Breed, Jeffrey Briggs, Rodney Brinkley, Carl Brown, Eric Brown, Walter Bryant, Edward Bullock, Jeremy Cash, Roseanna Castillo, Marvin Cathey, Markel Chaney, Charles Chantler, Robert Charles, Lester Churchill, Marvin Clark, Kelvin Coleman, Michael Cone, Michael Cothran, Brandon Curtis, Justin Davis, Nathan Dibble, James Dumas, Frank Dupie, Matthew Dyke, Andrew Edwards, Jesus Espinoza, Daniko Flowers, Okpara Frazier-Gaillard, Dustin Gardner, Joshua Gattis, Jeff Giles, Floyd Gill, Darrell Gilyard, Ryan Greene, Ryan Gregory, William Gustin, Roysland Halton, Terry Harding, Valon Harlan, Trennis Harvey, Solomon Olofinsua, Patrick Hauge, Daniel Hendry, Joseph Holmes, Terrance Howard, Robert Hulsey, Zebulun Humphrey, Jeremy Isaac, Charles Johnson, Emanuel Johnson, Maurice Johnson, Kristopher Klorres, Brian Knight, Roy Krizan, Alfonsa Kyles, Christopher Laconte, Randy Lee, Calvin Lester, David Lighty, Lewis Martin, Yolanda Massey, Daniel McCarthy, Daryl Meeks, James Mercer, Michael Merus, Clarence Morrison, George Mosley, Johnathan Nall, Richard Navarro, Kenneth Ogbondah, Solomon Olofinsua, Alex Padgett, Kevin Page, Clinton Parish, John Popp, Demetrius Porter, Courtney Prewitt, Stephen Price, Matthew Queen, Srinivas Reddy, Joseph Reed, Rickey Rentfrew, Darnell Richardson, David Ritchey, Vidal Rivera, Stefan Robinson, Ronald Rohan, Kevin Rossman, Carlos Sanchez, Fabiano Santinello, Dwayne Schwarz, Christopher Scott, Anthony Serrano, Gregory Silva, Johnathan Smith, Joseph Smith, William Smith, Carlos Spikes, Curtis Stanford, Vincent Steppes, Tron Sutherland, Antwaine Thomas, Lewis Thompson, John Troestler, Robert Van Hoose, Timothy Vanattia, Thomas Var-

ner, Wayne Watts, Charles White, Christopher Whitehead, D'Andre Wilkerson, Danny Williams, James Williamson, Antwan Winston, Johnathan Woodall, Rafael Zambrano, and Garrett Fountain.

Pursuant to Rule 29.6 of the Rules of this Court, petitioners FTS and UniTek state that FTS is wholly owned by UniTek, which in turn is wholly owned by UniTek Acquisitions, Inc., which in turn is wholly owned by UniTek Global Services, Inc. ("UGS").

UGS is owned in part by Cetus Capital II, LLC; Littlejohn Opportunities Master Fund LP; SG Distressed Fund, LP; New Mountain Finance Corporation ("NMF Corp."); New Mountain Finance Holdings, LLC ("NMF Holdings"); and members of the Cerberus Group, which include Cerberus ASRS Holdings, LLC; Cerberus AUS Levered Holdings LP; Cerberus Offshore Levered Loan Opportunities Master Fund II, L.P.; Cerberus Onshore, II CLO LLC; and Cerberus Levered Loan Opportunities Fund II, L.P. No other entity owns more than 10% of UGS's stock.

The sole member of Cetus Capital II, LLC is Littlejohn Fund IV, LP, the general partner of which is Littlejohn Associates IV, LLC. Littlejohn Associates, IV, LLC has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

The general partner of Littlejohn Opportunities Master Fund LP and SG Distressed Fund, LP is Littlejohn Opportunities GP LLC. Littlejohn Opportunities GP LLC has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

NMF Holdings is wholly owned by NMF Corp., which is publicly traded. NMF Corp. has no corpo-

rate parent, and FTS and UniTek are aware of no publicly held corporation that owns 10% or more of its stock.

FTS and UniTek are aware of no publicly held corporation that owns 10% or more of any entity in the Cerberus Group.

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PETITION FOR A WRIT OF CERTIORARI

FTS USA, LLC ("FTS") and UniTek USA, LLC ("UniTek") (collectively, "petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit opinion under review (App. 1a-69a) is reported at 860 F.3d 389. That court's prior opinion (App. 138a-197a) is reported at 815 F.3d 1000. Pertinent district court orders (App. 83a-117a) are reported at 257 F.R.D. 634 and 763 F. Supp. 2d 979. All other pertinent orders (App. 70a-82a, 118a-137a, 198a-203a) are unreported.

JURISDICTION

The Sixth Circuit entered judgment on June 21, 2017. Petitioners' timely petition for rehearing was denied on July 28, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part:

> No person shall be … deprived of life, liberty, or property, without due process of law.

The Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise

> reexamined in any Court of the United States, than according to the rules of the common law.

Pertinent provisions of the Fair Labor Standards Act are reproduced at App. 204a-228a.

STATEMENT

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, permits plaintiffs alleging violations of the statute's minimum-wage or overtime provisions to recover damages in a collective action on behalf of other "similarly situated" employees. *Id.* § 216(b). FLSA collective actions mirror class actions brought under Federal Rule of Civil Procedure 23(b)(3), except that under the FLSA, absent plaintiffs must opt in to participate. As the Seventh Circuit has noted, "there isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards." *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013). To maintain either type of suit, plaintiffs must demonstrate that the putative claimants share sufficient commonality, typicality, and cohesiveness such that a factfinder can accurately draw conclusions about the entire group from the evidence presented by its representatives. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016).

This Court vacated the opinion of a divided Sixth Circuit panel that had rejected this sensible view, giving the majority an opportunity to bring its decision in line with *Tyson* and other circuits' precedents. Instead, the majority—explicitly disagreeing with the Seventh Circuit's reasoning and result in *Espenscheid*, and faced with nearly identical facts—

reaffirmed its holding that the FLSA is "less demanding" than Rule 23, and that this lightened standard "controll[ed]" the outcome here. App. 11a, 28a-29a. Applying that diluted standard, the Sixth Circuit held that hundreds of employees asserting widely disparate theories of FLSA liability, based on "'inevitably individualized and distinct'" proof, App. 12a (citation omitted), could bring a single case and proceed to judgment so long as their legal theories could be described at the highest level of generality with the same abstract label.

The Sixth Circuit further held that liability could properly be *tried* based on supposedly "representative" witnesses handpicked by the plaintiffs' counsel, even though it was never actually shown—and the jury was never asked to find—that the witnesses were representative. That holding compounds the conflict with the Seventh Circuit and is irreconcilable with the FLSA and decisions of this Court and others recognizing due-process limitations on determining aggregate liability.

Exacerbating its errors, and creating a separate circuit conflict, the Sixth Circuit held that the Seventh Amendment permitted the district court to decide damages unilaterally, without any jury finding on that issue, by averaging the weekly *average* overtime hours worked by the 17 technicians who testified. As Judge Sutton explained in dissent, "[t]he Seventh Amendment bars this judge-run, average-of-averages approach." App. 64a.

The Sixth Circuit's rulings on certification, representative proof, and the jury-trial right contravene the FLSA and this Court's decisions. These errors and the circuit conflicts they create amply warrant this Court's review.

The petition should be granted.

1. FTS performs cable installation and support through technicians in field offices nationwide. App. 3a. Technicians at each office are managed by supervisors; each office is overseen by a project manager. *Ibid*. FTS's corporate parent, UniTek, provides human resources and payroll functions to FTS. *Ibid*.

As federal law permits, *see* 29 C.F.R. §§ 778.111-.112, FTS pays technicians using a "piece-rate" system, App. 4a, meaning workers are "paid by the job," not the hour. *Espenscheid*, 705 F.3d at 774. Hourly wages thus "var[y] from job to job and worker to worker." *Ibid.* For example, a technician who performs jobs worth $600 during a 30-hour week effectively earns $20 per hour. But a more efficient technician, who completes the same jobs in 25 hours, earns $24 per hour. Technicians' hourly wages thus vary each week depending on how many jobs they complete in how many hours.

Technicians who work more than 40 hours per week receive overtime for each hour in excess of 40. App. 9a. But, under applicable federal regulations, the premium for each overtime hour is one-half (instead of one-and-a-half) of the technician's effective hourly rate. App. 47a-48a.

Technicians themselves are responsible for recording by hand how many hours they work, both in the office and in the field. App. 229a-233a. FTS policies forbid technicians from falsifying their timesheets and require that technicians sign their timesheets before submitting them to payroll. App. 230a.

2. Respondents Monroe, Moore, and Williams formerly worked for FTS in Mississippi and Tennessee. They brought this collective action in 2008

against petitioners purportedly on behalf of all FTS technicians nationwide. The complaint asserted generically that technicians' time records did not fully record their overtime work. It did not specify how petitioners allegedly caused time records prepared by the technicians themselves to be inaccurate.

The district court conditionally certified the case as a collective action to provide notice to potential plaintiffs and permit discovery regarding certification. App. 5a. Notice was distributed nationally; ultimately, 296 technicians from 11 states opted in as plaintiffs. The parties agreed to conduct certification-related discovery of approximately 50 of them. App. 6a.

Discovery revealed that the participating technicians were highly heterogeneous. The technicians asserted widely divergent theories of what petitioners supposedly did wrong, and their allegations also differed in other material respects that bear on liability and damages. Some alleged, for example, that individual supervisors in certain offices filled out timesheets inaccurately or altered completed timesheets. Others, in contrast, claimed that they falsified their *own* timesheets for various reasons—ranging from their own desire to appear more efficient (and get routed on more jobs), to perceptions that management discouraged overtime, to alleged directions from some supervisors at certain offices "to underreport." App. 52a (Sutton, J., dissenting).

The nature of allegedly unrecorded hours also varied significantly. Some technicians claimed they were not paid for time spent in the office; others acknowledged that they were correctly compensated for office time. Some technicians claimed that they were required to record *one*-hour lunch breaks that

they never actually took; others claimed that they were required to record *half*-hour lunches whether or not they took them; and still others conceded that they took and correctly recorded lunch breaks. Finally, some technicians claimed that they should have been paid for commuting time (which generally is *not* compensable, with narrow exceptions), while others sought no compensation for such time.

3. Based on the results from discovery, petitioners filed a motion to decertify the collective action, D.C. Dkt. 193, which the district court denied. While acknowledging "variations" and "differences" in the facts affecting each plaintiff, the court reasoned that those disparities did not defeat certification because respondents alleged "a series of common methods by which Defendants allegedly deprived technicians proper overtime pay." App. 113a, 117a. Respondents, however, did not offer a trial plan that identified any means of linking any of these supposed methods to any individual plaintiff, prompting petitioners (unsuccessfully) to reiterate their "object[ion] to representational proof." D.C. Dkt. 241, at 2.

Petitioners separately moved to preclude respondents from using purportedly "representative" proof at trial, because respondents never adduced any evidence "demonstrating the propriety of [using] representative testimony" from a "handful" of technicians to "establish liability and damages on behalf of hundreds of individuals." D.C. Dkt. 246, at 1. Respondents countered that it was sufficient for their counsel to choose whichever technicians they viewed as "representative" and disclaimed any need to show the "representivity [*sic*]" of those witnesses through "statistics or science" in order to "extrapolate testimony from the testifying plaintiffs to the non-

testifying plaintiffs." D.C. Dkt. 249, at 16. Respondents acknowledged, however, that a trial of their claims would present multiple distinct "theories" of liability. D.C. Dkt. 269, at 3.

4. Over petitioners' continued objections, the district court permitted the trial to proceed as respondents proposed.

Respondents called 18 technicians, but the jury ultimately made findings as to only 17.[1] These purportedly "representative" technicians testified about their alleged "off-the-clock" work, resulting from their own individual experiences with particular FTS supervisors or managers at various FTS offices throughout the country. Several witnesses admitted that they were not aware of the practices of other technicians even in their own office, much less other offices nationwide. *See* Pet. C.A. Br. 14-15 & n.6 (collecting citations). Some also failed to identify the weeks in which they were not paid for unrecorded overtime, or how many hours they worked in those weeks. *Id.* at 15 & n.7 (collecting citations). Respondents presented no testimony, expert or otherwise, explaining how any of this testimony could logically be linked to the experiences of any particular nontestifying technician.

Petitioners requested an instruction directing the jury to decide whether the testifying witnesses were representative of the nearly 300 other plaintiffs. App. 242a-243a. Petitioners also proposed a verdict form requiring detailed findings as to each testifying and nontestifying plaintiff in order to secure

[1] Respondents omitted the eighteenth technician (Michael Colucci) from the verdict form, but his testimony was never stricken and was before the jury.

petitioners' "due process rights in the proper adjudication of these claims." D.C. Dkt. 261, at 2.[2] Respondents objected to petitioners' proposals precisely because they "ask[ed] the jury to decide representativity [*sic*]," which respondents argued was presumed because the case was "proceeding as a collective action." App. 255a.

While noting petitioners' "continuing objection to this representative proof," and stressing that there could not be "any inference that [petitioners] have at anytime waived anything," App. 253a, 263a, the district court agreed with respondents. It ruled and instructed the jury that "actions … found as to [testifying] plaintiffs *will be deemed and construed to apply* … across … the board to th[e] non-testifying plaintiffs." App. 261a (emphasis added). The court acknowledged that its decision was "contrary" to *Espenscheid v. DirectSat USA, LLC*, 2011 WL 2009967 (W.D. Wis. May 23, 2011), which denied collective-action certification in a suit by employees of the same ultimate employer performing substantially the same jobs—and which the Seventh Circuit has since affirmed, 705 F.3d 770.

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[2] Petitioners' original form asked the jury to make findings on each distinct theory of liability that respondents asserted for the class before trial. App. 240a; D.C. Dkt. 261-1. At trial, however, respondents abandoned any pretense that they could prove the precise means by which each nontestifying plaintiff was allegedly deprived of overtime, and instead sought only to prove "systematic shaving of overtime" through multiple, heterogeneous means. App. 249a-250a. While objecting that this "chang[e]" in "position" strengthened the need for the jury to "address each plaintiff" individually, App. 250a-251a, petitioners continued to seek a jury finding on representativeness. App. 257a-258a.

Following respondents' evidence, petitioners also sought judgment as a matter of law because respondents presented no evidence of damages. D.C. Dkt. 346. The district court denied petitioners' motion, App. 120a-124a, and accepted respondents' proposal that the court *itself* determine damages *after* the jury was discharged. App. 272a-275a. The court asked the jury only to determine petitioners' liability as to "Plaintiffs" as a group, and to calculate the "average" weekly number of unrecorded hours worked by the 17 "testifying representative Plaintiffs" listed in respondents' verdict form. App. 289a-290a. The court did not inform the jury that its "average" findings would be again averaged together "to make a class-wide finding," nor did it "charge the jury with determining the estimated [damages] each plaintiff should receive." App. 66a (Sutton, J., dissenting). "All the instructions did, in effect, was tell the jury that the judge would calculate damages." *Ibid.*

The jury returned a verdict concluding that petitioners were liable to respondents collectively, and calculating "average" weekly "unrecorded hours" for each of the 17 testifying witnesses—which varied widely from a low of 8 to a high of 24, App. 290a-291a (emphasis omitted). The court then discharged the jury, with no jury finding on damages as to anyone, testifying or nontestifying. D.C. Dkt. 490, at 18.

5. Respondents later moved for entry of judgment based on their *own* calculation of damages. Because the original trial judge (Hon. Bernice Donald) had been elevated to the Sixth Circuit, their motion was presented to a different judge, new to the case. Respondents proposed that nontestifying plaintiffs be awarded damages by averaging the average weekly overtime hours found by the jury for

the 17 witnesses—which, as noted, varied by 300% between 8 and 24 hours. Petitioners opposed this request because no damages issue had been "put to the jury for decision," and objected to the court's suggestion that a *new* jury be impaneled solely to decide damages. App. 294a-295a. The court adopted respondents' proposal and entered judgment in the exact amount they requested—almost $4 million—"[b]ased upon the Plaintiffs' memoranda." App. 125a.

Petitioners moved again for judgment as a matter of law, a new trial, and decertification, citing the Seventh Circuit's decision in *Espenscheid*. D.C. Dkt. 405, 406, 441. The court denied these motions based on Judge Donald's earlier rulings. App. 127a-137a.

6. Petitioners' appeal challenged the collective-action certification, the trial by purportedly "representative" evidence, and the ultimate judgment—under the FLSA, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment. Pet. C.A. Br. 21-63. A divided Sixth Circuit panel affirmed on all issues relevant here. App. 138a-180a.[3]

a. The majority expressly rejected the Seventh Circuit's reasoning and result in *Espenscheid*—which affirmed denial of certification of workers of the same ultimate employer—as inconsistent "with Sixth Circuit precedent." App. 159a. "The difference between the Seventh Circuit's standard for collective

[3] The Sixth Circuit set aside the district court's calculation of overtime pay because the district court mistakenly used a 1.5 multiplier, instead of the 0.5 multiplier that federal piece-work regulations prescribe, and had incorrectly calculated hourly wages. The panel made clear that any proceedings on remand would be purely mechanical. App. 178a-180a.

actions and our own," the panel explained, "is the controlling distinction for the issues before us." App. 160a. According to the majority, "the FLSA's 'similarly situated' standard is less demanding than Rule 23's standard" for class certification, and in FLSA cases employees are "'not required'" to show a "'unified policy' of violations." App. 148a (citation omitted). The assertion of common overarching legal theories is sufficient, the majority reasoned, "'even if the proofs of these theories are inevitably individualized and distinct.'" App. 154a (citation omitted). The majority rejected petitioners' argument that the trial improperly blended together multiple distinct legal theories, explaining that "[t]he definition of similarly situated does not descend to such a level of granularity." *Ibid*. The FLSA, it held, does not "require a violating policy to be implemented by a singular method." App. 155a.

Applying these rules, the majority held that respondents could proceed collectively based on an overarching corporate "time-shaving" policy—that is, a "policy" to violate the FLSA by not paying for overtime. App. 153a. This putative policy, the majority asserted, encompassed not only employees who claimed that they were instructed to underreport or that supervisors had altered their timesheets, but also those who had engaged in what *Espenscheid* called "benign underreporting"—*i.e.*, those who voluntarily underreported their own time, not under direction or pressure from petitioners, but because they "wanted to impress the company" with their efficiency. 705 F.3d at 774. "Even technicians who never received direct orders," the panel reasoned, "knew" that underreporting would help them "receiv[e] work assignments" and "avoid reprimand or termination." App. 154a. Because the 17 techni-

cians on the verdict form claimed at least one of these "three means" of "time-shaving," the case could be certified and tried as a collective action. App. 167a-168a.

The majority also rejected petitioners' due-process challenge to the trial procedure, holding that petitioners' individualized defenses and variation among class members "do not warrant decertification where sufficient common issues or job traits otherwise permit collective litigation." App. 157a. The panel asserted that petitioners fairly litigated their individual defenses against the "representatives" because the jury's findings of average amounts of unrecorded hours for those 17 technicians were lower than respondents had alleged, and those "defens[e]" findings could then be "distributed across the claims of nontestifying technicians." App. 157a-158a. The panel also suggested that a "representative" trial was appropriate because petitioners initially agreed to limit certification-stage discovery to 50 technicians. App. 161a, 168a.

Finally, the majority held that the district court had not violated the Seventh Amendment by determining damages by itself—after discharging the original jury—using the court's own estimates and an average of the 17 disparate averages found by the jury. "[T]he Seventh Amendment is not implicated," the panel held, because "the proof was representative" and the jury was told that the nontestifying technicians would be "'deemed by inference to be entitled to overtime compensation.'" App. 176a-177a. The majority also asserted that requiring jury findings on liability and damages for each plaintiff, as petitioners requested, "would contradict certification of the case as a collective action in the first place."

App. 176a. The majority further concluded that petitioners had "waived any right to a jury trial on damages" by "reject[ing] the district court's offer to impanel a second jury." App. 177a-178a.

b. Judge Sutton dissented. App. 181a-197a. He urged "adopt[ing] the Seventh Circuit's opinion [in *Espenscheid*] as [the panel's] own in this case, since it highlights precisely the same problems that afflicted the plaintiffs' trial plan." App. 185a. As in *Espencheid*, respondents' claims here "encompas[s] multiple policies, each one corresponding to a different type of statutory violation and some to no violation at all." App. 186a. Some respondents, for example, engaged in "'benign underreporting,'" which the FLSA "does not bar." *Ibid*. "Nor does it violate the FLSA to reduce an employee's amount of work to avoid increasing overtime costs." *Ibid*. The abstract "time-shaving" label, Judge Sutton explained, was merely "lawyer talk" to cover the wide disparities among the class's theories, "cognizable and non-cognizable alike." *Ibid*. In any event, respondents' "own evidence" demonstrated that the proof was "not remotely representative." App. 189a.

Judge Sutton also concluded that the district court "violated the Seventh Amendment" by determining damages unilaterally and "*assum*[*ing*]"—without requiring the jury to determine—"that each of the testifying and non-testifying employees was similarly situated for purposes of calculating damages." App. 192a. The majority's assertion that petitioners forfeited their Seventh Amendment objection by declining a second jury was simply "[n]ot true." App. 196a.

5. This Court vacated the panel's decision and remanded for further consideration in light of its in-

tervening decision in *Tyson*. App. 200a-201a. There, this Court affirmed certification of an FLSA collective action, but clarified the legal standards that apply: Plaintiffs may use "representative evidence" to "prov[e] classwide liability" if "each class member could have relied on that [evidence] to establish liability" in "an individual action," and the evidence is not "statistically inadequate." 136 S. Ct. at 1046, 1048. If representative evidence is allowed, it is the "near-exclusive province of the jury" to determine whether that evidence is "probative" as to "each employee." *Id*. at 1049. A "'failure of proof on the common question'" of representativeness is "fatal" to classwide liability. *Id*. at 1047 (citation omitted).

Nevertheless, the panel majority reissued its original opinion, again over Judge Sutton's dissent. The majority amended that opinion to address *Tyson*, stating that "*Tyson* d[id] not compel a different resolution" because the statements on which petitioners relied amounted to "two pieces of dicta" that did not "control this case." App. 3a, 17a. The panel did not consider *Tyson*'s impact on the district court's calculation of damages because the case "did not address damages." *Ibid*.

In dissent, Judge Sutton took issue with both conclusions, explaining that *Tyson* permits only "statistically adequate representative evidence" that "each class member could have used" in "an individual action," App. 51a, and confirms "the jury's starring role in determining damages," App. 64a.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S HOLDINGS ON REPRESENTATIVE LITIGATION CONFLICT WITH MULTIPLE LOWER-COURT DECISIONS AND THIS COURT'S PRECEDENT.

The Sixth Circuit's rulings upholding both certification of this case as a collective action and the procedure employed for trying it directly conflict with multiple other lower-court decisions limiting the use of representative proof in aggregate litigation. The decision below also contradicts this Court's cases and bedrock principles of due process. This Court's intervention is necessary to resolve these conflicts on these important questions.

A. The Decision Below Directly Conflicts With Seventh Circuit FLSA Case Law And Multiple Lower-Court Rulings On Proper Use Of Representative Proof.

As the Sixth Circuit openly acknowledged, its decision here rests squarely on its rejection of the legal standards that the Seventh Circuit applied in *Espenscheid*—a case involving nearly identical allegations against the same ultimate employer. The Sixth Circuit's broad view of permissible "representative" proof, moreover, is irreconcilable with decisions of multiple courts recognizing that due process forbids aggregate litigation by proxy unless those proxies are proven to be actually representative.

1. The majority conceded that the legal standards it applied here are "at odds with" the Seventh Circuit's decision in *Espenscheid* and that this difference in governing rules was the "controlling" factor in the cases' divergent outcomes. App. 28a-29a. It could scarcely have done otherwise: *Espenscheid*

involved nearly identical allegations, and similar "representative" witnesses handpicked by plaintiffs' counsel, against a different subsidiary of the same parent company. As Judge Sutton noted in dissent, *that* "is an apt use of the term similarly situated." App. 53a-54a.

In *Espenscheid*, satellite-dish technicians brought FLSA claims—against their direct employer (another UniTek subsidiary) and UniTek itself—for "work for which they were not compensated at all" and for "work[ing] more than 40 hours a week without being paid overtime for the additional hours." 705 F.3d at 773. Their claims mirrored respondents' allegations here: that the defendants required employees to understate overtime or otherwise discouraged overtime. Indeed, the relevant policies were those of the same corporate parent (UniTek), which *forbade* falsification of timesheets. *Ibid.*; App. 230a.

After initially certifying the case as a collective action for discovery purposes (as happened here), the district court in *Espenscheid* decertified the action because the "wide variability" in employee experiences showed that "one technician's experience may not be a proxy for others." 2011 WL 2009967, at *6.

The Seventh Circuit affirmed. Writing for the unanimous panel, Judge Posner explained that, even assuming the "plaintiffs could prove that [the employer's] policies violated the [law]," the case could not proceed as a collective action. 705 F.3d at 773. The variance among the "types of violation[s]" and the plaintiffs' circumstances was stark, encompassing (as here) even some "benign underreporting" for which employers cannot be held liable. *Id.* at 774-75.

The plaintiffs could not "get around the problem of variance" among class members, the Seventh Circuit held, "by presenting testimony" from "'representative' [class] members," *unless* they showed that those testifying were "genuinely representative" of the class—which they did not. 705 F.3d at 774-75. To make *that* showing, plaintiffs at a minimum were required (but failed) to "explain … how these 'representatives' were chosen." *Id.* at 774. Without assurances that "sampling methods used in statistical analysis were employed to create a random sample of class members," nothing would stop plaintiffs' counsel from "hand pick[ing]" *unrepresentative* plaintiffs with the strongest claims (and the greatest damages) to distort the evidence of liability and "magnify the damages." *Ibid.* With no way to "distinguish," on a classwide basis, plaintiffs who experienced one type of unlawful conduct from those who experienced another or none, certification was improper. *Ibid.*

The Sixth Circuit conceded that its decision here—reaching precisely the opposite result on essentially the same facts—conflicts with *Espenscheid.* App. 28a-29a. The conflict in legal standards was not news; indeed, the Seventh Circuit in *Espenscheid* understood its decision as departing from the Sixth Circuit precedent, *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567 (6th Cir. 2009), on which the court of appeals extensively relied here. *See* 705 F.3d at 772. The Sixth Circuit, moreover, explained that "[t]he difference between the Seventh Circuit's standard for collective actions and our own is the controlling distinction for the issues before us." App. 28a-29a. This express, outcome-dispositive circuit conflict on the interpretation of a frequently in-

voked federal statute alone suffices to warrant review.[4]

2. The Sixth Circuit's holding approving respondents' selection of so-called "representative" witnesses conflicts more broadly with multiple federal and state courts' decisions recognizing due-process limitations on the use of "representative" proof.

Several circuits have made clear that proper sampling methods are essential in selecting "representative" claimants in aggregate litigation, absent other reliable assurances of typicality and cohesion (*e.g.*, that claimants all worked together and can testify as percipient witnesses of each others' experiences). In *In re Chevron U.S.A., Inc.*, for example, the Fifth Circuit rejected a district court's plan to resolve common issues in separate actions by nearly 3,000 plaintiffs through a "bellwether trial" of claims by thirty claimants, half chosen by the plaintiffs and half by the defendant. 109 F.3d 1016, 1017, 1020 (5th Cir. 1997). "[D]ue process," it explained, requires courts employing representative proof to impose "safeguards designed to ensure that [each] clai[m]" is "determined in a proceeding that is reasonably calculated to reflect the results that would be obtained if those claims were actually tried." *Id.* at 1020. "[A]ny extrapolation" from individual plaintiffs to others, therefore, must be "based on *compe-*

[4] Despite explicitly acknowledging that the circuit conflict was "controlling," the Sixth Circuit halfheartedly attempted to distinguish *Espenscheid* on its facts—namely, that *Espenscheid* had reviewed a ruling decertifying a class and involved an even larger group of plaintiffs. App. 29a-30a. As Judge Sutton explained, these supposed distinctions do nothing to diminish the direct, outcome-determinative conflict on the legal standards that the panel majority conceded. App. 62a-63a.

tent, scientific, statistical evidence" that those individual plaintiffs "are representative of the larger group … from which they are selected." *Ibid.* (emphasis added). Thus, "where common issues" are tried through "a sample of individual claims or cases, the sample must be … randomly selected [and] statistically significant." *Id.* at 1021. Applying this principle, the Fifth Circuit rejected the district court's trial plan, because it lacked the "minimal level of reliability necessary" to "subjec[t] [the defendant] to potential liability to 3,000 plaintiffs." *Id.* at 1020.

The Ninth Circuit in *Hilao v. Estate of Marcos* applied the same principle—there to uphold a sampling method at the outer limits of these crucial requirements. 103 F.3d 767 (9th Cir. 1996). *Hilao* affirmed the district court's use of a sample of "137 claims … randomly selected by computer" to calculate aggregate damages for 9541 claims. *Id.* at 782. Although recognizing that representative proof "raise[d] serious questions" about "due process," the Ninth Circuit approved the "extremely accurate" sampling method based on expert assurances of "'a 95 percent statistical probability'" that the sample was valid. *Id.* at 782, 785-86. In *Wal-Mart Stores, Inc. v. Dukes*, this Court reversed the Ninth Circuit's attempt to extend this principle beyond those limits as an impermissible "Trial by Formula." 564 U.S. 338, 348, 367 (2011).

State courts similarly bound to provide due process have followed the same principle. In *Duran v. U.S. Bank National Association*, the California Supreme Court rejected a plan to try 260 state-law wage-and-hour claims based on a nonrandom sample of 21 plaintiffs. 325 P.3d 916 (Cal. 2014). "[D]ue

concern for the parties' rights," *Duran* held, required that "sampling" be "employed with caution": "[T]he sample relied upon must be representative and the results obtained must be sufficiently reliable to satisfy concerns of fundamental fairness," so the "sample must be randomly selected for its results to be fairly extrapolated to the entire class." *Id.* at 940-41, 945. Otherwise, the sample may be "'skewed'" by "[s]election bias." *Id*. at 941 (citation omitted). Because the plan the trial court had approved "undermined randomness" and allowed "class counsel … to influence the cases … in the sample group," the court held, the sample was "biased in plaintiffs' favor" and could not sustain a classwide judgment. *Id.* at 941-43; *see also Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 833-34 (Ill. 2005) ("[D]ue process" requires "a reasonable degree of certainty" when "statistical inference" is used to determine "aggregate liability").

The decision below cannot be squared with these holdings. The district court certified a collective action premised on the promise of representative proof and entered judgment based on testimony of 17 technicians, without ever requiring any showing (or jury finding) that those witnesses were in fact representative of anyone. Yet the Sixth Circuit approved that procedure, rejecting petitioners' due-process challenge.

Indeed, respondents have never claimed that their "sample" of 17 technicians was chosen randomly; respondents themselves handpicked those technicians based on criteria they have never divulged. And far from attempting to show that the sample was representative, respondents *disclaimed* any burden to justify by "statistics or science"—or any

established standard of reliability—"extrapolat[ing] testimony from the testifying plaintiffs to the non-testifying plaintiffs." D.C. Dkt. 249, at 16. By nevertheless affirming a judgment predicated on ersatz exemplars without requiring any showing or jury finding of representativeness, the majority expanded the lower-court conflict, endorsing modes of proof that are widely acknowledged to deprive litigants of the minimum level of reliability due process demands.

B. The Sixth Circuit's Approach To Aggregate Proof Contravenes This Court's Constitutional And FLSA Precedents.

The approach to representative proof that the Sixth Circuit affirmed also contradicts this Court's precedents concerning the limits on aggregate litigation and the constitutional principles they embody.

1. From the earliest days of representative litigation, and reflecting traditional equity practice, this Court has held that such litigation requires true representatives of the absent parties. In "all cases where … a few are permitted to sue and defend on the behalf of the many, by representation," the Court made clear, "care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1854) (citing Story's *Equity Pleadings* and other common-law authorities). Representative actions comport with due process only on the assumption that it is unnecessary to bring every claimant into court because the class representatives—and their individual claims—will be effective proxies for the absent parties and their claims. It is this "class cohesion that legitimizes representative action in the

first place." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

Most representative actions in federal court proceed as class actions under Rule 23, which itself "'stems from equity practice,'" *Wal-Mart*, 564 U.S. at 361 (citation omitted), and which ensures that named plaintiffs' individual claims are proxies for absent members while allowing a full and fair presentation of applicable defenses. Those objectives are advanced in all cases through Rule 23(a)'s requirements of commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a)(2)-(4). "[C]ommonality" ensures that representative proof is capable of "'generat[ing] common answers'" for all plaintiffs. *Wal-Mart*, 564 U.S. at 349-50 (citation omitted). Typicality and adequacy similarly guarantee that the representatives have "'suffer[ed] the same injury'" as absent plaintiffs. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (citation omitted). In class actions brought under Rule 23(b)(3)—the category most analogous to respondents' collective proceeding here—common questions must also "predominate over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3), a requirement designed to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623.

These principles apply with equal force in any representative action because traditional concepts of representation are deeply rooted in due process. As this Court has made clear in cases arising from state courts, for instance, the constitutional validity of class actions rests on proof that the representatives are true proxies for absent members. *Shutts*, 472

U.S. at 812; *Hansberry v. Lee*, 311 U.S. 32, 43-44 (1940). And in *Taylor v. Sturgell*, the Court rejected the notion that "virtual representation" could ever suffice to bind parties to a judgment, holding that "due process limitations" foreclose the notion that representation need be only "'close enough'" or "'equitable.'" 553 U.S. 880, 891, 894, 898 (2008). The Court specifically distinguished the representative character of "*properly conducted* class actions," emphasizing that Rule 23's "procedural protections" are "grounded in due process." *Id.* at 894, 901 (emphasis added).

Due process further limits representative litigation by entitling each party to litigate every claim or defense he has. The "right[s] guaranteed … by the Due Process Clause," the Court has long held, include the right "to litigate the issues raised," *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), and "'to present every available defense,'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (citation omitted). "A defendant in a class action" thus "has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *Wal-Mart*, 564 U.S. at 366-67.

The decision below contravenes these core due-process requirements. Respondents did not and could not plausibly demonstrate that the technicians who testified were representative of the nearly 300 claimants who did not. Technicians at different field offices asserted starkly distinct "methods" by which their overtime was allegedly reduced (App. 36a)—including some that are entirely *lawful*; as Judge Sutton noted, employers may lawfully reassign work

to underutilized employees who are not likely to incur overtime. App. 56a. Respondents neither "attempt[ed] to prove" that any one means was employed "across the entire class," App. 58a, nor offered any way to determine whether any particular nontestifying technician experienced some, all, or none of those means. The jury's findings even as to the few technicians that *did* testify confirm this multifaceted heterogeneity: The jury found wide variance in the testifying technicians' alleged average weekly unrecorded hours—from 8 to 24, App. 291a—*and made no finding on where any nontestifying technician fell on this spectrum.*

Because no witnesses were shown to be representative of the entire class, or even parts or members of the class, litigation of the merits of individual technicians' claims and petitioners' technician-specific defenses was impossible. The Sixth Circuit tried to paper over this due-process problem because it believed that all employees were challenging a supposed company-wide "policy" to avoid paying overtime. App. 36a. But as Judge Sutton explained, simply asserting abstract violations of law "at a vertigo-inducing height of generality" does not demonstrate that all employees are sufficiently similar to try their claims *en masse,* especially "when one of the theories [asserted] does not even violate the FLSA." App. 56a. The panel's holding that hazy allegations alone suffice leaves due process a dead letter.

Nor could petitioners' constitutional rights be jettisoned, as the majority believed, simply because some undefined quantum of "sufficient common issues or job traits otherwise permit collective litigation." App. 25a. Indeed, as Judge Sutton noted, the evidence was so unrepresentative that, had a "jury

returned a verdict for the defendants," most courts "would hesitate" to bind nontestifying technicians to that judgment. App. 59a; *Sturgell*, 553 U.S. at 894. Because "sauce for one … should be sauce for the other," the ruling below is "perilous for defendants *and* plaintiffs alike." App. 59a-60a.

2. Even if the trial-by-pseudo-proxy procedure the Sixth Circuit approved could be squared with constitutional constraints on representativeness, it independently runs afoul of the FLSA.

Although this Court has never expressly addressed the extent to which courts *must* follow class-action practice in FLSA actions—the central issue on which the Sixth and Seventh circuits disagreed—the Court itself has looked to Rule 23 precedents for guidance in such actions, especially those that address "the potential for misuse of the class device." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989). And for good reason. The purpose of collective actions under Section 216(b) is the same as under Rule 23: "efficient resolution in one proceeding of common issues of law and fact." *Id.* at 170. Moreover, when Congress first permitted representative FLSA suits in 1938, it presumably expected courts to be guided by rules of equity, *Smith*, 57 U.S. (16 How.) at 302-03, now reflected in Rule 23. Indeed, in keeping with those traditional rules, early cases treated such actions as "spurious class suits" under Rule 23 as it then stood. *Pentland v. Dravo Corp.*,

152 F.2d 851, 853-54 (3d Cir. 1945) (collecting authorities).[5]

This Court's most recent FLSA collective-action case, *Tyson*, illustrates the same approach. *Tyson* recognized that the "central dispute" under both Rule 23 and the FLSA is "[w]hether [an] inference [about the class] is permissible" through "[r]eliance on a representative sample." 136 S. Ct. at 1046. Plaintiffs thus may use "representative evidence" to "prov[e] classwide liability" *only if* "each class member could have relied on that [evidence] to establish liability" in "an individual action." *Ibid*. To justify a collective trial, the purportedly representative evidence must be both "*relevant* in proving a plaintiff's individual claim," and "*sufficient* to sustain a jury finding … if it were introduced in each employee's individual action." *Id.* at 1046, 1048 (emphases added).

The Sixth Circuit's decision flouts these requirements. The court expressly refused to require a showing akin to Rule 23. And it disregards *Tyson*'s central teaching that representative evidence be restricted to cases where any individual class member could rely on the purportedly representative evidence to prove her own individual case. *No* individual FTS technician could prove that he or she was denied overtime based on testimony by 17 testifying techni-

[5] Congress added the opt-in requirement in 1947 to alleviate burdens on employers. *Sperling*, 493 U.S. at 173. Given that provision, the 1966 amendments to Rule 23 permitting "opt out" classes cannot apply to the FLSA. But that scarcely means that Congress "directed [courts] to discard the compass of rule 23 entirely and navigate the murky waters of such actions by the stars or whatever other instruments they may fashion." *Shushan v. Univ. of Colo.*, 132 F.R.D. 263, 266 (D. Colo. 1990).

cians who asserted "various and conflicting theories of liability," App. 50a (Sutton, J., dissenting), and who testified that managers in *other* field offices using *different* payroll practices denied those *other* technicians overtime. *Espenscheid* "respect[ed] the lessons of *Tyson*" by rejecting representative proof in these circumstances; the Sixth Circuit's contrary decision "does not." App. 55a.

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The Sixth Circuit self-consciously parted company with the Seventh regarding the ground rules for FLSA collective actions. In the process, it broke with multiple other courts and this Court's case law concerning the outer limits of representative litigation. Only this Court can definitively resolve these conflicts on these important issues of federal statutory and constitutional law.

II. THE SIXTH CIRCUIT'S HOLDING THAT A COURT MAY UNILATERALLY DETERMINE DAMAGES IN REPRESENTATIVE ACTIONS WITHOUT ANY JURY FINDING VIOLATES THE SEVENTH AMENDMENT.

The Sixth Circuit's decision conflicts with this Court's and others' precedent in a second respect by approving the denial of petitioners' Seventh Amendment right to have a jury determine damages. The Court's error in approving the district court's usurpation of the jury's role independently warrants this Court's intervention and is egregious enough to justify summary reversal.

A. The Decision Below Creates A Conflict On Defendants' Seventh Amendment Right To Have A Jury Determine Each Plaintiff's Damages.

The panel's holding that the district court could properly calculate damages without any jury finding on that issue squarely conflicts with decisions of the Fifth and Second Circuits.

In *Cimino v. Raymark Industries, Inc.*, the Fifth Circuit concluded that the Seventh Amendment requires a jury to decide *each* plaintiff's damages, and that a court therefore may not use jury findings as to "representative" class members to approximate damages for the rest of the class. 151 F.3d 297 (5th Cir. 1998). The district court had awarded damages based on "the average of the verdicts rendered in … sample cases" brought by other plaintiffs alleging similar injuries. *Id.* at 300. The Fifth Circuit reversed. "The only juries that spoke to actual damages," it explained:

> received evidence only of the damages to the particular plaintiffs before them, were called on to determine only, and only determined, each of [those] particular plaintiffs' actual damages individually and severally (not on any kind of a group basis), and … did not determine or purport to determine, the damages of any other plaintiffs or group of plaintiffs.

Id. at 320 (emphasis omitted). "[E]xtrapolat[ing]" the damages in the sample cases to absent class members thus "violate[d] [the defendant's] Seventh Amendment right to have the amount of the legally

recoverable damages fixed and determined by a jury." *Ibid*.

Likewise, in *Grochowski v. Phoenix Construction*, the Second Circuit affirmed the entry of judgment as a matter of law on the claims of nontestifying plaintiffs for unpaid minimum wages and overtime under the FLSA. 318 F.3d 80 (2d Cir. 2003). Nine laborers employed on three separate construction projects had jointly sued their employer, but only five testified; the rest sought to "rel[y] on bits of testimony from [their] co-plaintiffs." *Id.* at 88. The Second Circuit rejected that gambit. While "not all employees need testify in order to prove FLSA violations or recoup back-wages, the plaintiffs must present sufficient evidence for the jury to make a reasonable inference as to the number of hours worked by the nontestifying employees." *Ibid*. Because "there was no evidence establishing how many hours" the nontestifying plaintiffs worked or their "rate of pay," the Second Circuit concluded that the evidence "was simply inadequate for a jury to determine whether their claims had any merit." *Ibid*.

The decision below conflicts directly with these cases. Over petitioners' objection, the district court discharged the jury after it found liability, and the court then calculated the damages itself by extrapolating from the 17 technicians listed on the verdict form to the rest of the nearly 300 plaintiffs. The jury itself made no finding of damages *as to any of the plaintiffs*. That procedure is even more extreme than those the Fifth and Second Circuits rejected: Far worse than extrapolating from a jury finding as to some plaintiffs to approximate the damages of others, the district court itself found the damages for *all*. The Sixth Circuit's approval of this even more

egregious procedure creates an additional circuit conflict that only this Court can resolve.

B. The Decision Below Violates Petitioners' Seventh Amendment Right To A Jury Finding Of Each Plaintiff's Damages.

The court of appeals' damages holding is also deeply misguided on the merits and irreconcilable with *this* Court's case law.

1. In suits subject to the Seventh Amendment—which include actions under Section 216(b), *Lorillard v. Pons*, 434 U.S. 575, 580 & n.7 (1978)—the parties are "entitled … to have a jury properly determine the question of liability and the extent of the injury by an *assessment of damages*." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (emphasis added). The jury-trial right thus "includes the right to have a jury determine the *amount* of statutory damages," *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998), and all genuinely disputed questions of fact underlying its verdict, *e.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996).

It follows that courts cannot, consistent with the Seventh Amendment, substitute their "own estimate of the amount of damages which the plaintiff ought to have recovered to enter an absolute judgment for any other sum than that assessed by the jury." *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889). A court that finds a verdict excessive may enter judgment for a "*lesser sum*" to avoid the need for a retrial *if* "the plaintiff *elect*[*s*] to remit the rest of the damages." *Id.* at 30 (emphases added). But it may not do so "without any election or consent" by the party aggrieved, *ibid.*, and it may never "*increase* the amount of damages awarded by a jury." *Dimick*, 293 U.S. at

482. Nor may a court, "by assessing an additional amount of damages," evade the jury-trial right "in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication." *Id.* at 486-87.

A fortiori, where the jury has made *no* finding as to damages, the court may not determine damages in the first instance based on its own independent findings. As this Court reaffirmed in *Tyson*, the "persuasiveness" of purportedly representative proof remains "a matter for the jury." 136 S. Ct. at 1049. *Tyson* thus "confirms the jury's starring role in determining damages," App. 64a (Sutton, J., dissenting): Where "[r]easonable minds may differ," it is the "near-exclusive province of the jury" to determine whether the "average time" worked by class representatives "is probative as to the time actually worked by each employee." 136 S. Ct. at 1049.

These principles are dispositive here. Respondents were required to "produc[e] sufficient evidence to show"—"as a matter of just and reasonable inference"—"the amount and extent of th[e] work" for which each plaintiff was "improperly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). But they expressly elected *not* to submit any question of damages to the jury—as to either testifying *or* nontestifying technicians. Under settled precedent, the consequence of that calculated choice was clear: Respondents' failure of proof on an essential element of their claim entitled petitioners to judgment as a matter of law. *See Weisgram v. Marley Co.*, 528 U.S. 440, 449-50 (2000). In no event could the district court *itself* determine damages. Yet it did precisely that—with the court of appeals' blessing. That procedure, in which the district court

finds damages after trial—increasing the damages award from zero to whatever figure the judge finds persuasive—amounts to an extreme form of additur that plainly violates the Seventh Amendment and requires reversal. *Dimick*, 293 U.S. at 486.

The Sixth Circuit majority excused this independent error with the same misguided reasoning it employed in affirming certification and the trial plan—asserting that "the proof was representative," and therefore the jury's liability findings based on the testimony of 17 technicians could be extrapolated to hundreds of others as mere "arithmetic." App. 45a-46a. The majority further reasoned that a jury determination of damages "would contradict certification of the case as a collective action in the first place," App. 45a; it thus allowed the FLSA's procedures to trump the Seventh Amendment's. That reasoning is fundamentally flawed at every step.

The jury, as noted, never found that the testifying technicians were representative. And it could not possibly have determined whether the testifying technicians' damages were representative of other plaintiffs' because the jury was never presented with competent proof of damages for the nontestifying technicians. Indeed, since the "average" unrecorded hours for the witnesses varied *by 300%*—from 8 to 24—there was "no basis for the judge to do the math or apply a formula." App. 65a (Sutton, J., dissenting).

In any event, the jury was not asked to find damages for *any* technicians, so there were no findings from which the district court could extrapolate, full stop. The only findings the jury made addressed the witnesses' "average" unrecorded hours. But those determinations of *unrecorded hours* are not the

same as *damages*. Nothing on the verdict form directed the jury to exclude from its estimate "'benign unreporting,'" which cannot be a basis for damages. App. 56a (Sutton, J., dissenting) (citation omitted), 291a. And since the work-load and hourly rates of piece-rate workers vary each week, and the jury was asked to make *no* findings on those issues, its bare findings on "average" amounts of unrecorded hours simpliciter cannot support damages findings even as to the testifying technicians. *Tyson*, 136 S. Ct. at 1052-53 (Roberts, C.J., concurring). Those determinations certainly cannot be extended to nearly 300 others who did not testify, and about whom the jury had no information and made no findings at all.

2. The panel attempted to shore up its untenable Seventh Amendment holding by asserting that petitioners waived their jury-trial right by rejecting the second judge's "offer to impanel a second jury to make additional findings and perform the damages calculation." App. 46a. That additional holding only further demonstrates the court of appeals' misapprehension of this Court's precedent.

The Seventh Amendment also "protect[s] [the jury-trial right] from indirect impairment" by precluding *reexamination* of the factual bases underlying jury verdicts, *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935), "unless a new trial is granted" or "the judgment of such court is reversed by a superior tribunal," *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (Story, J.). Even where "partial new trial" is "permit[ted]," "it *may not properly be resorted to* unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods.*

Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931) (emphasis added). Thus, where "the question of damages" is "so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty," a retrial on damages *must* also encompass questions of liability. *Ibid.*; *see also Norfolk S. R.R. v. Ferebee*, 238 U.S. 269, 273 (1915) ("[T]he instances would be rare in which it would be proper to submit to a jury the question of damages" alone.).

Thus, as lower courts have consistently recognized, the Seventh Amendment protects the "right to have juriable issues determined by the first jury impaneled to hear them." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) (right "to have only one jury pass on a common issue of fact"). A retrial "on damages alone" cannot proceed if it "would require essentially the same evidence as a trial on both liability and damages," *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1240 (8th Cir. 1987); *see also Sears v. S. Pac. Co.*, 313 F.2d 498, 503 (9th Cir. 1963), or if the initial verdict may have resulted from a compromise, *Pryer v. Slavic*, 251 F.3d 448, 455-58 (3d Cir. 2001).

The Sixth Circuit was therefore wrong to tax as a "waiver" petitioners' opposition to a "remedy" that would simply have substituted one Seventh Amendment violation for another. On the panel's own view, the question of liability decided by the jury (whether petitioners were liable for unrecorded overtime) overlaps *completely* with the central damages issue that the district court proposed to retry (the amount of unrecorded overtime). App. 26a-27a. Impaneling a second jury to decide damages thus would necessari-

ly entail reexamining the first jury's findings. Even if the liability and damages issues were somehow theoretically severable, here it was practically impossible: By the time the district court offered a second jury, there was no predicate that would allow another jury to make relevant damages findings without reexamining the first jury's determinations concerning the testifying technicians. Indeed, it is clear that the jury did not accept all of the technicians' testimony, yet it is impossible to say which parts it accepted.

The damages-only retrial procedure that the district court floated thus would have independently violated the Seventh Amendment. Petitioners did not waive their objection to one constitutional violation by declining to acquiesce in another.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING.

This Court is well acquainted with the important and recurring question of representative proof, which it addressed most recently in *Tyson*. Although *Tyson* established clear limits on representative proof in FLSA cases, the Sixth Circuit's refusal to follow *Tyson* in the face of a remand, and the enduring circuit conflict, are proof that further clarification is necessary.

The need for guidance is especially acute in FLSA cases, as new filings have increased in fourteen of the past fifteen years, topping out at 8,954 in 2015 and 8,308 in 2016. Gerald Maatman, Jr., *What 2016 Workplace Class Action Filings Suggest Employers Are Apt to Face in 2017* (Feb. 6, 2017), http://www.workplaceclassaction.com/2017/02/what-2016-workplace-class-actions-filings-suggest-

employers-are-apt-to-face-in-2017. Beyond the FLSA, too, clear direction is needed as state courts experiment with aggregate-litigation procedures that test the limits of due process, in wage-and-hour cases and otherwise.

This Court's intervention is also needed to rebuff the Sixth Circuit's misreading of the Seventh Amendment—without even *addressing Tyson* on that issue—and to restore uniformity regarding the jury-trial right. Correction of the Sixth Circuit's convoluted "waiver" ruling will enable the Court to address practical challenges of modern-day complex litigation—where courts frequently deploy novel procedural devices to sever subsets of issues for trial. *See* Steven S. Gensler, *Bifurcation Unbound*, 75 Wash. L. Rev. 705, 725-26 (2000); *Manual for Complex Litigation (Fourth)* § 22.93 (2004). The Court should grant review to reaffirm the principles articulated in *Gasoline Products,* and to make clear that, whether the question arises in a partial retrial or bifurcated trial, the Constitution does not permit "interwoven" issues to be tried before separate juries where, as here, the result would be "confusion," "uncertainty," and "injustice." 283 U.S. at 500.

CONCLUSION

The petition for a writ of certiorari should be granted. Petitioners respectfully submit that the Sixth Circuit's errors with respect to the second question presented are sufficiently egregious to merit summary reversal.

Respectfully submitted.

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October 25, 2017

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0131p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellees*, v. FTS USA, LLC and UNITEK USA, LLC, *Defendants-Appellants.*	No. 14-6063

On Remand from the United States Supreme Court.
No. 2:08-cv-02100—John Thomas Fowlkes, Jr., District Judge.

Decided and Filed: June 21, 2017

Before: BOGGS, SUTTON, and STRANCH, Circuit Judges.

* * *

STRANCH, J., delivered the opinion of the court in which BOGGS, J., joined, and SUTTON, J., joined in part. SUTTON, J. (pp. 36–49), delivered a separate opinion concurring in part and dissenting in part.

OPINION

STRANCH, Circuit Judge. Edward Monroe, Fabian Moore, and Timothy Williams brought this Fair Labor Standards Act (FLSA) claim, on behalf of themselves and others similarly situated, against their employers, FTS USA, LLC and its parent company, UniTek USA, LLC. FTS is a cable-television business for which the plaintiffs work or worked as cable technicians. The district court certified the case as an FLSA collective action, allowing 293 other technicians (collectively, FTS Technicians) to opt in. FTS Technicians allege that FTS implemented a company-wide time-shaving policy that required its employees to systematically underreport their overtime hours. A jury returned verdicts in favor of the class, which the district court upheld before calculating and awarding damages. On appeal, we affirmed the district court's certification of the case as a collective action and its finding that sufficient evidence supported the jury's verdicts, but reversed the district court's calculation of damages.

FTS and UniTek filed a petition for a writ of certiorari, and the Supreme Court issued a grant, vacate, and remand order (GVR)—granting the petition, vacating our opinion, and remanding the case to this court for further consideration in light of *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. —, 136 S. Ct. 1036 (2016), which the Supreme Court decided after we issued our opinion. *See FTS USA, LLC v. Monroe*, 137 S. Ct. 590 (2016) (mem.). "[O]ur law is clear that a GVR order does not necessarily imply that the Supreme Court has in mind a different result in the case, nor does it suggest that our prior decision was erroneous." *In re Whirlpool Corp. Front-Loading*

Washer Prods. Liab. Litig., 722 F.3d 838, 845 (6th Cir. 2013) (collecting cases). Rather, our task following the GVR in this case is to "determine whether our original decision . . . was correct or whether [*Tyson*] compels a different resolution." *Id.*

Upon reconsideration, we find that *Tyson* does not compel a different resolution; instead, *Tyson's* ratification of the *Mt. Clemens* legal framework and validation of the use of representative evidence support our original decision. Therefore, consistent with that opinion, we AFFIRM the district court's certification of the case as a collective action and its finding that sufficient evidence supports the jury's verdicts. We REVERSE the district court's calculation of damages and REMAND the case for recalculation of damages consistent with this opinion.

I. BACKGROUND

A. Facts

FTS contracts with various cable companies, such as Comcast and Time Warner, to provide cable installation and support, primarily in Tennessee, Alabama, Mississippi, Florida, and Arkansas. To offer these services, FTS employs technicians at local field offices, called "profit centers." FTS's company hierarchy includes a company CEO and president, regional directors, project managers at each profit center, and a group of supervisors. FTS Technicians report to the supervisors and project managers. FTS's parent company, UniTek, is in the business of wireless, telecommunication, cable, and satellite services, and provides human resources and payroll functions to FTS.

All FTS Technicians share substantially similar job duties and are subject to the same compensation

plan and company-wide timekeeping system. FTS Technicians report to a profit center at the beginning of each workday, where FTS provides job assignments to individual technicians and specifies two-hour blocks in which to complete certain jobs. Regardless of location, "the great majority of techs do the same thing day in and day out which is install cable." Time is recorded by hand, and FTS project managers transmit technicians' weekly timesheets to UniTek's director of payroll. FTS Technicians are paid pursuant to a piece-rate compensation plan, meaning each assigned job is worth a set amount of pay, regardless of the amount of time it takes to complete the job. The record shows that FTS Technicians are paid by applying a .5 multiplier to their regular rate for overtime hours.

FTS Technicians presented evidence that FTS implemented a company-wide time-shaving policy that required technicians to systematically underreport their overtime hours. Managers told or encouraged technicians to underreport time or even falsified timesheets themselves. To underreport overtime hours in compliance with FTS policy, technicians either began working before their recorded start times, recorded lunch breaks they did not take, or continued working after their recorded end time.

FTS Technicians also presented documentary evidence and testimony from technicians, managers, and an executive showing that FTS's time-shaving policy originated with FTS's corporate office. Technicians testified that the time-shaving policy was company-wide, applying generally to all technicians, though not in an identical manner. At meetings, managers instructed groups of technicians to underreport their hours, and managers testified that

corporate ordered them to do so. One former manager, Anthony Louden, offered testimony regarding high-level executive meetings. Louden identified overtime and fuel costs as the two leading items that an FTS executive felt it "should be able to manage and cut in order to make a bigger profit." Louden also stated that FTS executives circulated and reviewed technicians' timesheets, "go[ing] into detail on which technician had overtime, and, you know, go[ing] over why this guy had too much overtime and why he didn't have overtime." Technicians testified that they often complained about being obligated to underreport, and FTS's human resources director testified that she received such complaints. No evidence was presented that managers or technicians were disciplined for underreporting time.

B. Procedural History

A magistrate judge recommended conditional certification as a FLSA collective action, which the district court adopted. The district court also authorized notice of the collective action to be sent to all potential opt-in plaintiffs. The notice defined eligible class members as any person employed by FTS as a technician at any location across the country in the past three years to the present who were paid by piece-rate and did not receive overtime compensation for all hours worked over 40 per week during that period. A total of 293 technicians ultimately opted in to the collective action.[1]

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[1] Named plaintiff Monroe was a technician during the class period. After the class period, he was promoted to a managerial position.

The parties originally agreed on a discovery and trial plan, which the trial court adopted by order. Under the parties' agreement, discovery would be limited "to a representative sample of fifty (50) opt-in Plaintiffs," with FTS Technicians choosing 40 and FTS and UniTek choosing 10. The parties also agreed to approach the district court after discovery regarding "a trial plan based on representative proof" that "will propose a certain number of Plaintiffs from the pool of fifty (50) representative sample Plaintiffs that may be called as trial witnesses."

Following the completion of discovery, the district court denied FTS and UniTek's motions to decertify the class and for summary judgment, finding that the class members were similarly situated at the second stage of certification. In light of the parties' agreement and the district court's resulting order—under which the litigation proceeded—the court held that it could not "accept Defendants' contention that the parties' stipulated agreement to limit discovery to fifty representative plaintiffs did not also manifest Defendants' acquiescence to a process by which the remaining members of the class would not have to produce evidence as a prerequisite to proceeding to trial on their claims." (R. 238, PageID 5419.) The district court also denied FTS and UniTek's pretrial motion to preclude representative proof at trial because "the class representatives identified by Plaintiff[s] sufficiently represent the class" and "[t]o deny the use of representative proof in this case would undermine the purpose of class wide relief, and would have the effect of decertifying the class." (R. 308, PageID 6822.)

Accordingly, the collective action proceeded to trial on a representative basis. FTS Technicians

identified by name 38 potential witnesses and called 24 witnesses, 17 of whom were class-member technicians. FTS and UniTek identified all 50 representative technicians as potential witnesses, but called only four witnesses—all FTS executives and no technicians.

The district court explained the representative nature of the collective action to the jury, both before the opening argument and during its instructions, noting that FTS Technicians seek "to recover overtime wages that they claim [FTS and UniTek] owe them and the other cable technicians who have joined the case." (R. 450, PageID 10646–47; R. 463, PageID 12253.) The jury instructions specified that the named plaintiffs brought their claim on behalf of and collectively with "approximately three hundred plaintiffs who have worked in more than a dozen different FTS field offices across the country." (R. 463, PageID 12264.) The court also set out how the case would be resolved, instructing that FLSA procedure "allows a small number of representative employees to file a lawsuit on behalf of themselves and others in the collective group"; that the technicians who "testified during this trial testified as representatives of the other plaintiffs who did not testify"; and that "[n]ot all affected employees need testify to prove their claims" because "non-testifying plaintiffs who performed substantially similar job duties are deemed to have shown the same thing." (*Id.* at 12264–65.) The district court then charged the jury to determine whether all FTS Technicians "have proven their claims" by considering whether "the evidence presented by the representative plaintiffs who testified establishes that they worked unpaid overtime hours and are therefore entitled to overtime compensation." (*Id.* at 12265.) If the jury answers in

the affirmative, the court explained, "then those plaintiffs that you did not hear from are also deemed by inference to be entitled to overtime compensation." (*Id.* at 12265–66.)

The jury returned verdicts of liability in favor of the class, finding that FTS Technicians worked in excess of 40 hours weekly without being paid overtime compensation and that FTS and UniTek knew or should have known and willfully violated the law. The jury determined the average number of unrecorded hours worked per week by each testifying technician—all of whom were representative and were called on behalf of themselves and all similarly situated employees, as authorized by 29 U.S.C. § 216(b) and instructed by the district court. As indicated to the parties and the jury, the court used the jury's factual findings to calculate damages for all testifying and nontestifying technicians in the opt-in collective action. The trial court ruled that the formula for calculating uncompensated overtime should use a 1.5 multiplier, apparently based on the assumption that FTS and UniTek normally used that multiplier.

The district court[2] held a post-trial status conference and suggested that a second jury could be convened to decide the issue of damages. FTS and UniTek opposed a second jury, arguing that plaintiffs had failed to prove damages and judgment should be entered, "either for the defense or liability for plain-

[2] The Honorable Bernice Bouie Donald presided over all pretrial and trial issues before assuming her position on the Sixth Circuit. The Honorable Jon Phipps McCalla and John T. Fowlkes, Jr. presided over all post-trial issues, including the calculation of damages.

tiffs . . . with zero damages." After the court rejected this proposal, FTS and Unitek filed motions for judgment as a matter of law, a new trial, and decertification, all of which were denied. Finding that FTS Technicians had met their burden on damages, the court adopted their proposed order, using an "estimated-average" approach to calculate damages and employing a multiplier of 1.5.

II. ANALYSIS

FTS and UniTek challenge the certification of the case as a collective action pursuant to 29 U.S.C. § 216(b), the sufficiency of the evidence as presented at trial, the jury instruction on commuting time, and the district court's calculation of damages. After a review of the legal framework for collective actions in our circuit, we turn to each of these arguments.

A. Legal Framework

1. Certification and Burden of Proof Under the FLSA

Under the FLSA, an employer generally must compensate an employee "at a rate not less than one and one-half times the regular rate at which he is employed" for work exceeding forty hours per week. 29 U.S.C. § 207(a)(1). Labor Department regulations clarify, however, that in a piece-rate system only "additional half-time pay" is required for overtime hours. 29 C.F.R. § 778.111(a).

"Congress passed the FLSA with broad remedial intent" to address "unfair method[s] of competition in commerce" that cause "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806 (6th Cir. 2015); 29 U.S.C. § 202(a).

The provisions of the statute are "remedial and humanitarian in purpose," and "must not be interpreted or applied in a narrow, grudging manner." *Herman v. Fabri-Centers of Am., Inc.*, 308 F.3d 580, 585 (6th Cir. 2002) (quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251–262).

To effectuate Congress's remedial purpose, the FLSA authorizes collective actions "by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). To participate in FLSA collective actions, "all plaintiffs must signal in writing their affirmative consent to participate in the action." *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006). Only "similarly situated" persons may opt in to such actions. *Id.* Courts typically bifurcate certification of FLSA collective action cases. At the notice stage, conditional certification may be given along with judicial authorization to notify similarly situated employees of the action. *Id.* Once discovery has concluded, the district court—with more information on which to base its decision and thus under a more exacting standard—looks more closely at whether the members of the class are similarly situated. *Id.* at 547.

In *O'Brien v. Ed Donnelly* Enterprises*, Inc.*, we clarified the contours of the FLSA standard for certification. There, employees alleged that their employer violated the FLSA by requiring employees to work "off the clock," doing so in several ways—requiring unreported hours before or after work or by electronically altering their timesheets. 575 F.3d 567, 572–73 (6th Cir. 2009). The district court ini-

tially certified the *O'Brien* case as a collective action. *Id.* at 573. At the second stage of certification, the court determined that the claims required "an extensive individualized analysis to determine whether a FLSA violation had occurred" and that "the alleged violations were not based on a broadly applied, common scheme." *Id.* at 583. Applying a certification standard akin to that for class actions pursuant to Federal Rule of Civil Procedure 23, the district court decertified the collective action on the basis that individualized issues predominated. *Id.* at 584.

On appeal, we determined that the district court engaged in an overly restrictive application of the FLSA's "similarly situated" standard. It "implicitly and improperly applied a Rule 23-type analysis when it reasoned that the plaintiffs were not similarly situated because individualized questions predominated," which "is a more stringent standard than is statutorily required." *Id.* at 584–85. We explained that "[w]hile Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so in the FLSA," and applying a Rule 23-type predominance standard "undermines the remedial purpose of the collective action device." *Id.* at 584–86. Based on our precedent, then, the FLSA's "similarly situated" standard is less demanding than Rule 23's standard.

O'Brien applied the three non-exhaustive factors that many courts have found relevant to the FLSA's similarly situated analysis: (1) the "factual and employment settings of the individual[] plaintiffs"; (2) "the different defenses to which the plaintiffs may be subject on an individual basis"; and (3) "the degree of fairness and procedural impact of certifying the action as a collective action." *Id.* at 584 (quoting

7B Wright, Miller & Kane, Federal Practice and Procedure § 1807 at 487 n.65 (3d ed. 2005)); *see also Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261–65 (11th Cir. 2008) (applying factors); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001) (applying factors); *Frye v. Baptist Mem'l Hosp., Inc.*, 495 F. App'x 669, 672 (6th Cir. 2012) (concluding that district court properly exercised its discretion in weighing the *O'Brien* factors and granting certification). Noting that "[s]howing a 'unified policy' of violations is not required," we held that employees who "suffer from a single, FLSA-violating policy" *or* whose "claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct," are similarly situated. *O'Brien*, 575 F.3d at 584–85; *see also* 2 ABA Section of Labor & Emp't Law, The Fair Labor Standards Act 19-151, 19-156 (Ellen C. Kearns ed., 2d ed. 2010) (compiling cases supporting use of the three factors and noting that "many courts consider whether plaintiffs have established a common employer policy, practice, or plan allegedly in violation of the FLSA," which may "assuage concerns about the plaintiffs' otherwise varied circumstances").

Applying this standard, we found the *O'Brien* plaintiffs similarly situated. We determined that the district court erred because plaintiffs' claims were unified, as they "articulated two common means by which they were allegedly cheated: forcing employees to work off the clock and improperly editing timesheets." *O'Brien*, 575 F.3d at 585. However, due to *O'Brien*'s peculiar procedural posture (the only viable plaintiff remaining did not allege that she experienced the unlawful practices), remand for recertification was not appropriate. *Id.* at 586. In sum,

O'Brien explained the FLSA standard for certification, distinguishing it from a Rule 23-type predominance standard, and adopted the three-factor test employed by several of our sister circuits. *Id.* at 585.

Just as *O'Brien* clarifies the procedure and requirements for certification of a collective action, the Supreme Court's opinion in *Anderson v. Mt. Clemens Pottery Co.*—originally a Sixth Circuit case—explains the burden of proof at trial. Using a formula "applicable to all employees," the district court there awarded piece-rate employees recovery of some unpaid overtime compensation under the FLSA. 328 U.S. 680, 685–86 (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947. We reversed on appeal, determining that the district court improperly awarded damages and holding that it was the employees' burden "to prove by a preponderance of the evidence that they did not receive the wages to which they were entitled . . . and to show by evidence rather than conjecture the extent of overtime worked, it being insufficient for them merely to offer an estimated average of overtime worked." *Id.* at 686.

On certiorari, the Supreme Court held that we had imposed an improper standard of proof that "has the practical effect of impairing many of the benefits" of the FLSA. *Id.* It reminded us of the correct liability and damages standard, with a cautionary note: an employee bringing such a suit has the "burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies . . . militate against making that burden an impossible hurdle for the employee." *Id.* at 686–87. We have since acknowledged that instruction. *See Mo-*

ran v. Al Basit LLC, 788 F.3d 201, 205 (6th Cir. 2015). The Supreme Court also explained how an employee can satisfy his burden to prove both uncompensated work and its amount: "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687. The employee's burden of proof on damages can be relaxed, the Supreme Court explained, because employees rarely keep work records, which is the employer's duty under the Act. *Id.*; *see O'Brien*, 575 F.3d at 602; *see also* 29 U.S.C. § 211(c); 29 C.F.R. § 516.2(a)(7). Once the employees satisfy their relaxed burden for establishing the extent of uncompensated work, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens*, 328 U.S. at 687–88.

We quoted and applied this standard in *Herman v. Palo Group Foster Home, Inc.*, concluding that the employees had met their burden on liability because "credible evidence" had been presented that they had performed work for which they were improperly compensated. 183 F.3d 468, 473 (6th Cir. 1999). Also recognizing this shifting burden, we held that "Defendants did not keep the records required by the FLSA, so the district court properly shifted the burden to Defendants to show that they did not violate the Act." *Id.* The end result of this standard is that if an "employer fails to produce such evidence, the

court may then award damages to the employee, even though the result be only approximate." *Id.* at 472 (quoting *Mt. Clemens*, 328 U.S. at 688).

The core standards set out in the cases above are reinforced by the Supreme Court's recent decision in *Tyson*. There, employees of Tyson Foods, working in over 400 jobs across three departments in a pork processing plant, sued under the FLSA claiming that they did not receive overtime pay for time spent donning and doffing the protective gear specific to their job. 136 S. Ct. at 1041–42. The employees sought certification as a class action under Federal Rule of Civil Procedure 23 and as a collective action under 29 U.S.C. § 216. *Id.* at 1042. The district court certified the action over Tyson's objection that the employees' claims were too dissimilar for resolution on a classwide basis because the employees took varying amounts of time to don and doff varying kinds of gear. *Id.* at 1042–43. Because Tyson did not keep time records as required by the FLSA, the employees relied on representative evidence in the form of employee testimony, video recordings, and an expert study that estimated the average time spent donning and doffing equipment in different departments based on video observations. *Id.* at 1043. According to the employees' expert, donning and doffing time varied among workers, ranging from about 30 seconds to ten minutes in one department, and from two to nine minutes in another. *Id.* at 1055 (Thomas, J., dissenting). Subsequently, Tyson argued to the jury that this same variance made classwide recovery improper. *Id.* at 1044 (majority opinion). The jury found Tyson liable, but awarded significantly less in aggregate damages than the expert's estimated times would have supported. *Id.* The district court denied

Tyson's post-trial motions, including its motion to decertify the class, and the Eighth Circuit affirmed.

Before the Supreme Court, Tyson challenged the certification of the class and collective actions, raising arguments comparable to those made by FTS and UniTek here—that using a representative sample "manufactures predominance," absolves employees of their burden to prove personal injury, and robs an employer of the right "to litigate its defenses to individual claims." *Id.* at 1046. Based on these objections, Tyson sought a ban on representative evidence. *Id.* In response, the Supreme Court examined whether the employees' class certification under Rule 23 was appropriate given that the employees' key evidence, compiled in their expert's average time estimates, assumed that the various employees spent the same average time donning and doffing. *Id.* at 1041, 1046. Finding that the requested ban "would make little sense," the Court affirmed the class certification as proper, holding that the expert's study was admissible as representative evidence and that the jury's reliance on the study's assumption was permissible under *Mt. Clemens*. *Id.* at 1046–47; *id.* at 1046 ("In many cases, a representative sample is 'the only practicable means to collect and present relevant data' establishing a defendant's liability." (quoting *Manual of Complex Litigation* § 11.493, at 102 (4th ed. 2004))).

Tyson does not compel a result different from the original opinion in this case. It supports that decision because it reaffirms *Mt. Clemens*, its burden-shifting framework, and the permissibility of "just and reasonable inference[s]" from plaintiffs' evidence in FLSA cases where employers do not keep required records. *Id.* (quoting *Mt. Clemens*, 328 U.S. at 687).

Tyson, moreover, analyzed the issue of "generalized class-wide proof" through the predominance requirement for class certification under Rule 23, *id.* at 1045, which we have held "is a more stringent standard than is statutorily required" for collective actions under § 216, *O'Brien*, 575 F.3d at 585. The Supreme Court's ruling authorizing representative evidence under the standards of Rule 23 is therefore more than sufficient to cover FLSA collective actions under § 216— actions that effectuate the "remedial nature of [the FLSA] and the great public policy which it embodies." *Tyson*, 136 S. Ct. at 1047 (alteration in *Tyson*) (quoting *Mt. Clemens*, 328 U.S. at 687). Thus, the certification standards and burdens of proof for collective actions that we set out and applied in our original opinion are confirmed in *Tyson*. And, because *Tyson* did not address damages, our analysis on damages is also unaffected.

FTS and UniTek contend that two pieces of dicta in *Tyson* control this case. First, they challenge the district court's instruction that non-testifying technicians would be "deemed to have shown the same thing" as the testifying technicians, arguing that the instruction usurped the jury's role of determining the representativeness of the evidence. FTS and UniTek rely on the Court's acknowledgement that the persuasiveness of admitted evidence is generally a matter for the jury, including the question of "whether the average time [the employees' expert] calculated is probative as to the time actually worked by each employee." *Id.* at 1049. The Supreme Court, however, made this reference to illustrate the role of the district court in granting class certification. *See id.* ("The District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed that the employees

spent roughly equal time donning and doffing."). This dictum concerned how district courts should assess the representativeness of an expert's statistical average for class certification purposes, not how a district court could exercise its discretion to instruct a jury or structure a verdict form. The court below properly instructed the jury that FLSA procedure allows representative employees to file a lawsuit on behalf of a collective group and that the testimony of some may be considered representative proof on behalf of the whole class. *See supra* pp. 5–6; *infra* pp. 23–24 (citing precedent from nine sister circuits permitting representative testimony to establish liability for non-testifying employees in FLSA cases). The verdict form here permitted the jury to determine whether FTS applied a single, company-wide time-shaving policy to all FTS Technicians, including non-testifying employees. *See infra* pp. 26–27. *Tyson*, whose holding related only to class certification, does not require reversal of a trial that included a jury instruction or form concerning the nature of representative evidence in FLSA collective actions.

Second, FTS and UniTek turn to the Supreme Court's statement that representative evidence that is "statistically inadequate or based on implausible assumptions" could not be used to draw "just and reasonable" inferences about the number of uncompensated hours an employee worked. *Id.* at 1048–49 (quoting *Mt. Clemens*, 328 U.S. at 687, for the latter quotation). According to FTS and UniTek, the failure of FTS Technicians to present a statistical expert and study was a failure that should have ended the litigation or prohibited FTS Technicians' reliance on the testimony of 17 technicians. *Tyson* does not impose such a requirement. The Court's statement about statistical adequacy was made in the context of

the admissibility of representative evidence. *See id.* at 1049 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). FTS and UniTek do not challenge the admissibility of the testimony of the 17 technicians, but rather the sufficiency of FTS Technicians' representative evidence. And, significantly, *Tyson* did not discuss expert statistical studies because they are the *only* way a plaintiff may prove an FLSA claim, but because those plaintiffs offered such a study—along with employee testimony and video recordings. For our purposes when assessing the sufficiency of the evidence, "the only issue we must squarely decide is whether there was legally sufficient evidence—representative, direct, circumstantial, in-person, by deposition, or otherwise—to produce a reliable and just verdict." *Morgan*, 551 F.3d at 1280. As will be shown below, FTS Technicians presented more than sufficient evidence from representative technicians along with "good old-fashioned direct evidence," including six managers and supervisors and documentary proof containing timesheets and payroll records. *See infra* Part C.1. The 17 testifying technicians, moreover, were drawn from the representative sample of 50 technicians agreed upon by both parties. FTS and UniTek included all 50 technicians from this sample on their witness list and had, but chose not to exercise, the right to call any of them to challenge the representativeness of the testifying technicians. FTS and UniTek seek what *Tyson* rejected, "broad and categorical rules governing the use of representative and statistical evidence in class actions." *Id.* at 1049. *Tyson* did not create a rule limiting representative evidence beyond the well-established standards of admissibility.

In summary, *Tyson* approved the use of representative evidence in a FLSA case similar to this one

and expressly reaffirmed the principles set out in *Mt. Clemens*. It reinforced the remedial nature and underlying public policy of the FLSA and explicitly declined to set broad rules limiting the types of evidence permissible in FLSA collective actions. We conclude that *Tyson* does not change our analysis in this case.

B. Certification as a Collective Action

FTS and UniTek appeal the denial of their motion to decertify the collective action. We review a district court's certification of a collective action under an "abuse of discretion" standard. *See O'Brien*, 575 F.3d at 584. "A court abuses its discretion when it commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *Auletta v. Ortino* (*In re Ferro Corp. Derivative Litig.*), 511 F.3d 611, 623 (6th Cir. 2008).

The district court made its final certification determination post-trial. With the benefit of the entire trial record—including representative testimony from technicians covering the several regions in which FTS operates—the court found that FTS Technicians were similarly situated and a collective action was appropriate. FTS and UniTek challenge certification of the case as a collective action, arguing that differences among FTS Technicians (differences in location, supervisors, reasons for submitting false timesheets, and types and amount of uncompensated time) require an individualized analysis as to every plaintiff to determine whether a particular violation of the FLSA took place for each.

Turning to review, we may not examine the certification issue using a Rule 23-type analysis; we must

apply the "similarly situated" standard governed by the three-factor test set out in *O'Brien*. Two governing principles from our case law serve as guides: plaintiffs do not have to be "identically situated" to be similarly situated, and the FLSA is a remedial statute that should be broadly construed. 2 ABA Section of Labor & Emp't Law, *supra*, at 19-150, 19-166 (compiling cases).

1. Factual and Employment Settings

The first factor, the factual and employment settings of the individual FTS Technicians, considers, "to the extent they are relevant to the case, the plaintiffs' job duties, geographic locations, employer supervision, and compensation." *Id.* at 19-155. On FTS Technicians' duties and locations, the record reveals that all FTS Technicians work in the same position, have the same job description, and perform the same job duties: regardless of location, "the great majority of techs do the same thing day in and day out which is install cable." FTS Technicians also are subject to the same timekeeping system (recording of time by hand) and compensation plan (piece rate).

Key here, the record contains ample evidence of a company-wide policy of requiring technicians to underreport hours that originated with FTS executives. Managers told technicians that they received instructions to shave time from corporate, that underreporting is "company policy," and that they were "chewed out by corporate" for allowing too much time to be reported. Managers testified that FTS executives directed them to order technicians to underreport time. FTS executives reinforced their policy during meetings with managers and technicians at individual profit centers. FTS Technicians testified that they complained of being required to underre-

port, often in front of or to corporate representatives, who did nothing.

Evidence of market pressures suggests that FTS executives had a motive to institute a company-wide time-shaving policy. According to one manager's testimony, "[e]very profit center has . . . a budget," and to meet that budget "you couldn't put all of your overtime." Both managers and technicians were under the impression that FTS's profitability depended on underreporting.

The underreporting policy applied to FTS Technicians regardless of profit center or supervisor, as technicians employed at multiple profit centers and under multiple managers reported consistent time-shaving practices across the centers and managers. Namely, FTS executives told managers that technicians' time before and after work or during lunch should be underreported. One manager told his technicians that "an hour lunch break will be deducted whether [they] take it or not," while technicians who reported full hours were told to "change that" and that "[t]his is not how we do it over here, . . . you are just supposed to record your 40 hours a week, take out for your lunch, sign it and turn it in." If technicians failed to comply with the policy, managers would directly alter time sheets submitted by employees—one manager changed a seven to an eight and another used whiteout to change times. Regarding reporting lunch hours not taken, one manager said "that's the way it's got to be, you put it on there or I'll put it on there." Even technicians who never received direct orders from managers to underreport time knew that FTS required underreporting in order to continue receiving work assignments and to avoid reprimand or termination.

FTS Technicians identified the methods—the same methods found in *O'Brien*—by which FTS and UniTek enforced their time-shaving policy: (1) "requiring plaintiffs to work 'off the clock'" before or after scheduled hours or during lunch breaks and (2) "alter[ing] the times that had previously been entered." *O'Brien*, 575 F.3d at 572–73. As in *O'Brien*, such plaintiffs will be similarly situated where their claims are "unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *Id.* at 585.

The dissent asserts that FTS Technicians allege "distinct" violations of the FLSA and "define the company-wide 'policy' at such a lofty level of generality that it encompasses *multiple* policies." (Dis. at 39–40.) The definition of similarly situated does not descend to such a level of granularity. The Supreme Court has warned against such a "narrow, grudging" interpretation of the FLSA and has instructed courts to remember its "remedial and humanitarian" purpose, as have our own cases. *See Tenn. Coal, Iron & R.R. Co.*, 321 U.S. at 597; *Keller*, 781 F.3d at 806; *Herman*, 308 F.3d at 585. Many FLSA cases do focus on a single action, such as the donning and doffing cases that the dissent's reasoning would suggest is the only situation where representative proof would work. But neither the statutory language nor the purposes of FLSA collective actions require a violating policy to be implemented by a singular method. The dissent cites no Sixth Circuit case that would compel employees to bring a separate collective action (or worse, separate individual actions) for unreported work required by an employer before clocking in, and another for work required after clocking out, and another for work required during lunch, and yet

another for the employer's alteration of its employees' timesheets. Such a narrow interpretation snubs the purpose of FLSA collective actions.

The dissent concludes that FTS Technicians' claims do "not do the trick" because a "company-wide 'time-shaving' policy is lawyer talk for a company-wide policy of violating the FLSA." (Dis. at 40.) But FTS Technicians' claims do not depend on "lawyer talk"; they are based on abundant evidence in the record of employer mandated work off the clock. That an employer uses more than one method to implement a company-wide work "off-the-clock" policy does not prevent employees from being similarly situated for purposes of FLSA protection. This is not a new concept to our court or to other courts. In accordance with *O'Brien*, we have approved damages awards to FLSA classes alleging that employers used multiple means to undercompensate for overtime. *See, e.g.*, *U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 778 (6th Cir. 1995) (approving damages award where employers required employees to work uncompensated time both before and after their scheduled shifts and to report only the scheduled shift hours on their timesheets). Other circuits and district courts have done so as well. *See McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 588 (9th Cir. 1988) (affirming damages award where employees gave varied testimony on the means employer used to underpay overtime); *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 84 (10th Cir. 1983) (affirming damages award where employer failed to compensate for overtime both before and after work, at different locations); *Wilks v. Pep Boys*, No. 3:02-0837, 2006 WL 2821700, at *5 (M.D. Tenn. Sept. 26, 2006) (denying motion to decertify class that alleged employer deprived employees of overtime compensation by re-

quiring them to work off the clock and shaving hours from payroll records).

Like the plaintiffs in *O'Brien*, FTS Technicians' claims are unified by common theories: that FTS executives implemented a single, company-wide time-shaving policy to force all technicians—either through direct orders or pressure and regardless of location or supervisor—to underreport overtime hours worked on their timesheets. *See O'Brien*, 575 F.3d at 584–85; *see also Brennan v. Gen. Motors* Acceptance *Corp.*, 482 F.2d 825, 829 (5th Cir. 1973) (affirming finding of uncompensated overtime where employees understated overtime because of pressure brought to bear by immediate supervisors, putting upper management on constructive notice of potential FLSA violations). Based on the record as to FTS Technicians' factual and employment settings, therefore, the district court did not abuse its discretion in finding FTS Technicians similarly situated.

2. Individualized Defenses

We now turn to the second factor—the different defenses to which the plaintiffs may be subject on an individual basis. FTS and UniTek argue that they must be allowed to raise separate defenses by examining each individual plaintiff on the number of unrecorded hours they worked, but that they were denied that right by the allowance of representative testimony and an estimated-average approach. Several circuits, including our own, hold that individualized defenses alone do not warrant decertification where sufficient common issues or job traits otherwise permit collective litigation. *O'Brien*, 575 F.3d at 584–85 (holding that employees are similarly situated if they have "claims . . . unified by common theories of defendants' statutory violations, even if the

proofs of these theories are inevitably individualized and distinct"); *Morgan*, 551 F.3d at 1263; *see Thiessen*, 267 F.3d at 1104–08.

As noted above, the record includes FTS Technicians' credible testimonial and documentary evidence that they performed work for which they were improperly compensated. In the absence of accurate employer records, both Supreme Court and Sixth Circuit precedent dictate that the burden then shifts to the employer to "negative the reasonableness of the inference to be drawn from the employee's evidence" and, if it fails to do so, the resulting damages award need not be perfectly exact or precise. *Mt. Clemens*, 328 U.S. at 687–88 ("The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of [the FLSA]."); *see Herman*, 183 F.3d at 473.

Under this framework, and with the use of representative testimony and an estimated-average approach, defenses successfully asserted against representative testifying technicians were properly distributed across the claims of nontestifying technicians. For example, FTS and UniTek argue that testifying technicians did not work all of the overtime they claimed and underreported some of their overtime for reasons other than a company-wide policy requiring it. FTS and UniTek had every opportunity to submit witnesses and evidence supporting this claim. The jury's partial acceptance of these defenses, as evidenced by its finding that testifying technicians worked fewer hours than they claimed, resulted in a lower average for nontestifying technicians. Thus, FTS Technicians' representative evidence al-

lowed appropriate consideration of the individual defenses raised here. The district court, moreover, offered to convene a second jury and submit the issue of damages to it, but FTS and UniTek declined. *See Thiessen*, 267 F.3d at 1104–08 (concluding that district court abused its discretion in decertifying the class because defendants' "highly individualized" defenses could be dealt with at the damages stage of trial). Under our precedent and the trial record, we cannot say that the district court committed a clear error of judgment in refusing to decertify the collective action on the basis of FTS and UniTek's claimed right to examine and raise defenses separately against each of the opt-in plaintiffs.

3. Fairness and Procedural Impact

The third factor, the degree of fairness and the procedural impact of certifying the case, also supports certification. This case satisfies the policy behind FLSA collective actions and Congress's remedial intent by consolidating many small, related claims of employees for which proceeding individually would be too costly to be practical. *See Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (noting that FLSA collective actions give plaintiffs the "advantage of lower individual costs to vindicate rights by the pooling of resources"); *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013) ("[W]here it is class treatment or nothing, the district court must carefully explore the possible ways of overcoming problems in calculating individual damages."). Because all FTS Technicians allege a common, FLSA-violating policy, "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact." *Hoffman-La Roche, Inc.*, 493 U.S. at 170. In view of the entire record, neither this factor

nor the other two suggest that the district court abused its discretion in finding FTS Technicians similarly situated and maintaining certification.

4. The Seventh Circuit Decision in *Espenscheid*

Lastly, FTS and UniTek argue that *Espenscheid*—a Seventh Circuit case affirming the decertification of a collective action seeking unpaid overtime—compels decertification here. 705 F.3d at 773. *Espenscheid*, however, is based on Seventh Circuit authority and specifically acknowledges that it is at odds with Sixth Circuit precedent. *Id.* at 772 (citing *O'Brien*, 575 F.3d at 584). Though recognizing the differences between Rule 23 class actions and FLSA collective actions—and admitting that Rule 23 procedures are absent from the statutory provisions of the FLSA—the Seventh Circuit determined that "there isn't a good reason to have different standards for the certification of the two different types of action." *Id.* This conflicts with our precedent. Explaining that Congress could have but did not import the Rule 23 predominance requirement into the FLSA and that doing so would undermine the remedial purpose of FLSA collective actions, we have refused to equate the FLSA certification standard for collective actions to the more stringent certification standard for class actions under Rule 23. *O'Brien*, 575 F.3d at 584, 585–86.

The difference between the Seventh Circuit's standard for collective actions and our own is the

controlling distinction for the issues before us.[3] The facts and posture of *Espenscheid,* however, also distinguish it from this case. There, the district court decertified the collective action before trial, after which the parties settled their claims but appealed the decertification. Reviewing for abuse of discretion, the Seventh Circuit affirmed the district court. The circuit opinion noted that the plaintiffs had recognized the possible need for individualized findings of liability for a class of 2,341 members—nearly 10 times larger than the group here—but "truculently" refused to accept a specific plan for litigation or propose an alternative and failed to specify the other kinds of evidence that they intended to use to supplement the representative testimony. *Espenscheid*, 705 F.3d at 775–76; *see Thompson v. Bruister & Assocs., Inc.*, 967 F. Supp. 2d 1204, 1216 (M.D. Tenn. 2013) (holding that *Espenscheid* cannot "conceivably be read as an overall indictment of utilizing a collective action as a vehicle to establish liability in piecerate cases . . . because the Seventh Circuit was presented with little choice but to hold as it did, given the lack of cooperation by plaintiffs' counsel in explaining how they intended to prove up their case"). The opinion additionally references no evidence similar to that supporting the time-shaving policy here. And the proposed, but not agreed-upon, representative sample in *Espenscheid* constituted only 1.8% of the collective action, and the method of selecting the

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[3] The dissent suggests we must follow *Espenscheid* because it "involved the *same defendant in this case*." (Dis. at 38.) UniTek, the parent company that provided human resources and payroll functions, was involved in both cases, but at issue in each case was what the direct employer—here FTS, there DirectSat USA—required regarding the reporting of overtime.

sample was unexplained. *Espenscheid*, 705 F.3d at 774.

Conversely, FTS and UniTek ask us to overturn a case tried to completion. They seek a determination that the district court *abused its discretion* in declining to decertify the 293-member collective action after both parties preliminarily agreed to a representative trial plan, completed discovery on that basis, and jointly selected the representative members. The jury here, moreover, heard representative testimony from 5.7% of the class members at trial, FTS and UniTek had abundant opportunity to provide contradictory testimony, and FTS Technicians also submitted testimony from managers and supervisors along with documentary proof. Upon completion of the case presentations by the parties, and following jury instructions regarding collective actions, the jury returned verdicts in favor of FTS Technicians. In light of these legal, factual, and procedural differences, *Espenscheid* is simply not controlling.

To conclude our similarly situated analysis, certification here is supported by our standard. The factual and employment settings of individual FTS Technicians and the degree of fairness and the procedural impact of certifying the case favor upholding certification. FTS and UniTek's alleged individual defenses do not require decertification because they can be, and were, adequately presented in a collective forum. On the record before us, the district court was within its wide discretion to try the claims as a collective action and formulated a trial plan that appropriately did so. Based on the record evidence of a common theory of violation—namely, an FLSA-violating time-shaving policy implemented by corpo-

rate—we affirm the district court's certification of this case as a collective action.

C. Sufficiency of the Evidence

At the close of FTS Technicians' case and after the jury verdicts, FTS and UniTek moved for judgment as a matter of law, challenging the sufficiency of the evidence, particularly the allowance of representative testimony at trial to prove liability and the use of an estimated-average approach to calculate damages. The district court denied the motion, which FTS and UniTek now appeal.

"Our review of the sufficiency of the evidence is by review of a trial judge's rulings on motions for directed verdict or [judgment as a matter of law]." *Young v. Langley*, 793 F.2d 792, 794 (6th Cir. 1986). We review de novo a post-trial decision on a motion for judgment as a matter of law by applying the same standard used by the district court. *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 818 (6th Cir. 2013). "Judgment as a matter of law may only be granted if . . . there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion in favor of the moving party." *Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005). The court must decide whether there was sufficient evidence to support the jury's verdict, without weighing the evidence, questioning the credibility of the witnesses, or substituting the court's judgment for that of the jury. *Waldo*, 726 F.3d at 818. We must view the evidence in the light most favorable to the party against whom the motion is made, giving that party the benefit of all reasonable inferences. *Id.*

Pursuant to *Mt. Clemens*, the evidence as a whole must be sufficient to find that FTS Techni-

cians performed work for which they were improperly compensated (i.e., liability) and sufficient to support a just and reasonable inference as to the amount and extent of that work (i.e., damages). *Mt. Clemens*, 328 U.S. at 687. "[T]he only issue we must squarely decide is whether there was legally sufficient evidence—representative, direct, circumstantial, in-person, by deposition, or otherwise—to produce a reliable and just verdict." *Morgan*, 551 F.3d at 1280. Plaintiffs have the initial burden to make the liability and damages showing at trial; once made, the burden shifts to defendants to prove the precise amount of work performed or otherwise rebut the reasonably inferred damages amount. *Id.* at 687–88. If defendants fail to carry this burden, the court may award the reasonably inferred, though perhaps approximate, damages. *Id.* at 688.

1. Liability

FTS and UniTek challenge the district court's allowance of representative testimony to prove liability for nontestifying technicians. We have recognized that "representative testimony from a subset of plaintiffs [can] be used to facilitate the presentation of proof of FLSA violations, when such proof would normally be individualized." *O'Brien*, 575 F.3d at 585. Preceding *O'Brien*, we affirmed an award of back wages for unpaid off-the-clock hours based on representative testimony in *Cole Enterprises, Inc.*, 62 F.3d at 781. There, the defendant objected to an award of back wages to nontestifying employees, which was based on representative testimony at trial, interview statements, and the employment records. *Id.* We endorsed the sufficiency of representative testimony, holding that "[t]he testimony of fairly

representative employees may be the basis for an award of back wages to nontestifying employees." *Id.*

In FLSA cases, the use of representative testimony to establish class-wide liability has long been accepted. In the 1980s, the Tenth Circuit approved the use of representative testimony in a situation comparable to this case. There, the employer did not pay overtime to employees working cash-register stations before or after scheduled shift hours in six service stations in two states. *Simmons Petroleum Corp.*, 725 F.2d at 84. Though only twelve employees testified, the Tenth Circuit held that representative testimony "was sufficient to establish a pattern of violations," explaining that the rule in favor of representative testimony is not limited "to situations where the employees leave a central location together at the beginning of a work day, work together during the day, and report back to the central location at the end of the day." *Id.* at 86 & n.3. More recently, the Tenth Circuit continued this line of reasoning in another FLSA case against Tyson Foods, upholding a jury verdict for plaintiffs and explaining that, in order to prove liability as to each class member, "Plaintiffs did not need to individualize the proof of undercompensation once the district court ordered certification." *Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir. 2014). "[T]he jury could reasonably rely on representative evidence to determine class-wide liability" when the employer failed to keep required records. *Id.*

In another comparable FLSA case, the Eleventh Circuit held that, "[i]f anything, the *Mt. Clemens* line of cases affirms the general rule that not all employees have to testify to prove overtime violations." *Morgan*, 551 F.3d at 1279. Although *Mt. Clemens*'s

burden shifting framework did not apply because the employer kept "thorough payroll records," representative testimony could rebut on a collective basis the employer's allegedly individualized defenses to liability. *Id.* at 1276. To do so, seven plaintiffs testified on behalf of 1,424 plaintiffs, less than 1% of the total number. *Id.* The Eleventh Circuit found that the employer could not validly complain about the ratio of testifying plaintiffs where, as here, the trial record contained other "good old-fashioned direct evidence," *id.* at 1277, and the employer opposed the plaintiffs' introduction of additional testimony while choosing not to present its own, *id.* at 1277–78. As for the employer's argument that its defenses were so individualized that the testifying plaintiffs could not fairly represent those not testifying, the circuit court held that "[f]or the same reasons that the court did not err in determining that the Plaintiffs were similarly situated enough to maintain a collective action, it did not err in determining that the Plaintiffs were similarly situated enough to testify as representatives of one another." *Id.* at 1280. The same is true here.

Our sister circuits overwhelmingly recognize the propriety of using representative testimony to establish a pattern of violations that include similarly situated employees who did not testify. *See, e.g.*, *Garcia*, 770 F.3d at 1307 (quoting the Ninth Circuit's *Henry v. Lehman Commercial Paper, Inc.*, 471 F.3d 977, 992 (9th Cir. 2006), for the proposition that "[t]he class action mechanism would be impotent" without representative proof and the ability to draw class-wide conclusions based on it); *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997) ("[I]t is well-established that the Secretary may present the testimony of a representative sam-

ple of employees as part of his proof of the prima facie case under the FLSA."); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) ("Courts commonly allow representative employees to prove violations with respect to all employees."); *Brock v. Tony & Susan Alamo Found.*, 842 F.2d 1018, 1019–20 (8th Cir. 1988) ("[T]o compensate only those associates who chose or where chosen to testify is inadequate in light of the finding that other employees were improperly compensated."); *Ho Fat Seto*, 850 F.2d at 589 (holding that, based on representative testimony, "[t]he twenty-three non-testifying employees established a prima facie case that they had worked unreported hours"); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985) (holding that requirement that testimony establishing a pattern or practice must refer to all nontestifying employees "would thwart the purposes of the sort of representational testimony clearly contemplated by *Mt. Clemens*"); *Donovan v. Burger King Corp.*, 672 F.2d 221, 224–25 (1st Cir. 1982) (limiting testimony to six plaintiffs from six restaurant locations owned by defendant "in light of the basic similarities between the individual restaurants"); *Gen. Motors Acceptance Corp.*, 482 F.2d at 829 (holding that, based on testimony from sixteen representative employees and a report on six employees that found "employees in this type of job consistently failed to report all the overtime hours worked," "the trial court might well have concluded that plaintiff had established a prima facie case that all thirty-seven employees had worked unreported hours"). In the face of these consistent precedents, many with fact patterns similar to this case, FTS and UniTek point to no case categorically disapproving of representative testimony to prove employer liability to those in the collective ac-

tion who do not testify. *Tyson*, which held representative evidence to be permissible in a FLSA case certified under Rule 23, confirms the continued validity of these precedents. 136 S. Ct. at 1046–47.

FTS and UniTek next assert that, even if representative testimony is allowed generally, testifying technicians here were not representative of nontestifying technicians. The record suggests otherwise, as we explained above when determining that FTS Technicians were similarly situated. We found that testifying technicians were geographically spread among various FTS profit centers and were subject to the same job duties, timekeeping system, and compensation plan as nontestifying technicians. As *Morgan* highlights, the collective-action framework presumes that similarly situated employees are representative of each other and have the ability to proceed to trial collectively. *See Morgan*, 551 F.3d at 1280.

The dissent also challenges the representative nature of the technicians' testimony, arguing for a blanket requirement of direct correlation because a plaintiff alleging "*the company* altered my timesheets" cannot testify on behalf of one alleging that "*I* underreported my time because my supervisor directed me to." (Dis. at 41.) Though the time-shaving policy may have been enforced as to individual technicians by several methods, we do not define "representativeness" so specifically—just as we do not take such a narrow view of "similarly situated." *See O'Brien*, 575 F.3d at 585; *see also Cole Enters., Inc.*, 62 F.3d at 778. For the testifying technicians to be representative of the class as a whole, it is enough that technicians testified as to each means of enforcement of the common, FLSA-violating policy. *See*

Simmons Petroleum Corp., 725 F.2d at 86 (deeming testimony from at least one employee in each category of plaintiffs sufficient to establish a pattern of violations and support an award of damages to all); *see also Sec'y of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) ("Where the employees fall into several job categories, it seems to us that, at a minimum, the testimony of a representative employee from, or a person with first-hand knowledge of, each of the categories is essential to support a back pay award.").

Here, the jury heard testimony that managers told technicians to underreport hours before and after work and during lunch and that, in the absence of direct orders, FTS otherwise exerted pressure to underreport under threat of reprimand, loss of work assignments, or termination. Or managers just directly altered the timesheets. The dissent's conclusion that the proof was not "remotely representative" (Dis. at 42) neither acknowledges how representative testimony was presented here nor does it follow from the record evidence. There was ample evidence of managers implementing off-the-clock work requirements established and enforced through one corporate policy and ample evidence that the collective group of plaintiffs experienced the same policy enforced through three means. All FTS Technicians were properly represented by those testifying.

The collective procedure adopted by the district court, moreover, was based on FTS and UniTek's agreement, which was memorialized by court order, to limit discovery "to a representative sample of fifty (50) opt-in Plaintiffs" and to approach the district court after discovery regarding "a trial plan based on representative proof" that "will propose a certain number of Plaintiffs from the pool of fifty (50) repre-

sentative sample Plaintiffs that may be called as trial witnesses." After discovery closed, FTS and UniTek did object to the use of representative proof at trial. But as we have explained, the district court's denial of that motion is not grounds for reversal at this stage.

FTS and UniTek's remaining arguments on liability are simply reiterations of the claims that FTS Technicians are not similarly situated and that the testifying technicians are not representative. FTS and UniTek first complain that the liability verdict form gave the jury an "all or nothing" choice. But the jury's choice was whether or not FTS applied a single, company-wide time-shaving policy to all FTS Technicians that encompassed each means used to enforce it. The jury found that it did. This accords with precedent recognizing that preventing similarly situated employees from proceeding collectively based on representative evidence would render impotent the collective-action framework. *See, e.g.*, *Garcia*, 770 F.3d at 1307.

Next FTS and UniTek cite *Espenscheid* a second time. As to representative testimony, *Espenscheid* emphasized that the representative evidence before it could not be sufficient because it consisted entirely of testimony regarding "the experience of a small, unrepresentative sample of [workers]" (1.8% of the 2,341 members), which cannot "support an inference about the work time of thousands of workers." 705 F.3d at 775. These are not the facts before us. Testifying technicians here are representative, and the ratio of testifying technicians to nontestifying technicians—5.7%—is well above the range commonly accepted by courts as sufficient evidence, especially where other documentary and testimonial evi-

dence is presented. *See, e.g.*, *Morgan*, 551 F.3d at 1277 (affirming award to 1,424 employees based on testimony from seven, or .49%, in addition to other evidence); *S. New Eng.*, 121 F.3d at 67 (affirming award to nearly 1,500 employees based on testimony from 39, or 2.5%); *Burger King Corp.*, 672 F.2d at 225 (affirming award of back wages to 246 employees based on testimony from six, or 2.4%); *see also DeSisto*, 929 F.2d at 793 (holding "there is no ratio or formula for determining the number of employee witnesses required" but testimony of a single employee is not enough). FTS and UniTek, moreover, had the opportunity to call other technicians but chose not to. *See Morgan*, 551 F.3d at 1278 ("Family Dollar cannot validly complain about the number of testifying plaintiffs when . . . Family Dollar itself had the opportunity to present a great deal more testimony from Plaintiff store managers, or its own district managers, [but] it chose not to.").

In light of the proper use of representative testimony to prove liability, we note the sufficiency of the evidence presented here. FTS Technicians offered testimony from 17 representative technicians and six managers and supervisors, as well as documentary evidence including timesheets and payroll records, to prove that FTS implemented a company-wide timeshaving scheme that required employees to systematically underreport their hours. *See id.* at 1277 ("The jury's verdict is well-supported not simply by 'representative testimony,' but rather by a volume of good old-fashioned direct evidence."); *Gen. Motors Acceptance Corp.*, 482 F.2d at 829 (holding that trial court could conclude violations as to nontestifying employees based on evidence that "employees in this type of job consistently failed to report all the overtime hours worked"). Witnesses attributed the time-

shaving policy to corporate, and FTS executives told managers and technicians to underreport overtime. Technicians complained, but FTS took no remedial actions. *See Cole Enters., Inc.*, 62 F.3d at 779 ("[I]t is the responsibility of management to see that work is not performed if it does not want it to be performed."). In response to this evidence and despite agreeing to and participating in the selection of 50 representative technicians and including all 50 on its witness list, FTS and UniTek called only four corporate executives and no technicians.

Our standard of review dictates that we view the evidence in the light most favorable to FTS Technicians and give them the benefit of all reasonable inferences. Based on the trial record and governing precedent, we conclude that the evidence here is sufficient to support the jury's verdict that all FTS Technicians, both testifying and nontestifying, performed work for which they were not compensated.

2. Damages

FTS and UniTek object to the use of an estimated-average approach to calculate damages for nontestifying technicians. They argue that an estimated-average approach does not allow a "just and reasonable inference"—the *Mt. Clemens* standard—on the number of hours worked by nontestifying technicians because it results in an inaccurate calculation, giving some FTS Technicians more than they are owed and some less.

We addressed a version of the estimated-average approach in *Cole Enterprises, Inc.*, concluding that "[t]he information [pertaining to testifying witnesses] was also used to make *estimates and calculations* for similarly situated employees who did not testify.

The testimony of fairly representative employees may be the basis for an award of back wages to nontestifying employees." 62 F.3d at 781 (emphasis added). Other circuits and district courts have explicitly approved of an estimated average. *See Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472–73, 472 n.7 (11th Cir. 1982) (affirming district court's determination that "waitresses normally worked an eight and one-half hour day" based on "the testimony of the compliance officer and computations based on the payroll records"); *Donovan v. Hamm's Drive Inn*, 661 F.2d 316, 318 (5th Cir. 1981) (affirming as "accepted practice" and not "clearly erroneous" district court's finding that, "based on the testimony of employees, . . . certain groups of employees averaged certain numbers of hours per week" and award of "back pay based on those admittedly approximate calculations" because reversing would penalize the employees for the employer's failure to keep adequate records); *Baden-Winterwood v. Life Time Fitness Inc.*, 729 F. Supp. 2d 965, 997–1001 (S.D. Ohio 2010) (averaging hours per week worked by testifying plaintiffs and applying it to nontestifying plaintiffs); *Cowan v. Treetop Enters.*, 163 F. Supp. 2d 930, 938–39 (M.D. Tenn. 2001) ("From the testimony of the Plaintiffs' and the Defendants' employee records, the Court finds . . . that Plaintiffs worked an average of 89.04 hours per week and applying *Mt. Clemens*, this finding is applied to the entire Plaintiff class to determine the amount of overtime backpay owed for the number of weeks of work stipulated by the parties.").

Mt. Clemens acknowledges the use of "an estimated average of overtime worked" to calculate damages for nontestifying employees. 328 U.S. at 686. There, eight employees brought suit on behalf

of approximately 300 others. A special master concluded that productive work did not regularly commence until the established starting time. *Id.* at 684. Declining to adopt the special master's recommendation, the district court found that the employees were ready for work 5 to 7 minutes before starting time and presumed that they started immediately. *Id.* at 685. To calculate damages, the district court fashioned a formula to derive an estimated average of overtime worked by all employees, testifying and nontestifying. *Id.* On direct appeal to the Sixth Circuit, we deemed the estimated average insufficient. *Id.* at 686. Though the Supreme Court ultimately agreed with the special master, it reversed our disapproval of the estimated average, explaining that we had "imposed upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act." *Id.* at 686, 689.

Disapproving of an estimated-average approach simply due to lack of complete accuracy would ignore the central tenant of *Mt. Clemens*—an inaccuracy in damages should not bar recovery for violations of the FLSA or penalize employees for an employer's failure to keep adequate records. *See id.* at 688 ("The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.'" (quoting *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 563 (1931)); *see also Hamm's Drive Inn*, 661 F.2d at 318 (upholding an estimated-average approach and noting that "[e]vidence used to calculate wages owed need not be

perfectly accurate, since the employee should not be penalized when the inaccuracy is due to a defendant's failure to keep adequate records"). *Mt. Clemens* effectuates its principles through a burden-shifting framework in which employees are not punished but employers have the opportunity to make damages more exact and precise by rebutting the evidence presented by employees. *See Mt. Clemens*, 328 U.S. at 687–88; *see also Herman*, 183 F.3d at 473. FTS and UniTek had the opportunity at trial to present additional evidence to rebut FTS Technicians' evidence but failed to do so.

Mt. Clemens's burden-shifting framework, in conjunction with the estimated-average approach, functioned here as envisioned. Seventeen technicians working at various locations testified and were cross-examined as to the number of unrecorded hours they worked, allowing the jury to infer reasonably the average weekly unpaid hours worked by each. Testifying technicians were similarly situated to and representative of nontestifying technicians, as specified by the district court's instructions to the jury, and thus the average of these weekly averages applied to nontestifying technicians. The jury found fewer unrecorded hours than testifying technicians claimed; FTS and UniTek thus partially refuted the inference sought by FTS Technicians and their defenses were distributed to make the damages more exact and precise, as the *Mt. Clemens* framework encourages.

Viewing the evidence in the light most favorable to FTS Technicians, we cannot conclude that reasonable minds would come to but one conclusion in favor of FTS and UniTek. Accordingly, the average number of unpaid hours worked by testifying and nontestifying technicians, based on the jury's findings and

the estimated-average approach, resulted from a just and reasonable inference supported by sufficient evidence.

D. Jury Instruction on Commuting Time

In another challenge to the jury's determination of unrecorded hours worked, FTS and UniTek argue that the district court erred by instructing the jury on commuting time. FTS and UniTek do not dispute that the district court accurately instructed the jury on when commuting time requires compensation; they instead argue that, as a matter of law, the instruction should not have been given because a reasonable juror could not conclude that compensation for commuting time was required here.

"This [c]ourt reviews a district court's choice of jury instructions for abuse of discretion." *United States v. Ross*, 502 F.3d 521, 527 (6th Cir. 2007). A district court does not abuse its discretion in crafting jury instructions unless the instruction "fails accurately to reflect the law" or "if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Id.* We generally must assume that the jury followed the district court's instructions. *See United States v. Olano*, 507 U.S. 725, 740 (1993); *see also United States v. Monus*, 128 F.3d 376, 390–91 (6th Cir. 1997) ("[E]ven if there had been insufficient evidence to support a deliberate ignorance instruction, we must assume that the jury followed the jury charge and did not convict on the grounds of deliberate ignorance."). Here, the verdict form does not specify whether the jury included commuting time in the average numbers of unrecorded hours, and we assume that the jury followed the district court's instructions by not including commuting time that does not require compensation.

E. Calculation of Damages

FTS and UniTek lastly challenge the district court's calculation of damages. They argue that the district court (1) took the calculation of damages away from the jury in violation of the Seventh Amendment and (2) used an improper and inaccurate methodology by failing to recalculate each technician's hourly rate and by applying a 1.5 multiplier. These are questions of law or mixed questions of law and fact that we review de novo. *See Harries v. Bell*, 417 F.3d 631, 635 (6th Cir. 2005).

We begin with the Seventh Amendment arguments. The dissent claims that the Seventh Amendment was violated because the trial procedure resulted in "non-representative" proof (Dis. at 45) and posits a standard requiring a jury in any collective action to "determine the 'estimated average' that *each* plaintiff should receive" (*Id.* at 47 (emphasis added)). Such an individual requirement for each member of a collective action does not comport with the principles of and precedent on representative proof, and would contradict certification of the case as a collective action in the first place.

Here, moreover, the proof was representative and the jury rendered its findings for the testifying and nontestifying plaintiffs in accordance with the district court's charge. Finding that "the evidence presented by the representative plaintiffs who testified establishe[d] that they worked unpaid overtime hours," and applying that finding in accordance with the instruction that "those plaintiffs that you did not hear from [would] also [be] deemed by inference to be entitled to overtime compensation," the jury determined that all FTS Technicians had "proven their claims." The jury accordingly made the factual find-

ings necessary for the court to complete the remaining arithmetic of the estimated-average approach. The Seventh Amendment does not require the jury, instead of the district court, to perform a formulaic or mathematical calculation of damages. *See Wallace v. FedEx Corp.*, 764 F.3d 571, 591 (6th Cir. 2014) ("[A] court may render judgment as a matter of law as to some portion of a jury award [without implication of the Seventh Amendment] if it is compelled by a legal rule or if there can be no genuine issue as to the correct calculation of damages."); *see also Maliza v. 2011 MAR-OS Fashion, Inc.*, No. CV-07-463, 2010 WL 502955, at *1 (E.D.N.Y. Feb 10, 2010) (completing arithmetic on shortfalls, if any, in wages paid to plaintiff after jury calculated "month-by-month determinations of the hours worked by, and wages paid to, the plaintiff"). On this record, the Seventh Amendment is not implicated.

At any rate, FTS and UniTek rejected the district court's offer to impanel a second jury to make additional findings and perform the damages calculation. They had cited their "constitutional rights to a jury" at the end of trial, but at the status conference on damages the court asked if FTS and UniTek wished to have "a panel come in, select another panel, and submit the issues of damages." (R. 444, PageID 10171–72.) Their counsel responded, "No, your honor. I don't think that's allowed . . . for these claims." (*Id.* at 10172.) The court went on to ask, "You would be upset if we did have a jury trial to finish up the damages question?" (*Id.* at 10173.) Counsel responded, "Well, your Honor, again, it's our position that that's not appropriate." (*Id.*) Banking instead on their arguments that the estimated-average approach is inappropriate and that any calculation of damages would not be supported by sufficient evi-

dence, counsel maintained that "the only thing, quite frankly, that's left and that is appropriate is an entry of judgment . . . either for the defense or liability for plaintiffs and with zero damages." (*Id.*) After the court asked for a "more constructive approach from the defense," counsel agreed to a briefing schedule on the calculation of damages. (*Id.* at 10181.) Counsel subsequently qualified that FTS and UniTek were "not waiving . . . or changing their position," but the positions referenced were those relied upon at the status conference—the estimated-average-approach disagreement and sufficiency-of-the-evidence argument. Based on this record, FTS and UniTek abandoned and waived any right to a jury trial on damages that they may have had.

In regard to FTS and UniTek's challenge to the district court's methodology, FLSA actions for overtime are meant to be compensatory. *See, e.g.*, *Nw. Yeast Co. v. Broutin*, 133 F.2d 628, 630–31 (6th Cir. 1943) (finding that the FLSA "is premised upon the existence of an employment contract" and that recovery authorized by 29 U.S.C. § 216(b) "does not constitute a penalty, but is considered compensation"); 29 U.S.C. § 216(b) ("Any employer who violates [the FLSA] shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . ."). To achieve its purpose, the FLSA directs an overtime wage calculation to include (1) the regular rate, (2) a numerical multiplier of the regular rate, and (3) the number of overtime hours. *See* 29 U.S.C. § 207; 29 C.F.R. § 778.107. In a piece-rate system, "the regular hourly rate of pay is computed by adding together total earnings for the workweek from piece rates and all other sources" and then dividing "by the number of hours worked in the week for which such compensation was paid."

29 C.F.R. § 778.111(a). The numerical multiplier for overtime hours in a piece-rate system is .5 the regular rate of pay. *Id.* (A piece-rate worker is entitled to be paid "a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. . . . Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked.").

As for the hourly rate, the amount of "straight time" paid in a piece rate system remains the same regardless of the number of hours required to complete the number of jobs. The fixed nature of piece rates shows that piece-rate compensation was paid for all hours worked by FTS Technicians, regardless of whether that time was recorded. It also creates an inverse relationship between the number of hours worked and the hourly rate: working more hours lowers a technician's hourly rate. By not recalculating hourly rates to reflect the actual increased number of hours FTS Technicians worked each week, the district court used a higher hourly rate than would have been used if no violation had occurred. This approach overcompensated FTS Technicians and required FTS and UniTek to pay more for unrecorded overtime hours than recorded overtime hours. For the damages calculation to be compensatory, therefore, hourly rates must be recalculated with the correct number of hours to ensure that FTS Technicians receive the pay they would have received had there been no violation.

Regarding the correct multiplier, the FLSA entitles piece-rate workers to an overtime multiplier of .5, and the record shows that FTS and UniTek used

this multiplier to calculate FTS Technicians' overtime pay for recorded hours. In explaining the piece-rate system to their technicians, FTS and UniTek provided an example where a technician receiving $1,000 in piece rates for 50 hours of work would receive $100 in overtime compensation. Reverse engineering this outcome gives us the following formula: regular rate of $20.00/hour multiplied by a .5 multiplier and 10 overtime hours. Plugging a multiplier of 1.5 into the formula would result in $300 of overtime pay, overcompensating this hypothetical technician, as it did FTS Technicians. We accordingly reverse the district court's use of a 1.5 multiplier.

Reversal of the district court's calculation of damages does not necessitate a new trial on liability. We have "the authority to limit the issues upon remand to the [d]istrict [c]ourt for a new trial" and such action does "not violate the Seventh Amendment." *Thompson v. Camp*, 167 F.2d 733, 734 (6th Cir. 1948) (per curiam). We remand to the district court to recalculate damages consistent with this opinion.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's certification of this case as a collective action, allowance of representative testimony at trial, and use of an estimated-average approach; REVERSE the district court's calculation of damages; and REMAND to the district court for recalculation of damages consistent with this opinion.

CONCURRING IN PART AND DISSENTING IN PART

SUTTON, Circuit Judge, concurring in part and dissenting in part. Two questions loom over every multi-plaintiff representative action: Who is representing whom? And can the one group fairly represent the other? Whether it be a class action under Civil Rule 23, a joined action under Civil Rule 20, or as here a collective action under § 216 of the Fair Labor Standards Act, 29 U.S.C. § 216(b), the only way in which representative proof of liability—evidence by some claimants to prove liability as to all—makes any sense is if the theory of liability of the testifying plaintiffs mirrors (or is at least substantially similar to) the theory of liability of the non-testifying plaintiffs. The same imperative exists at the damages stage, where the trial court must match any representative evidence with a representative theory of liability and damages.

The three trial judges who handled this case (collectively as it were) did not heed these requirements. Before trial, the district court mistakenly certified this case as one collective action, not a collective action with two or three sub-classes, as the various and conflicting theories of liability required. At trial, the district court approved a method of assessing damages that violated the Seventh Amendment. After trial, the district court miscalculated damages by failing to adjust plaintiffs' hourly wages and by using an incorrect multiplier. The majority goes part of the way to correcting these problems by reversing the district court's damages calculation. I would go all of the way and correct the first two errors as well.

A recent Supreme Court decision confirms that we should correct these two other errors now. *Tyson Foods, Inc. v. Bouaphakeo* held that a jury may consider the persuasiveness of statistically adequate representative evidence *only* if each class member could have used that evidence in an individual action. 136 S. Ct. 1036 (2016). That principle was not followed here, making our decision inconsistent with *Tyson Foods* and inconsistent with the Seventh Circuit's resolution of the same class-action issue in a nearly identical setting. *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013). If we needed any other hints that we have strayed, that came when the Supreme Court vacated our first decision in this case and remanded the controversy to us for reconsideration in light of *Tyson Foods*. I don't doubt that my colleagues have reconsidered their position, but I do doubt that they have correctly interpreted *Tyson Foods* and the Court's other opinions in this area. For these reasons and those elaborated below, I must respectfully dissent.

Collective-action certification. The Fair Labor Standards Act permits employees to bring lawsuits on behalf of "themselves and other employees similarly situated." 29 U.S.C. § 216(b). To determine whether plaintiffs are "similarly situated," we look to (1) "the factual and employment settings of the individual[] plaintiffs," (2) "the different defenses to which the plaintiffs may be subject," and (3) "the degree of fairness and procedural impact of certifying the action as a collective action," among other considerations. *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 584 (6th Cir. 2009) (quotation omitted), *abrogated on other grounds by Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). Helpful as this checklist may be, it should not obscure the core in-

quiry: Are plaintiffs similarly situated *such that* their claims of liability and damages can be tried on a class-wide and representative basis? 7B Charles Alan Wright et al., Federal Practice and Procedure § 1807 (3d ed. 2005).

That is where the plaintiffs fall short. They claim that the defendants violated the Fair Labor Standards Act in three distinct ways: (1) by falsifying employees' timesheets; (2) by instructing employees to underreport their hours; and (3) by creating incentives for employees to underreport by rewarding "productiv[ity]" and scheduling fewer shifts for those who worked too many hours. R. 200 at 8. The problem with the plaintiffs' approach is that a jury could accept some of their theories of liability while rejecting others, and yet the verdict form gave the jury only an all-or-nothing-at-all option. Assume that, as plaintiffs allege, supervisors at a certain subset of the defendants' offices directed employees to underreport (which violates the FLSA), while supervisors at a distinct subset of offices merely urged employees to be more efficient (which normally will not violate the FLSA). *See Davis v. Food Lion*, 792 F.2d 1274, 1275–78 (4th Cir. 1986); *Brumbelow v. Quality Mills, Inc.*, 462 F.2d 1324, 1327 (5th Cir. 1972). A jury could decide that statutory violations occurred at the first group of offices but not the second (perhaps because the calls for efficiency did not rise to the level of a statutory violation, perhaps because the plaintiffs did not present enough evidence to conclude that supervisors pressured their employees to underreport, or perhaps because the only pressure—to be efficient—was self-induced and not a violation at all). What, then, is the jury tasked with delivering a class-wide verdict to do? It must say either that the defendants are liable as to the entire class or that

the defendants are liable as to no one—when the truth lies somewhere in the middle. Just as it would be unfair to impose class-wide liability for all 296 employees based on the "representative" testimony that *some* supervisors directed employees not to report their hours, so it would be unfair to deny class-wide liability based on the "representative" testimony that *some* supervisors merely urged employees to be more efficient. *See Tyson Foods*, 136 S. Ct. at 1046– 47.

The evidence at trial illustrates the problem. Start with Richard Hunt, who said he was instructed "to dock an hour for lunch whether [he] took it or not." R. 456 at 125. Compare him to Paul Crossan, who testified that he underreported his time "because [he] wanted more jobs for more money for [him]self," thinking he would not be scheduled for extra shifts if he recorded too many hours. R. 448 at 77. Then compare them both to Stephen Fischer, who said he was instructed to underreport his hours on some occasions, was told to *over-report* his hours on other occasions, and in still other cases underreported because he wanted to "be routed daily and not miss any work." R. 456 at 78. With so many variables in play—different employees offering different testimony about different types of violations—how could a jury fairly assess liability on a class-wide, one-size-fits-all basis? I for one do not see how it could be done.

The Seventh Circuit recently explained how all of this should work in its unanimous opinion in *Espenscheid*. The case not only arose in the same industry and not only concerned the same worker-incentive plans, but it also involved the *same defendant in this case*. *Espenscheid*, 705 F.3d at 772–73. Now that is

an apt use of the term similarly situated. In denying certification, Judge Posner explained the "complication presented by a worker who underreported his time, but did so . . . not under pressure by [the defendant] but because he wanted to impress the company with his efficiency." *Id.* at 774. The problem, as in this case, was that some plaintiffs were instructed to underreport; others underreported to meet the company's efficiency goals; and still others alleged that, while they recorded their time correctly, the company miscalculated their wages. *Id.* at 773–74; *see Espenscheid v. DirectSat USA, LLC*, No. 09-cv-625-bbc, 2011 WL 2009967, at *2 (W.D. Wis. May 23, 2011), *amended by* 2011 WL 2132975 (W.D. Wis. May 27, 2011). Because the plaintiffs offered no way to "distinguish . . . benign underreporting from unlawful conduct by [the defendant]"—and no other way to prove their multiple, conflicting theories of liability on an all-or-nothing class-wide basis—the Seventh Circuit refused to let them proceed collectively. 705 F.3d at 774.

The court also worried that, because each employee did not perform the same tasks, they were not sufficiently similar to permit a class-wide determination of liability or damages, *id.* at 773; that assessing damages would require a "separate evidentiary hearing[]" for each member of the class, *id.*; that the plaintiffs' plan to use "representative" proof with their hand-picked employees would not work because the various theories of liability made it impossible to have representative employees in a single class, *id.* at 774; and that "the experience of a small, unrepresentative sample" of testifying workers could not support "an inference about the work time of" the remaining plaintiffs, *id.* at 775. Although the district court had proposed to divide the employees into

three sub-classes, "corresponding to the three types of violation[s]" alleged, plaintiffs' counsel opposed the court's plan and "refus[ed] to suggest a feasible alternative, including a feasible method of determining damages." *Id.* at 775–76. We could adopt the Seventh Circuit's opinion as our own in this case, since it highlights precisely the same problems that afflicted the plaintiffs' trial plan. Because the employees here did not offer a "feasible method of determining" liability and damages, the district court should have decertified their case. In the last analysis, the Seventh Circuit's decision respects the lessons of *Tyson Foods*, 136 S. Ct. at 1048–49, while our decision with respect does not.

All of this does not mean that a collective action was not an option in our case. It means only that plaintiffs should have accounted for their distinct theories by dividing themselves into sub-classes, one corresponding to each theory of liability under the statute—and indeed under their own trial plan. That is a tried and true method of collective-action representation, and nothing prevented plaintiffs from using it here.

The plaintiffs offer two reasons for concluding that their trial plan worked, even without sub-classes. First, they argue that they were subject to a "unified" company-wide "time-shaving policy" and that their trial plan enabled them to prove this policy's existence on a class-wide basis. Appellees' Br. 41. But what was the relevant policy? Was it that supervisors should alter employees' timesheets? That they should instruct employees to underreport their hours? That they should subtly encourage employees to underreport by urging them to be efficient? The plaintiffs define the company-wide "policy" at such a

lofty level of generality that it encompasses *multiple* policies, each one corresponding to a different type of statutory violation and some to no violation at all. The FLSA does not bar "benign underreporting" where workers try "to impress the company with [their] efficiency in the hope of obtaining a promotion or maybe a better job elsewhere—or just to avoid being laid off." *Espenscheid*, 705 F.3d at 774. Nor does it violate the FLSA to reduce an employee's amount of work to avoid increasing overtime costs. *See* 29 C.F.R. § 785.13; *see also U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 779–80 (6th Cir. 1995); *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir. 2011). Yet what purports to link the plaintiffs' claims (cognizable and non-cognizable alike) is merely the theory—at a vertigo-inducing height of generality—that the defendants violated the overtime provisions of the FLSA. A company-wide "time-shaving" policy is lawyer talk for a company-wide policy of violating the FLSA. That does not do the trick. And most assuredly it does not do the trick when one of the theories does not even violate the FLSA.

The majority worries that, by requiring subclasses to litigate the relevant policies, my approach would limit liability to donning-and-doffing cases. But those are not the only types of cases in which a company-wide policy—in the singular—permits class-wide resolution of liability and damages. Imagine that FTS and UniTek, rather than employing different practices in different offices, told supervisors at every location to dock the pay of employees who worked at least fifty hours; or declined to pay employees for compensable commuting time; or stated that technicians in each office should not be paid for their lunch break, even if they worked through it; or

used punch-in clocks that systematically under-recorded employees' time. The plaintiffs in each of these cases could prove liability and damages on a class-wide basis, which means they could use the collective-action device to litigate their claims. *See Tyson Foods*, 136 S. Ct. at 1042–43. But if, as here, the company employs multiple policies, as FTS and UniTek allegedly did, the plaintiffs must bring separate actions or prove violations using sub-classes (or any other trial plan that permits class-wide adjudication). The majority warns that my approach "would compel employees to bring a separate collective action . . . for unreported work required by an employer before clocking in, and another for work required after clocking out." *Supra* at 17. But of course that "level of granularity," *id.* at 15, is not required, and crying wolf won't make it so. All that's required is an approach that allows plaintiffs to litigate their claims collectively only when they can *prove* their claims collectively.

Second, the plaintiffs argue that the jury could assess class-wide liability by relying on "representative" proof. They note that, before trial, the parties agreed to take discovery on a "sample" of fifty employees—forty chosen by the plaintiffs, ten by the defendants. R. 249-1 at 2. The plaintiffs called seventeen of those employees to testify at trial. This representative testimony, say the plaintiffs, gave the jury enough information to reach a class-wide verdict, which means the employees were sufficiently similar to permit collective-action certification and collective-action resolution.

That representative proof works in some cases does not mean it works in all cases. *Tyson Foods*, 136 S. Ct. at 1048. The question—always—is *who*

can fairly represent *whom*. *Id.* at 1047–48. If the proof shows systematic underreporting by the employer of, say, the time it takes to don and doff the same protective clothing—giving the same type of workers credit for three minutes when the proof shows it takes seven minutes—representative proof works just fine. In that setting, there is evidence about how long it takes workers to don and doff and proof that the same deficiency was applied to all plaintiffs. But I am skeptical, indeed hard pressed to believe, that plaintiffs who allege one theory of liability (*e.g.*, *the company* altered my timesheets) can testify on behalf of those who allege another (*e.g.*, *I* underreported my time because my supervisor directed me to) or still another (*e.g.*, *I* altered my time because the company urged me to be efficient). Plaintiffs who were told to underreport, for example, tell us very little about plaintiffs at different offices, working under different supervisors, who underreported based on efforts to improve efficiency. That is why the majority goes astray when it suggests that "it is enough that technicians testified as to each means of enforcement of the common, FLSA-violating policy." *Supra* at 26. The question is not whether each "means of enforcement" was represented; it is whether each means of enforcement was represented *in proportion to* its actual employment by FTS and UniTek across the entire class—something that the plaintiffs never attempted to prove.

The Supreme Court's intervening decision in *Tyson Foods*, of which the district court did not have the benefit, confirms all of this and more. Not all inferences drawn from representative evidence, it makes clear, suffice to establish class-wide liability or damages. 136 S. Ct. at 1048. "Representative evidence that is statistically inadequate or based on

implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked." *Id.* at 1048–49. "If the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action," for example, "that sample is a permissible means of establishing the employees' hours worked in a class action." *Id.* at 1046–47. By contrast, a sample that fails to account for the various theories of liability for employees working at different locations under different supervisors is exactly the sort of representative evidence that fails to establish class-wide liability. Drawing inferences from such nominally representative evidence is neither reasonable nor just.

Tyson Foods, it is true, is a different case with different facts. Most cases are. And for that reason, the court is correct to say that *Tyson Foods* does not "compel" us to change our earlier decision. *Supra* at 12. But that analysis answers the wrong question. The Court does not enter "GVRs"—orders granting the petition for a writ of certiorari and vacating the lower court decision for reconsideration in light of intervening authority—only when new authority *compels* us to rule differently. As often as not, GVRs are used when intervening authority suggests a better answer may exist. Just so here, as the Seventh Circuit has already concluded.

Does anyone doubt how this case would come out if the roles were reversed—if most of the testifying plaintiffs underreported on their own while only a few were told to do so? We would hesitate, I suspect, to say that the testifying employees were "representative" of their non-testifying peers, especially if the jury returned a verdict for the defendants. What

is sauce for one, however, presumably should be sauce for the other, making the district court's certification order perilous for defendants *and* plaintiffs alike. No doubt, collective actions permit plaintiffs to rely on representative proof. But that proof must be *representative*—and here plaintiffs' own evidence demonstrates that it was not remotely representative. *See Tyson Foods*, 136 S. Ct. 1048; *Espenscheid*, 705 F.3d at 774; *see also Sec'y of Labor v. DeSisto*, 929 F.2d 789, 793–94 (1st Cir. 1991); *Reich v. S. Md. Hosp., Inc.*, 43 F.3d 949, 952 (4th Cir. 1995).

The plaintiffs claim that *Anderson v. Mt. Clemens Pottery Co.* permits this trial plan. *See* 328 U.S. 680 (1946). But that is a case about damages, not liability. *See Tyson Foods*, 136 S. Ct. at 1047. *Mt. Clemens Pottery* holds that, *after* an employee has shown that he "performed work and has not been paid in accordance with the" FLSA, he may "show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687–88. The "just and reasonable inference" rule, in other words, comes into play only when the "fact of damages" is "certain" but the "amount of damages" is unclear. *Id.* at 688. As *O'Brien* explains, "*Mt. Clemens Pottery* and its progeny do not lessen the standard of proof for showing that a FLSA violation occurred." 575 F.3d at 602; *see also Tyson Foods*, 136 S. Ct. 1048–49; *Shultz v. Tarheel Coals, Inc.*, 417 F.2d 583, 584 (6th Cir. 1969) (per curiam); *Porter v. Leventhal*, 160 F.2d 52, 58 (2d Cir. 1946); *Kemmerer v. ICI Ams. Inc.*, 70 F.3d 281, 290 (3d Cir. 1995); *Brown v. Family Dollar Stores of Ind., LP*, 534 F.3d 593, 594–95 (7th Cir. 2008); *Carmody v. Kansas City Bd. of Police Comm'rs*, 713 F.3d 401, 406 (8th Cir. 2013); *Alvarez v. IPB, Inc.*, 339 F.3d 894, 914–15 (9th Cir. 2003). The case thus provides no support for the plaintiffs'

claim that they can show liability under a "relaxed" standard of proof. Appellees' Br. 39.

The plaintiffs counter that the defendants agreed to representative discovery, claiming that this means they necessarily agreed to representative proof at trial. But to take the one step does not require the other. The only way to determine whether one group of plaintiffs is representative of another is to gather information about both groups, typically by conducting discovery. When the defendants, after taking depositions, learned that the selected employees were not representative of their peers, they objected to the plaintiffs' plan to use representative proof at trial. Then they objected to it three more times. We have no right to penalize them for failing to raise this objection *before* discovery when the targeted problem did not materialize until *after* discovery was complete. Put another way, there is a difference between *alleging* a uniform policy of underreporting and *proving* one. Once discovery showed there was no uniform policy, the defendants properly objected to representative proof. *See Tyson Foods*, 136 S. Ct. at 1048–49.

The plaintiffs lean on *O'Brien v. Ed Donnelly Enterprises* to overcome these problems but it cannot bear the weight. 575 F.3d 567 (6th Cir. 2009). *O'Brien* said that plaintiffs are similarly situated when "their claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *Id.* at 585. But *O'Brien*'s point was that, *if* plaintiffs offer a trial plan that enables them to prove their case on a class-wide basis, the court should permit the suit to proceed as a collective action. Such a trial plan, in some cases, may involve

"individualized" presentations of proof; in other cases, representative proof may suffice. *Id.* But in all cases, plaintiffs must offer *some* reasoned method for the jury to assess class-wide liability—and that is just what the plaintiffs failed to do here. *See Tyson Foods*, 136 S. Ct. at 1048–49. As for *O'Brien*'s *holding*, it was that the opt-in plaintiff was *not* similarly situated to the other plaintiffs, "because she failed to allege that she suffered from" the "unlawful practice[s]" endured by those employees. *O'Brien*, 575 F.3d at 586. Just so here, where the plaintiffs failed to offer a means of proving that they suffered from "unlawful practice[s]" on a class-wide basis.

Finally, the plaintiffs (and the majority) try to distinguish this case from the Seventh Circuit's decision in *Espenscheid*. It is true that the Seventh Circuit applies the Rule 23 class-action standard to assess whether plaintiffs are "similarly situated" and that our circuit has rejected Rule 23(b)(3)'s "predominance" inquiry as an element of the "similarly situated" analysis. *Compare Espenscheid*, 705 F.3d at 772, *with O'Brien*, 575 F.3d at 584–85. But that makes no difference. Under both the Seventh Circuit's approach and our own, one way for plaintiffs to satisfy the "similarly situated" inquiry is to allege "common theories" of liability that can be proved on a class-wide basis. *See O'Brien*, 575 F.3d at 585. That is exactly what the Seventh Circuit found to be missing when it held that the *Espenscheid* plaintiffs failed to distinguish "benign underreporting from unlawful conduct." 705 F.3d at 774. And that is exactly what is missing here. The majority also notes that *Espenscheid* involved a larger group of plaintiffs than this case. But that had no bearing on the Seventh Circuit's analysis. Nor could it. Whether the collective action consisted of twenty employees or two

thousand, the problem was that those employees could not prove class-wide liability—and the same reasoning applies to the class of two-hundred-plus plaintiffs today. An error does not become harmless because it affects "just" 200 people or "just" two companies.

Seventh Amendment. If class-wide liability turns on non-representative proof, that skews the liability finding. And it should surprise no one when a skewed liability determination leads to a skewed damages calculation. So it happened in this case.

The majority to its credit corrects one problem with the damages calculation. I would correct the other. The plaintiffs provided no evidence from which the jury (or, alas, the court) could conclude that the testifying plaintiffs failed to record a comparable number of hours on their timesheets as their non-testifying peers. The district court nonetheless adopted a trial procedure that *assumed* that each of the testifying and non-testifying employees was similarly situated for purposes of calculating damages. That procedure not only ignored the non-representative nature of the proof, but it also violated the Seventh Amendment. *See Tyson Foods*, 136 S. Ct. at 1049.

Here's how the district court calculated damages: When the jury returned a verdict for the plaintiffs, it identified the average number of weekly hours that each of the seventeen testifying employees had worked but had not recorded on their timesheets. The court then averaged together the number of unrecorded hours for each testifying employee, assumed that this value was also the average number of unrecorded hours for each of the 279 *non*-testifying em-

ployees, and awarded damages to the class as a whole.

The Seventh Amendment bars this judge-run, average-of-averages approach. "[N]o fact tried by a jury," the Amendment reads, "shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. That means a court may not "substitut[e] its own estimate of the amount of damages which the plaintiff ought to have recovered[] to enter an absolute judgment for any other sum than that assessed by the jury." *Lulaj v. Wackenhut Corp.*, 512 F.3d 760, 766 (6th Cir. 2008) (quotation omitted). Yet that is just what the court did. The jury awarded damages to the seventeen testifying plaintiffs, but the court—on its own and without any jury findings—extrapolated that damages award to the remaining 279 plaintiffs.

Tyson Foods confirms the jury's starring role in determining damages. "Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury." *Tyson Foods*, 136 S. Ct. at 1049. "Reasonable minds may differ as to whether the average time . . . calculated . . . is probative as to the time actually worked by each employee." *Id.* But "[r]esolving that question . . . is the near-exclusive province of the jury," not the judge. *Id.* The jury in this case may not have thought it appropriate to extrapolate the damages award to the remaining 279 plaintiffs. Indeed, the jury in *Tyson Foods* more than halved the damages recommended by the expert in that case. *Id.* at 1044.

The plaintiffs defend this procedure by noting that a court may "render judgment as a matter of law as to some portion of a jury award if it is com-

pelled by a legal rule or if there can be no genuine issue as to the correct calculation of damages." *Lulaj*, 512 F.3d at 766. But the district court did not award damages based on a legal conclusion; it did so based on its finding that the non-testifying plaintiffs failed to record the same number of hours, on average, as their testifying peers. That is a *factual finding* about the number of hours worked by each plaintiff. And the Seventh Amendment means that a jury, not a judge, must make that finding. *See Tyson Foods*, 136 S. Ct. at 1049.

The majority portrays the district court's damages determination as a matter of "arithmetic," a "formulaic or mathematical calculation." *Supra* at 32. How could that be? There was no finding by the jury about the overtime hours worked by the non-testifying employees and thus no basis for the judge to do the math or apply a formula. Imagine that ten plaintiffs bring a lawsuit. The court gives the jury a verdict form, listing the names of five plaintiffs and asking the jury to write down the amount of damages those plaintiffs should receive. After the jury does so, the judge decides that the remaining five plaintiffs are similar to their peers and decides they should receive damages too, all in the absence of any finding by the jury about the similarity of the two classes of plaintiffs. It then doubles the jury's award and gives damages to all ten plaintiffs. I have little doubt we would find a Seventh Amendment violation, and the majority says nothing to suggest otherwise. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990); *Wallace v. FedEx Corp.*, 764 F.3d 571, 591–94 (6th Cir. 2014). That conclusion should not change simply because this case arises in the collective-action context, where the "estimated average approach" is the ac-

cepted practice. The missing ingredient is that the jury, not the judge, must still determine the "estimated average" that each plaintiff should receive. And no court to my knowledge—either in the collective-action context or outside of it—has endorsed a procedure by which the jury awards damages to testifying plaintiffs while the judge awards damages to their non-testifying counterparts with no finding from the jury as to the latter group.

Nor did the district court cure the problem when it instructed the jury that non-testifying plaintiffs would be "deemed by inference to be entitled to overtime compensation." R. 463 at 28. This instruction told the jury only that, if it found liability with respect to the testifying plaintiffs, it also was finding liability with respect to the non-testifying plaintiffs. The court did not inform the jury that its damages calculations would be averaged together to make a class-wide finding. Nor did the court charge the jury with determining the estimated average that each plaintiff should receive. All the instructions did, in effect, was tell the jury that the judge would calculate damages. But it should go without saying that a court cannot *correct* a Seventh Amendment violation by *informing* the jury that a Seventh Amendment violation is about to occur.

For the same reason, *Mt. Clemens Pottery* has nothing to do with this case. It is not a Seventh Amendment case. It did not permit a judge, rather than a jury, to decide whether the damages of the testifying and non-testifying employees were similar and thus could be assessed on an "estimated average approach." And it involved compensation for employees' preliminary work activities, which took roughly the same amount of time for each employee

to perform. 328 U.S. at 690–93. The jury in today's case, however, found that the number of unrecorded hours varied widely among the testifying technicians—from a low of eight hours per week to a high of twenty-four, with considerable variation in between. This range of evidence increased the risk of under-compensation for employees who worked the most hours (and over-compensation for those who worked the fewest) in a way that *Mt. Clemens Pottery* never needed to confront. And that risk of course heightens the importance of keeping the damages determination where it belongs—with the jury, which is best equipped to undertake the intricate fact-finding required when the employees' unrecorded hours span so broadly.

Herman v. Palo Group Foster Home, Inc., 183 F.3d 468 (6th Cir. 1999), is of a piece. It said that the *Mt. Clemens Pottery* framework enables juries to find damages "as a matter of just and reasonable inference" when employers do not keep adequate records of their employees' time. *Id.* at 472. Nowhere does *Herman* endorse the procedure used in this case, which permitted the *court* to *assume* (not even infer) that all employees failed to record the same number of hours on their timesheets.

The majority claims in the alternative that the defendants forfeited their claim to a jury trial on damages. Not true. The defendants opposed the district court's ruling that the court could calculate damages, and they reiterated their objections at a post-trial status conference. Consistent with these objections, the district judge did not decide that defendants forfeited the point. He instead explained he was "at a little bit of a loss" because he had not tried the case and only "now" "realize[d]" that a "residual

issue" remained. R. 444 at 6. In response, the district court offered to call a second jury to calculate damages, and asked the defendants what steps would be "appropriate[.]" *Id.* at 6–7. Counsel responded, "[W]e think the only thing . . . that's left and that is appropriate is an entry of judgment . . . either for the defense or liability for plaintiffs . . . with zero damages." *Id.* at 7. "[P]art of our position," counsel concluded, "is to be clear for any type of post-trial appellate record" that the defendants were "not waiving . . . or changing their position." *Id.* at 19–20. Nowhere in this exchange do the defendants forfeit their Seventh Amendment argument; at times they indeed reaffirm it. Of course, even if the defendants *had* forfeited or for that matter waived their right to a jury trial (which they did not), the appropriate response would have been to conduct a *bench trial* on damages, not to impose damages as a matter of law with no finding by anyone—judge or jury—about the right amount. *Cf. Singer v. United States*, 380 U.S. 24, 26 (1965).

* * *

It is not difficult to imagine how this case could have gone differently. The plaintiffs could have organized themselves into sub-classes, one corresponding to each type of alleged statutory violation. *See, e.g.*, *Fravel v. County of Lake*, No. 2:07 cv 253, 2008 WL 2704744, at *3–4 (N.D. Ind. July 7, 2008). Or they could have complained to the Department of Labor, which may seek damages on the employees' behalf. *See* 29 U.S.C. § 216(c); *Espenscheid*, 705 F.3d at 776. But the plaintiffs did not take either route. Because they did not do so— because they proposed a trial plan that violated both statutory and constitutional requirements—we should remand this case

and allow them to propose a new procedure that permits reasoned and fair adjudication of their representative claims. *See Tyson Foods*, 136 S. Ct. at 1048–49.

The majority seeing things differently, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, on behalf of themselves and other similarly situated employees,	)	
Plaintiffs,	)	
v.	)	**No. 08-2100**
FTS USA, LLC and UNITEK USA, LLC,	)	
Defendants.	)	

REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION FOR CONDITIONAL CLASS CERTIFICATION AND COURT-AUTHORIZED NOTICE

Before the Court is Plaintiffs' Motion for Conditional Class Certification and Court-Authorized Notice (Docket Entry #36). This motion has been referred to United States Magistrate Judge Gerald B. Cohn for Report and Recommendation. For the reasons set forth herein, the Court RECOMMENDS that Plaintiffs' request for conditional certification be GRANTED and that a hearing be held to determine the appropriate manner of discovery of the identities of putative plaintiffs and to determine the proper information to be authorized in the judicial notice of lawsuit.

I. Background

This case arises from allegations that technicians employed by FTS USA, LLC ("FTS") and Unitek USA, LLC ("Unitek") were paid under a piece-rate system without compensation for non-productive work hours and overtime hours in violation of the Fair Labor Standards Act ("FLSA"). See 29 U.S.C. § 207; 29 C.F.R. § 778.23; 29 C.F.R. § 778.318.

FTS provides installation, maintenance, and repair services to customers of cable companies, including Comcast, Cox Communications, Charter, Time Warner, Suddenlink and Brighthouse, who subscribe to television, telephone and/or internet services. Pl.'s Mot. for Conditional Cert., Ex. A., ("Downey Dep.") at 38-39, 56-57. FTS currently operates in Alabama, Arkansas, Florida, Louisiana, Tennessee, Texas, California, North Carolina, and South Carolina and employs approximately 600 technicians. Id. at 55, 58-59. Unitek is the parent corporation of FTS and provides payroll and human resource services for its subsidiaries. Id. at 14-15, 25, 30. The three named Plaintiffs are employed by FTS as technicians at the Memphis, Tennessee location, which is the company's largest branch. Id. at 30. In addition, eleven current and former employees of Defendants' Tennessee, Alabama and Louisiana branches have consented to join this litigation.

In the present motion, Plaintiffs request to conditionally certify the class of all FTS technicians as similarly situated employees. In support of the motion, Plaintiffs assert that Defendants use the same employee handbook for all FTS employees and that there is one job description for all FTS technicians nationwide. Id. 112, 114. The job description of a "technician" has not been significantly altered since

FTS's inception in 2006 because, as the Rule 30(b)(6) representative explained, "a technician is a technician." Id. at 62, 165. All technicians have the same job duties and responsibilities of installing cable services, repairing cable services, upgrading cable services, and handling customer complaints regardless of where they are located. Id. at 62. Although there are three levels of technicians, Plaintiffs state that the only differences between these levels is their skill set and pay rate. Id. at 67. All technicians are all subject to the same monthly evaluation by the cable companies who measure each technician's percentage of completions and quality control. Id. at 68.

As to technicians' job duties, Plaintiffs cite that all technicians receive their jobs or work orders from a router and are required to fill out routing sheets on a daily basis. Id. at 92. The routing sheets are created by Unitek's corporate finance department who sends them to local FTS branch locations with a list of each service that the technician performs at the subscriber's property and informs the company of the piece rate that the technician receives for each associated service. Id. at 72, 76, 80. While in the field, all technicians are required to stay at the subscriber's property until the cable company activates the cable services. Id. at 82, 85. In addition to the technicians' field responsibilities, all technicians at all FTS branch locations are required to attend weekly safety meetings, complete daily check-ins, and reconcile their daily routing sheet with the work orders received from the cable company, and complete weekly time sheets. Id. at 87-88, 116. However, Plaintiffs and the putative class members either deny completing weekly time sheets or contend that the weekly time sheet did not record all of their hours

worked. Pl.'s Memo. in Support of Mot. for Conditional Certification ("Pl.'s Memo") at 5.

All technicians are compensated under the piece-rate compensation plan where they are paid for each type of job they perform. Id. at 99-100. All technicians are required to sign the same piece-rate agreement at the commencement of their employment showing how much will be earned per piece. Id. at 123-24. Further, FTS technicians are classified as non-exempt employees, eligible for overtime pay. Id. at 164-65. Plaintiffs claim that due to the piece-rate compensation system, they have never been paid overtime for working over forty hours per week. Pl.'s Mot. for Conditional Cert., Ex. B, ¶¶ 5.

In response, Defendants assert that Plaintiffs are not similarly situated to all nationwide technicians that they purport to represent. Defendants state that Plaintiffs have failed to allege sufficient facts to show what they do, the hours they allegedly work, when and/or how often they allegedly work more than forty hours per week, the basis of their regular and extra compensation, and their alleged entitlement to overtime compensation. Further, Defendants state that the compensation of technicians varies depending the particular cable company, the hours worked by each individual technician, the skill level of each technician, and state law regulating employee compensation.

II. Analysis

1. Conditional Certification

The central issue presented in the instant motion is whether the Court should conditionally certify the class of similarly situated FTS technicians. Under the FLSA,

> [a]n action . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves or other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b). Collective actions of similarly situated employees provide for the efficient adjudication of similar claims and allow those whose claims are small and not likely to be brought on an individual basis to join together to prosecute their claims. Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989). According to the Supreme Court, the district court has the discretion to determine what is an "appropriate case" for conditional certification. Id.

To determine whether a collective action is proper, federal courts in this district and others in Tennessee and the Sixth Circuit have followed an ad hoc two step approach. White v. MPW Indus. Servs., Inc., 236 F.R.D. 363, 366 (E.D. Tenn. 2006); Brasfield v. Source Broadband Servs., 2008 WL 2697261, at *1 (W.D. Tenn. Jun. 3, 2008) Shabazz v. Asurion Ins. Serv., 2008 WL 1730318, at *3 (M.D. Tenn. Apr. 10, 2008); Musarra v. Digital Dish, Inc., 2008 WL 818692, at *2 (S.D. Ohio Mar. 24, 2008); Wilks v. Pep Boys, 2005 WL 2821700, at *2 (M.D. Tenn. Sept. 26, 2006). Although the Sixth Circuit has not explicitly adopted this approach, it has acknowledged that courts utilize the two-phase inquiry in FLSA class certification proceedings. Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006).

The first step is the notice stage, in which the Court must determine whether a collective action should be certified for purposes of sending judicial notice and conducting discovery. White, 236 F.R.D. at 366. Because only minimal evidence is available to the parties and to the court at this point, the "similarly situated" question is measured by a lenient standard. Id. As such, all fact questions and credibility issues are resolved in favor of the moving party. Scott v. Heartland Home Fin., Inc., 2006 WL 1209813, at *3 (N.D. Ga. May 3, 2006).

Following the completion of discovery, the Court may make a second determination of the similarly situated question, usually in response to a motion for decertification. Shabazz, 2008 WL 1730318, at *3; White, 236 F.R.D. at 366. At this stage, the Court has sufficient information to base its decision upon the complete record. Comer, 454 F.3d at 547; White, 236 F.R.D. at 366. This second step is a specific factual consideration of each individual claim to assure that it is appropriate to be party to the collective action. Henry v. Quicken Loans, Inc., 2006 WL 2811291, at *4 (E.D. Mich. Sept. 28, 2006).

In the present case, the record contains the deposition of Unitek's Rule 30(b)(6) representative, Elizabeth Downey, and the declarations of the three named Plaintiffs and five opt-in Plaintiffs to support the assertion that all technicians are similarly situated. See Pl's. Mot. for Conditional Cert., Exhibits A & B. Upon review of the evidence, Downey stated that the job description is the same for all the technicians at FTS and that all technicians are paid under the same piece-rate compensation plan. Downey Dep. at 62, 99-100. In their declarations, Plaintiffs and Opt-In Plaintiffs stated that they believed that

the job duties of other technicians were substantially similar to their own and that all technicians are compensated under a piece-rate system and are not compensated for overtime or non-productive work hours. Monroe Decl. ¶¶ 3-8; Moore Decl. ¶¶ 3-8; Williams Decl. ¶¶ 3-8; Becton Decl. ¶¶ 3-8; Burks Decl. ¶¶ 3-8; Davis Decl. ¶¶ 3-8; Malone Decl. ¶¶ 3-8; Thornton Decl. ¶¶ 3-8. These employee-declarants, along with the rest of the eleven Opt-In Plaintiffs, worked as FTS technicians in Memphis, Tennessee, Birmingham, Alabama, and New Orleans, Louisiana. Additionally, Unitek's representative states that the job responsibilities and duties of all technicians are the same regardless of location, including "[i]nstalling cable services, repairing cable services, upgrading cable services, handling customer complaints while they're out installing cable services." Downey Dep. at 62. To further express the similar situation of the various technicians, Downey succinctly stated that "a technician is a technician." Id. at 165.

Based upon the evidence brought forth by Plaintiffs, the Court is initially persuaded that the FTS technicians are similarly situated. The technicians perform the same job functions and were all paid under the same compensation system alleged to be unlawful in this case. Thus, the Court is initially inclined to recommend that Plaintiffs' request be granted. However, Defendants raise several critical arguments that the Court must consider. First, Defendants argue that the technicians are not similarly situated because they operate in different markets, install different products, and are governed by the laws of different states. While the Court recognizes that differences exist between each individual employee, the Court realizes that certain unique cir-

cumstances will inevitably be present in a collective action. However, Section 216(b) explicitly provides for such collective actions for "similarly" situated individuals. As one court stated, the putative class members need only be "similar, not identical" to the named plaintiffs for conditional certification. Crawford v. Lexington-Fayette Urban County Gov't., 2007 WL 293865, at *4 (E.D. Ky. Jan. 26, 2007). Instead of requiring identical factual situations, courts have held that a "modest factual showing" of central control of the employment circumstances resulting in the claim of illegality is sufficient for conditional certification. White, 236 F.R.D. at 366. The evidence brought forth in this case demonstrates that Defendants had central control over the compensation system and that the same piece-rate scheme applied to the compensation of all technicians. It is the lawfulness of this overarching policy that is challenged in this litigation. Thus, the Court is not persuaded by Defendants concerns that the technicians' individualized situations render a collective action imprudent.

Next, Defendants argue that Plaintiffs are not victims of a single unlawful decision, policy or plan and have failed to show Defendants' knowledge of alleged willful violations of law. Initially, the Court notes that Defendant Unitek's Rule 30(b)(6) representative acknowledged that all technicians are paid according to the same compensation program challenged by Plaintiffs. Downey Dep. at 99-100. While Defendants contend that the compensation system is not illegal, this court should not weigh the merits of the underlying claims in determining whether potential opt-in plaintiffs are similarly situated. Brasfield, 2008 WL 2697261, at *2. Further, all factual questions and issues of credibility must be resolved in favor of the moving party in a motion for conditional

certification. Scott, 2006 WL 1209813, at *3. Thus, the Court is not persuaded by Defendants argument that the class should not be conditionally certified because they contend that they have not committed any illegal conduct.

Finally, Defendants assert that the declarations in the record are vague, conclusory, inadmissible, and merely "parrot" the Complaint. Def.'s Resp. at 11-12. However, courts in the Sixth Circuit have held that plaintiff's evidence on a motion for conditional certification must not meet the same evidentiary standards applicable to motions for summary judgment because "to require more at this stage of litigation would defeat the purpose of the two-stage analysis" under Section 216(b). White, 236 F.R.D. at 369; Crawford, 2007 WL 293865. The reason for this difference is that there is no "possibility of final disposition at the conditional certification stage." White, 236 F.R.D. at 368. "Therefore, requiring a plaintiff to present evidence in favor of conditional certification that meets the hearsay standards of the Federal Rules of Evidence fails to take into account that the plaintiff has not yet been afforded an opportunity, through discovery, to test fully the factual basis of his case." Id. Thus, the Court is persuaded that the declarations presented by Plaintiffs, which stated they are based upon their knowledge and experience, are sufficient to support conditional certification. The Plaintiffs will have further opportunity through discovery to determine the specific bases for each putative class members' claims, and Defendants will have an opportunity to file a motion to decertify the class after discovery is complete to fully address any substantive concerns relative to the class.

Following a consideration of Plaintiffs' proof and Defendants' counter-arguments, the Court opines that this case is strikingly analogous to several other cases in which courts have permitted conditional certification. Most notably, in Balazero v. Nth Connect Telecom, Incorporated, No. 07-5243, 2008 WL 552474 (N.D. Cal. May 2, 2008), the court conditionally certified for a collective action a lawsuit brought by cable installation technicians who challenged their piece-rate compensation under the FLSA and applicable state law. See Order Granting Motion for Approval of Hoffman-La Roche Notice, May, 2, 2008. The Balazero court conducted the same two-tier inquiry into class certification and relied upon the declarations of both Plaintiffs, another employee-technician, and the employer payroll supervisor to determine that the allegations and evidence are sufficient to meet the relatively low threshold required to send conditional class notice under the FLSA. Id. at 4. Given the obvious similarities to the issues in the present case, the Court finds the Balazero court's ruling to certify the class highly relevant.

Additionally, in Kautsch v. Premier Communications, 504 F. Supp. 2d 685 (W.D. Mo. Jan. 23, 2007), the court considered a motion for conditional class certification of similarly situated field technicians that installed satellite television services and were compensated under a piece-rate system. Id. at 687-89. The court explicitly noted as follows: "No two technicians have identical circumstances. Some work longer hours than others. Some take longer to complete a job than others." Id. at 687. However, the court stated that, "[d]espite these differences," the employer was required to comply with the FLSA in the company-wide piece-rate compensation scheme. Id. As the court found that the Plaintiffs had met

the "lenient notice standard" by presenting a "modest factual showing" that the putative class members are similarly situated, the court conditionally certified the class and authorized judicial notice. Id. at 690. This Court is likewise heavily persuaded by the Kautsch court's determination that conditional class certification was appropriate, especially considering its specific discussion of the individual circumstances that are inevitably present in a collective action.

In light of the factual proof presented by Plaintiffs, the lenient standard for conditional certification, and the conditional certification of highly analogous cases by other courts, the Court RECOMMENDS that Plaintiff's request for conditional certification of class by GRANTED.

2. Discovery of Potential Class Members and Judicial Notice

Next, Plaintiffs request that Defendants be required to produce a "computer readable data file containing the names, last known mailing address, last known telephone number, employee number, last four digits of the social security number, work locations, and dates of employment for all potential opt-in plaintiffs." See Pl.'s Mot. for Conditional Cert. at 1. Plaintiffs further request that the Court approve its proposed Notice of Lawsuit and authorize it to be sent to all potential opt-in Plaintiffs to apprise them of the lawsuit. See id. & Ex. E.

Defendants raise several key objections to Plaintiffs' proposed method of notice and assert that the Court "must afford Defendants the opportunity to respond and be heard on significant issues regarding the proposed notice to putative class members." Def.'s Resp. at 18. First, Defendants argue that

Plaintiffs are not entitled to provide court-approved notice to all technicians employed within the last three years, claiming instead that a two-year statute of limitations should apply to this case because Plaintiffs have failed to put forth evidence to establish a willful violation as the three-year statute of limitations requires. See 29 U.S.C. § 255(a). Next, Defendants argue that Unitek should not be listed in the judicial notice because, as the parent company, it does not directly employee any technicians. Def.'s Resp. at 18. Further, Defendants claim that Plaintiffs have failed to address significant issues related to the notice procedures, including as follows:

> who bears the costs of and related to the notice to the putative class members; the appropriate and necessary restrictions on communicating with the putative class members after the notices are sent; the timeliness of the notice; the inclusion of Defendants' counsel contact information; the fact the putative class members may be required to participate in the discovery process; and the fact that putative class members may be responsible for a portion of Defendants' costs of Defendants are the prevailing parties.

Id. Additionally, Defendants contest that the Plaintiffs are erroneously listed as being "employed as technicians" despite two Plaintiffs' promotions and that the notice unnecessary states that putative class members "consent to join any subsequent action to assert claims against Unitek and FTS for overtime pay." Id. at 19. Finally, Defendants assert that the proposed Notice of Lawsuit states that putative class members may participate if they were "paid by piecerate and not paid overtime for all hours worked over

forty," but Defendants argue that the FLSA provides for piece-rate compensation and that implying that such a compensation plan is improper is inappropriate. Id.

Because of the extensive issues raised by Defendants and the importance of a clear and accurate procedure for conducting any judicial notice, the Court is persuaded that Defendants' explicit request for a court hearing before the determination of these issues is appropriate. Accordingly, the Court RECOMMENDS that a hearing be held on the issues of discovery of potential class members and judicial notice if Plaintiffs' request for conditional certification is granted.

III. Conclusion

For the reasons set forth herein, the Court RECOMMENDS that Plaintiffs' request for conditional certification be GRANTED and that a hearing be held on Plaintiffs' request for discovery of putative class members' identities and on the manner and substance of Plaintiffs' request for court-authorized notice.

IT IS SO ORDERED this 23rd day of February, 2009.

s/ Gerald B. Cohn
GERALD B. COHN
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, on behalf of themselves and all other similarly situated employees,	
Plaintiffs,	
v.	**Case No. 2:08-cv-2100-BBD-dkv**
FTS USA, LLC and UNITEK USA, LLC,	
Defendants.	

ORDER ADOPTING REPORT AND RECOMMENDATION AND GRANTING MOTION TO CONDITIONALLY CERTIFY CLASS

Before the Court is Plaintiff's Motion for Class Certification. (D.E. #36.) The matter was referred to the Magistrate Judge for a report and recommendation. On February 23, 2009, the Magistrate Judge entered his Report and Recommendation. No objections have been filed. Upon a de novo review of the case file, the Court adopts the Report of the Magistrate Judge. Based on the reasoning set forth therein, Plaintiffs' motion to conditionally certify class is **GRANTED**.

IT IS SO ORDERED this 17th day of March, 2009.

s/ Bernice B. Donald
JUDGE BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, on behalf of themselves and all other similarly situated employees,	)	
Plaintiffs,	)	
v.	)	**Case No. 2:08-cv-2100**
FTS USA, LLC, and UNITEK USA, LLC,	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION TO DECERTIFY CLASS AND MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendants FTS USA, LLC ("FTS") and UniTek USA, LLC's ("UniTek")[1] April 1, 2010 motion to decertify the plaintiff class, which now comprises over 300 individuals either currently or formerly employed by Defendants as cable installation technicians. (D.E. #193.) Plaintiffs allege that Defendants failed to pay them proper overtime compensation in accordance with the requirements of the

[1] The Court will use "Defendants" when referring to both FTS and UniTek.

Fair Labor Standards Act of 1938 ("FLSA" or "Act"), 29 U.S.C. §§ 201 et seq. Also before the Court is Defendants' motion for summary judgment filed April 1, 2010, seeking dismissal of all claims pursuant to Rule 56 of the Federal Rules of Civil Procedure. (D.E. #194.) On May 5, 2010, Plaintiffs responded in opposition to Defendants' motions to decertify and for summary judgment, and with leave of court, Defendants filed replies in support of both motions on May 21, 2010.

In their motion to decertify, Defendants argue that the members of the plaintiff class present claims that are radically different from one another, rendering adjudication of their claims on a classwide basis inappropriate. In their motion for summary judgment, Defendants contend that, as a matter of law, (1) the evidence supporting Plaintiffs' claims is insufficient to support a finding that Plaintiffs are entitled to damages; (2) Plaintiffs have failed to offer a valid method by which to establish damages on a classwide basis; and (3) the evidence in the record before the Court is insufficient to support a finding that Defendants willfully violated the FLSA. Defendants also seek summary judgment on the claims of those Plaintiffs as to whom no discovery was tak-

en—a group that includes the vast majority of the plaintiff class members.[2]

For the reasons stated below, the Court finds that Plaintiffs' claims are substantially similar and therefore appropriate for resolution on a classwide basis. Therefore, the Court **DENIES** Defendants' motion to decertify the class. The Court further finds that Plaintiffs have offered sufficient evidence from which the finder of fact may reasonably award damages, that Plaintiffs' damages may be calculated on a representative basis for the entire class, that disputed issues of material fact exist regarding the question of Defendants' willfulness, and that dismissal of claims brought by those class members as to whom no discovery was taken is inappropriate. Accordingly, Defendants' motion for summary judgment is **DENIED** as inappropriate.

I. BACKGROUND

Defendant FTS is a Delaware limited liability company with its principal place of business in Blue Bell, Pennsylvania, and an additional corporate office in Dallas, Texas. (Defs.' Statement of Undisputed Facts ("Defs.' SOF") ¶¶ 1-2; Pls.' Response to Defs.' Statement of Facts ("Pls.' Response to SOF")

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[2] Defendants further single out five plaintiffs from the group of fifty plaintiffs as to whom discovery was taken and make individualized arguments as to why their claims fail. As explained below, the Court **DENIES** summary judgment as to these plaintiffs' claims as well, but cautions the one plaintiff (Plaintiff Whitehead), who has failed to participate in discovery, that he must respond to Defendants' discovery requests within twenty (20) days of this order to avoid dismissal of his claims for lack of prosecution.

¶¶ 1-2.)[3] Defendant UniTek, also a Delaware limited liability company with corporate offices in Blue Bell, Pennsylvania, is the parent company of FTS. (Defs.' SOF ¶¶ 3-4; Pls.' Response to SOF ¶¶ 3-4.) FTS performs cable installation services in several states, including Tennessee, under contracts with cable television providers—specifically, Cox Cable Communications, Charter, Time Warner, Brighthouse, and Comcast. (Defs.' SOF ¶¶ 3-4; Pls.' Response to SOF ¶¶ 3-4.) FTS operates field offices (also called profit centers) in the geographic areas it services. (Defs.' SOF ¶ 8; Pls.' Response to SOF ¶ 8.) FTS maintains three types of employees in its field offices: (1) installation technicians, who perform services at a cable subscriber's home; (2) supervisors, who manage the installation technicians; and (3) project managers, who are responsible for the operations of the field office. (Defs.' SOF ¶ 9; Pls.' Response to SOF ¶ 9.)

Plaintiffs are current and former cable installation technicians employed by Defendants and classified as non-exempt for purposes of the Fair Labor Standards Act. (Defs.' SOF ¶ 10; Pls.' Response to SOF ¶ 10.) Defendants compensate technicians on a "piece-rate" system, whereby a technician is paid a set percentage of the overall billing and revenue he

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[3] Because of the voluminous discovery taken and filed in this case, the Court will alter its usual practice of citing directly to the relevant documents in the record and will instead cite Defendants' statement of undisputed facts and Plaintiffs' response, each of which was filed pursuant to Local Rule 7.2(d)(2)-(3).

or she produces.[4] (Pls.' Response to SOF ¶¶ 11-12.) This process involves the technician completing a "tick sheet," which is different from the technician's timesheet and lists the work performed by the technician at a subscriber's home. (Id. ¶ 12.) Defendants' finance department assigns each task on the tick sheet a dollar amount, or piece-rate, that varies depending on the technician's skill level classification. (Id.)

At the times relevant to this case, Defendants maintained a formal, written policy directing technicians to record both the time spent each day working and the production values generated that day. (Defs.' SOF ¶¶ 17, 19-21.) Defendants also maintained formal, written policies requiring the payment of all overtime worked, even if management did not approve the overtime work in advance. (Defs.' SOF ¶¶ 31-32.) Additionally, Defendants' project administrators engaged in weekly conference calls with Defendants' human resources department to address any issues with compliance and determine if additional training was needed. (Defs.' SOF ¶ 37; Pls.' Response to SOF ¶ 37.)

Plaintiffs contend that, in spite of these policies and procedures, Defendants undertook a series of measures to prevent technicians from recording all of

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[4] Defendants characterize their compensation structure for technicians as a "job-rate" system. Plaintiffs dispute this characterization and contend that it is a "piece-rate" system. Because of the procedural posture by which this case comes before the Court—specifically, Defendants' motion for summary judgment—the Court construes the evidence in the light most favorable to Plaintiffs and adopts their interpretation of the relevant disputed facts for purposes of this order.

the hours they worked each day. (Pls.' Response to SOF ¶¶ 17, 19-21.) First, Plaintiffs testified that Defendants, through managerial employees in their field offices, directed technicians to understate their hours by not recording time for work that was compensable and by telling employees to record certain start and stop times for their work days regardless of the actual times they began and completed work. (Id. ¶ 17.) For example, according to Plaintiffs' evidence, a supervisor instructed one plaintiff to record 9:00 a.m. as his start time even though he began work two hours earlier, while another plaintiff began work at 6:50 a.m., but was instructed not to clock in until 8:00 a.m. (Id. ¶ 19 (citing Barriero Dep. at 54 and C. Huggins Dep. at 60).) Also affecting Plaintiffs' hours was Defendants' policy of deducting for a lunch break each day irrespective of whether the technician actually took lunch—a practice the existence of which is confirmed by Defendants' managerial employees. (Id. ¶ 19.)

Plaintiffs also offer evidence from several plaintiffs that managerial employees altered otherwise accurate timesheets from technicians to reduce or remove overtime hours. (Id. ¶ 17.) Other plaintiffs testified that their timesheets now contain information in handwriting they do not recognize and, in some instances, the timesheets include apparent forgeries of the technician's signature. (Id.) Additionally, Plaintiffs contend that Defendants have implemented their piece-rate compensation system in such a way as to discourage technicians from properly recording the hours they work. (Id.) Two plaintiffs testified that they knew if they accurately recorded the number of hours they worked and supervisors deemed those hours excessive, they would not be allowed to work the rest of the week. (Id. (citing D.

Dowdy Dep. at 17-18, 63 and M. Dyke Dep. at 22).) Plaintiffs contend as well that, although supervisors, project administrators, and Defendants' corporate payroll department were each charged with reconciling Plaintiffs' timesheets and tick sheets to ensure proper payment of wages, the responsible individuals and the payroll office routinely accepted timesheets that did not match information on the corresponding tick sheet. (Pls.' Response to SOF ¶ 25.)

Defendants assert that Plaintiffs either never complained of not receiving overtime pay or only complained to the supervisors in their field offices, but did not take their complaints to upper levels of management. (Defs.' SOF ¶¶ 41-46.) Plaintiffs, however, cite evidence from several Plaintiffs to the contrary. (See, e.g., Pls.' Response to SOF ¶¶ 41-46.) For example, Plaintiff Timothy Williams testified that he asked both his project manager and his project administrator about not receiving proper overtime pay, but neither individual was receptive to his concerns. (Pls.' Response to SOF ¶ 41 (citing T. Williams Dep. at 19-20).) Plaintiff Matthew Queen complained to his supervisor and project manager before complaining to Defendants' corporate payroll department, but the payroll department told him to address his concerns to his project manager. (Id. ¶ 42 (citing M. Queen Dep. at 43-44, 46-47).) Similarly, Plaintiffs Walter Huggins and Ben Kurk testified that they both contacted one of Defendants' corporate offices to inform it of their concerns, but neither ever received a return call. (Id. ¶ 54 (citing W. Huggins Dep. at 18-19 and B. Kurk Dep. at 70-71).) Additionally, Plaintiffs aver in their interrogatories and depositions that they routinely complained to their managers about not being paid for all of the hours they worked. (Id. ¶¶ 53-54.) However, when

Plaintiffs brought their concerns to supervisors and other managers, the most they received were assurances that the issue would be handled, and Defendants continued to deny them proper overtime pay.[5] (Id. ¶ 54.)

On February 14, 2008, Plaintiffs Edward Monroe, Fabian Moore, and Timothy Williams filed suit, on behalf of themselves and all other similarly situated employees, in the United States District Court for the Western District of Tennessee, alleging that Defendants' employment practices violated the FLSA by depriving technicians of proper overtime compensation. The Court granted conditional class certification on March 17, 2009, Monroe v. FTS USA, LLC, 257 F.R.D. 634 (W.D. Tenn. 2009), and over 300 plaintiffs have now opted into the action. The parties stipulated to conducting limited discovery of fifty plaintiffs—all but one of whom has provided written interrogatory responses. Defendants then deposed sixteen of these plaintiffs. Now, Defendants move to

[5] Although Plaintiffs argue that Defendants have recently been the subject of U.S. Department of Labor investigations and named as defendants in other wage and hour lawsuits, the parties dispute the probative value of these other legal matters. The Court finds it unnecessary to rely on these factual averments for either of the two motions before it, and therefore will not address the relevancy of these actions at this time.

decertify the plaintiff class and for summary judgment.[6]

II. LEGAL STANDARDS

A. Substantive and Procedural Overview of the FLSA

The Fair Labor Standards Act compels employers to pay the federal minimum wage and provide overtime pay to those employees covered by the Act's overtime provisions. See Jewell Ridge Coal Corp. v. Local No. 6167, 325 U.S. 161, 167 (1945). An employer must compensate any covered, non-exempt employee who works more than forty hours per workweek for "employment in excess of the hours above specified 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). If the employer violates the FLSA by failing to pay the minimum wage or overtime compensation to a covered employee, then the employer is "liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). In an action by an employee to recover unpaid wages under

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[6] The Court agrees with Plaintiffs that Defendants' motion for summary judgment is in tension with their motion to decertify since one seeks to conclude the case on a classwide basis while the other argues that classwide adjudication is improper. See Helmert v. Butterball, LLC, No. 4:08CV00342 JLH, 2009 WL 5066759, at *4 n.3 (E.D. Ark. Dec. 15, 2009) (citing Spoerle v. Kraft Foods Global, Inc., 253 F.R.D. 434, 439 (W.D. Wis. 2008)).

the FLSA,[7] the employee generally "must prove by a preponderance of evidence that he or she 'performed work for which he [or she] was not properly compensated.'" Myers v. Copper Cellar Corp., 192 F.3d 546, 551 (6th Cir. 1999) (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686-87 (1946)).

To be liable under the FLSA, however, an employer must possess actual or constructive knowledge of the employee's overtime. Thus, "where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of . . . [the FLSA]." Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413, 414 (9th Cir. 1981). Nevertheless, "[w]ork not requested but suffered or permitted is work time" for which the employer is liable. 29 C.F.R. § 785.11; see Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 718 (2d Cir. 2001) ("[A]n employee must be compensated for time she works outside of her scheduled shift, even if the employer did not ask that the employee work during that time, so long as the employer 'knows or has reason to believe that [the employee] is continuing to work' and that work was

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[7] Although an employee may maintain a suit against his employer for unpaid wages or overtime compensation, the FLSA also enables the United States Secretary of Labor to sue the employer for monetary and injunctive relief. 29 U.S.C. §§ 216(b)-(c), 217; see Bureerong v. Uvawas, 922 F. Supp. 1450, 1464 (C.D. Cal. 1996).

'suffered or permitted' by the employer.") (quoting 29 C.F.R. § 785.11).

To ensure compliance with its provisions, the FLSA mandates that an employer keep and preserve records of its employees' wages and hours in addition to records concerning its employment practices. 29 U.S.C. § 211(c); 29 C.F.R. § 516.2. An employee who proves that the relevant records kept by the employer are unreliable is held to a less stringent standard of proof in establishing damages for unpaid overtime compensation under the FLSA. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946).

> [W]here the employer's records are inaccurate or inadequate . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Herman v. Palo Group Foster Home, Inc., 183 F.3d 468, 472 (6th Cir. 1999) (quoting Mt. Clemens, 328 U.S. at 687-88); Myers, 192 F.3d at 551 n.9.

Under § 216(b), an aggrieved employee may bring a "collective action" on behalf of other "similar-

ly situated" employees who expressly consent in writing to join the suit. 29 U.S.C. § 216(b). The process of bringing a § 216(b) collective action is "distinguished from the opt-out approach utilized in class actions under Fed. R. Civ. P. 23," Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006), and employees who opt into a FLSA collective action "are party plaintiffs, unlike absent class members in a Rule 23 class action," O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 583 (6th Cir. 2009) (citing 7B Wright, Miller & Kane, Federal Practice and Procedure § 1807 at 474 n.13 (3d ed. 2005)).

Many trial courts utilize a two-step approach to certification of a collective action under § 216(b). See id. at 583-84. In the first stage, conditional certification is granted on a modest factual showing that the named plaintiff or plaintiffs and the putative opt-in plaintiffs were aggrieved in some similar manner. See White v. MPW Indus. Servs., Inc., 236 F.R.D. 363, 366 (E.D. Tenn. 2006) (collecting cases from several courts). If this lenient standard is satisfied, the court conditionally certifies the class, and the putative class members receive notice regarding their ability to opt into the action. Id. (citation omitted); Johnson v. Koch Foods, Inc., 657 F. Supp. 2d 951, 953-54 (E.D. Tenn. 2009). The second stage presents the more demanding and factually-intensive inquiry into whether the class should be decertified, and "to avoid decertification, a plaintiff must meet a stricter standard of proving that the putative plaintiffs are similarly situated." White, 236 F.R.D. at 366 (internal quotation marks and citations omitted); see Koch Foods, Inc., 657 F. Supp. 2d at 954. "The burden of demonstrating that class members are similarly situated is significantly higher at the decertification stage and requires consideration of the disparate fac-

tual and employment settings of the individuals, the defenses available to the defendants, and fairness and procedural considerations." Jordan v. IBP, Inc., 542 F. Supp. 2d 790, 812 (M.D. Tenn. 2008).

B. Legal Standard for Motion for Summary Judgment

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Although hearsay evidence may not be considered on a motion for summary judgment, Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 927 (6th Cir. 1999), evidentiary materials presented to avoid summary judgment otherwise need not be in a form that would be admissible at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Thaddeus-X v. Blatter, 175 F.3d 378, 400 (6th Cir. 1999). The evidence and justifiable inferences based on facts must be viewed in a light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Wade v. Knoxville Utilities Bd., 259 F.3d 452, 460 (6th Cir. 2001). At the summary judgment stage, "the judge's role is not to weigh the evidence and determine the truth of the matter, but to decide whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

Summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. The moving party can prove the absence of a genuine issue of ma-

terial fact by showing that there is a lack of evidence to support the nonmoving party's case. Id. at 325. This may be accomplished by submitting affirmative evidence negating an essential element of the nonmoving party's claim, or by attacking the nonmoving party's evidence to show why it does not support a judgment for the nonmoving party. 10A Charles A. Wright et al., Federal Practice and Procedure § 2727 (3d ed. 1998).

Once a properly supported motion for summary judgment has been made, "an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. Anderson, 477 U.S. at 248. To avoid summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586.

III. ANALYSIS[8]

A. Sufficiency of Plaintiffs' Proof as to Hours and Compensation

Defendants argue that Plaintiffs' proof is insufficient to support a finding of liability on a classwide basis and that no plaintiff in this case has offered reliable and competent proof of damages. More specifically, Defendants first contend that Plaintiffs have

[8] The Court will consider Defendants' motion for summary judgment before proceeding to consider their motion to decertify the plaintiff class.

failed to produce evidence from which their damages can be calculated on a classwide, as opposed to an individual, basis. Stated otherwise, Defendant's position is that because Plaintiffs allege that they were deprived of pay for overtime that was worked but never reported, there is no reliable means of determining how many uncompensated overtime hours each plaintiff worked short of hearing each plaintiff's claim individually and determining both liability and damages in what would amount to nearly 300 mini-trials.[9] Further, Defendants assert that Plaintiffs' estimates of the uncompensated overtime they worked are "self-serving and speculative" and thus insufficient to support their claims as a matter of law. Finally, Defendants argue that Plaintiffs' estimates fail to account for the fact that Plaintiffs' compensation was not set at a flat per hour rate, but instead varied depending on the task performed by the technician. As a result of these alleged deficiencies in Plaintiffs' proof, Defendants maintain that the entire case must be dismissed.

The evidence before the Court, however, when viewed in the light most favorable to Plaintiffs, gives rise to factual inferences that are fatal to Defendants' arguments. According to Plaintiffs' proof, Defendants—through individual supervisors and managers—instructed employees to omit overtime from their timesheets, altered timesheets that accurately reflected overtime hours, deducted time for lunch breaks whether or not employees took lunch, and knowingly accepted timesheets that did not match

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[9] Though Defendants state that there are now 275 plaintiffs in this case, Plaintiffs' represent that the number of plaintiffs now stands at 303.

employee tick sheets or coincide with the hours the employees worked. These facts, if accepted by the finder of fact, compel the conclusion that Defendants' records are inaccurate or inadequate. See Robinson v. Food Serv. of Benton, Inc., 415 F. Supp. 2d 1227, 1228-29 (D. Kan. 2005) ("If the jury decides that the time records are accurate and complete, then any damages owed to plaintiffs will be readily ascertainable by reference to those records. If the jury decides that the time records are inaccurate or incomplete, then plaintiffs' evidence concerning their damages is sufficient . . . .").

Because Defendants' records—at least according to Plaintiffs' evidence—are inaccurate, Plaintiffs' "burden of proof is relaxed, and, upon satisfaction of that relaxed burden, the onus shifts to the employer to negate the employee's inferential damage estimate." Myers, 192 F.3d at 551. To support their inferential damage estimate, Plaintiffs use the memories of individual plaintiff-employee witnesses to develop estimates as to how much overtime Plaintiffs worked without compensation. Defendants assert that this evidence is insufficient because it is "self-serving." The Court disagrees. As with any testimony that depends on the memory of a party, there are a host of reasons—including bias—that an estimate based on a plaintiff's recollection of hours worked weeks, months, and years previous might be inaccurate. Defendants will no doubt attempt to impeach Plaintiffs' estimates at trial, but the fact that evidence may be impeached for bias is no cause for its categorical exclusion. For well more than a century, Anglo-American jurisprudence has been free of the former rule by which a party was disqualified from acting as a witness in his own case on the grounds that testimony from parties is inherently untrust-

worthy. See Ferguson v. Georgia, 365 U.S. 570, 573-83 (1961) (tracing the demise of this rule in both civil and criminal cases throughout Anglo-American legal world); see also Fed. R. Evid. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."). Thus, the mere fact that a plaintiff's damages estimate may be self-serving hardly makes the plaintiff's evidence incompetent. See, e.g., Donovan v. Kentwood Devel. Co., 549 F. Supp. 480, 485-87 (D. Md. 1982). Although Defendants urge the Court to reject Plaintiff's estimates of their uncompensated overtime as self-serving, the Court finds that Plaintiffs' approximations are sufficient for consideration by the factfinder at trial as a good faith "inferential damage estimate" of Plaintiffs' purported back wages. See Herman, 183 F.3d at 472 (quoting Mt. Clemens, 328 U.S. at 687-88).

Defendants likewise contend that Plaintiffs' estimates are too "speculative" to allow their claims to survive summary judgment and that, because Plaintiffs' hourly rate varies depending on the type of job performed, Plaintiffs must prove the type of work they undertook in their overtime hours in order to recover any pay for that time. It is, however, a fundamental precept of the FLSA that an employee "should not be denied [recovery] because proof of the number of hours worked is inexact or not perfectly accurate." Mendez v. Brady, 618 F. Supp. 579, 587 (W.D. Mich. 1985) (citations omitted); see Berger v. Cleveland Clinic Found., No. 1:05 CV 1508, 2007 WL 2902907, at *15 (N.D. Ohio Sept. 29, 2007) (quoting Mendez, 618 F. Supp. at 587); cf. Mt. Clemens, 328 U.S. at 688. Moreover, as the Supreme Court has explained:

> [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of . . . the Act . . . . Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages.

Mt. Clemens, 328 U.S. at 688 (internal quotation marks and citations omitted); see Donovan v. Tony and Susan Alamo Found., 722 F.2d 397, 403-04 (8th Cir. 1983). In the instant case, Plaintiffs offer substantial evidence that they worked uncompensated overtime, and thus their right to recovery is not speculative. Further, the fact that the type of work Plaintiffs performed determined their rate of compensation does not alter the fact that, if they worked overtime performing any task for Defendants, Plaintiffs were entitled to receive compensation. The fact that this calculation will necessarily be inexact does not mean that Plaintiffs did not suffer damages. At

trial, Plaintiffs need only offer evidence from which the finder of fact can reasonably infer what their pay would have been otherwise. Therefore, Defendants are not entitled to summary judgment.

The Court also rejects Defendants' contention that Plaintiffs have failed to show that this is a proper case in which to litigate and award damages on a classwide basis. Defendants aver that the claims of all but the forty-nine members of the plaintiff class who have supplied evidence that they worked uncompensated overtime should fail because the record contains no evidence that these other class members worked uncompensated overtime. First, the Court cannot accept Defendants' contention that the parties' stipulated agreement to limit discovery to fifty representative plaintiffs did not also manifest Defendants' acquiescence to a process by which the remaining members of the class would not have to produce evidence as a prerequisite to proceeding to trial on their claims. Nevertheless, even if Defendants only agreed to limit discovery and did not also agree to litigate the claims of the class in a representative manner, Plaintiffs have come forward with damages estimates from the representative plaintiffs on which the finder of fact may reasonably establish damages for the entire class of plaintiffs as a matter of just and reasonable inference.

The Sixth Circuit has expressly recognized that "it is possible that representative testimony from a subset of plaintiffs could be used to facilitate the presentation of proof of FLSA violations, when such proof would ordinarily be individualized," O'Brien, 575 F.3d at 585, and that "[t]he testimony of fairly representative employees may be the basis for an award of back wages to nontestifying employees,"

U.S. Dep't of Labor v. Cole Enters., Inc., 62 F.3d 775, 781 (6th Cir. 1995) (citations omitted); see, e.g., Baden-Winterwood v. Life Time Fitness, Inc., 729 F. Supp. 2d 965, 995-97 (S.D. Ohio 2010) (utilizing testimony of representative plaintiffs to set damages for nontestifying plaintiffs).

As explained more fully in the Court's discussion of Defendants' motion to decertify the plaintiff class, Plaintiffs have demonstrated that this case is appropriate for trial on representational proof. Plaintiffs' evidence, if credited, establishes that Defendants violated the FLSA with respect to all members of the class, which means that, if the finder of fact agrees with Plaintiffs that FLSA violations occurred, then the fact-finder will be tasked with setting Plaintiffs' damages. Damages in such a case are not set according to proof by a preponderance of the evidence as to every individual plaintiff, but in accordance with the amount the representational proof establishes for the class members as a matter of just and reasonable inference. See Herman, 183 F.3d at 472. Evidence from every member of the plaintiff class is not required for this task and, if required, would be so burdensome as to make trial of this case, or any other large collective action under § 216(b), impracticable. Accordingly, Defendants' motion for summary judgment on the grounds that Plaintiffs' proof is insufficient to establish violations of the FLSA and to set damages as to the entire class is **DENIED**.

B. Evidence of Defendants' Willfulness

The Court also denies Defendants motion for summary judgment as to whether any violation of the FLSA by Defendants was willful. Although FLSA claims are normally subject to a two-year statute of limitations, a three-year statute of limitations

applies where the plaintiff proves by a preponderance of the evidence that the employer's violation was willful. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133-35 (1988); Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 967 (6th Cir. 1991). For a FLSA violation to be considered willful, the plaintiff must show "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute[.]" McLaughlin, 486 U.S. at 133; Dole, 942 F.2d at 967. Noncompliance with the FLSA that is merely negligent, even if unreasonable, is not considered willful. McLaughlin, 486 U.S. at 135 & n.13.

Defendants argue that the evidence before the Court fails to show that any failure to properly pay Plaintiffs overtime, as mandated by the FLSA, was willful. Defendants contend that because Plaintiffs received compensation in accordance with the timesheets Plaintiffs admit they submitted, any FLSA violation would not be willful. Defendants additionally argue that they have shown that they had in place a series of measures to guarantee FLSA compliance, including a written policy to pay all overtime due, individual and group training for managers on how to ensure that overtime is properly recorded, instruction for technicians on filling out timesheets, and internal auditing mechanisms designed to reconcile any potential discrepancies between an employee's timesheet and his tick sheet. As a result, Defendants assert, any FLSA violation was the result of "rogue" managers or supervisors in individual offices, not company policy. Defendants also imply that Plaintiffs must show that they informed a corporate officer of any problems in receiving overtime pay in order to show a willful FLSA violation.

Despite Defendants' contentions, the Court finds that Plaintiffs' proof belies Defendants' factual assertions, creating material issues of fact for trial. First, the existence of written policies setting forth proper rules for the payment of overtime does not itself immunize an employer from a finding that the employer willfully violated the FLSA. See Reich v. Dep't of Conservation & Nat'l Res., 28 F.3d 1076, 1083 (11th Cir. 1994); see also Chao v. Gotham Registry, Inc., 514 F.3d 280, 288-89 (2d Cir. 2008); cf. 29 C.F.R. § 785.13 ("[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed . . . . The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so."). Plaintiffs have offered substantial evidence that supervisors instructed technicians to omit overtime from their timesheets and otherwise understate their hours. Plaintiffs have further offered evidence that supervisors adjusted hours recorded by technicians to eliminate overtime pay and that, notwithstanding the internal reconciliation process, Defendants paid overtime based on timesheets that reflected less time worked than the corresponding tick sheets. These violations allegedly occurred not at a few discrete locations, but at field offices across the country. Such evidence suggests the possibility of a company culture in which written policies on overtime were disregarded as a matter of course. This allows the factfinder to conclude that Defendants willfully failed to ensure FLSA compliance.

Moreover, since Plaintiffs contend that they did not record the time they worked overtime because their supervisors' instructed them not to, Defendants

cannot escape a finding of willfulness by asserting that Plaintiffs failed to properly document their overtime hours. Jarrett v. ERC Props., Inc., 211 F.3d 1078, 1083 (8th Cir. 2000) (deeming evidence sufficient to sustain a finding of willfulness where employee was told by immediate supervisors to not record overtime despite policy manual indicating otherwise). Contrary to Defendants' representations, members of the Plaintiff class have offered proof that they reported their concerns about not receiving proper overtime pay to their supervisors. Although there exists no requirement that an FLSA plaintiff report the nonpayment of overtime to a corporate officer, at least two plaintiffs testified that they attempted to report their concerns about uncompensated overtime to Defendants' corporate headquarters, only to receive no response.

If accepted, Plaintiffs' evidence indicates that Defendants' alleged violations of the FLSA were not merely negligent, but were instead the result of a pervasive policy within the ranks of Defendants' management to deny pay for compensable overtime worked by technicians. In light of this evidence, the Court finds that there are disputed issues of material fact as to the question of Defendants' willfulness, making summary judgment inappropriate.

C. Plaintiffs Dowdy, Jones, Crossan, Boone, and Whitehead

In addition to the arguments advanced regarding the plaintiff class as a whole, Defendants also offer specific reasons for dismissal of the claims of five individual members of the plaintiff class.

1. Plaintiffs Dowdy and Jones

Defendants first argue that the Court should dismiss the claims of Plaintiffs Danny Dowdy and Marcus Jones because they intentionally did not report overtime hours. Although Defendants are correct that an employer is generally not liable for overtime under the FLSA if the employee deliberately prevents the employer from learning of the overtime worked, see Brennan v. Qwest Commc'ns Int'l, Inc., 727 F. Supp. 2d 751, 758-59 (D. Minn. 2010), where the employee's failure to report overtime results from a supervisor's direction to not record overtime, the employer remains liable, see Allen v. Board of Pub. Educ. for Bibb Cnty., 495 F.3d 1306, 1319-20 (11th Cir. 2007) ("[W]hen an employer's actions squelch truthful reports of overtime worked, or where the employer encourages artificially low reporting, it cannot disclaim knowledge.") (citing Brennan v. Gen. Motors Acceptance Corp., 482 F.2d 825, 828 (5th Cir. 1973)); see, e.g., Jarrett, 211 F.3d at 1083. Plaintiffs Dowdy and Jones both testified that they refrained from reporting overtime only because they were told by their supervisors that they should not record time beyond the normal forty-hour workweek. (See Pls.' Response to SOF ¶¶ 47, 50.) Plaintiff Dowdy even testified that he was threatened with termination if he continued to report overtime. Rather than undermining the claims of Plaintiffs Dowdy and Jones, these facts support the contention of the entire plaintiff class that Defendants engaged in a widespread policy of discouraging the recording of overtime by technicians. Accordingly, Defendants' motion as to Plaintiffs Dowdy and Jones is **DENIED**.

2. Plaintiffs Crossan and Boone

Defendants next contend that the Court must dismiss Plaintiff Paul Crossan's claims because, when deposed, he failed to provide testimony to reasonably support the estimated hours of uncompensated overtime he worked. Defendants, however, mischaracterize the nature of the Plaintiff Crossan's testimony. Plaintiff Crossan testified that he based his damages estimate on the average number of hours he recalls working per day and the number of times he remembers not returning home until well after the normal end time for his workday. Although he used the term "guesstimate" to describe his calculation, he clearly purports to base his assertion on his recollection of the facts, making it sufficient for consideration by the fact-finder in reaching a just and reasonable approximation of overtime owed. (Id. ¶ 49.)

Defendants challenge Plaintiff Tyrus Boone's claims on the grounds that, when he testified, he could not recall whether his timesheets were accurate. What Defendants omit is that Plaintiff Boone specifically testified that he recalled observing supervisors and others alter his timesheets after he had turned them in. (Id. ¶ 51.) Clearly, a permissible inference to be drawn from his testimony was that he could not speak to the accuracy of any particular timesheet because he knew his timesheets were altered. Likewise, Plaintiff Boone is not required to testify as the exact dates on which he believes he worked uncompensated overtime. This does not mean that he is precluded from testifying generally that he recalls working overtime for which he did not receive proper compensation. Therefore,

Defendants' motion as to Plaintiffs Crossan and Boone is **DENIED**.

3. Plaintiff Whitehead

Finally, Defendants move for summary judgment as to the claims of Plaintiff Christopher Andrew Whitehead. Counsel selected Plaintiff Whitehead as one of the fifty members of the plaintiff class from whom discovery would be taken. Although Defendants sent him interrogatories and requests for admissions, Plaintiff Whitehead has failed to respond to Defendants' discovery. Defendants cast their request as one for summary judgment based on a lack of evidence in the record to support Plaintiff Whitehead's claims, but the Court finds that Defendants' request is more appropriately analyzed as a motion to dismiss for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure.

Considering all appropriate factors, the Court finds that dismissal of Plaintiff Whitehead's claims at this juncture is inappropriate. See Schafer v. City of Defiance Police Dep't, 529 F.3d 731, 737 (6th Cir. 2008) (articulating factors to consider in determining whether to dismiss for failure to prosecute, including prejudice to the defendant, whether the plaintiff was previously warned about the consequences of failing to prosecute, and whether less drastic alternatives have already been imposed). Because the other forty-nine representative plaintiffs responded to discovery, Defendant is not prejudiced by Plaintiff Whitehead's delinquent discovery, and the Court has not previously cautioned Plaintiff Whitehead that failing to prosecute could result in dismissal. Nor has the Court previously imposed a lesser sanction.

Accordingly, Defendants' request for summary judgment to dismiss Plaintiff Whitehead's claims is **DENIED**. Plaintiff Whitehead is given twenty (20) days to respond to Defendants' discovery. Plaintiff Whitehead is hereby placed on notice that further refusal to cooperate in discovery may result in dismissal of his claims with prejudice, pursuant to Federal Rule of Civil Procedure 41(b), or other appropriate sanction.

D. Defendants' Motion to Decertify Class

Section 216(b) allows a collective action by employees who are "similarly situated," though it leaves the term "similarly situated" undefined. Courts across the country have reached divergent results in attempting to ascertain the meaning of "similarly situated" as used § 216(b). See Bouaphakeo v. Tyson Foods, Inc., 564 F. Supp. 2d 870, 890-91 (N.D. Iowa 2008). The Sixth Circuit has made clear that the "similarly situated" standard is less demanding than the standard for certification of a class under Rule 23 of the Federal Rules of Civil Procedure. O'Brien, 575 F.3d at 584 ("While Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so in the FLSA.") (citations omitted).

At the decertification stage, courts consider a variety of factors in determining whether plaintiffs are similarly situated, including "(1) the disparate factual and employment settings of the individual plaintiffs, such as a) job duties; b) geographic location; c) supervision; and d) salary; (2) the various defenses available to the defendant that appear to be individual to each plaintiff; and (3) fairness and procedural considerations." Wilks v. The Pep Boys, No. 3:02-0837, 2006 WL 2821700, at *3 (M.D. Tenn. Sept. 26,

2006) (citing White, 236 F.R.D. at 367 and Moss v. Crawford & Co., 201 F.R.D. 398, 409 (W.D. Pa. 2000)); see O'Brien, 575 F.3d at 584. Plaintiffs are not required to show a "unified policy" by the defendant in order to be similarly situated. O'Brien, 575 F.3d at 584. "Some courts employ a separate balancing test after considering these factors, while others fit the balancing test under the rubric of the 'fairness and procedural considerations' factor." Wilks, 2006 WL 2821700, at *3 (internal citations omitted). Irrespective of how the inquiry is formulated, the trial court's ultimate responsibility in considering these factors is to weigh the benefits of litigating all claims in a single proceeding against any prejudice to the defendant and any other procedural obstacles that may undermine the utility of a collective action. Id. (citations omitted); see O'Brien, 575 F.3d at 585-86. Stated otherwise, in considering decertification, "[t]he question is simply whether the differences among the plaintiffs outweigh the similarities of the practices to which they were allegedly subjected." Frye v. Baptist Mem'l Hosp., No. CIV. 07-2708-Ma, 2010 WL 3862591, at *3 (W.D. Tenn. Sept. 27, 2010) (citation omitted). "If the plaintiffs are similarly situated, the action proceeds collectively. 'If the claimants are not similarly situated,' however, 'the court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice. The class representatives—i.e. the original plaintiffs—proceed to trial on their individual claims.'" Id. (quoting Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir. 2001) (other citations omitted)).

In moving to decertify the plaintiff class, Defendants argue that the facts surrounding the claims of each individual plaintiff in the class are too different for Plaintiffs to be considered "similarly situated" for

purposes of a § 216(b) collective action. First, Defendants contend that decertification is proper because Plaintiffs do not allege that they were subjected to one uniform policy, but rather make allegations that vary depending on the supervisor and location of work. Contrary to Defendants' assertions, however, Plaintiffs' claims rely on a series of common methods by which Defendants allegedly deprived technicians proper overtime pay regardless of location or supervisor. Specifically, Plaintiffs have presented evidence indicating that Defendants (1) altered technicians' timesheets to eliminate or understate overtime hours; (2) directed technicians to either not report or underreport their overtime hours; and (3) discouraged the reporting of overtime by use of a piece-rate compensation system accompanied by the threat of being terminated or receiving less than a full work schedule if overtime was reported. Plaintiffs across the class allege these same practices. Additionally, the plaintiff class comprises cable technicians tasked with the same job responsibilities and subject to pay under the same piece-rate system. Such a unifying set of facts and theories strongly counsels against decertification, notwithstanding certain variations in the factual circumstances of each individual plaintiff's situation. See, e.g., Wilks, 2006 WL 2821700, at *4-6 (finding decertification inappropriate, even though there were variations in the claims presented by each individual plaintiff, because the plaintiffs offered proof that the defendant subjected them "to a common, impermissible practice in a manner that suffices to meet their burden at this decertification stage of the proceedings"); see also Moss v. Crawford & Co., 201 F.R.D. 398, 409 (W.D. Pa. 2000).

Defendants further contend that decertification is warranted because the question whether Defendants had knowledge, either actual or constructive, of Defendants' uncompensated overtime will vary depending on whether that individual plaintiff complained of not receiving proper overtime. The Court squarely rejects this contention. So long as Defendants were generally aware—either actually or constructively—of the types of practices that Plaintiffs allege were used to deny them overtime, there is no requirement in the law to compel each member of the plaintiff class to establish that he or she individually complained of the FLSA violation. Imposition of such a perquisite for recovery would undermine the entire collective action vehicle by requiring specific evidence where Congress has decreed that more generalized proof will suffice. See O'Brien, 575 F.3d at 585. Of course, nothing about allowing Plaintiffs' proof to proceed in a collective fashion precludes Defendants from presenting the proof they deem appropriate to support their position that they were unaware of any of the violations Plaintiffs allege.

Defendants likewise assert that adjudication of Plaintiffs' claims on a classwide basis is improper because the finder of fact must assess the credibility of the each plaintiff individually as to how much, if any, uncompensated overtime he or she worked. Defendants also argue that their defenses can only be raised individually. The Court first notes that many of the purported defenses Defendants identify are clearly amenable to classwide determination. This includes the issues of whether management knew of the methods being used to deny overtime pay and whether Defendants acted willfully, since, as stated above, showing notice of an illegal practice would surely place Defendants on notice of FLSA issues af-

fecting more than the single individual who complained. Defendants' other purported defenses are in effect other ways of asserting that the finder of fact must assess each plaintiff's credibility, including how many hours he or she worked, what individual supervisors knew about the alleged uncompensated overtime, and whether the overtime work was pursuant to a supervisor's instructions. The Court finds that the use of representative testimony in a collective action will not impair Defendants' ability to effectively raise these issues. The plaintiffs who testify will do so in a representative capacity, and the issues Defendants raise concerning the nature and extent of the plaintiffs' alleged uncompensated overtime may be broached with the testifying plaintiffs. While it will not afford the same level of forensic specificity as cross-examination of each plaintiff individually, a collective action under § 216(b) is not held to the same rigors as either a typical lawsuit or a class action under Rule 23 precisely because the FLSA contemplates that representative testimony may be used to adjudicate the claims of nontestifying plaintiffs and thereby arrive at an approximation of damages.[10] See O'Brien, 575 F.3d at 585; Nerland v. Caribou Coffee Co., Inc., 564 F. Supp. 2d 1010, 1024 (D. Minn. 2007) ("[A]lthough . . . [the defendant] . . . contends it has the right to defend against individualized claims on an individual basis, rather than collectively, . . . this right must be balanced with the rights of the plaintiffs—many of whom

[10] Of course, the finder of fact at trial will only be required to set damages by the "just and reasonable inference" standard if it first finds by a preponderance of the evidence that Defendants' records are inaccurate or inadequate.

would likely be unable to bear the costs of an individual trial—to have their day in court.") (citation omitted); Wilks, 2006 WL 2821700, at *3 ("Notably, even at the decertification stage, similarly situated does not mean identically situated.") (emphasis in original); see, e.g., Takacs v. Hahn Auto. Corp., No. C-3-95-404, 1999 WL 33127976, at *1 (S.D. Ohio Jan. 25, 1999) ("[D]amages in FLSA cases may be proved with evidence from representative employees (in other words, . . . it is not necessary that every Plaintiff testify in order to prove his or her damages.)").

Fairness and procedural considerations also strongly militate against decertification. If not addressed as a collective action, the claims of the plaintiff class would have to be heard in individual suits—perhaps requiring more than 300 mini-trials. The investment of time and resources required for this many separate trials would render adjudication of Plaintiffs' claims so unwieldy and expensive as to substantially hinder, if not preclude, their resolution by judicial means. Such a result is incompatible with the goals of FLSA collective actions, which include facilitating trial of claims that otherwise would be too cost-prohibitive to warrant independent litigation. See, e.g., Nerland, 564 F. Supp. 2d at 1026 (denying decertification because, in part, it would "contravene[] the policy behind collective actions under section 216(b) of the FLSA of allowing plaintiffs to vindicate their rights with lower individual costs by pooling resources and benefitting the judicial system through efficient resolution in one proceeding of common issues of fact and law arising from the same alleged . . . activity") (internal quotation marks and citation omitted).

Therefore, the Court finds that the differences among Plaintiffs' individual claims are so not great as to predominate over the ways that their claims are similar or to outweigh the benefits of proceeding on the Plaintiffs' claims a collective action under § 216(b). See Frye, 2010 WL 3862591, at *3; Wilks, 2006 WL 2821700, at *8. Accordingly, Defendants' motion to decertify the plaintiff class is **DENIED**.

IV. CONCLUSION

For the reasons stated above, Defendants' motion to decertify the plaintiff class is **DENIED**. Defendants' motion for summary judgment is also **DENIED**. Plaintiff Whitehead is **ORDERED** to respond to Defendants' discovery within twenty (20) days of the date of this order. Plaintiff Whitehead is cautioned that continued failure to participate in discovery may subject his claims to dismissal under Federal Rule of Civil Procedure 41(b) for failure to prosecute. The parties are **ORDERED** to submit an amended scheduling order within fifteen (15) days specifying the number of trial days required. Thereafter, by separate order, the Clerk will set a trial date in accordance with the needs of the parties. Failure to timely abide by this order will result in the Court entering an order fixing pretrial and trial dates sua sponte.

IT IS SO ORDERED, this the 7th day of February, 2011.

s/ Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, on behalf of themselves and all other similarly situated employees, Plaintiffs, v. FTS USA, LLC, and UNITEK USA, LLC, Defendants.	CIVIL ACTION No. 2:08-cv-2100 The Honorable Bernice B. Donald

ORDER DENYING DEFENDANT'S MOTION TO PRECLUDE PLAINTIFFS FROM USING REPRESENTATIVE PROOF AT TRIAL

Before the Court is Defendant's motion to prevent Plaintiffs from using representative proof at trial. (D.E. 246). On September 1, 2011, the Court heard arguments of counsel as to issues raised in the motion. After considering the motion, response, applicable case law and rules, the court finds that Plaintiffs should be allowed to use representative proof. Moreover, the Court finds that the class representatives identified by Plaintiff sufficiently represent the class. Moreover, the court finds that unlike the class in Wal-mart v. Dukes., 131 S. Ct. 2541 (2011), this case represents a very narrow issue:

1) whether Plaintiffs were entitled to overtime, and 2) whether Defendants failed to pay overtime in violation of the FSLA.

To deny the use of representative proof in this case would undermine the purpose of class wide relief, and would have the effect of decertifying the class.

For these reasons, Defendant's motion is DENIED.

s/ Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, on behalf of themselves and all other similarly situated employees, Plaintiffs, v. FTS USA, LLC, and UNITEK USA, LLC, Defendants.	CIVIL ACTION No. 2:08-cv-02100 The Honorable Bernice B. Donald

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50

Before this court is Defendants' motion for judgment as a matter of law (D.E. #346.) For the reasons set forth below, the Motion is **DENIED**.

"Judgment as a matter of law is appropriate when viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion in favor of the moving party." Tisdale v. Fed. Express Corp., 415 F.3d 516, 527 (6th Cir. 2005) (internal quotation omitted). In the instant case Defendants assert two

grounds in support of the motion: (1) Plaintiffs failed to establish damages; and (2) Plaintiffs claims for compensation during commuting time fail as a matter of law under the FLSA and the continuous workday doctrine does not apply here.

In support of the motion, Defendants argue first that Plaintiffs cannot establish damages. However, in their motion Defendants acknowledge "FTS maintained meticulous records – which are admitted in evidence – that display the number of hours recorded on a weekly basis, the total amount of production for each week." (Def.'s Memo of Law, D.E. #346-1, at 5.) Clearly, the record contains sufficient evidence, when viewed in the light most favorable to the non-moving party, for a reasonable juror to determine damages.

Defendants then contend that Plaintiffs must produce an expert damages report to establish damages. Defendants are mistaken, Plaintiffs need only establish the basis for a reasonable inference that they were due compensation they did not receive; once sufficient proof is in the record that employees were in fact due compensation, jurors may draw a reasonable inference as to the extent of the damages. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946).[1] This policy incentivizes employers to maintain just the type of "meticulous" records that Defendants have claimed existed in the instant case. Such records should provide a sufficient basis of damages; to the extent they do not, jurors are free to

[1] While *Anderson* has been abrogated in part by 29 U.S.C. § 251, *United States v. Cook,* 795 F.2d 987, 990-91 (Fed. Cir. 1986), the portion cited here was not. Solano v. A Navas Party Prod., 728 F. Supp. 2d 1334, 1342 n.6 (S.D. Fla. 2010).

award "approximate" damages so long as there is a basis for a reasonable inference. Id.

Next, Defendants argue that the testimony in the record is insufficient to establish damages for the non-testifying Plaintiffs. Essentially, the question is whether there is a large enough statistical sampling to provide an accurate measurement of damages. Defendants cite Grochowski v. Phoenix Construction, 318 F.3d 80, 88-89 (2d Cir. 2003), but fail to recognize a key distinction: in *Grochowski* there were only nine Plaintiffs, a small and manageable class of Plaintiffs where extrapolating from a sufficient sample is not necessary or appropriate. On the other hand, the Supreme Court found eight of 300 employees a sufficient sampling to establish damages for nontestifying Plaintiffs. Anderson, 328 U.S. at 687-88; *see also, e.g.,* Reich v. Southern New England Telecomms. Corp., 121 F.3d 58, 66-68 (2d Cir. 1997) (39 employees out of 1,500 found to be a sufficient sampling); Donovan v. New Floridian Hotel, Inc., 676 F. 2d 468, 472-73 (11th Cir. 1982) (23 employees out of 207 found to be a sufficient sampling). Here, Defendants do not dispute that evidence of eighteen employees was entered into the record. Rather, Defendants argue that the absence of testimony from 280 other employees establishes Plaintiffs failure to meet their burden. Defendants contend that eighteen employees is an insufficient sample size to establish the damages of the other 280 employees.

Again, the Defendants are mistaken. Like *Anderson*, *Reich*, & *Donovan* show, courts may allow a sample of employees to testify in order to prove an FLSA violation. Here, a sample sufficient for the jury to make a reasonable inference existed. *See* Anderson, 328 U.S. at 687-88.

Defendants next argue that because Plaintiffs failed to show precisely which weeks each employee worked in excess of forty-hours, the court must find no reasonable juror could conclude any violation occurred. Despite the appeal, such an argument fails because the Plaintiffs burden is not so great. While Defendants are correct that Plaintiffs carry a burden of establishing the violation of FLSA, such burden shifts to the employer upon presentation of evidence sufficient for a jury to draw a reasonable inference that a violation existed. Id. Here, the evidence put on by the Plaintiff was sufficient that a reasonable juror could conclude a violation existed. Specifically, Plaintiff's introduced evidence at least sufficient to show a violation as it relates to eighteen employees as recognized in the Defendants motion. From this a juror may reasonably infer a systematic practice by the Defendant of not paying their employees the overtime they were due. Such reasonable inferences are of course subject to rebuttal by the Defendant. That just such an inference exists, though, is sufficient to defeat the Defendants motion here.

Defendants argue also they are entitled to judgment as a matter of law as it relates to any damages for commuting time because the employees who testified, arguably, had discretion as to when certain work activities had to be conducted. Because this is an issue of fact, and a reasonable juror could find to the contrary, judgment as a matter of law is inappropriate.

Finally, Defendants argue the Plaintiffs are not similarly situated so that extrapolating from a sample of employees is fundamentally unfair and in violation of the FLSA. Whether employees are similarly situated within the meaning of the FLSA was previ-

ously addressed by this court when it held "the Court finds that the differences among Plaintiffs' individual claims are so not great as to predominate over the ways that their claims are similar or to outweigh the benefits of proceeding on the Plaintiffs' claims a collective action under § 216(b)." Monroe v. FTS USA, L.L.C., 763 F. Supp. 2d 979, 996 (W.D. Tenn. 2011). The court reaffirms its earlier written and oral rulings without additional discussion.

CONCLUSION

For the reasons stated above, Defendants' motion for judgment as a matter of law is **DENIED**.

IT IS SO ORDERED this 22nd day of February, 2012.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, *on behalf of themselves and all other similarly situated employees*, Plaintiffs, v. FTS USA, LLC and UNITEK USA, LLC, Defendants.	)	Case No. 2:08-cv-02100-JTF-cgc

ORDER FOR ENTRY OF JUDGMENT WITH DAMAGES

Before the Court is Plaintiffs' Motion for Entry of Judgment with Damages. Based upon the Plaintiffs' memoranda, the Court has determined that Plaintiffs' Motion for Entry of Judgment with Damages is GRANTED.

This Court having decided that damages would be determined post-trial if the jury returned a verdict on liability in Plaintiffs' favor, and a jury having returned a liability verdict in Plaintiffs' favor, this Court orders the following:

1. A judgment is this day entered in Plaintiffs' favor and against Defendants FTS USA, LLC and Unitek USA, LLC in the amount reflected below:
   a. Plaintiffs' overtime damages: $1,936,522.74;
   b. Plaintiffs' liquidated damages: $1,936,522.74;
2. Plaintiffs shall have thirty (30) days from the entry of this judgment to petition for their attorneys' fees and litigation costs; and
3. The twenty-three (23) Plaintiffs who "opted-in" to this case by filing consent to join forms with the Court, but are not subject to the trial verdict by the parties' agreement are hereby dismissed without prejudice and their statute of limitations are tolled to their original consent filing date.

IT IS SO ORDERED this 31st day of October, 2012.

BY THIS COURT:

/s/ John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, *on behalf of themselves and all other similarly situated employees*, Plaintiffs, v. FTS USA, LLC and UNITEK USA, LLC, Defendants.	)	Case No. 2:08-cv-02100-JTF-cgc

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW (D.E. #405)

ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL (D.E. #406)

ORDER DENYING DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT (D.E. #407)

ORDER DENYING DEFENDANTS' MOTION FOR DECERTIFICATION (D.E. #441)

ORDER DENYING DEFENDANTS' MOTION FOR LEAVE TO FILE EXCESS PAGES AS MOOT (D.E. #440)

ORDER DENYING DEFENDANTS' MOTION FOR LEAVE TO FILE A REPLY AS MOOT (D.E. #443)

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL (D.E. #434)

ORDER DENYING DEFENDANTS' MOTION TO QUASH AS MOOT (D.E. #433)

Before the Court are Defendants' Motion for Judgment as a Matter of Law, filed on November 28, 2012 (D.E. #405); Defendants' Motion for a New Trial, filed on November 28, 2102 (D.E. #406); Defendants' Motion to Alter or Amend Judgment, filed on November 28, 2012 (D.E. #407); Defendants' Motion for Decertification, filed on March 11, 2013 (D.E. #441); Defendants' Motion for Leave to File Excess Pages in Defendants' Memorandum of Law in Support of Motion for Decertification, filed on March 11, 2013; Defendants' Motion for Leave to File a Reply Memorandum in Support of its Motion for Decertification, filed on April 4, 2013. (D.E. #443); Plaintiffs' Motion to Compel, filed on February 8, 2013 (D.E. #434); and Defendants' Motion to Quash, filed on February 5, 2013 (D.E. #433). A hearing on these Motions was held before this Court on September 16, 2013. For the following reasons, this Court DENIES Defendants' Motion for Judgment as a Matter of Law; DENIES Defendants' Motion for New Trial; DENIES Defendants' Motion to Alter or Amend Judgment; DENIES Defendants' Motion for Decertification; DENIES Defendants' Motion for Leave to File Excess Pages as MOOT; DENIES Defendants' Motion for Leave to File a Reply as MOOT; GRANTS Plaintiffs' Motion to Compel; and DENIES Defendants' Motion to Quash as MOOT.

The above-styled case was originally tried before the Honorable Bernice D. Donald in September and October 2011. Defendants filed their first Motion for Judgment as a Matter of Law, or Fed. R. Civ. P. 50(a) Motion, on September 26, 2011, after Plaintiffs' presentation of their case-in-chief. Defendants argued that: 1) Plaintiffs' claims fail in their entirety because Plaintiffs' have not established damages, under the proper standard or under the more lenient "just and reasonable" inference, and they have provided no evidence of damages as to the non-testifying Plaintiffs; 2) Plaintiffs have not established which weeks Plaintiffs (both testifying and non-testifying) worked more than forty (40) hours without overtime compensation; 3) Plaintiffs' claims seeking compensation for their commuting time fail as a matter of law, because commuting time is not compensable under the FLSA and the continuous workday doctrine does not apply to this case; and 4) The collective class should be decertified because Plaintiffs cannot meet their burden under Section 216(b) of the FLSA. (D.E. #346). Plaintiffs filed their Response to Defendants' September 26, 2011 Motion for Judgment as a Matter of Law on September 28, 2011, arguing that they have provided sufficient evidence to prove liability, damages, and coverage under the continuous workday doctrine. (D.E. #349). Plaintiffs also contend that the jury should only decide the number of unrecorded overtime hours and not the dollar value of damages and that the collective action should not be decertified. Defendants filed a Reply, on September 30, 2011, opposing Plaintiffs' assertions and raising many of the same arguments as it did in its Motion. (D.E. #350). On October 3, 2011, Defendants renewed their Motion for Judgment as a Matter of

Law during trial, and the Court ruled that it would take the Motion under advisement. (D.E. #353).

On October 4, 2011, Defendants filed a Motion for Reconsideration of the Court's ruling concerning the overtime premium applicable to any overtime wages Plaintiffs might establish at trial. (D.E. #355). Specifically, Defendants averred that, because Plaintiffs were paid pursuant to a piece rate payment system, Plaintiffs were entitled to a .5 overtime premium and not the 1.5 overtime premium. Defendants argued that the 1.5 overtime premium would exceed the mandates of the FLSA and the regulations that interpret the FLSA's requirements.

On October 12, 2011, Plaintiffs filed their Response in opposition to Defendants' Motion for Reconsideration. (D.E. #360). Plaintiffs contend that the Court's previous ruling is consistent with the applicable statutes and regulations. *See* 29 U.S.C. § 207 and 29 U.S.C. § 778.107 (damage calculation designated by: **REGULAR RATE x 1.5 x UNRECORDED OVERTIME HOURS= UNPAID OVERTIME)**.

On October 25, 2011, the jury returned a verdict in favor of Plaintiffs. Jury found that Plaintiffs met their burden of proving by the preponderance of the evidence that: 1) they worked in excess of forty (40) hours in one or more weeks and were not paid overtime compensation for those hours; 2) Defendants knew or should have known that Plaintiffs were not paid overtime compensation; and 3) Defendants willfully violated the law. The jury also indicated the number of unrecorded hours they believed each testifying Plaintiff worked per week.

On December 29, 2011, the Honorable Jon Phipps McCalla was added as presiding judge to the case.[1] However, all the previous trial and post-trial motions were decided by Judge Donald. On February 22, 2012, Judge Donald filed an Order Denying Defendants' Motion for Judgment as a Matter of Law. (D.E. #372). Judge Donald found that: 1) there was sufficient evidence for a reasonable juror to determine the amount of damages for testifying and non-testifying Plaintiffs; 2) that Plaintiffs need only establish the basis for a reasonable inference that they were not properly compensated for their work; 3) there was sufficient evidence for a reasonable juror to draw a reasonable inference that a FLSA violation existed; 4) Defendant's argument that damages for commuting time is entitled to a judgment as a matter of law is an issue of fact for a reasonable juror to decide; and 5) the Court has already ruled that Plaintiffs are similarly situated as a sample of employees in this case, so the collective class should not be decertified. On June 5, 2012, Judge Donald entered an Order Denying Defendants' Motion for Reconsideration stating that the court's previous ruling that Plaintiffs' overtime wages should be calculated at 1.5 times the regular pay remains in place. (D.E. #378).

In a Status Conference held on July 12, 2012, then-Chief Judge McCalla ordered Plaintiffs to file their entry of judgment with damages by July 13, 2012. Defendants were to respond to Plaintiffs' Motion by July 30, 2012, and Plaintiffs' were to have until August 6, 2012 to file a Reply, if necessary.

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[1] During the time in which this case was before the Hon. Jon Phipps McCalla, he was Chief Judge of this District.

(D.E. #381). On July 13, 2012, Plaintiffs' filed a Motion for Entry of Judgment with Damages, requesting the Court to enter a judgment in the amount of $3,873,045.48 for Plaintiff. Plaintiff calculated the damages by using the formula approved by the court, **REGULAR RATE x NUMERICAL MULTIPLIER x OVERTIME HOURS=OVERTIME WAGES**, with the 1.5 numerical multiplier and the number of unrecorded overtime hours determined by the jury during trial.

On July 30, 2012, Defendants filed a Response in opposition to Plaintiffs' Motion for Entry of Judgment with Damages, asserting the same arguments made previously before the Court, regarding Plaintiffs' failure to prove damages. (D.E. #386). Specifically, Defendants argue that: 1) Plaintiffs are asking the Court to make crucial factual determinations left unanswered by the jury, adopt mischaracterizations of the record and law of the case, and apply an untested, unproven, and unprecedented method of calculating damages with no legal authority; 2) the damages calculations can only be performed with regard to the seventeen (17) testifying Plaintiffs identified on the jury verdict form and not the 280 non-testifying Plaintiffs; and 3) Plaintiffs have not performed their damages' calculations correctly.

On August 6, 2012, Plaintiffs' filed a Reply averring that the issues Defendants attempt to present in their Response have already been decided upon by Judge Donald, are reserved for appeal, and are inappropriate for consideration by this Court. (D.E. #388). However, on August 28, 2012, Defendants filed a Sur-Reply contending that: 1) Plaintiffs cited certain legal authority for the first time in their Reply and it is inapplicable and/or supportive of De-

fendants' position; 2) Plaintiffs continue to beseech the Court to accept post-trial statement by Plaintiffs' counsel as record evidence; and 3) Plaintiffs have failed to establish the necessary elements, which requires the Court to enter a judgment in favor of Defendants. (D.E. #392).

The current judge, the Honorable John T. Fowlkes, Jr., presiding over this case was reassigned to this case on August 3, 2012. On October 31, 2012, after considering all the issues, this Court granted Plaintiffs' Motion for Entry of Judgment with Damages and entered a Judgment in a favor of Plaintiffs. (D.E. ##396, 397).

On November 28, 2012, Defendants filed a Motion for Judgment as a Matter of Law, in which they made the same arguments they had previously raised before Judge Donald. Namely, Defendants argued: 1) Plaintiffs' claims fail because Plaintiffs have not established damages and have provided no evidence for the non-testifying Plaintiffs; 2) Plaintiffs have not established which week Plaintiffs worked more than forty (40) hours without overtime compensation; and 3) overtime compensation for commuting time fails as a matter of law because it is not compensable under FLSA. (D.E. #405). Plaintiffs responded, on January 4, 2013, asserting that Defendants arguments are repetitive of their previous arguments and have been previously ruled on by Judge Donald. (D.E. #421). Defendants' filed a Reply, on January 18, 2013, contending that the Court "usurped the role of the fact-finder and calculated damages" in violation of Defendants' constitutional and statutory rights. (D.E. #428).

Defendants also filed a Motion for New Trial, on November 28, 2012, arguing: 1) Defendants are enti-

tled to a new trial based upon the Sixth Circuit opinion *White v. Baptist Mem'l Health Care Corp.*, No. 11-5717, 2012 WL 539261 (6th Cir. Nov. 6, 2012); 2) Plaintiffs have failed to demonstrate that the testifying Plaintiffs were representative of all members of the FLSA class; 3) Plaintiffs' counsel made improper statements during closing arguments about his personal opinions of the veracity of the witnesses; and 4) the Court did not follow Sixth Circuit precedent because it failed to give the *falsus in uno, falsus in omnibus* instructions to the jury. (D.E. #406). On January 4, 2013, Plaintiffs filed a Response in opposition to Defendants' Motion arguing, once again, that Defendants were only reiterating the same arguments they asserted in their pretrial, trial, and post-trial motions. (D.E. #420). Plaintiffs also contend that the Sixth Circuit's *White* opinion is distinguishable from the present case at hand, because the *White* case involves issues of constructive knowledge of FLSA violations, as opposed to the instant case, which involves issues of actual knowledge of FLSA violations. Defendants filed a Reply, on January 18, 2013, that simply reiterated its previous arguments in its Motion for New Trial.

Furthermore, on November 28, 2012, Defendants filed a Motion to Alter or Amend Judgment, contending that, if Plaintiffs' damages are granted, the .5 overtime premium, not the 1.5 premium, should apply. (D.E. #407). Plaintiffs' Response echoed their previous arguments that Defendants have consistently raised issues that have already been addressed and ruled on by the Court. (D.E. #419). However, Defendants' Reply argues that Plaintiffs seek damages that are not mandated by law, provided for by regulations, or supported by facts in the record. (D.E. #430).

Beyond these issues, several other motions were filed by both Plaintiffs and Defendants. Specifically, on February 5, 2013, Defendants filed a Motion to Quash, requesting the Court to quash Plaintiffs' subpoena to obtain the billing records of Defendants' former and current counsel. (D.E. #433). Defendants argued that the subpoena is defective because it: 1) demands production of documents that are more than 100 miles outside of the District; 2) is untimely and irrelevant to Plaintiffs' fee petition; 3) requires disclosure of documents protected by attorney-client privilege and/or attorney-work product doctrine; and 4) is overbroad and unduly burdensome. Plaintiffs filed a Response in opposition, on February 19, 2013, requesting the Court to hold its ruling on the Motion to Quash in abeyance until Plaintiffs' Motion to Compel (D.E. #434), which was filed on February 8, 2013, was ruled on. (D.E. #435). Additionally, Plaintiffs argued that the subpoena is relevant to the issue of attorneys' fees and that it does not seek to obtain privileged information. Defendants filed a Reply, on March 4, 2013, reiterating their position why the subpoena should be quashed.

Plaintiffs' Motion to Compel (D.E. #434) argues that this Court's January 28, 2013 Order Granting Plaintiffs' Motion for Leave to File a Reply in Support of their Motion for Attorneys' Fees and Costs, to File Response to Defendants' Objections to Plaintiffs' Bill of Taxable Costs, and to Request a Page Extension required Defendants to provide their time and billing records to Plaintiffs. ("Plaintiffs must file their Reply Brief . . . within ten (10) days of receiving Defendants' counsels' time records." D.E. #432). However, Defendants responded to Plaintiffs' Motion to Compel by averring that Plaintiffs have attempted to convert the Court's Order into a Motion to Compel

and that the Court's intention was not to force the production of Defendants' records of their billing records.

On March 11, 2013, Defendants filed their Motion for Decertification, arguing that a recent Seventh Circuit case, *Espenscheid, et al v. DirectSat USA, LLC, and UniTek USA*, *LLC*, 705 F.3d. 770 (7th Cir. 2013), provides proof that the previous certification decision by Judge Donald is an unsuitable ruling. (D.E. #441). Defendants also filed a Motion for Leave to File Excess Pages for their Motion for Decertification, on March 11, 2013. (D.E. #440). However, in their Motion for Decertification, Defendants included the excess pages without receiving the Court's ruling on the Motion. Again, Plaintiffs asserted that Defendants Motion should be reserved for appeal because decertification has already been properly considered and previously ruled on by Judge Donald. (D.E. #442). On April 4, 2013, Defendants filed a Motion for Leave to File a Reply to further support its Motion for Decertification. (D.E. #443).

After reviewing the Motions, Responses, and the oral arguments of the parties, this Court is of the opinion that Defendants' Motion for Judgment as a Matter of Law, Motion for New Trial, Motion to Alter or Amend Judgment, and Motion for Decertification should be DENIED. All of these Motions are repetitive motions that have been filed by Defendants in pretrial, trial, and post-trial procedures. This Court believes Judge Donald has appropriately addressed and ruled on these motions and that there is no need to interfere with her ruling. Specifically, with regard to Defendants' Motion for New Trial, the Court does take into account the absence of the *falsus in uno,*

falsus in omnibus instructions to the jury. However, after a review of the jury instructions in their totality, the Court does not believe that the absence of these instructions is sufficient to meet the standard for a new trial. Therefore, Defendants' Motion for Judgment as a Matter of Law, Motion for New Trial, and Motion to Alter or Amend Judgment are DENIED. Consequently, Defendants' Motion for Leave to File Excess Pages in Support of their Motion for Decertification and Motion for Leave to File a Reply for their Motion for Decertification are hereby DENIED as MOOT.

Lastly, this Court is persuaded by Plaintiffs' Motion to Compel. Although the Court's January 28, 2012 was not to serve as a vehicle to compel Defendants' production of their billing records, the Court does believe that Defendants' billing records are discoverable and should be produced for Plaintiffs' review. Therefore, finding Plaintiffs' Motion to be well-taken and for good cause shown, this Court hereby GRANTS Plaintiffs' Motion to Compel. Defendants are to provide the billing records requested by Plaintiffs within ten (10) days from the September 16, 2013 Motion Hearing date, or by September 26, 2013. Consequently, Defendants' Motion to Quash is DENIED as Moot.

IT IS SO ORDERED this 18th day of September, 2013.

BY THIS COURT:

s/ John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

APPENDIX I

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 16a0054p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellees*, v. FTS USA, LLC; UNITEK USA, LLC, *Defendants-Appellants.*	No. 14-6063

Appeal from the United States District Court for the Western District of Tennessee at Memphis.
No. 2:08-cv-02100—John Thomas Fowlkes, Jr., District Judge.

Argued: October 6, 2015

Decided and Filed: March 2, 2016

Before: BOGGS, SUTTON, and STRANCH, Circuit Judges.

* * *

STRANCH, J., delivered the opinion of the court in which BOGGS, J., joined. SUTTON, J. (pp. 31-

42), delivered a separate opinion concurring in part and dissenting in part.

OPINION

STRANCH, Circuit Judge. Edward Monroe, Fabian Moore, and Timothy Williams brought this Fair Labor Standards Act (FLSA) claim, on behalf of themselves and others similarly situated, against their employers, FTS USA, LLC and its parent company, UniTek USA, LLC. FTS is a cable-television business for which the plaintiffs work or worked as cable technicians. The district court certified the case as an FLSA collective action, allowing 293 other technicians (collectively, the FTS Technicians) to opt in. FTS Technicians allege that FTS implemented a company-wide time-shaving policy that required its employees to systematically underreport their overtime hours. A jury returned verdicts in favor of the class, which the district court upheld before calculating and awarding damages. We AFFIRM the district court's certification of the case as a collective action and its finding that sufficient evidence supports the jury's verdicts. We REVERSE the district court's calculation of damages and REMAND the case for recalculation of damages consistent with this opinion.

I. BACKGROUND

A. Facts

FTS contracts with various cable companies, such as Comcast and Time Warner, to provide cable installation and support, primarily in Tennessee, Alabama, Mississippi, Florida, and Arkansas. To offer these services, FTS employs technicians at local field offices, called "profit centers." FTS's company hier-

archy includes a company CEO and president, regional directors, project managers at each profit center, and a group of supervisors. FTS Technicians report to the supervisors and project managers. FTS's parent company, UniTek, is in the business of wireless, telecommunication, cable, and satellite services, and provides human resources and payroll functions to FTS.

All FTS Technicians share substantially similar job duties and are subject to the same compensation plan and company-wide timekeeping system. FTS Technicians report to a profit center at the beginning of each workday, where FTS provides job assignments to individual technicians and specifies two-hour blocks in which to complete certain jobs. Regardless of location, "the great majority of techs do the same thing day in and day out which is install cable." Time is recorded by hand, and FTS project managers transmit technicians' weekly timesheets to UniTek's director of payroll. FTS Technicians are paid pursuant to a piece-rate compensation plan, meaning each assigned job is worth a set amount of pay, regardless of the amount of time it takes to complete the job. The record shows that FTS Technicians are paid by applying a .5 multiplier to their regular rate for overtime hours.

FTS Technicians presented evidence that FTS implemented a company-wide time-shaving policy that required technicians to systematically underreport their overtime hours. Managers told or encouraged technicians to underreport time or even falsified timesheets themselves. To underreport overtime hours in compliance with FTS policy, technicians either began working before their recorded start times,

recorded lunch breaks they did not take, or continued working after their recorded end time.

FTS Technicians also presented documentary evidence and testimony from technicians, managers, and an executive showing that FTS's time-shaving policy originated with FTS's corporate office. Technicians testified that the time-shaving policy was company-wide, applying generally to all technicians, though not in an identical manner. At meetings, managers instructed groups of technicians to underreport their hours, and managers testified that corporate ordered them to do so. One former manager, Anthony Louden, offered testimony regarding high-level executive meetings. Louden identified overtime and fuel costs as the two leading items that an FTS executive felt it "should be able to manage and cut in order to make a bigger profit." Louden also stated that FTS executives circulated and reviewed technicians' timesheets, "go[ing] into detail on which technician had overtime, and, you know, go[ing] over why this guy had too much overtime and why he didn't have overtime." Technicians testified that they often complained about being obligated to underreport, and FTS's human resources director testified that she received such complaints. No evidence was presented that managers or technicians were disciplined for underreporting time.

B. Procedural History

A magistrate judge recommended conditional certification as a FLSA collective action, which the district court adopted. The district court also authorized notice of the collective action to be sent to all potential opt-in plaintiffs. The notice defined eligible class members as any person employed by FTS as a technician at any location across the country in the

past three years to the present who were paid by piece-rate and did not receive overtime compensation for all hours worked over 40 per week during that period. A total of 293 technicians ultimately opted in to the collective action.[1]

The parties originally agreed on a discovery and trial plan, which the trial court adopted by order. Under the parties' agreement, discovery would be limited "to a representative sample of fifty (50) opt-in Plaintiffs," with FTS Technicians choosing 40 and FTS and UniTek choosing 10. The parties also agreed to approach the district court after discovery regarding "a trial plan based on representative proof" that "will propose a certain number of Plaintiffs from the pool of fifty (50) representative sample Plaintiffs that may be called as trial witnesses."

Following the completion of discovery, the district court denied FTS and UniTek's motions to decertify the class and for summary judgment, finding that the class members were similarly situated at the second stage of certification. In light of the parties' agreement and the district court's resulting order—under which the litigation proceeded—the court held that it could not "accept Defendants' contention that the parties' stipulated agreement to limit discovery to fifty representative plaintiffs did not also manifest Defendants' acquiescence to a process by which the remaining members of the class would not have to produce evidence as a prerequisite to proceeding to trial on their claims." (R. 238, Page-

[1] Named plaintiff Monroe was a technician during the class period. After the class period, he was promoted to a managerial position.

ID 5419.) The district court also denied FTS and UniTek's pretrial motion to preclude representative proof at trial because "the class representatives identified by Plaintiff[s] sufficiently represent the class" and "[t]o deny the use of representative proof in this case would undermine the purpose of class wide relief, and would have the effect of decertifying the class." (R. 308, PageID 6822.)

Accordingly, the collective action proceeded to trial on a representative basis. FTS Technicians identified by name 38 potential witnesses and called 24 witnesses, 17 of whom were class-member technicians. FTS and UniTek identified all 50 representative technicians as potential witnesses, but called only four witnesses—all FTS executives and no technicians.

The district court explained the representative nature of the collective action to the jury, both before the opening argument and during its instructions, noting that FTS Technicians seek "to recover overtime wages that they claim [FTS and UniTek] owe them and the other cable technicians who have joined the case." (R. 450, PageID 10646–47; R. 463, PageID 12253.) The jury instructions specified that the named plaintiffs brought their claim on behalf of and collectively with "approximately three hundred plaintiffs who have worked in more than a dozen different FTS field offices across the country." (R. 463, PageID 12264.) The court also set out how the case would be resolved, instructing that FLSA procedure "allows a small number of representative employees to file a lawsuit on behalf of themselves and others in the collective group"; that the technicians who "testified during this trial testified as representatives of the other plaintiffs who did not testify"; and that

"[n]ot all affected employees need testify to prove their claims" because "non-testifying plaintiffs who performed substantially similar job duties are deemed to have shown the same thing." (*Id.* at 12264–65.) The district court then charged the jury to determine whether all FTS Technicians "have proven their claims" by considering whether "the evidence presented by the representative plaintiffs who testified establishes that they worked unpaid overtime hours and are therefore entitled to overtime compensation." (*Id.* at 12265.) If the jury answers in the affirmative, the court explained, "then those plaintiffs that you did not hear from are also deemed by inference to be entitled to overtime compensation." (*Id.* at 12265–66.)

The jury returned verdicts of liability in favor of the class, finding that FTS Technicians worked in excess of 40 hours weekly without being paid overtime compensation and that FTS and UniTek knew or should have known and willfully violated the law. The jury determined the average number of unrecorded hours worked per week by each testifying technician—all of whom were representative and were called on behalf of themselves and all similarly situated employees, as authorized by 29 U.S.C. § 216(b) and instructed by the district court. As indicated to the parties and the jury, the court used the jury's factual findings to calculate damages for all testifying and nontestifying technicians in the opt-in collective action. The trial court ruled that the formula for calculating uncompensated overtime should use a 1.5 multiplier, apparently based on the assumption that FTS and UniTek normally used that multiplier.

The district court[2] held a post-trial status conference and suggested that a second jury could be convened to decide the issue of damages. FTS and UniTek opposed a second jury, arguing that plaintiffs had failed to prove damages and judgment should be entered, "either for the defense or liability for plaintiffs . . . with zero damages." After the court rejected this proposal, FTS and Unitek filed motions for judgment as a matter of law, a new trial, and decertification, all of which were denied. Finding that FTS Technicians had met their burden on damages, the court adopted their proposed order, using an "estimated-average" approach to calculate damages and employing a multiplier of 1.5.

II. ANALYSIS

FTS and UniTek challenge the certification of the case as a collective action pursuant to 29 U.S.C. § 216(b), the sufficiency of the evidence as presented at trial, the jury instruction on commuting time, and the district court's calculation of damages. After a review of the legal framework for collective actions in our circuit, we turn to each of these arguments.

A. Legal Framework

Under the FLSA, an employer generally must compensate an employee "at a rate not less than one and one-half times the regular rate at which he is employed" for work exceeding forty hours per week. 29 U.S.C. § 207(a)(1). Labor Department regulations

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[2] The Honorable Bernice Donald presided over all pretrial and trial issues before assuming her position on the Sixth Circuit. The Honorable Jon Phipps McCalla and John Fowlkes presided over all post-trial issues, including the calculation of damages.

clarify, however, that in a piece-rate system only "additional half-time pay" is required for overtime hours. 29 C.F.R. § 778.111(a).

"Congress passed the FLSA with broad remedial intent" to address "unfair method[s] of competition in commerce" that cause "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806 (6th Cir. 2015); 29 U.S.C. § 202(a). The provisions of the statute are "remedial and humanitarian in purpose," and "must not be interpreted or applied in a narrow, grudging manner." *Herman v. Fabri-Centers of Am., Inc.*, 308 F.3d 580, 585 (6th Cir. 2002) (quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251–262).

To effectuate Congress's remedial purpose, the FLSA authorizes collective actions "by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). To participate in FLSA collective actions, "all plaintiffs must signal in writing their affirmative consent to participate in the action." *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006). Only "similarly situated" persons may opt in to such actions. *Id.* Courts typically bifurcate certification of FLSA collective action cases. At the notice stage, conditional certification may be given along with judicial authorization to notify similarly situated employees of the action. *Id.* Once discovery has concluded, the district court—with more information on which to base its decision and thus under a more exacting standard—looks more closely

at whether the members of the class are similarly situated. *Id.* at 547.

In *O'Brien v. Ed Donnelly Enterprises, Inc.*, we clarified the contours of the FLSA standard for certification. There, employees alleged that their employer violated the FLSA by requiring employees to work "off the clock," doing so in several ways—requiring unreported hours before or after work or by electronically altering their timesheets. 575 F.3d 567, 572–73 (6th Cir. 2009). The district court initially certified the *O'Brien* case as a collective action. *Id.* at 573. At the second stage of certification, the court determined that the claims required "an extensive individualized analysis to determine whether a FLSA violation had occurred" and that "the alleged violations were not based on a broadly applied, common scheme." *Id.* at 583. Applying a certification standard akin to that for class actions pursuant to Federal Rule of Civil Procedure 23, the district court decertified the collective action on the basis that individualized issues predominated. *Id.* at 584.

On appeal, we determined that the district court engaged in an overly restrictive application of the FLSA's "similarly situated" standard. It "implicitly and improperly applied a Rule 23-type analysis when it reasoned that the plaintiffs were not similarly situated because individualized questions predominated," which "is a more stringent standard than is statutorily required." *Id.* at 584–85. We explained that "[w]hile Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so in the FLSA," and applying a Rule 23-type predominance standard "undermines the remedial purpose of the collective action device." *Id.* at 584-86. Based on our precedent,

then, the FLSA's "similarly situated" standard is less demanding than Rule 23's standard.

O'Brien applied the three non-exhaustive factors that many courts have found relevant to the FLSA's similarly situated analysis: (1) the "factual and employment settings of the individual[] plaintiffs"; (2) "the different defenses to which the plaintiffs may be subject on an individual basis"; and (3) "the degree of fairness and procedural impact of certifying the action as a collective action." *Id.* at 584 (quoting 7B Wright, Miller & Kane, Federal Practice and Procedure § 1807 at 487 n.65 (3d ed. 2005)); *see Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261–65 (11th Cir. 2008) (applying factors); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001) (applying factors); *Frye v. Baptist Mem'l Hosp., Inc.*, 495 F. App'x 669, 672 (6th Cir. 2012) (concluding that district court properly exercised its discretion in weighing the *O'Brien* factors and granting certification). Noting that "[s]howing a 'unified policy' of violations is not required," we held that employees who "suffer from a single, FLSA-violating policy" *or* whose "claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct," are similarly situated. *O'Brien*, 575 F.3d at 584–85; *see* 2 ABA Section of Labor & Employ't Law, The Fair Labor Standards Act 19-151, 19-156 (Ellen C. Kearns ed., 2d ed. 2010) (compiling cases supporting use of the three factors and noting that "many courts consider whether plaintiffs have established a common employer policy, practice, or plan allegedly in violation of the FLSA," which may "assuage concerns about the plaintiffs' otherwise varied circumstances").

Applying this standard, we found the *O'Brien* plaintiffs similarly situated. We determined that the district court erred because plaintiffs' claims were unified, as they "articulated two common means by which they were allegedly cheated: forcing employees to work off the clock and improperly editing timesheets." *O'Brien*, 575 F.3d at 585. However, due to *O'Brien's* peculiar procedural posture (the only viable plaintiff remaining did not allege that she experienced the unlawful practices), remand for recertification was not appropriate. *Id.* at 586. In sum, *O'Brien* explained the FLSA standard for certification, distinguishing it from a Rule 23-type predominance standard, and adopted the three-factor test employed by several of our sister circuits. *Id.* at 585.

Just as *O'Brien* clarifies the procedure and requirements for certification of a collective action, the Supreme Court's opinion in *Anderson v. Mt. Clemens Pottery Co.*—originally a Sixth Circuit case—explains the burden of proof at trial. Using a formula "applicable to all employees," the district court there awarded piece-rate employees recovery of some unpaid overtime compensation under the FLSA. 328 U.S. 680, 685–86 (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947. We reversed on appeal, determining that the district court improperly awarded damages and holding that it was the employees' burden "to prove by a preponderance of the evidence that they did not receive the wages to which they were entitled . . . and to show by evidence rather than conjecture the extent of overtime worked, it being insufficient for them merely to offer an estimated average of overtime worked." *Id.* at 686.

On certiorari, the Supreme Court held that we had imposed an improper standard of proof that "has the practical effect of impairing many of the benefits" of the FLSA. *Id.* It reminded us of the correct liability and damages standard, with a cautionary note: an employee bringing such a suit has the "burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies . . . militate against making that burden an impossible hurdle for the employee." *Id.* at 686–87. We have since acknowledged that instruction. *See Moran v. Al Basit LLC*, 788 F.3d 201, 205 (6th Cir. 2015). The Supreme Court also explained how an employee can satisfy his burden to prove both uncompensated work and its amount: "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687. The employee's burden of proof on damages can be relaxed, the Supreme Court explained, because employees rarely keep work records, which is the employer's duty under the Act. *Id.*; *see O'Brien*, 575 F.3d at 602; *see also* 29 U.S.C. § 211(c); 29 C.F.R. § 516.2(a)(7). Once the employees satisfy their relaxed burden for establishing the extent of uncompensated work, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens*, 328 U.S. at 687–88.

We quoted and applied this standard in *Herman v. Palo Group Foster Home, Inc.*, concluding that the employees had met their burden on liability because "credible evidence" had been presented that they had performed work for which they were improperly compensated. 183 F.3d 468, 473 (6th Cir. 1999). Also recognizing this shifting burden, we held that "Defendants did not keep the records required by the FLSA, so the district court properly shifted the burden to Defendants to show that they did not violate the Act." *Id.* The end result of this standard is that if an "employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Id.* at 472 (quoting *Mt. Clemens*, 328 U.S. at 688). We now apply these standards to the case before us.

B. Certification as a Collective Action

FTS and UniTek appeal the denial of their motion to decertify the collective action. We review a district court's certification of a collective action under an "abuse of discretion" standard. *See O'Brien*, 575 F.3d at 584. "A court abuses its discretion when it commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *Auletta v. Ortino (In re Ferro Corp. Derivative Litig.)*, 511 F.3d 611, 623 (6th Cir. 2008).

The district court made its final certification determination post-trial. With the benefit of the entire trial record—including representative testimony from technicians covering the several regions in which FTS operates—the court found that FTS Technicians were similarly situated and a collective action was appropriate. FTS and UniTek challenge certification of the case as a collective action, arguing

that differences among FTS Technicians (differences in location, supervisors, reasons for submitting false timesheets, and types and amount of uncompensated time) require an individualized analysis as to every plaintiff to determine whether a particular violation of the FLSA took place for each.

Turning to review, we may not examine the certification issue using a Rule 23-type analysis; we must apply the "similarly situated" standard governed by the three-factor test set out in *O'Brien*. Two governing principles from our case law serve as guides: plaintiffs do not have to be "identically situated" to be similarly situated, and the FLSA is a remedial statute that should be broadly construed. 2 ABA Section of Labor & Employ't Law, *supra*, at 19-150, 19-166 (compiling cases).

1. Factual and Employment Settings

The first factor, the factual and employment settings of the individual FTS Technicians, considers, "to the extent they are relevant to the case, the plaintiffs' job duties, geographic locations, employer supervision, and compensation." *Id.* at 19-155. On FTS Technicians' duties and locations, the record reveals that all FTS Technicians work in the same position, have the same job description, and perform the same job duties: regardless of location, "the great majority of techs do the same thing day in and day out which is install cable." FTS Technicians also are subject to the same timekeeping system (recording of time by hand) and compensation plan (piece rate).

Key here, the record contains ample evidence of a company-wide policy of requiring technicians to underreport hours that originated with FTS executives. Managers told technicians that they received in-

structions to shave time from corporate, that underreporting is "company policy," and that they were "chewed out by corporate" for allowing too much time to be reported. Managers testified that FTS executives directed them to order technicians to underreport time. FTS executives reinforced their policy during meetings with managers and technicians at individual profit centers. FTS Technicians testified that they complained of being required to underreport, often in front of or to corporate representatives, who did nothing.

Evidence of market pressures suggests that FTS executives had a motive to institute a company-wide time-shaving policy. According to one manager's testimony, "[e]very profit center has . . . a budget," and to meet that budget "you couldn't put all of your overtime." Both managers and technicians were under the impression that FTS's profitability depended on underreporting.

The underreporting policy applied to FTS Technicians regardless of profit center or supervisor, as technicians employed at multiple profit centers and under multiple managers reported consistent time-shaving practices across the centers and managers. Namely, FTS executives told managers that technicians' time before and after work or during lunch should be underreported. One manager told his technicians that "an hour lunch break will be deducted whether [they] take it or not," while technicians who reported full hours were told to "change that" and that "[t]his is not how we do it over here, . . . you are just supposed to record your 40 hours a week, take out for your lunch, sign it and turn it in." If technicians failed to comply with the policy, managers would directly alter time sheets

submitted by employees—one manager changed a seven to an eight and another used whiteout to change times. Regarding reporting lunch hours not taken, one manager said "that's the way it's got to be, you put it on there or I'll put it on there." Even technicians who never received direct orders from managers to underreport time knew that FTS required underreporting in order to continue receiving work assignments and to avoid reprimand or termination.

FTS Technicians identified the methods—the same methods found in *O'Brien*—by which FTS and UniTek enforced their time-shaving policy: (1) "requiring plaintiffs to work 'off the clock'" before or after scheduled hours or during lunch breaks and (2) "alter[ing] the times that had previously been entered." *O'Brien*, 575 F.3d at 572–73. As in *O'Brien*, such plaintiffs will be similarly situated where their claims are "unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *Id.* at 585.

The dissent asserts that FTS Technicians allege "distinct" violations of the FLSA and "define the company-wide 'policy' at such a high level of generality that it encompasses *multiple* policies." (Dis. at 34.) The definition of similarly situated does not descend to such a level of granularity. The Supreme Court has warned against such a "narrow, grudging" interpretation of the FLSA and has instructed courts to remember its "remedial and humanitarian" purpose, as have our own cases. *See Tenn. Coal, Iron & R.R. Co.*, 321 U.S. at 597; *Keller*, 781 F.3d at 806; *Herman*, 308 F.3d at 585. Many FLSA cases do focus on a single action, such as the donning and doffing cases that the dissent's reasoning would suggest is

the only situation where representative proof would work. But neither the statutory language nor the purposes of FLSA collective actions require a violating policy to be implemented by a singular method. The dissent cites no Sixth Circuit case that would compel employees to bring a separate collective action (or worse, separate individual actions) for unreported work required by an employer before clocking in, and another for work required after clocking out, and another for work required during lunch, and yet another for the employer's alteration of its employees' timesheets. Such a narrow interpretation snubs the purpose of FLSA collective actions.

The dissent concludes that FTS Technicians' claims do "not do the trick" because a "company-wide 'time-shaving' policy is lawyer talk for a company-wide policy of violating the FLSA." (Dis. at 35.) But FTS Technicians' claims do not depend on "lawyer talk"; they are based on abundant evidence in the record of employer mandated work off the clock. That an employer uses more than one method to implement a company-wide work "off-the-clock" policy does not prevent employees from being similarly situated for purposes of FLSA protection. This is not a new concept to our court or to other courts. In accordance with *O'Brien*, we have approved damages awards to FLSA classes alleging that employers used multiple means to undercompensate for overtime. *See, e.g.*, *U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 778 (6th Cir. 1995) (approving damages award where employers required employees to work uncompensated time both before and after their scheduled shifts and to report only the scheduled shift hours on their timesheets). Other circuits and district courts have done so as well. *See McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 588 (9th Cir. 1988)

(affirming damages award where employees gave varied testimony on the means employer used to underpay overtime); *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 84 (10th Cir. 1983) (affirming damages award where employer failed to compensate for overtime both before and after work, at different locations); *Wilks v. Pep Boys*, No. 3:02-0837, 2006 WL 2821700, at *5 (M.D. Tenn. Sept. 26, 2006) (denying motion to decertify class that alleged employer deprived employees of overtime compensation by requiring them to work off the clock and shaving hours from payroll records).

Like the plaintiffs in *O'Brien*, FTS Technicians' claims are unified by common theories: that FTS executives implemented a single, company-wide time-shaving policy to force all technicians—either through direct orders or pressure and regardless of location or supervisor—to underreport overtime hours worked on their timesheets. *See O'Brien*, 575 F.3d at 584–85; *see also Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973) (affirming finding of uncompensated overtime where employees understated overtime because of pressure brought to bear by immediate supervisors, putting upper management on constructive notice of potential FLSA violations). Based on the record as to FTS Technicians' factual and employment settings, therefore, the district court did not abuse its discretion in finding FTS Technicians similarly situated.

2. Individualized Defenses

We now turn to the second factor—the different defenses to which the plaintiffs may be subject on an individual basis. FTS and UniTek argue that they must be allowed to raise separate defenses by examining each individual plaintiff on the number of un-

recorded hours they worked, but that they were denied that right by the allowance of representative testimony and an estimated-average approach. Several circuits, including our own, hold that individualized defenses alone do not warrant decertification where sufficient common issues or job traits otherwise permit collective litigation. *O'Brien*, 575 F.3d at 584–85 (holding that employees are similarly situated if they have "claims . . . unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct"); *Morgan*, 551 F.3d at 1263; *see Thiessen*, 267 F.3d at 1104–08.

As noted above, the record includes FTS Technicians' credible testimonial and documentary evidence that they performed work for which they were improperly compensated. In the absence of accurate employer records, both Supreme Court and Sixth Circuit precedent dictate that the burden then shifts to the employer to "negative the reasonableness of the inference to be drawn from the employee's evidence" and, if it fails to do so, the resulting damages award need not be perfectly exact or precise. *Mt. Clemens*, 328 U.S. at 687–88 ("The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of [the FLSA]."); *see Herman*, 183 F.3d at 473.

Under this framework, and with the use of representative testimony and an estimated- average approach, defenses successfully asserted against representative testifying technicians were properly distributed across the claims of nontestifying technicians. For example, FTS and UniTek argue that tes-

tifying technicians did not work all of the overtime they claimed and underreported some of their overtime for reasons other than a company-wide policy requiring it. FTS and UniTek had every opportunity to submit witnesses and evidence supporting this claim. The jury's partial acceptance of these defenses, as evidenced by its finding that testifying technicians worked fewer hours than they claimed, resulted in a lower average for nontestifying technicians. Thus, FTS Technicians' representative evidence allowed appropriate consideration of the individual defenses raised here. The district court, moreover, offered to convene a second jury and submit the issue of damages to it, but FTS and UniTek declined. *See Thiessen*, 267 F.3d at 1104–08 (concluding that district court abused its discretion in decertifying the class because defendants' "highly individualized" defenses could be dealt with at the damages stage of trial). Under our precedent and the trial record, we cannot say that the district court committed a clear error of judgment in refusing to decertify the collective action on the basis of FTS and UniTek's claimed right to examine and raise defenses separately against each of the opt-in plaintiffs.

3. Fairness and Procedural Impact

The third factor, the degree of fairness and the procedural impact of certifying the case, also supports certification. This case satisfies the policy behind FLSA collective actions and Congress's remedial intent by consolidating many small, related claims of employees for which proceeding individually would be too costly to be practical. *See Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (noting that FLSA collective actions give plaintiffs the "advantage of lower individual costs to vindicate rights by the

pooling of resources"); *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013) ("[W]here it is class treatment or nothing, the district court must carefully explore the possible ways of overcoming problems in calculating individual damages."). Because all FTS Technicians allege a common, FLSA-violating policy, "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact." *Hoffman-La Roche, Inc.*, 493 U.S. at 170. In view of the entire record, neither this factor nor the other two suggest that the district court abused its discretion in finding FTS Technicians similarly situated and maintaining certification.

4. The Seventh Circuit Decision in *Espenscheid*

Lastly, FTS and UniTek argue that *Espenscheid*—a Seventh Circuit case affirming the decertification of a collective action seeking unpaid overtime—compels decertification here. 705 F.3d at 773. *Espenscheid*, however, is based on Seventh Circuit authority and specifically acknowledges that it is at odds with Sixth Circuit precedent. *Id.* at 772 (citing *O'Brien*, 575 F.3d at 584). Though recognizing the differences between Rule 23 class actions and FLSA collective actions—and admitting that Rule 23 procedures are absent from the statutory provisions of the FLSA—the Seventh Circuit determined that "there isn't a good reason to have different standards for the certification of the two different types of action." *Id.* This conflicts with our precedent. Explaining that Congress could have but did not import the Rule 23 predominance requirement into the FLSA and that doing so would undermine the remedial purpose of FLSA collective actions, we have refused to equate the FLSA certification standard for

collective actions to the more stringent certification standard for class actions under Rule 23. *O'Brien*, 575 F.3d at 584, 585–86.

The difference between the Seventh Circuit's standard for collective actions and our own is the controlling distinction for the issues before us.[3] The facts and posture of *Espenscheid*, however, also distinguish it from this case. There, the district court decertified the collective action before trial, after which the parties settled their claims but appealed the decertification. Reviewing for abuse of discretion, the Seventh Circuit affirmed the district court. The circuit opinion noted that the plaintiffs had recognized the possible need for individualized findings of liability for a class of 2,341 members—nearly 10 times larger than the group here—but "truculently" refused to accept a specific plan for litigation or propose an alternative and failed to specify the other kinds of evidence that they intended to use to supplement the representative testimony. *Espenscheid*, 705 F.3d at 775–76; *see Thompson v. Bruister & Assocs.*, Inc., 967 F. Supp. 2d 1204, 1216 (M.D. Tenn. 2013) (holding that *Espenscheid* cannot "conceivably be read as an overall indictment of utilizing a collective action as a vehicle to establish liability in piecerate cases . . . because the Seventh Circuit was presented with little choice but to hold as it did, given the lack of cooperation by plaintiffs' counsel in ex-

[3] The dissent suggests we must follow *Espenscheid* because it "involved the *same defendant in this case*." (Dis. at 33.) UniTek, the parent company that provided human resources and payroll functions, was involved in both cases, but at issue in each case was what the direct employer—here FTS, there DirectSat USA—required regarding the reporting of overtime.

plaining how they intended to prove up their case"). The opinion additionally references no evidence similar to that supporting the time-shaving policy here. And the proposed, but not agreed-upon, representative sample in *Espenscheid* constituted only 1.8% of the collective action, and the method of selecting the sample was unexplained. *Espenscheid*, 705 F.3d at 774.

Conversely, FTS and UniTek ask us to overturn a case tried to completion. They seek a determination that the district court *abused its discretion* in declining to decertify the 293-member collective action after both parties preliminarily agreed to a representative trial plan, completed discovery on that basis, and jointly selected the representative members. The jury here, moreover, heard representative testimony from 5.7% of the class members at trial, FTS and UniTek had abundant opportunity to provide contradictory testimony, and FTS Technicians also submitted testimony from managers and supervisors along with documentary proof. Upon completion of the case presentations by the parties, and following jury instructions regarding collective actions, the jury returned verdicts in favor of FTS Technicians. In light of these legal, factual, and procedural differences, *Espenscheid* is simply not controlling.

To conclude our similarly situated analysis, certification here is supported by our standard. The factual and employment settings of individual FTS Technicians and the degree of fairness and the procedural impact of certifying the case favor upholding certification. FTS and UniTek's alleged individual defenses do not require decertification because they can be, and were, adequately presented in a collective forum. On the record before us, the district

court was within its wide discretion to try the claims as a collective action and formulated a trial plan that appropriately did so. Based on the record evidence of a common theory of violation—namely, an FLSA-violating time-shaving policy implemented by corporate—we affirm the district court's certification of this case as a collective action.

C. Sufficiency of the Evidence

At the close of FTS Technicians' case and after the jury verdicts, FTS and UniTek moved for judgment as a matter of law, challenging the sufficiency of the evidence, particularly the allowance of representative testimony at trial to prove liability and the use of an estimated-average approach to calculate damages. The district court denied the motion, which FTS and UniTek now appeal.

"Our review of the sufficiency of the evidence is by review of a trial judge's rulings on motions for directed verdict or [judgment as a matter of law]." *Young v. Langley*, 793 F.2d 792, 794 (6th Cir. 1986). We review de novo a post-trial decision on a motion for judgment as a matter of law by applying the same standard used by the district court. *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 818 (6th Cir. 2013). "Judgment as a matter of law may only be granted if . . . there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion in favor of the moving party." *Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005). The court must decide whether there was sufficient evidence to support the jury's verdict, without weighing the evidence, questioning the credibility of the witnesses, or substituting the court's judgment for that of the jury. *Waldo*, 726 F.3d at 818. We must view the evidence in the light most favorable to the

party against whom the motion is made, giving that party the benefit of all reasonable inferences. *Id.*

Pursuant to *Mt. Clemens*, the evidence as a whole must be sufficient to find that FTS Technicians performed work for which they were improperly compensated (*i.e.*, liability) and sufficient to support a just and reasonable inference as to the amount and extent of that work (i.e., damages). *Mt. Clemens*, 328 U.S. at 687. "[T]he only issue we must squarely decide is whether there was legally sufficient evidence—representative, direct, circumstantial, in-person, by deposition, or otherwise—to produce a reliable and just verdict." *Morgan*, 551 F.3d at 1280. Plaintiffs have the initial burden to make the liability and damages showing at trial; once made, the burden shifts to defendants to prove the precise amount of work performed or otherwise rebut the reasonably inferred damages amount. *Id.* at 687–88. If defendants fail to carry this burden, the court may award the reasonably inferred, though perhaps approximate, damages. *Id.* at 688.

1. Liability

FTS and UniTek challenge the district court's allowance of representative testimony to prove liability for nontestifying technicians. We have recognized that "representative testimony from a subset of plaintiffs [can] be used to facilitate the presentation of proof of FLSA violations, when such proof would normally be individualized." *O'Brien*, 575 F.3d at 585. Preceding *O'Brien*, we affirmed an award of back wages for unpaid off-the-clock hours based on representative testimony in *Cole Enterprises, Inc.*, 62 F.3d at 781. There, the defendant objected to an award of back wages to nontestifying employees, which was based on representative testimony at tri-

al, interview statements, and the employment records. *Id.* We endorsed the sufficiency of representative testimony, holding that "[t]he testimony of fairly representative employees may be the basis for an award of back wages to nontestifying employees." *Id.*

In FLSA cases, the use of representative testimony to establish liability has long been accepted. In the 1980s, the Tenth Circuit approved the use of representative testimony in a situation comparable to this case. There, the employer did not pay overtime to employees working cash-register stations before or after scheduled shift hours in six service stations in two states. *Simmons Petroleum Corp.*, 725 F.2d at 84. Though only twelve employees testified, the Tenth Circuit held that representative testimony "was sufficient to establish a pattern of violations," explaining that the rule in favor of representative testimony is not limited "to situations where the employees leave a central location together at the beginning of a work day, work together during the day, and report back to the central location at the end of the day." *Id.* at 86 & n.3.

In another comparable FLSA case, the Eleventh Circuit held that, "[i]f anything, the *Mt. Clemens* line of cases affirms the general rule that not all employees have to testify to prove overtime violations." *Morgan*, 551 F.3d at 1279. Although *Mt. Clemens*'s burden shifting framework did not apply because the employer kept "thorough payroll records," representative testimony could rebut on a collective basis the employer's allegedly individualized defenses to liability. *Id.* at 1276. To do so, seven plaintiffs testified on behalf of 1,424 plaintiffs, less than 1% of the total number. *Id.* The Eleventh Circuit found that the employer could not validly complain about the

ratio of testifying plaintiffs where, as here, the trial record contained other "good old-fashioned direct evidence," *id.* at 1277, and the employer opposed the plaintiffs' introduction of additional testimony while choosing not to present its own, *id.* at 1277–78. As for the employer's argument that its defenses were so individualized that the testifying plaintiffs could not fairly represent those not testifying, the circuit court held that "[f]or the same reasons that the court did not err in determining that the Plaintiffs were similarly situated enough to maintain a collective action, it did not err in determining that the Plaintiffs were similarly situated enough to testify as representatives of one another." *Id.* at 1280. The same is true here.

Our sister circuits overwhelmingly recognize the propriety of using representative testimony to establish a pattern of violations that include similarly situated employees who did not testify. *See, e.g.*, *Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir. 2014) (quoting the Ninth Circuit's *Henry v. Lehman Commercial Paper, Inc.*, 471 F.3d 977, 992 (9th Cir. 2006), for the proposition that "[t]he class action mechanism would be impotent" without representative proof and the ability to draw class-wide conclusions based on it); *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997) ("[I]t is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA."); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) ("Courts commonly allow representative employees to prove violations with respect to all employees."); *Brock v. Tony & Susan Alamo Found.*, 842 F.2d 1018, 1019–20 (8th Cir. 1988) ("[T]o compensate only those associates who chose or

where chosen to testify is inadequate in light of the finding that other employees were improperly compensated."); *Ho Fat Seto*, 850 F.2d at 589 (holding that, based on representative testimony, "[t]he twenty-three non-testifying employees established a prima facie case that they had worked unreported hours"); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985) (holding that requirement that testimony establishing a pattern or practice must refer to all nontestifying employees "would thwart the purposes of the sort of representational testimony clearly contemplated by *Mt. Clemens*"); *Donovan v. Burger King Corp.*, 672 F.2d 221, 224–25 (1st Cir. 1982) (limiting testimony to six plaintiffs from six restaurant locations owned by defendant "in light of the basic similarities between the individual restaurants"); *Gen. Motors Acceptance Corp.*, 482 F.2d at 829 (holding that, based on testimony from sixteen representative employees and a report on six employees that found "employees in this type of job consistently failed to report all the overtime hours worked," "the trial court might well have concluded that plaintiff had established a prima facie case that all thirty-seven employees had worked unreported hours"). In the face of these consistent precedents, many with fact patterns similar to this case, FTS and UniTek point to no case categorically disapproving of representative testimony to prove employer liability to those in the collective action who do not testify.

FTS and UniTek next assert that, even if representative testimony is allowed generally, testifying technicians here were not representative of nontestifying technicians. The record suggests otherwise, as we explained above when determining that FTS Technicians were similarly situated. We found that

testifying technicians were geographically spread among various FTS profit centers and were subject to the same job duties, timekeeping system, and compensation plan as nontestifying technicians. As Morgan highlights, the collective-action framework presumes that similarly situated employees are representative of each other and have the ability to proceed to trial collectively. *See Morgan*, 551 F.3d at 1280.

The dissent also challenges the representative nature of the technicians' testimony, arguing for a blanket requirement of direct correlation because a plaintiff alleging "*the company* altered my timesheets" cannot testify on behalf of one alleging that "*I* underreported my time because my supervisor directed me to." (Dis. at 36.) Though the time-shaving policy may have been enforced as to individual technicians by several methods, we do not define "representativeness" so specifically—just as we do not take such a narrow view of "similarly situated." *See O'Brien*, 575 F.3d at 585; *see also Cole Enters., Inc.*, 62 F.3d at 778. For the testifying technicians to be representative of the class as a whole, it is enough that technicians testified as to each means of enforcement of the common, FLSA-violating policy. *See Simmons Petroleum Corp.*, 725 F.2d at 86 (deeming testimony from at least one employee in each category of plaintiffs sufficient to establish a pattern of violations and support an award of damages to all); *see also Sec'y of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) ("Where the employees fall into several job categories, it seems to us that, at a minimum, the testimony of a representative employee from, or a person with first-hand knowledge of, each of the categories is essential to support a back pay award.").

Here, the jury heard testimony that managers told technicians to underreport hours before and after work and during lunch and that, in the absence of direct orders, FTS otherwise exerted pressure to underreport under threat of reprimand, loss of work assignments, or termination. Or managers just directly altered the timesheets. The dissent's conclusion that the proof was not "remotely representative" (Dis. at 36) neither acknowledges how representative testimony was presented here nor does it follow from the record evidence. There was ample evidence of managers implementing off-the-clock work requirements established and enforced through one corporate policy and ample evidence that the collective group of plaintiffs experienced the same policy enforced through three means. All FTS Technicians were properly represented by those testifying.

The collective procedure adopted by the district court, moreover, was based on FTS and UniTek's agreement, which was memorialized by court order, to limit discovery "to a representative sample of fifty (50) opt-in Plaintiffs" and to approach the district court after discovery regarding "a trial plan based on representative proof" that "will propose a certain number of Plaintiffs from the pool of fifty (50) representative sample Plaintiffs that may be called as trial witnesses." After discovery closed, FTS and UniTek did object to the use of representative proof at trial. But as we have explained, the district court's denial of that motion is not grounds for reversal at this stage.

FTS and UniTek's remaining arguments on liability are simply reiterations of the claims that FTS Technicians are not similarly situated and that the testifying technicians are not representative. FTS

and UniTek first complain that the liability verdict form gave the jury an "all or nothing" choice. But the jury's choice was whether or not FTS applied a single, company-wide time-shaving policy to all FTS Technicians that encompassed each means used to enforce it. The jury found that it did. This accords with precedent recognizing that preventing similarly situated employees from proceeding collectively based on representative evidence would render impotent the collective-action framework. *See, e.g.*, *Garcia*, 770 F.3d at 1307.

Next FTS and UniTek cite *Espenscheid* a second time. As to representative testimony, *Espenscheid* emphasized that the representative evidence before it could not be sufficient because it consisted entirely of testimony regarding "the experience of a small, unrepresentative sample of [workers]" (1.8% of the 2,341 members), which cannot "support an inference about the work time of thousands of workers." 705 F.3d at 775. These are not the facts before us. Testifying technicians here are representative, and the ratio of testifying technicians to nontestifying technicians—5.7%—is well above the range commonly accepted by courts as sufficient evidence, especially where other documentary and testimonial evidence is presented. *See, e.g.*, *Morgan*, 551 F.3d at 1277 (affirming award to 1,424 employees based on testimony from seven, or .49%, in addition to other evidence); *S. New Eng.*, 121 F.3d at 67 (affirming award to nearly 1,500 employees based on testimony from 39, or 2.5%); *Burger King Corp.*, 672 F.2d at 225 (affirming award of back wages to 246 employees based on testimony from six, or 2.4%); *see also DeSisto*, 929 F.2d at 793 (holding "there is no ratio or formula for determining the number of employee witnesses required" but testimony of a single employee is not

enough). FTS and UniTek, moreover, had the opportunity to call other technicians but chose not to. *See Morgan*, 551 F.3d at 1278 ("Family Dollar cannot validly complain about the number of testifying plaintiffs when . . . Family Dollar itself had the opportunity to present a great deal more testimony from Plaintiff store managers, or its own district managers, [but] it chose not to.").

In light of the proper use of representative testimony to prove liability, we note the sufficiency of the evidence presented here. FTS Technicians offered testimony from 17 representative technicians and six managers and supervisors, as well as documentary evidence including timesheets and payroll records, to prove that FTS implemented a company-wide timeshaving scheme that required employees to systematically underreport their hours. *See id.* at 1277 ("The jury's verdict is well-supported not simply by 'representative testimony,' but rather by a volume of good old-fashioned direct evidence."); *Gen. Motors Acceptance Corp.*, 482 F.2d at 829 (holding that trial court could conclude violations as to nontestifying employees based on evidence that "employees in this type of job consistently failed to report all the overtime hours worked"). Witnesses attributed the timeshaving policy to corporate, and FTS executives told managers and technicians to underreport overtime. Technicians complained, but FTS took no remedial actions. *See Cole Enters., Inc.*, 62 F.3d at 779 ("[I]t is the responsibility of management to see that work is not performed if it does not want it to be performed."). In response to this evidence and despite agreeing to and participating in the selection of 50 representative technicians and including all 50 on its witness list, FTS and UniTek called only four corporate executives and no technicians.

Our standard of review dictates that we view the evidence in the light most favorable to FTS Technicians and give them the benefit of all reasonable inferences. Based on the trial record and governing precedent, we conclude that the evidence here is sufficient to support the jury's verdict that all FTS Technicians, both testifying and nontestifying, performed work for which they were not compensated.

2. Damages

FTS and UniTek object to the use of an estimated-average approach to calculate damages for nontestifying technicians. They argue that an estimated-average approach does not allow a "just and reasonable inference"—the *Mt. Clemens* standard—on the number of hours worked by nontestifying technicians because it results in an inaccurate calculation, giving some FTS Technicians more than they are owed and some less.

We addressed a version of the estimated-average approach in *Cole Enterprises, Inc.*, concluding that "[t]he information [pertaining to testifying witnesses] was also used to make *estimates and calculations* for similarly situated employees who did not testify. The testimony of fairly representative employees may be the basis for an award of back wages to nontestifying employees." 62 F.3d at 781 (emphasis added). Other circuits and district courts have explicitly approved of an estimated average. *See Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472–73, 472 n.7 (11th Cir. 1982) (affirming district court's determination that "waitresses normally worked an eight and one-half hour day" based on "the testimony of the compliance officer and computations based on the payroll records"); *Donovan v. Hamm's Drive Inn*, 661 F.2d 316, 318 (5th Cir. 1981)

(affirming as "accepted practice" and not "clearly erroneous" district court's finding that, "based on the testimony of employees, . . . certain groups of employees averaged certain numbers of hours per week" and award of "back pay based on those admittedly approximate calculations" because reversing would penalize the employees for the employer's failure to keep adequate records); *Baden-Winterwood v. Life Time Fitness Inc.*, 729 F. Supp. 2d 965, 997–1001 (S.D. Ohio 2010) (averaging hours per week worked by testifying plaintiffs and applying it to nontestifying plaintiffs); *Cowan v. Treetop Enters.*, 163 F. Supp. 2d 930, 938–39 (M.D. Tenn. 2001) ("From the testimony of the Plaintiffs' and the Defendants' employee records, the Court finds . . . that Plaintiffs worked an average of 89.04 hours per week and applying *Mt. Clemens*, this finding is applied to the entire Plaintiff class to determine the amount of overtime backpay owed for the number of weeks of work stipulated by the parties.").

Mt. Clemens acknowledges the use of "an estimated average of overtime worked" to calculate damages for nontestifying employees. 328 U.S. at 686. There, eight employees brought suit on behalf of approximately 300 others. A special master concluded that productive work did not regularly commence until the established starting time. *Id.* at 684. Declining to adopt the special master's recommendation, the district court found that the employees were ready for work 5 to 7 minutes before starting time and presumed that they started immediately. *Id.* at 685. To calculate damages, the district court fashioned a formula to derive an estimated average of overtime worked by all employees, testifying and nontestifying. *Id.* On direct appeal to the Sixth Circuit, we deemed the estimated average insufficient.

Id. at 686. Though the Supreme Court ultimately agreed with the special master, it reversed our disapproval of the estimated average, explaining that we had "imposed upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act." *Id.* at 686, 689.

Disapproving of an estimated-average approach simply due to lack of complete accuracy would ignore the central tenant of *Mt. Clemens*—an inaccuracy in damages should not bar recovery for violations of the FLSA or penalize employees for an employer's failure to keep adequate records. *See id.* at 688 ("The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.'" (quoting *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 563 (1931)); *see also Hamm's Drive Inn*, 661 F.2d at 318 (upholding an estimated-average approach and noting that "[e]vidence used to calculate wages owed need not be perfectly accurate, since the employee should not be penalized when the inaccuracy is due to a defendant's failure to keep adequate records"). *Mt. Clemens* effectuates its principles through a burden-shifting framework in which employees are not punished but employers have the opportunity to make damages more exact and precise by rebutting the evidence presented by employees. *See Mt. Clemens*, 328 U.S. at 687–88; *see also Herman*, 183 F.3d at 473. FTS and UniTek had the opportunity at trial to present additional evidence to rebut FTS Technicians' evidence but failed to do so.

Mt. Clemens's burden-shifting framework, in conjunction with the estimated-average approach, functioned here as envisioned. Seventeen technicians working at various locations testified and were cross-examined as to the number of unrecorded hours they worked, allowing the jury to infer reasonably the average weekly unpaid hours worked by each. Testifying technicians were similarly situated to and representative of nontestifying technicians, as specified by the district court's instructions to the jury, and thus the average of these weekly averages applied to nontestifying technicians. The jury found fewer unrecorded hours than testifying technicians claimed; FTS and UniTek thus partially refuted the inference sought by FTS Technicians and their defenses were distributed to make the damages more exact and precise, as the *Mt. Clemens* framework encourages.

Viewing the evidence in the light most favorable to FTS Technicians, we cannot conclude that reasonable minds would come to but one conclusion in favor of FTS and UniTek. Accordingly, the average number of unpaid hours worked by testifying and nontestifying technicians, based on the jury's findings and the estimated-average approach, resulted from a just and reasonable inference supported by sufficient evidence.

D. Jury Instruction on Commuting Time

In another challenge to the jury's determination of unrecorded hours worked, FTS and UniTek argue that the district court erred by instructing the jury on commuting time. FTS and UniTek do not dispute that the district court accurately instructed the jury on when commuting time requires compensation; they instead argue that, as a matter of law, the instruction should not have been given because a rea-

sonable juror could not conclude that compensation for commuting time was required here.

"This [c]ourt reviews a district court's choice of jury instructions for abuse of discretion." *United States v. Ross*, 502 F.3d 521, 527 (6th Cir. 2007). A district court does not abuse its discretion in crafting jury instructions unless the instruction "fails accurately to reflect the law" or "if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Id.* We generally must assume that the jury followed the district court's instructions. *See United States v. Olano*, 507 U.S. 725, 740 (1993); *see also United States v. Monus*, 128 F.3d 376, 390–91 (6th Cir. 1997) ("[E]ven if there had been insufficient evidence to support a deliberate ignorance instruction, we must assume that the jury followed the jury charge and did not convict on the grounds of deliberate ignorance."). Here, the verdict form does not specify whether the jury included commuting time in the average numbers of unrecorded hours, and we assume that the jury followed the district court's instructions by not including commuting time that does not require compensation.

E. Calculation of Damages

FTS and UniTek lastly challenge the district court's calculation of damages. They argue that the district court (1) took the calculation of damages away from the jury in violation of the Seventh Amendment and (2) used an improper and inaccurate methodology by failing to recalculate each technician's hourly rate and by applying a 1.5 multiplier. These are questions of law or mixed questions of law and fact that we review de novo. *See Harries v. Bell*, 417 F.3d 631, 635 (6th Cir. 2005).

We begin with the Seventh Amendment arguments. The dissent claims that the Seventh Amendment was violated because the trial procedure resulted in "non-representative" proof (Dis. at 39) and posits a standard requiring a jury in any collective action to "determine the 'estimated average' that *each* plaintiff should receive" (*Id.* at 40 (emphasis added)). Such an individual requirement for each member of a collective action does not comport with the principles of and precedent on representative proof, and would contradict certification of the case as a collective action in the first place.

Here, moreover, the proof was representative and the jury rendered its findings for the testifying and nontestifying plaintiffs in accordance with the district court's charge. Finding that "the evidence presented by the representative plaintiffs who testified establishe[d] that they worked unpaid overtime hours," and applying that finding in accordance with the instruction that "those plaintiffs that you did not hear from [would] also [be] deemed by inference to be entitled to overtime compensation," the jury determined that all FTS Technicians had "proven their claims." The jury accordingly made the factual findings necessary for the court to complete the remaining arithmetic of the estimated-average approach. The Seventh Amendment does not require the jury, instead of the district court, to perform a formulaic or mathematical calculation of damages. *See Wallace v. FedEx Corp.*, 764 F.3d 571, 591 (6th Cir. 2014) ("[A] court may render judgment as a matter of law as to some portion of a jury award [without implication of the Seventh Amendment] if it is compelled by a legal rule or if there can be no genuine issue as to the correct calculation of damages."); *see also Maliza v. 2011 MAR-OS Fashion, Inc.*, No. CV-07-463,

2010 WL 502955, at *1 (E.D.N.Y. Feb 10, 2010) (completing arithmetic on shortfalls, if any, in wages paid to plaintiff after jury calculated "month-by-month determinations of the hours worked by, and wages paid to, the plaintiff"). On this record, the Seventh Amendment is not implicated.

At any rate, FTS and UniTek rejected the district court's offer to impanel a second jury to make additional findings and perform the damages calculation. They had cited their "constitutional rights to a jury" at the end of trial, but at the status conference on damages the court asked if FTS and UniTek wished to have "a panel come in, select another panel, and submit the issues of damages." (R. 444, PageID 10171–72.) Their counsel responded, "No, your honor. I don't think that's allowed . . . for these claims." (*Id.* at 10172.) The court went on to ask, "You would be upset if we did have a jury trial to finish up the damages question?" (*Id.* at 10173.) Counsel responded, "Well, your Honor, again, it's our position that that's not appropriate." (*Id.*) Banking instead on their arguments that the estimated-average approach is inappropriate and that any calculation of damages would not be supported by sufficient evidence, counsel maintained that "the only thing, quite frankly, that's left and that is appropriate is an entry of judgment . . . either for the defense or liability for plaintiffs and with zero damages." (*Id.*) After the court asked for a "more constructive approach from the defense," counsel agreed to a briefing schedule on the calculation of damages. (*Id.* at 10181.) Counsel subsequently qualified that FTS and UniTek were "not waiving . . . or changing their position," but the positions referenced were those relied upon at the status conference—the estimated-average-approach disagreement and sufficiency-of-the-evidence argu-

ment. Based on this record, FTS and UniTek abandoned and waived any right to a jury trial on damages that they may have had.

In regard to FTS and UniTek's challenge to the district court's methodology, FLSA actions for overtime are meant to be compensatory. *See, e.g., Nw. Yeast Co. v. Broutin*, 133 F.2d 628, 630–31 (6th Cir. 1943) (finding that the FLSA "is premised upon the existence of an employment contract" and that recovery authorized by 29 U.S.C. § 216(b) "does not constitute a penalty, but is considered compensation"); 29 U.S.C. § 216(b) ("Any employer who violates [the FLSA] shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . ."). To achieve its purpose, the FLSA directs an overtime wage calculation to include (1) the regular rate, (2) a numerical multiplier of the regular rate, and (3) the number of overtime hours. *See* 29 U.S.C. § 207; 29 C.F.R. § 778.107. In a piece-rate system, "the regular hourly rate of pay is computed by adding together total earnings for the workweek from piece rates and all other sources" and then dividing "by the number of hours worked in the week for which such compensation was paid." 29 C.F.R. § 778.111(a). The numerical multiplier for overtime hours in a piece-rate system is .5 the regular rate of pay. *Id.* (A piece-rate worker is entitled to be paid "a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. . . . Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked.").

As for the hourly rate, the amount of "straight time" paid in a piece rate system remains the same regardless of the number of hours required to complete the number of jobs. The fixed nature of piece rates shows that piece-rate compensation was paid for all hours worked by FTS Technicians, regardless of whether that time was recorded. It also creates an inverse relationship between the number of hours worked and the hourly rate: working more hours lowers a technician's hourly rate. By not recalculating hourly rates to reflect the actual increased number of hours FTS Technicians worked each week, the district court used a higher hourly rate than would have been used if no violation had occurred. This approach overcompensated FTS Technicians and required FTS and UniTek to pay more for unrecorded overtime hours than recorded overtime hours. For the damages calculation to be compensatory, therefore, hourly rates must be recalculated with the correct number of hours to ensure that FTS Technicians receive the pay they would have received had there been no violation.

Regarding the correct multiplier, the FLSA entitles piece-rate workers to an overtime multiplier of .5, and the record shows that FTS and UniTek used this multiplier to calculate FTS Technicians' overtime pay for recorded hours. In explaining the piece-rate system to their technicians, FTS and UniTek provided an example where a technician receiving $1,000 in piece rates for 50 hours of work would receive $100 in overtime compensation. Reverse engineering this outcome gives us the following formula: regular rate of $20.00/hour multiplied by a .5 multiplier and 10 overtime hours. Plugging a multiplier of 1.5 into the formula would result in $300 of overtime pay, overcompensating this hypothetical technician,

as it did FTS Technicians. We accordingly reverse the district court's use of a 1.5 multiplier.

Reversal of the district court's calculation of damages does not necessitate a new trial on liability. We have "the authority to limit the issues upon remand to the [d]istrict [c]ourt for a new trial" and such action does "not violate the Seventh Amendment." *Thompson v. Camp*, 167 F.2d 733, 734 (6th Cir. 1948) (per curiam). We remand to the district court to recalculate damages consistent with this opinion.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's certification of this case as a collective action, allowance of representative testimony at trial, and use of an estimated-average approach; REVERSE the district court's calculation of damages; and REMAND to the district court for recalculation of damages consistent with this opinion.

CONCURRING IN PART AND DISSENTING IN PART

SUTTON, Circuit Judge, concurring in part and dissenting in part. Two questions loom over every multi-plaintiff action: Who is representing whom? And can they fairly represent them? Whether it be a class action under Civil Rule 23, a joined action under Civil Rule 20, or as here a collective action under § 216 of the Fair Labor Standards Act, 29 U.S.C. § 216(b), the only way in which representative proof of liability—evidence by some claimants to prove liability for all—makes any sense is if the theory of liability of the testifying plaintiffs mirrors (or is at least substantially similar to) the theory of liability of the non-testifying plaintiffs. The same imperative exists at the damages stage, where the trial court must match any representative evidence with a representative theory of liability and damages.

The three trial judges who handled this case (collectively as it were) did not heed these requirements. Before trial, the district court mistakenly certified this case as one collective action as opposed to a collective action with two or three sub-classes, as the various and conflicting theories of liability required. At trial, the district court approved a method of assessing damages that violated the Seventh Amendment. After trial, the district court miscalculated damages by failing to adjust plaintiffs' hourly wages and using an incorrect multiplier. The majority goes part of the way to correcting these problems by reversing the district court's damages calculation. I would go all of the way and correct the first two errors as well.

Collective-action certification. The Fair Labor Standards Act permits employees to bring lawsuits on behalf of "themselves and other employees similarly situated." 29 U.S.C. § 216(b). To determine whether plaintiffs are "similarly situated," we look to (1) "the factual and employment settings of the individual[] plaintiffs," (2) "the different defenses to which the plaintiffs may be subject," and (3) "the degree of fairness and procedural impact of certifying the action as a collective action," among other considerations. *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 584 (6th Cir. 2009) (quotation omitted), *abrogated on other grounds by Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). Helpful as this checklist may be, it should not obscure the core inquiry: Are plaintiffs similarly situated *such that* their claims of liability and damages can be tried on a class-wide and representative basis? 7B Charles Alan Wright et al., Federal Practice and Procedure § 1807 (3d ed. 2005).

That is where the plaintiffs come up short. They claim that the defendants violated the Fair Labor Standards Act in three distinct ways: (1) by falsifying employees' timesheets; (2) by instructing employees to underreport their hours; and (3) by creating incentives for employees to underreport by rewarding "productiv[ity]" and scheduling fewer shifts for those who worked too many hours. R. 200 at 8. The problem with the plaintiffs' approach is that a jury could accept some of their theories of liability while rejecting others, and yet the verdict form gave the jury only an all-or-nothing-at-all option. Assume that, as plaintiffs allege, supervisors at a certain subset of the defendants' offices directed employees to underreport (which violates the FLSA), while supervisors at a distinct subset of offices merely urged em-

ployees to be more efficient (which normally will not violate the FLSA). *See Davis v. Food Lion*, 792 F.2d 1274, 1275–78 (4th Cir. 1986); *Brumbelow v. Quality Mills, Inc.*, 462 F.2d 1324, 1327 (5th Cir. 1972). A jury could decide that statutory violations occurred at the first group of offices but not the second (perhaps because the calls for efficiency did not rise to the level of a statutory violation, perhaps because the plaintiffs did not present enough evidence to conclude that supervisors pressured their employees to underreport, or perhaps because the only pressure—to be efficient—was self- induced and not a violation at all). What, then, is the jury tasked with delivering a class-wide verdict to do? It must say either that the defendants are liable as to the entire class or that the defendants are liable as to no one—when the truth lies somewhere in the middle. Just as it would be unfair to impose class-wide liability for all 296 employees based on the "representative" testimony that some supervisors directed employees not to report their hours, so it would be unfair to deny class-wide liability based on the "representative" testimony that *some* supervisors merely urged employees to be more efficient.

The evidence introduced at trial illustrates the problem. Start with Richard Hunt, who said he was instructed "to dock an hour for lunch whether [he] took it or not." R. 456 at 125. Compare him to Paul Crossan, who testified that he underreported his time "because [he] wanted more jobs for more money for [him]self," thinking he would not be scheduled for extra shifts if he recorded too many hours. R. 448 at 77. Then compare them both to Stephen Fischer, who said he was instructed to underreport his hours on some occasions, was told to *overreport* his hours on other occasions, and in still other cases underre-

ported because he wanted to "be routed daily and not miss any work." R. 456 at 78. With so many variables in play—different employees offering different testimony about different types of violations—how could a jury fairly assess liability on a class-wide, one-size-fits-all basis? I for one do not see how it could be done.

The Seventh Circuit recently explained how all of this should work in its unanimous opinion in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (2013). The case not only arose in the same industry and not only concerned the same worker-incentive plans, but it also involved the *same defendant in this case*. *Id.* at 772–73. Now that is an apt use of the term similarly situated. In denying certification, Judge Posner explained the "complication presented by a worker who underreported his time, but did so . . . not under pressure by [the defendant] but because he wanted to impress the company with his efficiency." *Id.* at 774. The problem, as in this case, was that some plaintiffs were instructed to underreport; others underreported to meet the company's efficiency goals; and still others alleged that, while they recorded their time correctly, the company miscalculated their wages. *Id.* at 773–74; *see Espenscheid v. DirectSat USA, LLC*, No. 09-cv-625-bbc, 2011 WL 2009967, at *2 (W.D. Wis. May 23, 2011), *amended by* 2011 WL 2132975 (W.D. Wis. May 27, 2011). Because the plaintiffs offered no way to "distinguish . . . benign underreporting from unlawful conduct by [the defendant]"—and no other way to prove their multiple, conflicting theories of liability on an all-or-nothing class-wide basis—the Seventh Circuit refused to let them proceed collectively. 705 F.3d at 774. The court also worried that, because each employee did not perform the same tasks, they

were not sufficiently similar to permit a class-wide determination of liability or damages, *id.* at 773; that assessing damages would require a "separate evidentiary hearing[]" for each member of the class, *id.*; that the plaintiffs' plan to use "representative" proof with their hand-picked employees would not work because the various theories of liability made it impossible to have representative employees in a single class, *id.* at 774; and that "the experience of a small, unrepresentative sample" of testifying workers could not support "an inference about the work time of" the remaining plaintiffs, *id.* at 775. Although the district court had proposed to divide the employees into three sub-classes, "corresponding to the three types of violation[s]" alleged, plaintiffs' counsel opposed the court's plan and "refus[ed] to suggest a feasible alternative, including a feasible method of determining damages." *Id.* at 775–76. We could adopt the Seventh Circuit's opinion as our own in this case, since it highlights precisely the same problems that afflicted the plaintiffs' trial plan. Because the employees did not offer a "feasible method of determining" liability and damages, the district court should have decertified their case. *Id.* at 776.

All of this does not mean that a collective action was not an option. It means only that plaintiffs should have accounted for their distinct theories by dividing themselves into sub-classes, one corresponding to each theory of liability under the statute—and indeed under their own trial plan. That is a tried and true method of collective-action representation, and nothing prevented plaintiffs from using it here.

The plaintiffs offer two reasons for concluding that their trial plan worked, even without sub-classes. First, they argue that they were subject to a

"unified" company-wide "time-shaving policy" and that their trial plan enabled them to prove this policy's existence on a class-wide basis. Appellees' Br. 41. But what was the relevant policy? Was it that supervisors should alter employees' timesheets? That they should instruct employees to underreport their hours? That they should subtly encourage employees to underreport by urging them to be efficient? The plaintiffs define the company-wide "policy" at such a high level of generality that it encompasses multiple policies, each one corresponding to a different type of statutory violation and some to no violation at all. The FLSA does not bar "benign underreporting" where workers try "to impress the company with [their] efficiency in the hope of obtaining a promotion or maybe a better job elsewhere—or just to avoid being laid off." *Espenscheid*, 705 F.3d at 774. Nor does it violate the FLSA to reduce an employee's amount of work to avoid increasing overtime costs. *See* 29 C.F.R. § 785.13; *see also U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 779–80 (6th Cir. 1995); *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir. 2011). Yet what purports to link the plaintiffs' claims (cognizable and non-cognizable alike) is merely the theory—at a dizzying level of generality—that the defendants violated the overtime provisions of the FLSA. A company-wide "time-shaving" policy is lawyer talk for a company-wide policy of violating the FLSA. That does not do the trick. And most assuredly it does not do the trick when one of the theories does not even violate the FLSA.

The majority worries that, by requiring subclasses to litigate the relevant policies, my approach would limit liability to donning and doffing cases. But those are not the only types of cases in which a

company-wide policy—in the singular—permits class-wide resolution of liability and damages. Imagine that FTS and UniTek, rather than employing different practices in different offices, told supervisors at every location to dock the pay of employees who worked at least fifty hours; or declined to pay employees for compensable commuting time; or stated that technicians in each office should not be paid for their lunch break, even if they worked through it; or used punch-in clocks that systematically under-recorded employees' time. The plaintiffs in each of these cases could prove liability and damages on a class-wide basis, which means they could use the collective-action device to litigate their claims. But if, as here, the company employs multiple policies, as FTS and UniTek allegedly did, the plaintiffs must bring separate actions or prove violations using subclasses (or any other trial plan that permits class-wide adjudication). The majority warns that my approach "would compel employees to bring a separate collective action . . . for unreported work required by an employer before clocking in, and another for work required after clocking out." *Supra* at 13. But of course that "level of granularity," *id.* at 12–13, is not required, and crying wolf won't make it so. All that's required is an approach that allows plaintiffs to litigate their claims collectively only when they can *prove* their claims collectively.

Second, the plaintiffs argue that the jury could assess class-wide liability by relying on "representative" proof. They note that, before trial, the parties agreed to take discovery on a "sample" of fifty employees—forty chosen by the plaintiffs, ten by the defendants. R. 249-1 at 2. The plaintiffs called seventeen of those employees to testify at trial. This representative testimony, say the plaintiffs, gave the ju-

ry enough information to reach a class-wide verdict, which means the employees were sufficiently similar to permit collective-action certification and collective-action resolution.

That representative proof works in some cases does not mean it works in all cases. The question—always—is *who* can fairly represent *whom*. If the proof shows systematic underreporting by the employer of, say, the time it takes to don and doff the same protective clothing—giving the same workers credit for three minutes when the proof shows it takes seven minutes—representative proof works just fine. In that setting, there is evidence about how long it takes workers to don and doff and proof that the same deficiency was applied to all plaintiffs. But I am skeptical, indeed hard pressed to believe, that plaintiffs who allege one theory of liability (*e.g.*, *the company* altered my timesheets) can testify on behalf of those who allege another (*e.g.*, *I* underreported my time because my supervisor directed me to) or still another (*e.g.*, *I* altered my time because the company urged me to be efficient). Plaintiffs who were told to underreport, for example, tell us very little about plaintiffs at different offices, working under different supervisors, who underreported based on efforts to improve efficiency. That is why the majority goes astray when it suggests that "it is enough that technicians testified as to each means of enforcement of the common, FLSA-violating policy." *Supra* at 21. The question is not whether each "means of enforcement" was represented; it is whether each means of enforcement was represented *in proportion to* its actual employment by FTS and UniTek across the entire class—something that the plaintiffs did not even attempt to prove.

Does anyone doubt how this case would come out if the roles were reversed—if most of the testifying plaintiffs were subtly pressured to underreport while only a few were told to do so? We would hesitate, I suspect, to say that the testifying employees were "representative" of all their non-testifying peers, especially if the jury returned a verdict for the defendants. What is sauce for one, however, presumably should be sauce for the other, making the district court's certification order perilous for defendants *and* plaintiffs alike. No doubt, collective actions permit plaintiffs to rely on representative proof. But that proof must be *representative*—and here plaintiffs' own evidence demonstrates that it was not remotely representative. *See Espenscheid*, 705 F.3d at 774; *see also Sec'y of Labor v. DeSisto*, 929 F.2d 789, 793–94 (1st Cir. 1991); *Reich v. S. Md. Hosp., Inc.*, 43 F.3d 949, 952 (4th Cir. 1995).

The plaintiffs claim that *Anderson v. Mt. Clemens Pottery Co.* permits this trial plan. 328 U.S. 680 (1946). But by its own terms, that is a case about damages, not liability. *Mt. Clemens Pottery* holds that, *after* an employee has shown that he "performed work and has not been paid in accordance with the" FLSA, he may "show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687–88. The "just and reasonable inference" rule, in other words, comes into play only when the "fact of damages" is "certain" but the "amount of damages" is unclear. *Id.* at 688. As *O'Brien* explains, "*Mt. Clemens Pottery* and its progeny do not lessen the standard of proof for showing that a FLSA violation occurred." 575 F.3d at 602; *see also Shultz v. Tarheel Coals, Inc.*, 417 F.2d 583, 584 (6th Cir. 1969) (per curiam); *Porter v. Leventhal*, 160 F.2d 52, 58 (2d Cir. 1946); *Kemmerer v. ICI Ams.*

Inc., 70 F.3d 281, 290 (3d Cir. 1995); *Brown v. Family Dollar Stores of Ind., LP*, 534 F.3d 593, 594–95 (7th Cir. 2008); *Carmody v. Kansas City Bd. of Police Comm'rs*, 713 F.3d 401, 406 (8th Cir. 2013); *Alvarez v. IPB, Inc.*, 339 F.3d 894, 914–15 (9th Cir. 2003). The case thus provides no support for the plaintiffs' claim that they can show liability under a "relaxed" standard of proof. Appellees' Br. 39.

The plaintiffs counter that the defendants agreed to representative discovery, claiming that this means they necessarily agreed to representative proof at trial. The one does not follow from the other. The only way to determine whether one group of plaintiffs is representative of another is to gather information about both groups, typically by conducting discovery. When the defendants, after taking depositions, learned that the selected employees were not representative of their peers, they objected to the plaintiffs' plan to use representative proof at trial. Then they objected to it three more times. We have no right to penalize them for failing to raise this objection *before* discovery when the targeted problem did not materialize until *after* discovery was complete. Put another way, there is a difference between *alleging* a uniform policy of underreporting and *proving* one. Once discovery showed there was no uniform policy, the defendants properly objected to representative proof.

The plaintiffs lean on *O'Brien v. Ed Donnelly Enterprises* to try to sidestep these problems but it cannot bear the weight. 575 F.3d 567 (6th Cir. 2009). *O'Brien* in dicta said that plaintiffs are similarly situated when "their claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individual-

ized and distinct." *Id.* at 585. But *O'Brien*'s point was that, *if* plaintiffs offer a trial plan that enables them to prove their case on a class-wide basis, the court should permit the suit to proceed as a collective action. Such a trial plan, in some cases, may involve "individualized" presentations of proof; in other cases, representative proof may suffice. *Id.* But in all cases, plaintiffs must offer *some* reasoned method for the jury to assess class-wide liability—and that is just what the plaintiffs failed to do here. As for *O'Brien*'s *holding*, it was that the opt-in plaintiff was *not* similarly situated to the other plaintiffs, "because she failed to allege that she suffered from" the "unlawful practice[s]" endured by those employees. *Id.* at 586. Just so here, where the plaintiffs failed to offer a means of proving that they suffered from "unlawful practice[s]" on a class-wide basis.

Finally, the plaintiffs (and the majority) try to distinguish this case from the Seventh Circuit's decision in *Espenscheid*. It is true that the Seventh Circuit applies the Rule 23 class-action standard to assess whether plaintiffs are "similarly situated" and that our circuit has rejected Rule 23(b)(3)'s "predominance" inquiry as an element of the "similarly situated" analysis. *Compare Espenscheid*, 705 F.3d at 772, with *O'Brien*, 575 F.3d at 584–85. But that makes no difference here. Under both the Seventh Circuit's approach and our own, one way for plaintiffs to satisfy the "similarly situated" inquiry is to allege "common theories" of liability that can be proved on a class-wide basis. *See O'Brien*, 575 F.3d at 585. That is exactly what the Seventh Circuit found to be missing when it held that the *Espenscheid* plaintiffs failed to distinguish "benign underreporting from unlawful conduct." 705 F.3d at 774. And that is exactly what is missing here. The

majority also notes that *Espenscheid* involved a larger group of plaintiffs than this case. But that had no bearing on the Seventh Circuit's analysis. Nor could it. Whether the collective action consisted of twenty employees or two thousand, the problem was that those employees could not prove class-wide liability—and the same reasoning applies to the class of two-hundred-plus plaintiffs today. An error does not become harmless because it affects "just" 200 people or "just" two companies.

Seventh Amendment. It should come as no surprise that a skewed liability determination leads to a skewed damages calculation. The majority to its credit corrects one problem with the damages calculation. I would correct the other. The plaintiffs provided no evidence from which the jury (or, alas, the court) could conclude that the testifying plaintiffs failed to record a comparable number of hours on their timesheets as their non-testifying peers. The district court nonetheless adopted a trial procedure that *assumed* that each of the testifying and non-testifying employees was similarly situated for purposes of calculating damages. That procedure not only ignored the non-representative nature of the proof but it also violated the Seventh Amendment.

Here's how the district court calculated damages: When the jury returned a verdict for the plaintiffs, it identified the average number of weekly hours that each of the seventeen testifying employees had worked but had not recorded on their timesheets. The court then averaged together the number of unrecorded hours for each testifying employee, assumed that this value was also the average number of unrecorded hours for each of the 279 *non*-testifying em-

ployees, and awarded damages to the class as a whole.

The Seventh Amendment bars this judge-run, average-of-averages approach. "In Suits at common law, where the value in controversy shall exceed twenty dollars," the Amendment reads, "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. That means a court may not "substitut[e] its own estimate of the amount of damages which the plaintiff ought to have recovered[] to enter an absolute judgment for any other sum than that assessed by the jury." *Lulaj v. Wackenhut Corp.*, 512 F.3d 760, 766 (6th Cir. 2008) (quotation omitted). Yet that is just what the court did. The jury awarded damages to the seventeen testifying plaintiffs, but the court—on its own and without any jury findings—extrapolated that damages award to the remaining 279 plaintiffs.

The plaintiffs defend this procedure by noting that a court may "render judgment as a matter of law as to some portion of a jury award if it is compelled by a legal rule or if there can be no genuine issue as to the correct calculation of damages." *Id.* But the district court did not award damages based on a legal conclusion; it did so based on its finding that the non-testifying plaintiffs failed to record the same number of hours, on average, as their testifying peers. That is a *factual finding* about the number of hours worked by each plaintiff. And the Seventh Amendment means that a jury, not a judge, must make that finding.

The majority portrays the district court's damages determination as a matter of "arithmetic," a "for-

mulaic or mathematical calculation." *Supra* at 28. How could that be? There was no finding by the jury about the overtime hours worked by the non-testifying employees and thus no basis for the judge to do the math or apply a formula. Imagine that ten plaintiffs bring a lawsuit. The court gives the jury a verdict form, listing the names of five plaintiffs and asking the jury to write down the amount of damages those plaintiffs should receive. After the jury does so, the judge decides that the remaining five plaintiffs are similar to their peers and decides they should receive damages too, all in the absence of any finding by the jury about the similarity of the two classes of plaintiffs. It then doubles the jury's award and gives damages to all ten plaintiffs. I have little doubt we would find a Seventh Amendment violation, and the majority says nothing to suggest otherwise. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990); *Wallace v. FedEx Corp.*, 764 F.3d 571, 591–94 (6th Cir. 2014). That conclusion should not change simply because this case arises in the collective-action context, where the "estimated average approach" is the accepted practice. The missing ingredient is that the jury, not the judge, must still determine the "estimated average" that each plaintiff should receive. And no court to my knowledge—either in the collective-action context or outside of it—has endorsed a procedure by which the jury awards damages to testifying plaintiffs while the judge awards damages to their non-testifying counterparts with no finding from the jury as to the latter group.

Nor did the district court cure the problem when it instructed the jury that non-testifying plaintiffs would be "deemed by inference to be entitled to overtime compensation." R. 463 at 28. This instruction

told the jury only that, if it found liability with respect to the testifying plaintiffs, it also was finding liability with respect to the non-testifying plaintiffs. The court did not inform the jury that its damages calculations would be averaged together to make a class-wide finding. Nor did the court charge the jury with determining the estimated average that each plaintiff should receive. All the instructions did, in effect, was tell the jury that the judge would calculate damages. But it should go without saying that a court cannot *correct* a Seventh Amendment violation by *informing* the jury that a Seventh Amendment violation is about to occur.

For the same reason, *Mt. Clemens Pottery* has nothing to do with this case. It is not a Seventh Amendment case. It did not permit a judge, rather than a jury, to decide whether the damages of the testifying and non-testifying employees were similar and thus could be assessed on an "estimated average approach." And it involved compensation for employees' preliminary work activities, which took roughly the same amount of time for each employee to perform. 328 U.S. at 690–93. The jury in today's case, however, found that the number of unrecorded hours varied widely among the testifying technicians—from a low of eight hours per week to a high of twenty-four, with considerable variation in between. This range of evidence increased the risk of under-compensation for employees who worked the most hours (and over-compensation for those who worked the fewest) in a way that *Mt. Clemens Pottery* never needed to confront. And that risk of course heightens the importance of keeping the damages determination where it belongs—with the jury, which is best equipped to undertake the intricate

factfinding required when the employees' unrecorded hours span so broadly.

Herman v. Palo Group Foster Home, Inc., is of a piece. 183 F.3d 468 (6th Cir. 1999). It stated that the *Mt. Clemens Pottery* framework enables juries to find damages "as a matter of just and reasonable inference" when employers do not keep adequate records of their employees' time. *Id.* at 472. Nowhere does *Herman* endorse the procedure used in this case, which permitted the *court* to *assume* (not even infer) that all employees failed to record the same number of hours on their timesheets.

The majority claims in the alternative that the defendants forfeited their claim to a jury trial on damages. Not true. The defendants opposed the district court's ruling that the court could calculate damages, and they reiterated their objections at a post-trial status conference. Consistent with these objections, the district judge did not decide that defendants forfeited the point. He instead explained he was "at a little bit of a loss" because he had not tried the case and only "now" "realize[d]" that a "residual issue" remained. R. 444 at 6. In response, the district court offered to call a second jury to calculate damages, and asked the defendants what steps would be "appropriate[.]" *Id.* at 6–7. Counsel responded, "[W]e think the only thing . . . that's left and that is appropriate is an entry of judgment . . . either for the defense or liability for plaintiffs . . . with zero damages." *Id.* at 7. "[P]art of our position," counsel concluded, "is to be clear for any type of post-trial appellate record" that the defendants were "not waiving . . . or changing their position." *Id.* at 19–20. Nowhere in this exchange do the defendants forfeit their Seventh Amendment argu-

ment; at times they indeed reaffirm it. Of course, even if the defendants *had* forfeited or for that matter waived their right to a jury trial (which they did not), the appropriate response would have been to conduct a *bench trial* on damages, not to impose damages as a matter of law with no finding by anyone—judge or jury—about the right amount. *Cf. Singer v. United States*, 380 U.S. 24, 26 (1965).

* * *

It is not difficult to imagine how this case could have gone differently. The plaintiffs could have organized themselves into sub-classes, one corresponding to each type of alleged statutory violation. *See, e.g., Fravel v. County of Lake*, No. 2:07 cv 253, 2008 WL 2704744, at *3–4 (N.D. Ind. July 7, 2008). Or they could have complained to the Department of Labor, which may seek damages on the employees' behalf. *See* 29 U.S.C. § 216(c); *Espenscheid*, 705 F.3d at 776. But the plaintiffs did not take either route. Because they did not do so—because they proposed a trial plan that violated both statutory and constitutional requirements—we should remand this case and allow them to propose a new procedure that permits reasoned and fair adjudication of their claims.

The majority seeing things differently, I respectfully dissent.

APPENDIX J

FILED
Apr 05, 2016
DEBORAH S. HUNT, Clerk

No. 14-6063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD MONROE, ET AL., Plaintiffs-Appellees, v. FTS USA, LLC, ET AL., Defendants-Appellants.	)))))))	ORDER

BEFORE: BOGGS, SUTTON, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full[*] court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

[*] Judge Donald recused herself from participation in this ruling.

ENTERED BY ORDER OF THE COURT

s/_____

Deborah S. Hunt, Clerk

APPENDIX K

Supreme Court of the United States

No. 16-204

FTS USA, LLC, ET AL.,

Petitioners

v.

EDWARD MONROE, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for writ of certiorari is granted. The judgment of the above court is vacated with costs, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Tyson Foods, Inc.* v. *Bouaphakeo,* 577 U. S. ___ (2016).

IT IS FURTHER ORDERED that the petitioners FTS USA, LLC, et al. recover from Edward Monroe, et al., Individually and on Behalf of All Others Similarly Situated Three Hundred Dollars ($300.00) for costs herein expended.

December 12, 2016

Clerk's costs: $300.00

A True copy SCOTT S. HARRIS

Test

Clerk of the Supreme Court of the United States

APPENDIX L

FILED
July 28, 2017
DEBORAH S. HUNT, Clerk

No. 14-6063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD MONROE, ET AL., Plaintiffs -Appellees,	)	
v.	)	ORDER
FTS USA, LLC, ET AL., Defendants-Appellants.	)	

BEFORE: BOGGS, SUTTON, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full[*] court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

[*] Judge Donald recused herself from participation in this ruling.

ENTERED BY ORDER OF THE COURT

s/_____

Deborah S. Hunt, Clerk

APPENDIX M

29 U.S.C. § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of

employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than

one and one-half times the regular rate at which he is employed.

(c), (d) Repealed. Pub. L. 93–259, § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums[1] paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not

[1] So in original. Probably should not be capitalized.

pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day of workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section,[2] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by

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[2] So in original. The comma probably should be preceded by a closing parenthesis.

regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this ti-

tle (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during non-overtime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Administrator as be-

ing substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Credit toward minimum wage or overtime compensation of amounts excluded from regular rate

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) of this section shall not be creditable toward wages required under section 206 of this title or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a repre-

sentative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged, or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (in-

cluding security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(*l*) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

(m) Employment in tobacco industry

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) of

this section without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer—

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban, or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) of this section applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(*o*) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the em-

ployee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher[3]

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) of this section if—

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[3] So in original. Probably should be followed by a period.

(A) such employee is paid at a per-page rate which is not less than—

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was em-

ployed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is—

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

(r) Reasonable break time for nursing mothers

(1) An employer shall provide—

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

29 U.S.C. § 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the

amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of

this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947 [29 U.S.C. 255(a)], it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C. 251 et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed

in a possession named in section 206(a)(3)[1] of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Civil penalties for child labor violations

(1)(A) Any person who violates the provisions of sections[2] 212 or 213(c) of this title, relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed—

(i) $11,000 for each employee who was the subject of such a violation; or

(ii) $50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term "serious injury" means—

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

---

[1] See References in Text note below.

[2] So in original. Probably should be "section".

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 206 or 207 of this title, relating to wages, shall be subject to a civil penalty not to exceed $1,100 for each such violation.

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be—

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5 and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.

APPENDIX N

UniTek USA

Employee Handbook

UniTek Employee Handbook 01/07

* * *

EARNINGS AND REPORTING HOURS OF WORK

* * *

OVERTIME

When operating requirements or other needs cannot be met during regular work hours, it may be necessary for you to work overtime. An attempt will be made to schedule overtime in advance so that Employees and customers can plan accordingly.

Only nonexempt Employees are eligible for overtime pay and all overtime work must be authorized in advance by your Manager. Working overtime without prior authorization may result in disciplinary action up to and including termination. Nonexempt Employees will be compensated for all overtime hours worked in accordance with state and federal law.

TIMEKEEPING PROCEDURES

Nonexempt Employees must record the actual time worked for payroll and benefit purposes. Record the time you begin and end work, as well as the beginning and ending time of each meal period or extended break on the timesheet. Nonexempt Employees must also record any departure from work for any non-work-related reason. Keep a copy of your signed timesheet for your records.

Nonexempt and Temporary Employees are responsible for ensuring that the information provided on their timesheet is recorded accurately, honestly, and submitted by the established deadline for written approval by their Manager. The Company does not permit altering, falsifying, tampering with timesheets, or recording time on another Employee's timesheet. Should corrections or modifications need to be made, both the Employee and the Manager must verify the accuracy of the changes by initialing the timesheet. Every Employee must sign his or her timesheet to verify the validity of reported time worked.

Some locations use an electronic system or time clock to record hours worked. All statements above about accuracy, honesty and timeliness in reporting apply to Employees using time clocks. Further, Employees may not record another Employee's timecard. Each Employee must record their own timecard.

Exempt Employees are also required to record their days worked and report absence from work for reasons such as paid time off or leave without pay. This information is recorded on Time Off Request form. The form must be approved by the Employee's Manager before being forwarded to the Payroll Department.

Falsification of a timesheet, time clock or Time Off Request is grounds for disciplinary action, up to and including termination.

* * *

APPENDIX O

UniTek USA

Employee Policy Booklet

* * *

Time Card Policy & Procedure

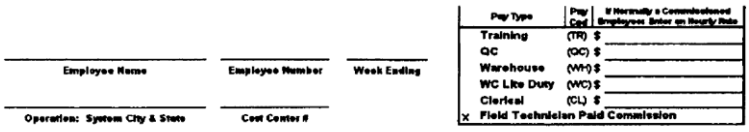
Purpose

To provide specific guidelines to employees for completing a timesheet that meets both legal requirements and Company policy. This policy will also allow management to ensure accuracy of timesheets on a timely basis and manage the productivity of technicians as to hours worked.

Please Note: The workweek begins on Sunday and ends Saturday.

Instructions

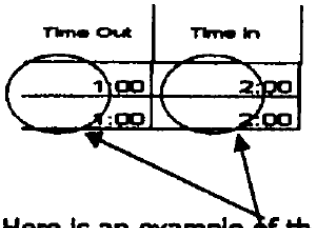
- Each non-exempt employee will have a timecard issued each week.
- Timesheets must stay at the local office in the designated area set forth by management. If timesheets are removed from local office, disciplinary action may be enforced.
- Please complete the top of the timecard. Below is an example:



1) Fill in the Day of the Week and Date in the first two columns:

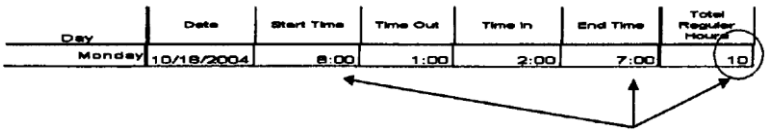
Day	Date
Sunday	10/17/2004
Monday	10/18/2004
Tuesday	10/19/2004
Wednesday	10/20/2004
Thursday	10/21/2004
Friday	10/22/2004
Saturday	10/23/2004

2) You must log your clock in time that morning and your clock out time from the night before each morning. Note: You will not be issued a route until this task is completed. You are required by company policy, to take a mandatory unpaid one hour lunch break. This break should be reflected on your timesheet in the following columns:



Note: Here is an example of the one hour lunch break.

3) Each day you should total the day before. Before you are issued a route, your manager should review the timesheet verifying the hours you have logged. Note: No route will be issued without this timesheet review. Below is an example.



4) You must contact your manager every evening after last job and "1019" to clear out of the field. Failure to do this will result in disciplinary action.

5) Your hours should be totaled at the end of the week. It is the employee's responsibility to complete a timesheet that is accurate and turn it in no later that 8:00 a.m. every Monday. Both you and the manager should print and sign your name. Failure to do this will result in disciplinary action and could potentially cause a delay in your payroll for that pay period.

Day	Date	Start Time	Time Out	Time In	End Time	Total Regular Hours	Total OT Hours**
					Weekly Totals	40	9.6

6) All Overtime must be approved by your manager. As you are approaching 40 hours, your manager should be notified. Please refer to the attached Overtime Policy. No employee in training should have overtime.

7) Our goal is to pay you accurately and on a timely basis. It is a performance expectation for you to complete a timesheet accurately, while following these established company guidelines and procedures. We have provided a sample timesheet in its entirety for your review.

Prepared By:
Date:
Revised By:
Date: 6/22/06

Overtime Policy

Purpose

To provide specific guidelines to employees for obtaining approval for overtime and to help management oversee day to day productivity of technicians based on number of jobs and hours being recorded daily.

Scope

In general, overtime is not permitted. However, there may be occasions that warrant overtime because of a business necessity.

Examples include but are not limited to:

- Unexpected increase in routed work.
- Potentially missed time frames due to issues in the field.
- Unexpected shortage of technicians based on points received.

All overtime requires management approval in advance.

Technician Overtime Procedures

At no time should a trainee have overtime. Managers should review the amount of hours worked daily. The technician's workload may be adjusted at that time. All employees should notify his/her manager or supervisor if approaching unexpected overtime. At this time, managers should make a business decision to approve that time worked.

Failure of notification should result in the following disciplinary procedures:

- 1st Offense – Verbal warning that is documented by using the Corrective Action form

- 2nd Offense – Final written warning
- 3rd Offense – Termination of employment

Please note: All technicians will be monitored on revenue per truck goals daily. Each technician is expected to complete the designated amount of jobs per day with minimal overtime. If there is a trend of non-productive work and excessive hours, the manager will access whether or not it is a training need or performance discrepancy. At that time corrective action or more training may be recommended.

Manager Overtime Approval

Managers should review and sign timesheets on a weekly basis. Any questions or discrepancies should be resolved. Listed below are the timesheet procedures:

- Make sure the timesheet has been completed in its entirety.
- Review the hours logged and make sure minutes are rounded to the nearest quarter hour.
- Review that an unpaid 30 minute, mandatory lunch break has been logged.
- If there is any overtime, it should be logged on a daily basis.
- Employee has signed and dated the timesheet.
- Employee has made a copy for his/her records.
- The manager has signed and dated the timesheet approving all recorded hours.

Prepared By:
Date:
Revised By:
Date: 6/22/06

Technician Payroll Policy and Procedures

Purpose

To outline responsibilities with regard to the technician payroll and timely submission of all work orders.

Scope

This policy applies to all technicians.

Work Order Submission Process

In general, the flow of Work Orders is as follows:

- Work orders are distributed on a daily basis.
- All work orders are to be attached and logged on the daily route sheet.
- Both complete and incomplete work orders must be submitted back to supervisors the following work day morning.
- The hours worked on the daily route sheet MUST MATCH the hours worked on the timesheet.
- Once all paperwork from the previous day has been handed over to management, technicians can receive work orders for the next day.

Payment based off closed Work-orders

- Employees are to close completed jobs real-time from the customer's home.
- All non-completed jobs also need to be statused real-time from customer's home.
- Employees will be paid based of the closed work-order file provided by DirecTV.

- Employees will document confirmation number given by dispatch on each work-order.
- DirectSat will provide each technician with the detail of the closed file from the previous day.

Reconciliation of Payment based off closed Work-Orders

- Employees will submit all job payment disputes on the Jobs Reconciliation Form.
- All disputes MUST be submitted within 30 days in order to be accepted.
- All requested information should be provided.
- Receipt of Dispute submissions will be acknowledged to the employee within 72 hours.

Failure to follow these procedures will result in the following disciplinary actions:

1. First offense – Formal verbal warning
2. Second offense – Formal written warning
3. Third offense – Termination

Prepared By: Robert Fabrizio
Date: 8/4/04
Revised By:
Date: 9/20/06

* This Policy may not apply to all UniTek subsidiaries

* * *

APPENDIX P

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, on behalf of themselves and all other similarly situated employees, Plaintiffs, v. FTS USA, LLC, and UNITEK USA, LLC, Defendants.	CIVIL ACTION No. 2:08-cv-2100 The Honorable Bernice B. Donald

DEFENDANTS FTS USA, LLC'S AND UNITEK USA, LLC'S
PROPOSED JURY INSTRUCTIONS

* * *

DATED: August 22, 2011

* * *

DEFENDANTS' PROPOSED INSTRUCTIONS

Defendants respectfully submit the following proposed jury instructions. The scope of this case is currently the subject of briefing by both parties and under consideration by the Court. In spite of these issues, Defendants have attempted to draft as many appropriate instructions as possible at this time. De-

fendants reserve the right to supplement these instructions as some of these issues are resolved up to the time of trial, as expressly provided in the Court's Setting Order, or during the trial pending resolution of issues raised by the parties during the course of their respective presentations.

* * *

III. POST-TRIAL INSTRUCTIONS

* * *

A. FLSA COLLECTIVE ACTION INSTRUCTIONS

Defendants' Requested Instruction No. 19: COLLECTIVE ACTION (29 U.S.C. § 216(b))

This case arises under the Fair Labor Standards Act, a federal law that provides for the payment of overtime wages for hours worked in excess of forty in a given week. In addition, plaintiffs brought this action as a collective action under the FLSA. This means that the Court has allowed approximately 300 plaintiffs who have worked in more than a dozen different FTS field offices across the country to pursue their claims collectively with the named Plaintiffs. The plaintiffs other than Mr. Williams, Mr. Monroe, and Mr. Moore are entitled to prevail on their claims only if they establish that they are all similarly situated to Mr. Williams, Mr. Monroe, and Mr. Moore. Plaintiffs must prove that there was a pattern and practice of violations at FTS and UniTek. In order for you to find a patter of practice of violations, you must find that the alleged conduct involved widespread violations across all of the FTS field office locations. Events which are isolated, sporadic or infrequent do not comprise a pattern of practice. It is Plaintiffs' burden to prove that the alleged violations

occurred and that such violations were widespread. If you find that Plaintiffs' evidence supports a reasonable inference that the alleged violations were widespread, you must consider whether Defendants have rebutted that inference by producing evidence tending to negate the conclusion that any such violations occurred on a widespread basis. You must find that Plaintiffs' evidence supports an inference that any such violations at issue occurred on a widespread basis and that Defendants have failed to rebut that inference, in order to find that a pattern or practice is established. In making this decision, you should consider whether the witnesses that testified had the opportunity or ability to observe nontestifying plaintiffs and, if they had, you should consider what the testifying witnesses observed.

Plaintiffs in this case rely upon three theories of liability, that they claim were widespread in nature and shared by all of the testifying and non-testifying witnesses.

1. Defendants' altered technicians' timesheets to eliminate or understate overtime hours;
2. Defendants directed technicians to either not report or understate overtime hours; and
3. Defendants discouraged the reporting of overtime by use of a piece-rate compensation system accompanied by the threat of being terminated or receiving less than a full work schedule if overtime was reported.

It is your task to determine whether Plaintiffs have proven that each of these theories was widespread, for the duration of the class period.

Source: Opinion and Order, Dkt. No. 238; Thiebes v. Wal-Mart Stores, Inc., 2004 WL 1688544, at

*5 (D. Or. July 26, 2004); DeAsencio v. Tyson Foods, No. 2:00-CV-04294-RK (E.D. Pa. June 20, 2006), rev'd on other grounds, 500 F.3d 361 (3d Cir. 2007); Reich v. S. Md. Hosp., Inc., 43 F.3d 949, 952 (4th Cir. 1995); Sperling v. Hoffman-La Roche, 118 F.R.D. 392, 406 (D.N.J. 1988), aff'd on other grounds, 862 F.2d 439 (3d Cir. 1988), aff'd, 493 U.S. 165, 107 L. Ed. 2d 480, 110 S. Ct. 482 (1989); Espenscheid v. DirectSat USA, LLC, No. 09-625, 2011 WL 2009967 (W.D. Wis. May 23, 2011); Johnson v. Big Lots Stores, Inc., 561 F.Supp.2d 567, 586 (E.D.La.2008).[1]

[1] Plaintiffs' submissions to the Court to date contain no plan, metric, or objective criteria for determining which of the plaintiffs assert which, if any, theory of liability. Defendants are including these instructions to preserve their rights at trial, but still assert that it is impossible for Plaintiffs to accomplish this task without individual mini-trials concerning the experiences of all absent collective class members. See, e.g., Mace v. Van Ru Credit Corp., 109 F.3d 338, 341 (7th Cir. 1997) Bell v. Addus Healthcare, Inc., 2007 WL 3012507, *5 (W.D. Wash. Oct. 12, 2007); In re: Wal-Mart Wage and Hour Employment Practices Lit., 2008 WL 3179315 (D. Nev. June 20, 2008); Roussell v. Brinker Intern., Inc., 2008 WL 2714079, *22 (S.D. Tex. July 9, 2008).

Defendants' Requested Instruction No. 20:
REPRESENTATIVE TESTIMONY UNDER THE FLSA[2]

To establish defendants' alleged failure to pay all overtime wages owed under the FLSA, the plaintiffs have put on testimony that they allege to be "representative" of all of the plaintiffs in this case, to establish a pattern or practice of violations. In determining whether evidence of testifying plaintiffs is fairly representative, you should decide whether their experiences also happened to non-testifying plaintiffs. Because there are multiple theories of liability in this case, you must make this determination as to each theory.

You may consider such factors as the nature of the work involved, the documents admitted into evidence, the working conditions, the relationships between employees and managers, the testifying plaintiffs' knowledge of other individuals and other field offices, and the detail and credibility of the testimony. While no exact number or percentage of the plaintiffs is required to testify, the plaintiffs must present a sufficient number of representatives, which, when considered together with all of the other

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[2] For reasons discussed in Defendants' Motion to Preclude Representative Proof, Defendants do not believe that representative proof is appropriate in this case because Plaintiffs cannot identify which members of the absent class have experiences that are represented by the individuals who testify. Bell, 2007 WL 3012507, at *5; In re: Wal-Mart Wage and Hour Employment Practices Lit., 2008 WL 3179315 at *4; Roussell v. Brinker Intern., Inc., 2008 WL 2714079, at *22. Defendants include this instruction to preserve their rights at trial.

evidence presented in this case, establishes a pattern or practice common to the entire subclass at issue.

Source: Espenscheid v. DirectSat USA, LLC and UniTek USA, LLC, No. 09-625, Doc. No. 643; Mace v. Van Ru Credit Corp., 109 F.3d 338, 341 (7th Cir. 1997); Roussell v. Brinker Intern., Inc., 2008 WL 2714079, *22 (S.D. Tex. July 9, 2008); Proctor v. Allsups Convenience Stores, Inc., 250 F.R.D. 278, 284 (N.D. Tex. 2008); Johnson v. Big Lots Stores, Inc., 561 F. Supp. 2d 567, 579 (E.D. La. 2008).

* * *

APPENDIX Q

(UNREDACTED)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, on behalf of themselves and all other similarly situated employees,	)	
Plaintiffs,	)	NO. 08-2100
VS.	)	
FTS USA, LLC AND UNITEK USA, LLC,	)	
Defendants.	)	

TRIAL PROCEEDINGS
BEFORE THE HONORABLE
BERNICE B. DONALD, JUDGE
MONDAY AFTERNOON
OCTOBER 3, 2011

* * *

[Tr. 1556]

* * *

THE COURT: Ms. Prakash, take -- I'm going to give you a moment to take a look at defendant's 19 which appears to introduce the act and then I will hear more from you.

MS. PRAKASH: Okay.

[Tr. 1557]

THE COURT: Just take your time and let me know when you are ready.

MR. PRAKASH: All right. Well, I think that we're talking about substantively two sort of different things with these instructions.

First, plaintiff instruction number ten is simply a statement of what the FLSA is and what it does in relevant part to this case.

If you go to plaintiffs 11, which we don't need to talk about, that is where we talk about the collective actions.

For the purposes of this instruction, plaintiffs ten, was simply to lay the basic groundwork of the FLSA.

In terms of the moving target which the defendant has just referenced, I'm not sure what it is. But the only claim in this case is overtime. So in relevant part plaintiffs ten addresses that.

With respect to defendants 19, they're talking about representative proof and -- and that more or less being a jury question, which the plaintiffs contends it is not, it's been decided by Your Honor already several times in this case.

So we would object to using the [Tr. 1558] defendant's language in 19 and 20, and would agree that plaintiffs ten is properly framed to state the framework of the FLSA.

THE COURT: Okay. What is the -- what is the objection to pulling language, appropriate and relevant language right out of the statute?

You know, one of those statements has said that the FLSA provides in relevant part and then read from the statute. I mean, I know that the statute is kind of huge, but they're objecting to your summary, you're objecting to their summary.

Is there some language that we can look at from the statute that would help get us 'passed this point?

MR. PRAKASH: We would be happy to say in relevant part the FLSA and then cite from 129 USC 207 which is the overtime.

THE COURT: Okay. Can we -- can we hold this until tomorrow and you take a look at that and see what kind of language you come up with that comes right from the statute.

Okay. And does that mean that we need to hold up on plaintiffs 11 also or not?

Can we deal with 11?

[Tr. 1559]

MR. PRAKASH: Plaintiff 11 I think is more of a substantive dispute with the defendants over what the jury needs to hear about representative proof.

THE COURT: Okay.

MR. PRAKASH: It's not necessarily a simple statutory matter. Rather plaintiffs' position has been and continues to be that Your Honor has already decided that this case is proceeding on a representative basis.

THE COURT: Okay.

MR. PRAKASH: So the plaintiffs 11 spells out that what is decided for testifying plaintiffs is therefore by inference applied to the non-testifying plain-

tiffs because of the collective action, not the purpose of a collective action and that's the purpose of plaintiffs 11. The defendants obviously disagree. So --

THE COURT: Okay. Let me hear from you, Mr. Bronstein.

MR. BRONSTEIN: That's correct, Your Honor, defendants do disagree. And again, when you look at some of the language that the plaintiffs have included, this procedure allows a small number of, I mean, they specific -- they [Tr. 1560] want to make it more specific. I guess they, I mean, that may be more acceptable.

Again it goes to our continuing objection, Your Honor, to the -- to the representative proof and the collective action nature.

But when you see things like the word deemed throughout the instruction, Your Honor, doesn't lend to any conclusive finding or anything that the jury would -- would have to find.

THE COURT: But how would -- how would they do in a representative capacity other than to deem based on extrapolating from the testimony of a witness from whom they have found certain -- certain things.

MR. BRONSTEIN: Well, this goes, Your Honor, directly to Mr. Dougherty's argument that --

THE COURT: Okay.

MR. BRONSTEIN: -- the lack of proof that the plaintiffs have put forth would preclude the jury from making such a finding.

THE COURT: Okay. And then this -- this really is a fundamental disagreement with the court's

ruling on the use of representative [Tr. 1561] evidence, and that's properly an appeal issue.

So I'm going to put this in right now, but I'll -- I'll -- I'll look over it carefully and -- and -- and let you make a more, you know, I guess, detailed argument, if you will, on it before the final, but I understand you disagree with it, this is an appellate issue, the disagreement with the tact that the court has taken in allowing them to use representative proof.

* * *

[Tr. 1582]

* * *

THE COURT: Thank you, Mr. Bronstein. What about uncompensated overtime?

[Tr. 1583]

MR. PRAKASH: The plaintiffs object to this on the basis that again it's discussing non-testifying plaintiffs, and again discussing that plaintiffs must prove -- it doesn't talk about any workweek standards. So the plaintiffs has proven unpaid overtime and we believe that liability is established.

THE COURT: From the defense?

MR. BRONSTEIN: Your Honor, it goes to the argument that the defendant's Rule 50 motion, it's something that the court hasn't yet -- not yet decided. And if we look to the beginning line where we talk about three theories of liability, that references back to the defendant's proposed number 19 which is how this case started out and is consistent with Your Honor's prior opinion that there were at the time three theories of liability, but it seems that is not how the case was presented.

THE COURT: Okay. This is one that I know it is the subject of your Rule 50 motion. And in light of the fact that I have said that I am going to reserve those motions until after the close of the plaintiffs' proof, this is not an instruction that I will give to the jury, but I will [Tr. 1584] specifically note your objection.

And on this one I'm going to make it -- I am going to pull this instruction out and make it an exhibit to this charge conference because I think it is a critical piece of the case.

So I want you, Ms. Elchlepp, to make this, and for this charge conference, I'm going to make this Exhibit A because this really goes to the heart of what we have been talking all afternoon.

* * *

[Tr. 1590]

MR. PRAKASH: Well, first, we have stipulated to joint employer status today, so that first question up there is unnecessary.

With respect to the rest of their verdict form, they proposed a series of questions and then copy it over again for the series of liability that were not presented to the jury.

So, for example, liability theory number one they state, violation of the FLSA to altering timecards.

Number two, liability theory is directed -- plaintiffs were directed not to report or underreport overtime hours.

And three is that defendants discouraged the reporting of overtime in violation of the FLSA, that

case was not presented to jury that way, the verdict form likewise makes no sense as organized.

With respect to the specific question --

THE COURT: When you say all of those things that they have listed out as separate theories support one theory which would be what?

MR. PRAKASH: The systematic shaving [Tr. 1591] of overtime.

THE COURT: So -- so where the testimony was introduced from -- through certain witnesses that said there was different writing on the forms that changed the hours, that's just another thing that the jury should use to evaluate shaving overtime?

MR. PRAKASH: Correct, Your Honor.

THE COURT: All right. And what else is wrong with their form?

MR. PRAKASH: Then with respect to their specific question, they're talking about having the jury decide whether plaintiffs have presented representative evidence.

Again, it goes to the dispute of whether or not the jury needs decide that.

In terms of subpart B, subpart C will vary depending on the theory that you are talking about in defendant's proposed verdict form, again because those theories were not presented to the jury, we believe that subpart C is unnecessary.

MR. DOUGHERTY: Your Honor, if I may interrupt.

This verdict form was prepared based on the representations made by plaintiffs in [Tr. 1592] previous filings about their theories of liability. Those theories, it's certainly our position they have changed during this case. If we could rework, we will have something, we will bring it to court with us or file it right before Your Honor tomorrow, that might be --

THE COURT: That's fine. But even before then I want to hear from you or from the defense what's wrong with the plaintiff's verdict -- proposed verdict form, what is it that you -- what's wrong with it?

MR. DOUGHERTY: Well, question one, it's our position, and, you know, it's been our position that any week for any plaintiff theory of liability is -- is the fatal flaw. The plaintiffs need to prove liability as to each plaintiff for each week, not any plaintiff for any one week for liability, which is, you know, the plaintiff's first question is exactly that, they -- evidence that one plaintiff worked in excessive of forty hours in any week.

Question two again is -- it doesn't address each plaintiff, it only addresses the plaintiffs in the sort of undefined collective.

And then section -- that's section A, [Tr. 1593] section B is one question, and that is what they caption as damages, kind of the crux of our Rule 50 motion, and we would argue is hours and it's only hours to the testifying plaintiffs. There is absolutely no presentation of damages in this case, and that's our Rule 50 motion.

So I guess plaintiff's or defendant's position to their -- to plaintiff's, it tracks plaintiff's arguments in

this case which is where we have this fundamental disagreement.

THE COURT: Okay. The plaintiffs wish Ito respond?

MR. PRAKASH: Only that there is no requirement, Your Honor, that every single plaintiff testify. I mean, Mr. Dougherty is right, it does track plaintiff's view of the case and additionally the procedural posture of the case, which is that this is a class action. And so we believe it can be proceed on a representative basis.

Additionally, with respect to section B, we are happy to change the wording if that's what the title to hours worked, because we do believe that the jury should be determining hours worked after they determine liability and the [Tr. 1594] dollar amount can be calculated post trial.

THE COURT: Okay. Well, let me say this. I'm -- we're going to start to put together a packet on the instructions.

Mr. Bronstein and Mr. Dougherty are going to work around with their -- their verdict form.

I would certainly invite you all to spend sometime talking and see if you can come up with a document that you can agree on, understanding that it doesn't waive the objections that you all have made, but if you can't, each of you having heard what the other side say is wrong with yours, work on it and see if you can't address that, and then I'll, you know, I'll decide on a verdict form tomorrow morning.

* * *

(UNREDACTED)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, on behalf of themselves and all other similarly situated employees,	)	
Plaintiffs,	)	NO. 08-2100
VS.	)	
FTS USA, LLC AND UNITEK USA, LLC,	)	
Defendants.	)	

TRIAL PROCEEDINGS
BEFORE THE HONORABLE
BERNICE B. DONALD, JUDGE
TUESDAY MORNING
OCTOBER 4, 2011

* * *

[Tr. 1607]

* * *

THE COURT: The next reservation is on page 21. Collective action and representative proof. Mr. Bronstein, you wanted an [Tr. 1608] opportunity to look at this, think about the language. And as I said before, I know that the defense has a continuing objection to this representative proof. The fact that we speak about it in the jury instructions does not waive that objection. But looking at this instruction,

tell me again, Mr. Bronstein, or tell me now what is your objection to the instruction and then give me your recommended language?

MR. BRONSTEIN: Yes, Your Honor.

If you looked in the third paragraph, the paragraph that begins and says "you must consider."

THE COURT: Yes.

MR. BRONSTEIN: And we talked about rather if some employees testified about the activities they performed or the amount of unpaid overtime they worked, other non-testifying plaintiffs performed substantially similar job duties or deemed to have shown the same thing.

That is just not the case, Your Honor. The evidence that the plaintiffs have adduced, it directly contradicts the evidence that the plaintiffs have adduced. They have failed to [Tr. 1609] prove, the plaintiffs have failed to prove that other plaintiffs who -- while may substantial -- may perform substantially similar job duties, we heard live testimony a technician is a technician is a technician. But the testimony that the jury has heard is that they may all install cable, but they are all different, and they are different everyday. And all the plaintiffs testified, Your Honor, that they are here testifying as to their own individual experiences. And although the duties maybe the same, the plaintiffs all have different claims.

As Your Honor recalls, some people at different time and at different offices, not only in the same office had no problems with their morning times, didn't record lunches, had no problems with their end times, some had two of the three, some had all of the three, some had none for certain periods of time.

So given the testimony that the jury has heard, the jury can now be told that or should not be told that if some employees testify about activities they performed, it's the same as or you must deem it to be the same for the non-testifying plaintiffs.

[Tr. 1610]

And that's our objection, Your Honor along with the other objections that Your Honor has aptly noted. We appreciate, and if we go to the defendant's proposed instruction number 19.

THE COURT: Okay.

MR. BRONSTEIN: That would be the defendant's proposal that we submit in lieu of the plaintiff's proposed P-11.

THE COURT: Okay. Plaintiffs look at their 19 and then come back and address the argument made by Mr. Bronstein.

MR. PRAKASH: Thank you, Your Honor.

We have a problem with the defendant's 19 because it asks the jury to decide representativity.

It also focuses on three theories of this case that did -- that have not been asserted during the trial in which the jury has not heard presented that way. So on face, that's a problem with the language in defendant's 19.

To address Mr. Bronstein's argument, Your Honor has already decided the issue of representativity and that this case is proceeding as a collective action.

Now with respect to Mr. Bronstein's [Tr. 1611] argument that plaintiffs testified as to their own personal knowledge, certainly they did. There is no

requirement that plaintiff had knowledge, personal knowledge of other people in order for the case to remain certified. And I would cite to the Bel-Loc Finer case out of the Fourth Circuit.

Now I would also note that similarly situated, which is the standard, does not mean identically situated. And so the fact that people, the intricacies of people's job duties may vary does not warrant decertification or removing the issue of representativity proof at the court's discretion leaving it to the jury.

I would point to the Ninth Circuit case of Ho Fat Seto in which the testifying employees testified as to different aspects of time shaving or off-the-clock work.

So, for example, some of those employees said the off-the-clock work happened in the morning, some said that it happened in the evening. That's very similar to the testifying plaintiffs here.

And I would also point to the percentage of testimony plaintiffs that -- that were put on during this trial, it is approximately [Tr. 1612] 6.1 percent of the class which is well-above the percentages that have been approved in similar class actions.

For example, the Second Circuit case of Blake versus (unintelligible) Telecom had 2.5 percent of employees testified.

And so in that way this case and our trial, the way that we put on the proof, warrants continued certification.

MR. BRONSTEIN: Your Honor, if I may.

I can agree with one thing that Mr. Prakash said and that is the instruction that was in the origi-

nal defendant's 9 had the three theories as to how the case was initially presented.

THE COURT: Sure.

MR. BRONSTEIN: They came midstream and the case went in differently, and I have a revised D-19 that takes away -- I'm sorry, I didn't mention it earlier, that takes away the three theories. The rest of my argument is some what similar.

In response to Ms. Prakash's argument, Your Honor, the court said that the plaintiffs can go forward representatively, but they still have [Tr. 1613] to show that the plaintiffs are representative.

And the testimony that the jury has heard clearly demonstrates they are not representative. So, again, those examples that were cited yesterday during the argument, particularly with, for example, Mr. Monroe and Mr. Garrett in the same office, little lone people in different offices.

The case law that Ms. Prakash has cited, these cases are -- are vastly misstated.

And Your Honor also precluded defendants from arguing percentages, so rather than argue that now because the class size in all of those case differed greatly, we were precluded from going to trial of arguing the percentages here. So 6.1 for a class of three hundred doesn't compare to the cases cited where classes maybe thousands, and 6.1 percent may be somewhat more justified.

THE COURT: Ms. Prakash, have you had an opportunity to look over defendant's revised 19?

MR. PRAKASH: I have, Your Honor. It does remove the three theories that were not presented to

the court. However, it [Tr. 1614] still phrases the issue of representativity as a jury question.

THE COURT: You mean the language about you must find that the plaintiff had an opportunity to observe the non-testifying plaintiffs?

MR. PRAKASH: Correct.

THE COURT: Okay. All right. Is that the only thing about it that you find problematic?

MR. PRAKASH: What we find problematic is that through this instruction the jury is being asked to determine whether plaintiffs have proven widespread practices, whether plaintiffs have proven that other technicians suffered the same fate. And that proof is assumed in the collective nature of this case. Our position is that you have already decided that.

THE COURT: Okay.

MR. BRONSTEIN: Certainly, Your Honor, that's not assumed, that's exactly what the court directed the plaintiffs to prove from the outset.

THE COURT: Okay. Well, in the – the court did allow the plaintiffs to go forward on representative proof, but that representative group of people have to show that violations [Tr. 1615] occurred. So I have not relieved the plaintiffs of the burden to show, and I have reminded the jury at all times that the burden of proof is on the plaintiff to show that violations of law occurred. But I did say in the representative capacity that once they showed that through these – through these plaintiffs, if they were able to show it, then these plaintiffs represent the case and their – the actions that are proofed through them are deemed to apply to the broader class.

So I guess in that sense what I said is that if they prove it, then it applies to the larger class. I haven't relieved them of the burden of proofing as to those folks who came in and testified. So that is the essence of representative proof.

Now looking at these two instructions, I just read the defendant's instruction, so let me go through the plaintiff's again.

The case is proceeding in a collective action under the Fair Labor Standards Act. You must not consider whether the plaintiffs have properly brought their claims as a collective action because I have already determined that they [Tr. 1616] have.

Second, you must consider whether the plaintiffs have proven their claims. The plaintiffs that testified during this trial testified as representatives of other plaintiffs that did not testify. Not all of affected employees need testify to prove their claims, rather if some employees testify about the activities they performed or about the amount of overtime they worked, other non-testifying plaintiffs who performed similar job duties are deemed to have shown the same thing. There is no requirement that a certain number of a percentage of plaintiffs must testify. If the evidence presented by the representative plaintiffs who testify establishes that they worked unpaid overtime hours and are, therefore, entitled to overtime compensation, then those plaintiffs that find – pardon me – those plaintiffs that you did not hear from are also deemed by inference to be entitled to overtime compensation.

Okay. Seems to me that – that language should probably be are deemed to have also proven their

claim – let me see, I'm going to compare that to defendants.

[Tr. 1617]

Okay. On – on these two instructions, I don't have a problem with the first paragraph in defendant's instructions, but the second paragraph does ask the jury to make a determination about the issue that the court has already determined. And so I'm going to go with the plaintiff's instruction as to the collective action representative proof and note the defendant's exception.

I will give the first paragraph of the parties – if the defense wishes that added on to the plaintiffs as an introductory instruction, but otherwise I will give the plaintiff's instruction.

That's the court's ruling, exception noted.

MR. BRONSTEIN: Your Honor, if I may, just so we are clear.

Is the – is the court directing that the plaintiffs find – if the plaintiffs establish for the jury that the testifying plaintiffs worked unrecorded hours for which they are entitled to overtime, the court is directing then that the non-testifying plaintiffs will also be found to have recorded non-recorded overtime hours for which they are entitled to compensation.

[Tr. 1618]

THE COURT: Based on what their worksheets – based on the evidence of the worksheets that have been submitted.

And so, you know, I think that automatically gets us to into the some kind of post trial resolution of those documents. But I'm not – I'm not there yet,

but I am saying that these individuals who testified as representative plaintiffs, the actions that are found as to those plaintiffs will be deemed and construed to apply it across to the board to those non-testifying plaintiffs in the collective action.

And I know that that is contrary to Judge Crabb, but that's – that's the ruling.

MR. BRONSTEIN: Your Honor –

THE COURT: Yes, sir.

MR. BRONSTEIN: – again, one – one other issue of clarification.

THE COURT: Okay.

MR. BRONSTEIN: If the jury finds credible testifying plaintiffs who admitted that he's fraudulently recorded his timesheets, is that deemed for the other testifying plaintiffs – non-testifying plaintiffs?

THE COURT: Okay. Now when you say [Tr. 1619] fraudulently –

MR. BRONSTEIN: Alter, inaccurately, whatever the testimony that the plaintiff used.

THE COURT: Well, remember, the proof in the record was, except for this one person, that they were directed to underreport, not report, and so the term fraudulently has specifically connotation. There was the one plaintiff who testified, I think about, and I think you all covered this on cross-examination about, you know, the hours that he put down, because I think he said in times past either worked and didn't, but I only remember the one that testified about any action that sounded like it could have possibly come within fraudulent. Other people testified that they were either told not to report or they un-

derstood there was a policy that they couldn't record. So that's why I'm honing in on your use of the word fraudulently.

MR. BRONSTEIN: Okay. Well, that's a -- use a different word, if they just altered it or took it upon themselves, I think there were multiple plaintiffs who said they took it upon themselves to change their recorded hours.

[Tr. 1620]

Is that deemed to extend to the non-testifying plaintiffs as well?

And again, this goes directly to the argument –

THE COURT: Well, sure, I mean, absolutely, but the proof in the record, whatever that proof is, has to apply to the, good or bad, has to apply to the non-testifying ones. We can't just apply the positive to them without applying the negatives, too. And I fully expect you to argue, as you have throughout this process, to the jury that -- that all of this applies to those non-testifying people, and that people showed up at 7:30 in the morning, you know, that – for whatever reasons they did that, the company had a policy that, you know, to pay people for the work they -- they did, you know, if they reported it in one of these timesheets, I mean, you can argue whatever you want to argue about that.

But what I said, by the determination of representative proof is that good, bad, whatever, it comes -- it goes against the class whether it hurts them or helps them. And there's a lot of each in here, whether it hurts them or helps them. Okay.

[Tr. 1621]

MR. BRONSTEIN: Yes, Your Honor.

Again, the defendants objects to this ruling.

THE COURT: Of course, you had a continuing objection to this whole thing.

MR. BRONSTEIN: Thank you.

THE COURT: And as to -- and I -- and I take -- and I have no problem with you raising it frequently because I don't want there to be any inference that you have at anytime waived anything.

* * *

[Tr. 1646]

* * *

THE COURT: Okay. And -- and now we are down to page 35, determine plaintiffs unrecorded hours.

This one was reserved for discussion this morning.

MR. PRAKASH: Correct, Your Honor.

This goes to the issue of who should be determining damages.

[Tr. 1647]

THE COURT: Okay. But it's – it's your instruction, so you didn't reserve it, they did. So why don't you let them speak to their objections to it.

MR. BRONSTEIN: Yes, Your Honor, regarding plaintiff's proposed instruction 19?

THE COURT: Yes, sir.

MR. BRONSTEIN: Without any citations, plaintiffs are again presuming that this is all plaintiffs have to prove. And again, consistent with the arguments made yesterday on the Rule 50 motion,

which we – we are again renewing and continuing, this instruction may be appropriate if the parties have agreed or the court determines that, which the court has not yet determined, that the jury is only asked to or – or make – the only determination that you have to make related to damages in this case, the last sentence of this proposed instruction, Your Honor, and that's not the case. As the court has directed, as the law mandates and is consistent with defendant's constitutional rights, the plaintiffs have to prove damages to the jury.

[Tr. 1648]

And there has been no agreement here about this post trial procedure that the plaintiffs are preserving – are presuming the court is going to impose to eliminate their burden and save their case. Therefore, this instruction is highly inappropriate and it's – it's – it violates defendant's rights, it's unbelievably prejudicial to defendants.

THE COURT: Okay. All right. Well, then, let's just – let's just hold that until we get down, I want to come back to this because –

MR. BRONSTEIN: Given, Your Honor – excuse me, Your Honor, given that the pay here is in dispute and just – it just eliminates – it just shows that this case – this proposal is irrelevant.

For a different case, different facts, maybe this applies, but it certainly is not applicable to this case given the facts as – as put to the jury.

THE COURT: Okay.

MR. PRAKASH: Your Honor, we would – if you are reserving argument on this, then we will come back to it. If you would like to hear plaintiff's posi-

tion, I think what has been [Tr. 1649] missing in this is showing Your Honor exactly what the defendants are asking the jury to do.

THE COURT: Okay. Why don't you go ahead and argue now.

MS. SREY: Taffy, can you turn on the lap – Taffy could you turn on the laptop thing.

Thank you.

THE CLERK: One moment.

MR. PRAKASH: In this case the only dispute with respect to how the overtime should be calculated – well, let me backup.

Overtime is formulated, as I said multiple times. The regular rate can be deprived from defendants' payroll and defendants dispute how the regular rate is to be calculated. But the information necessary to calculate it, either under defendant's version or our version, is – exist.

1.5 is the multiplier to be used as Your Honor has determined. And then the – but the next question is unrecorded overtime hours and that is the only piece that is missing, that is the only piece the jury needs to decide.

If you look at defendant's payroll, which is what damages will be based off of, each [Tr. 1650] row is a week for – that each plaintiff worked at defendant's business.

Now, if you scroll down, there are more than ten thousand weeks that the jury would have to do a computation for. And the way that it works would be like this, I have an example that I excerpted based on plaintiff Ed Monroe.

I will hand the defendants a copy.

Your Honor, may I approach with this copy?

THE COURT: You may.

MR. PRAKASH: Now given the overtime calculation which is again regular rate times 1.5 times unreported overtime hours, the jury is going to be doing at least ten thousand calculations to get all the way through these three hundred plaintiffs that are in this case for each workweek.

If we look at the example I just handed you, this is how Ed Monroe damages would be calculated. If you go to the second page of that example, that's an excerpt from the spreadsheet. So, if we look at the week ending January 19th, Mr. Monroe has a recorded 37 hours. It is undisputed that that was paid to him for those [Tr. 1651] recorded hours that he works.

The jury, we're asking to determine unreported hours after they find liability. If they, for example, determine that Mr. Monroe worked an unrecorded 12 hours, they would then need to determine unrecorded overtime hours. This is an additional calculation that it would add.

Now columns Y, Z, columns after X are columns that we have added just to demonstrate to Your Honor what the jury would have to be putting in.

So to determine unrecorded hours the jury would take the 37 that Mr. Monroe worked, add the 12 that they have found as unrecorded hours and subtract 40 because we are only dealing with unrecorded overtime hours. So that would be nine unrecorded overtimes hours.

Now in terms of the regular rate, plaintiff's position is that that is contained in defendant's data because they have all established a regular rate based on the amounts that Mr. Monroe is paid for that week and the hours that it covered.

So we would then have the jury copy that into the regular rate column on this [Tr. 1652] spreadsheet which is column Z.

And after we are done with this demonstration we can talk about different ways of calculating the regular rate.

The basic dispute between the parties is which hours should be used. But the hours are going to be determined by the jury or based on the recorded hours in payroll.

And then next when you have the regulate rate, the unrecorded overtime hours, you would calculate weekly damages by multiplying those two numbers and multiplying it by 1.5 which Your Honor yesterday is the proper rate, and that would be Mr. Monroe's weekly overtime damages which is on the sheet I handed to you – we're having a little technical difficulty – but it would $202.50.

And the jury would have to go through that for Mr. Monroe for each week that he worked and then do the same for each of the three hundred plaintiffs. So at minimum it would be ten thousand calculations not to mention we will have bring in a computer for the jury. And there just seems to be no reason to do that when the amount Mr. Monroe was paid, the recorded hours and the [Tr. 1653] 1.5 multiplier have already been determined.

Really what the jury needs to tell us after a liability finding is how many unrecorded hours are

there. That's the piece missing from this equation. And because that's the only piece missing from this equation, it just doesn't make sense to us for the jury to go through this laborious process. It's simple now, you don't need and expert to do it, it's multiplication, addition and subtraction, but it's burdensome and time consuming. And that's the basis for our position of damages should be calculated by the parties post trial.

And just to address defendant's concern regarding a special master. It's not a fancy way of us to bring in an expert, rather it is somebody that can decide disputes if they arise after we begin the process of going through all of these numbers.

MR. DOUGHERTY: Your Honor, if I may.

Well, I guess this is the crux of our argument. This is the first time, now that the plaintiff – now that the entire case is closed that the plaintiffs have every addressed how damages are recorded or how damages are [Tr. 1654] determined.

This in and of itself is the admission that they haven't done it. Now that they are trying to post hoc show and demonstrate to Your Honor how you do it with a spreadsheet demonstrates not only did they fail to do it, that an expert was absolutely required in this case to do the math for the jury, and they failed to present an expert. They are trying to usurp the defendant's constitutional rights to a jury, ignore Your Honor's direct rulings, ignore the law that requires damages be proven in an FLSA case and say no, no, no, it's math, but it's easy math but it will be burdensome, so let's take it out of the jury's hands and ignore everything we've done previously.

* * *

[Tr. 1656]

MR. DOUGHERTY:

* * *

[Tr. 1657]

* * *

This is the first time that we're hearing about this calculation. It's not simple math. I agree that there is ten thousand lines, I agree that it would be incredibly burdensome for the plaintiffs and frustrating, I'm sorry, for the jury frustrating, and they will need at a minimum a computer if not three computers and an expert to explain it which is why this is all part of plaintiffs' burden which they have failed to do. They haven't addressed how damages are calculated. [Tr. 1658] They haven't addressed what affect the hours – they're doing it now hoping that Your Honor usurps our rights, instructs the jury or even just says, you know what it is going to be too confusing, I'm going to appoint the expert. And not only an expert, they want somebody to resolve disputes, the jury resolves disputes, that's the point of the jury. If there's disputed facts, the jury resolves them. It is not some special maters, they want to call a special master, we want to call an expert. We've never agreed to this. This has been an ongoing issue. And the plaintiffs said they were ready to go, they tried their case, they put their case on, they never touched on damages. They never touched on damages to anybody. They're now sitting here trying to explain it to Your Honor. I mean, you even start to peel the onion more.

What about Mr. Monroe week to week when he said I did record all of my time. And about when he

instructed other people who there is no listing of where they worked. I instructed other people.

What about Mr. Lighty who said Madison is – I don't have a claim for when I'm in [Tr. 1659] Madison. None of this was addressed by plaintiffs. They're just throwing it up now hoping that Your Honor takes it away from us and gives it to a special – special master to solve their problem.

But this is the problem, it is incredibly burdensome, it is incredibly difficult. It's not simple math because there's even more calculations than plaintiffs are pointing to. It's even more burdensome and difficult than plaintiffs are talking about which is why they needed an expert, which is why they haven't proven their case. And which is why the court needs to grant the Rule 50 motion.

THE COURT: Okay.

MS. PRAKASH: Your Honor, there are several avenues to that so I would like to address them.

One is the issue of the special master. We don't need a special master. I mean, the special master is there if we have a dispute over a decimal point, it's not – it is simple math, it is just going to take a long time to do.

Second, this idea of a constitutional right. There is no constitutional right that a [Tr. 1660] jury determine undisputed facts. And here it is undisputed how much these people got paid, it's in defendant's payroll, it's undisputed how many hours were recorded and they paid for, that's in defendant's payroll.

What is disputed is how many unrecorded hours there are.

THE COURT: Okay. You, you know, the defendants didn't raise this specter of a special master. So you have just said we don't need that. So how is it that you are proposing that the jury make the calculations that you have just – because you started off telling me how complicated this was going to be, how they would have to go through ten thousand calculations.

Fine. The fact that something is difficult doesn't mean that it's not within the province of the jury.

You have come back now and said after raising this notion of the special master, so rather than just rebutting what Mr. Dougherty has told me, why don't you tell me how you propose to address – first of all, tell me what the issue is again that you believe the jury has to decide on the issue of damages and the mechanism by which [Tr. 1661] you propose to have that matter decided.

MR. PRAKASH: We propose that the only issue the jury decide with respect to damages is unrecorded hours.

THE COURT: Okay.

MR. PRAKASH: The verdict form we have proposed has the jury determine that for each testifying plaintiff.

THE COURT: Okay.

MS. PRAKASH: We then propose the damages would be calculated by the parties post trial.

THE COURT: Okay.

MS. PRAKASH: – and our jury instruction that we – that prompted this discussion instructs the jury to determine those unrecorded hours.

THE COURT: So the plaintiffs would determine the damages post trial and the defendants would respond to that.

MR. PRAKASH: Or the parties would do it collaboratively.

THE COURT: That's optimistic.

MR. PRAKASH: Very optimistic.

In the event that the jury does need [Tr. 1662] to calculate damages going to Mr. Dougherty's point about not presenting that to the jury during trial, it is math, and we have crafted a jury instruction which I am happy to share with you and defendants in the event that the jury does need to come up with a dollar amount, but it is just simply a question of law and how the spreadsheet works to plug in those numbers, the spreadsheet is already entered into evidence.

* * *

[Tr. 1664]

* * *

THE COURT: Okay. Going back to plaintiffs number 19, which is where we are now, which reads as follows: If you find defendants failed to pay plaintiffs for overtime hours worked in violation of the Fair Labor Standards Act you must determine how many unrecorded hours a week each testifying representative plaintiff worked on average. That is, you must find – that is, you must first determine whether the testifying representative plaintiff worked unrecorded hours. Then you must determine a weekly average of how many hours each testifying representative plaintiff worked that were not recorded on their timesheet. These are the only determinations

that you have to make relating to damages in this case. [Tr. 1665] And this instruction assumes that if plaintiffs prevail, further calculations will be made upon submissions by the parties to the court or collaboratively by the parties.

The – the defendants have said they want to take this issue away and send it to a special master, they don't want to do that.

I am – Mr. Dougherty and Mr. Bronstein and Mr. Belz, I know that there's a huge dispute about how this ought to be calculated. I know that you've said that – that what the court needs to do is to decide your Rule 50 motion at this juncture. And I have – have said and continue to say that I'm going to hold that.

I am inclined to give the plaintiff's 19 because it leaves all of your arguments intact assuming that the jury can't do this. So I'm going to give this instruction and have them determine the number of – of – of – unrecorded unpaid hours as the instruction asks for. And then the parties would submit, so this will be a bifurcated proceeding with calculations if – if the plaintiffs carry their burden being done by the court post trial.

* * *

[Tr. 1685]

THE COURT: Okay. Let me say this about this case, which is – which has been interesting and difficult.

Based on the defendant's Rule 50 motion, the defendant's proof, the defendant's case is so deficient and so flawed, and the standards being used are so erroneous that no instruction could cure that. It is

the defendant's position that this claim, this case needs to be and must be decertified and the parties must be able to proceed on an individual basis. And that is the motion that has been lodged that the court has taken under – is reserving.

Because under the plaintiff's theory, anything that we do, whatever kind of instruction that we submit to the jury, however limiting or however fulsome, it is erroneous because the case under the motion must be decertified because the plaintiffs are not similarly situated, because there is no common, no commonality between all of these parties in the collective.

I have that motion under and reserved, I understand those issues. I understand from the defendants that the plaintiffs have failed to put [Tr. 1686] on expert proof to do these calculations and the court is attempting or the plaintiffs are attempting to have the court usurp the role of the fact finder post trial and reserve it to the court; that these are not simple math calculations, but this whole thing based on base rate and overtime rate, those are things that need to be established in the proof through an expert, that is another deficiency of the case, and so I understand that.

Because there is no instruction that the defense – no verdict form that the defense could conceive of that would – that would cure these alleged deficiencies, which are still ripe in the ruling, the court is going to opt for the simple straightforward form and submit the plaintiff's verdict form to the jury.

And I have all of the defendant's objections reserved and, as I said, the very comprehensive Rule 50 motion that the defendants have filed further pre-

serves all of these issues. And so I'm just going to give the jury this verdict form because I am fully prepared to have to decide that motion, and that motion has to be decided with some specificity addressing all of [Tr. 1687] the points resolved. So having said that, the defendant's objections to this verdict form are noted, but this is the verdict form we are going to use and your objections are preserved for all of these things, Mr. Dougherty, I understand you, I've heard you.

* * *

(UNREDACTED)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS, on behalf of themselves and all other similarly situated employees,	)	
Plaintiffs,	)	NO. 08-2100
VS.	)	
FTS USA, LLC, AND UNITEK USA, LLC,	)	
Defendants.	)	

TRIAL PROCEEDINGS
BEFORE THE HONORABLE
BERNICE B. DONALD, JUDGE
TUESDAY AFTERNOON
OCTOBER 4, 2011

* * *

[Tr. 1702]

JURY INSTRUCTIONS

THE COURT:

* * *

[Tr. 1718]

* * *

This case arises under the Fair Labor Standards Act, a federal law that provides for the payment of

overtime wages for hours worked in excessive of 40 in a given week.

In addition, plaintiffs brought this action as a collective action under the FLSA. This means that the court has allowed approximately three hundred plaintiffs who have worked in more than a dozen different FTS field office across the county to pursue their claims collectively with the named plaintiffs. This case is proceeding as a collective action under the Fair Labor Standards Act. This procedure allows a small number of representative employees to file a lawsuit on behalf of themselves and others in the collective group. This collective action contains the named plaintiffs and all others who have filed a form with the court stating their desire to [Tr. 1719] pursue their federal overtime claim.

You must not consider whether plaintiffs have properly brought their claim as a collective action because I have already determined this issue and have determined that the claim is properly brought as a collective action, instead you must consider whether the plaintiffs have proven their claims. The plaintiffs that testified during this trial testified as representatives of the other plaintiffs who did not testify. Not all affected employees need testify to prove their claims, rather if some employees testify about the activities they performed or the amount of overtime – pardon me – or the amount of unpaid overtime they worked. Other non-testifying plaintiffs who performed substantially similar job duties are deemed to have shown the same thing.

There is no requirement that a certain number or a certain percentage of plaintiffs must testify. If the evidence presented by the representative plaintiffs who testified establishes that they worked unpaid

overtime hours and are therefore entitled to overtime compensation, then those plaintiffs that you did [Tr. 1720] not hear from are also deemed by inference to be entitled to overtime compensation.

On willfulness.

Not all violations of the Fair Labor Standards Act are willful. A violation of the Fair Labor Standards Act is willful only when the employer knew that its conduct violated the law or the employer acted with reckless disregard for the matter of whether its actions were in compliance with the law. A willful violation cannot be established merely by showing or suggesting that the defendant could have done more to eliminate alleged unreported and unpaid work. Willfulness requires more than mere negligence, unreasonable conduct, or the mere fact that a pay practice violates the statute. An employer who believes in good faith that its conduct complies with the Fair Labor Standards Act cannot be found to have committed a willful violation.

Now under the Fair Labor Standards Act an employee must be paid for all time spent at the workplace that is controlled or required by the employer. Hours worked include anytime that the employee is permitted to work even if those hours are not specifically requested or authorized.

[Tr. 1721]

Additionally, hours worked do not – do not only include those hours spent in physical or mental exertion, there need be no exertion at all. An employer can hire a person to do nothing or to do nothing but wait for something to happen.

For example, members of the jury, let me – bear with me for just a moment.

Let me see counsel at the bench just one moment.

(The following proceedings had at side-bar bench.)

THE COURT: I know yesterday there was a complaint about the examples, the one that you withdraw the objection.

MR. BRONSTEIN: Not those examples, those are supposed to be the statute, those are examples that we were going to see in advance but we did not.

THE COURT: So did you go back and fix those?

MR. PRAKASH: I believe that –

THE COURT: I can't hear you.

MR. PRAKASH: This is cut and pasted from the statute, from the regulation.

THE COURT: Look at that and see if [Tr. 1722] that is what I just –

Did you send that to us, you didn't transmit that?

MR. PRAKASH: I don't think we did.

THE COURT: Okay. I'm going to skip the example and read on. They objected to it and I said they had to come from the statute and I didn't read it.

(The following proceedings were had in open court.)

THE COURT: Thank you, members of the jury.

Now under the Fair Labor Standards Act an employee must be paid for all time spent at the workplace that is controlled or required by the employer. Hours worked include any time the employee is suf-

fered or permitted to work even if those hours are not specifically requested or authorized.

Additionally, hours worked do not only include those hours spent in physical or mental exertion, there may be no exertion at all, the employer can hire a person to do nothing or to do nothing but wait for something to happen.

Additionally, short rest periods or [Tr. 1723] downtime count as hours worked. Rest periods of short duration running from five minutes to 20 minutes are common in the industry, they promote the efficiency of the employee and are not customarily paid for as working time, they must be counted – they promote the efficiency of the employee and are customarily paid for his working time, they must be counted as hours worked.

Bona fide meal periods are not considered work time, only if the employee is completely relieved from all work duties for the purpose of eating regular meals, the employee is not completely relieved if he is required to perform any duties whether active or inactive while eating.

Additionally, short periods of less than – pardon me – additionally, short periods of less than 30 minutes for coffee breaks, time for snacks or things of that nature are not bona fide meal breaks. These rest periods that should be counted as hours worked.

* * *

[Tr. 1727]

* * *

THE COURT: Members of the jury, thank you for your accommodations. As I said, we have been

working really hard but sometimes it just takes a little more time.

Let me speak to you about the elements of an FLSA claim, overtime claim.

To establish liability under the Fair [Tr. 1728] Labor Standards Act for unpaid overtime plaintiffs must prove three elements.

First, the plaintiffs must prove that they were employed by the defendants.

The parties have stipulated to this element so you do not need to consider this element because the parties have agreed that it's been established.

Second, the plaintiffs must prove that they were – that they are employees engaged in commerce or in the production of goods for commerce, and were employed by an enterprise engaged in commerce in the production of goods for commerce.

You do not need to consider this element because the parties have already stipulated to this element.

Third, plaintiffs must prove that they performed work in excess of 40 hours in any workweek at issue for which they were not properly compensated, and that the employer had knowledge that such uncompensated overtime work was occurring. The plaintiffs have the burden of proving by a preponderance of the evidence that they performed work for which they were not [Tr. 1729] properly compensated.

Piece or job rate payments.

You have heard testimony concerning FTS's piece rate or job rate payment system. I'm instructing you that it is lawful to pay individuals pursuant to a piece rate system or a job rate system. The fact

that FTS used a piece rate or job rate system does not standing alone violate the Fair Labor Standards Act.

Now I'm going to talk with you about continuous workday.

Defendants must pay plaintiffs for all time worked during the continuous workday. The continuous workday is defined as all times spent by employees between the time the employee starts and completes the principal activity or activities in the same workday excluding a bona fide meal period.

Principal activity or activities embrace all work activities that are integral and – that are integral and indispensable part of the principal activity or activities.

I will explain what integral and indispensable means in a moment.

An activity is integral and [Tr. 1730] indispensable to a principal activity if the activity is required by the employer is necessary for the employee to perform his or her job duties and is primarily done for the benefit of the employer.

In general, an employer is required to compensate its employees for their time beginning when the employee performs the first principal activity of the workday until the employee's last principal activity of the day.

An employer is not required to compensate employees for commuting time at the beginning of the shift unless the commuting comes immediately after an employee's first activity that is worked.

The same concept is true at the end of the shift, that is, an employer is not required to compensate

employees for commuting time that comes after an employee's last activity that is worked and that is not followed immediately by additional work.

Even if an individual performs tasks immediately before a morning commute or immediately after an evening commute, the employer is not required to compensate the employee for the [Tr. 1731] commute if the employee was free to perform the various tasks at any point or another point during the day. In other words, if there is no requirement that an employee perform work immediately before or immediately after commuting, the commuting time is not compensable under the FLSA unless the commute time is a principal work activity. Even if the commute is not compensable, any principal work activities performed with the employer's knowledge at the end of the workday after the commute time may still be compensable if the employer knew that the employee was performing that principal work activity.

Now defendant's knowledge of overtime work.

An employer must compensate its employees for work that is performed with the knowledge of the employer. The employer's knowledge is measured in accordance with the employer's duty to inquire into the conditions prevailing in the business or its business. In other words, an employer is not excused merely because his business requires the employer to rely on subordinates, rather an employer is said to have knowledge if through reasonable diligence the [Tr. 1732] employer could learn for example that immediate supervisors had pressured employees to understate their hours. In this way a supervisor's or manager's knowledge counts as an employer's knowledge. In other words, there is not – there is no requirement that upper – pardon me – in other

words, there is not a requirement that upper-level management have knowledge of overtime work if the supervisors and managers did.

Additionally, if the – an employer directly or indirectly encourages employees to underreport their time, the employer cannot disclaim knowledge.

An employee must also be compensated for time she works outside of her scheduled shift even if the employer prohibited such work or did not ask that the employee work during that time so long as the employer knows or has reason to believe that the employee is continuing to work and that such work was suffered or committed by the employer.

For example, an employee may voluntarily continue to work at the end of the shift. The employer may be a piece worker, may desire to finish an assigned task or may wish to [Tr. 1733] correct errors, complete paperwork at home, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that the employees continue to work and the time is working time.

It is the duty of management to exercise its control and see that the work is not performed if it is not – if the employer does not want it to be performed. Management cannot sit back and accept the benefits without compensating them.

The mere promulgation of a rule against such work is not enough because management has the power to enforce the rules and must make every effort to do so.

In determining whether FTS has knowledge or could have learned that overtime hours worked, you should consider all of the evidence including whether

FTS, through its supervisors or agents, were in a position to see the plaintiffs work, whether there was too much work performed for the regular hours allotted, whether there were repeated and numerous occasions of extra work being performed, whether there was at pattern or practice of acquiescence to the work [Tr. 1734] or any other facts from which knowledge can be inferred.

Now under the Fair Labor Standards Act employers only employ individuals when they suffer or commit work. In other words, the defendants are only required to pay overtime wages if the plaintiffs prove that defendants knew plaintiffs performed work for which they did not receive proper overtime compensation.

Knowledge of overtime worked performed under the FLSA can be either actual knowledge or constructive knowledge.

Constructive knowledge exist if an employer exercising reasonable diligence will become aware that an employee is working overtime. An employer cannot stand idly by without paying an employee that he knows or should know is working unpaid overtime hours. However, an employer does not have such knowledge and is not in violation of the Fair Labor Standards Act if the employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge about such work.

For instance, an employer does not have knowledge of uncompensated work when an [Tr. 1735] employee submits timekeeping or other records that do not show the hours in fact were worked unless plaintiffs establish that the employer knew or

had reason to believe that the reported information was inaccurate.

FTS, like other covered employers – FTS like all other covered employers is required to keep an accurate record of all the hours worked by each employee each workday. The total hours worked each workweek and the total amounts paid for overtime worked by each employee. When the employer's records are inaccurate or inadequate, the employer has the burden – pardon me – the employer has to bear the burden of any lack of preciseness in the back wage calculations.

Employers, such as FTS, may not transfer the responsibility of ensuring those records accuracy to their employees, such as the plaintiffs.

An employer's duty under the FLSA to maintain accurate records of its employees may not be delegated to the employees. Once an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation simply because the employee failed to properly [Tr. 1736] report or claim on his overtime hours on his timesheets.

You must determine whether FTS kept adequate records that accurately reflected all of the – all of this information. If you determine that FTS failed to maintain accurate or adequate records and failed to prove the hours plaintiffs worked, then the plaintiffs are entitled to back pay for the amount of overtime worked – for the amount of overtime work they establish through just and reasonable inferences even if that amount is approximate. The plaintiffs do not need to provide exact proof of the precise number of hours worked, rather their estimates based on their

own recollection are sufficient. This is true even where the employee fills out his own timesheets and purposefully rendered them inaccurate at his manager's discretion.

If an employer fails to keep accurate time records, the plaintiffs only need to show that they worked overtime hours without being paid time and a half and produce enough evidence to support a just and reasonable inferences of the hours worked. That evidence can include representative employee testimony based on their [Tr. 1737] own recollections, testimony from other people with knowledge of the employer's practices, time records and other business records. The evidence does not have to be precise. Then it becomes the employer's burden to prove the precise amount of work performed or to disprove the existence of the wage violations. If the employer fails to produce that level of evidence, the employees are entitled to backpay for the amount of work that they established, even though the amount is only approximate. The employer cannot complain that the estimation of hours worked lack the precision that would have been possible if the employer had kept the records required by the law.

If you find that the defendant failed to keep accurate or adequate time records, and the employee cannot offer convincing substitutes, the solution is not to penalize the employee by denying him any recovery on the grounds that he is not able to prove the precise extent of his uncompensated work. As such, a result would be contrary to the remedial nature of the FLSA. An employee's good faith estimate of work hours is sufficient.

Now the law does not allow employees [Tr. 1738] to waive or give up their rights to overtime pay un-

der the Fair Labor Standards Act or to sign a contract agreeing not to be paid overtime. Accordingly in deciding whether the plaintiffs have been paid for all of the overtime pay they are owed, you are not to consider whether plaintiffs were told that they would be required to work overtime or that they would not be paid overtime. You are also not to consider whether the plaintiffs signed their timesheets, contracts or agreements indicating or agreeing that they should or would not receive overtime pay. The fact that plaintiffs find timesheets paying them for some of their overtime hours does not waive plaintiffs right to seek payment for the additional overtime hours worked.

If you find that the defendants failed to pay plaintiffs for overtime worked in violation of the Fair Labor Standards Act, you must determine how many unrecorded hours a week each testifying representative plaintiff worked on an average. That is, you must first determine whether the testifying representative plaintiffs worked unrecorded hours, then you must determine a weekly average of how many hours each testifying [Tr. 1739] representative plaintiff worked that were not recorded on their timesheet. These are the only determinations that you have to make relating to damages in this case.

* * *

APPENDIX R

FILED IN OPEN COURT:
DATE: *10/5/11*
TIME: *3:15 pm*
INITIALS: *JC*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Edward Monroe, Fabian Moore, and Timothy Williams, on behalf of themselves and all other similarly situated employees,	Court File No. 2:08-cv-2100-BBD-cgc

Plaintiffs,

v.

FTS USA, LLC and Unitek USA, LLC,

Defendants.

VERDICT FORM

SECTION A: LIABILITY

1. Have the Plaintiffs met their burden of proving by a preponderance of the evidence that they worked in excess of forty (40) hours in one or more weeks and were not paid overtime compensation for all of those hours?

Yes ☒

No ☐

If your answer is "No," then your deliberation are complete and please proceed directly to Section D, have your foreperson sign and date the verdict sheet and please provide the Court Security Officer with a note that states that you have reached a verdict.

If your answer is "Yes," then please proceed to Question No. 2.

2. Have the Plaintiffs met their burden of proving by a preponderance of the evidence that the Defendants knew or should have known that the Plaintiffs were not paid overtime compensation for all hours worked over forty (40) in a week?

Yes ☒

No ☐

If your answer is "No," then your deliberation are complete and please proceed directly to Section D, have your foreperson sign and date the verdict sheet and please provide the Court Security Officer with a note that states that you have reached a verdict.

If your answer is "Yes," then please proceed to Section B.

SECTION B: HOURS WORKED

You should only be completing this section if your answer to Question No. 1 is "Yes" and your answer to Question No. 2 is "Yes." If you provided these responses then you should provide a numerical answer greater than 0 to the following question.

3. How many **unrecorded** hours did the following testifying representative Plaintiffs work a week on average? NOTE: You should indicate the

number of unrecorded hours for each person listed below regardless of whether those hours are overtime hours or regular hours.

David Lighty:	*12*	hours
Matthew Dyke:	*11*	hours
Evan Gary:	*18*	hours
Edward Monroe:	*10*	hours
Fabian Moore:	*8*	hours
Jason Williams:	*18*	hours
Calvin McNutt:	*11*	hours
Richard Dabbs:	*12*	hours
Ben Kurk:	*17*	hours
Antwan Winston:	*16*	hours
Paul Crossan:	*15*	hours
Joshua Haydel:	*15*	hours
Tim Vannatia:	*24*	hours
Matthew Queen:	*8*	hours
Monfrea Perry:	*9*	hours
Stephen Fischer:	*10*	hours
Richard Hunt:	*15*	hours

Please proceed to Section C.

SECTION C: WILLFUL VIOLATION OF THE LAW

You should only be completing this section if your answer to Question No. 1 is "Yes" and your answer to Question No. 2 is "Yes."

4. Have Plaintiffs proven by a preponderance of the evidence that Defendants *willfully* violated the law?

   Yes ☒

   No ☐

   Please proceed to Section D.

SECTION D: SIGNATURE

FOREPERSON

Sign Name: _s/_____

Print Name: _*John Scott Carmichael*

Date: *October 05*, 2011

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EDWARD MONROE, ET AL PLAINTIFF, VS. FTS USA, LLC, ET AL DEFENDANT.	NO. 08-CV-2100 (JPM) UNITED STATES COURTHOUSE MEMPHIS, TENNESSEE JULY 2, 2012 4:00 P.M.

TELEPHONE STATUS CONFERENCE
BEFORE THE HONORABLE
JOHN PHIPPS MCCALLA
UNITED STATES DISTRICT COURT JUDGE

* * *

[Tr. 4]

* * *

THE COURT: Have y'all talked about how we're going to wrap this case up now?

MR. RYAN: Your Honor, we have; and I think we've got a good solution to propose to you. Hopefully, it will be agreeable, acceptable to the defendants. If I may –

THE COURT: Basically, you've had the liability determined and I'm aware of that and now that Judge Donald has ruled on really the last motion, we should be ready to just finish some calculations and enter everything, right?

MR. DOUGHTERY: I guess the –

THE COURT: And I'm sorry. Would you identify yourselves?

Ms. Warren just reminded me that she can't see who you are.

MR. DOUGHERTY: This is Colin Dougherty. I apologize, your Honor.

I guess the best way to say this is that we've, you know, we've objected throughout the trial and post-trial of this case that it can be handled by simply some calculations, that damages were a jury issue, and they were never put to the jury for decision.

THE COURT: I understood that that was agreed, [Tr. 5] by agreement.

MR. DOUGHERTY: That's not correct, your Honor. That was over our objection.

Judge Donald allowed plaintiffs to have certain charges to the jury and their jury verdict sheet to go to the jury. Plaintiffs, again, over our objection in the charging conference, the judge kind of summarized, essentially said we've preserved our issues for appeal and she was going to allow the plaintiffs to do what they wanted and then she would address things in the Rule 50 brief and in the Rule 50, her Rule 50 opinion, she stated that there was enough evidence, although we don't obviously agree with all of her findings, that there was enough evidence for the jury as fact finder to issue a damage award and they were never asked to do it.

THE COURT: Okay. I did have some – I don't know anything really. I didn't know anything about how it was being handled at the time. I was aware that it was being tried because for some reason I

happened to be over there for something that was taking place and I was aware that the verdict – in fact, this is the one – they gave me the verdict. So, I went over there and got that. That's really all I knew. Nobody said anything to me at that time about our – I do remember nobody said anything about my needing to submit any additional questions to the [Tr. 6] jury.

MR. DOUGHERTY: And there was none proposed, your Honor, by plaintiffs.

THE COURT: Okay. Well, I'm kind of at a little bit of a loss because, as you know, I went over to take the verdict and I did and I didn't know that there was a residual issue. So, and I realize there is now; but I need to figure out what we need to do.

Your suggestion is that we have then a panel come in, select another panel, and submit the issue of damages.

MR. DOUGHERTY: No, your Honor. I don't think that's allowed. I think –

THE COURT: Oh, it is allowed. I've done that before. You could have one panel decide the issue of liability and then if for some reason there – I mean, I'm not quite sure what happened but you can have a second jury come in and decide the issue of damages. Sometimes that's appropriate. You say it's not appropriate in this case.

MR. DOUGHERTY: That's correct, your Honor.

THE COURT: Okay.

MR. DOUGHERTY: And our understanding it's at least not allowed, you know, for these claims. Plaintiffs' position, you know, throughout the trial and [Tr. 7] post-verdict has been that through a spe-

cial master or some sort of calculation that we, you know, have not and will not agree to.

THE COURT: Okay. Well, I thought y'all were going to be happy and tell me how to wrap it up. Okay. Never works out the way you think.

You would be upset if we did have a jury trial to finish up the damages question?

MR. DOUGHERTY: Well, your Honor, again, it's our position that that's not appropriate, if that's what the Court orders –

THE COURT: I'm just asking you: What is appropriate?

MR. DOUGHERTY: Well, we don't – we think the only thing, quite frankly, that's left and that is appropriate is an entry of judgment and it would be an entry of judgment either for the defense or liability for plaintiffs and with zero damages.

THE COURT: That doesn't sound like something that's going to be very popular with the other side.

MR. DOUGHERTY: I would doubt it is, your Honor, yes.

THE COURT: Okay. Okay. Well, Mr. Ryan, I thought you had these people lined up.

MR. RYAN: I understand their and respect their [Tr. 8] legal argument but their legal arguments, unfortunately for them, they were ruled against by Judge Donald and she blessed and approved and consented and agreed that it would be a waste of time to have the jury perform calculations in the jury room that would take them weeks to perform and particularly when the only disputed issue of fact that related to damages at trial was just the additional

amount of off-the-clock hours that the installers performed.

Once the jury spoke on that issue, it's now literally a mathematical calculation as far as what everybody's damages are; and we've done that calculation.

So, the defendants can always, once – what we propose is to move for entry of judgment, attach our calculations, and we'll – we'll have the explanation for the Court so that – and defendant knows how their – the damages are calculated but we'll certainly have an explanation for the Court so that the Court is very comfortable with what we've done.

And then the defendants – it's just going to be math. The defendant shouldn't have any problem with our math; but if they find any mathematical errors, they can point those out to the Court.

Once the judgment gets entered on the amount, if defendant wants to file a Rule 50(b) motion, [Tr. 9] post-judgment motion, they can certainly do so.

I will say that we think your Honor and we certainly would hope that you'd agree with Judge Donald.

We recognize that you're not required to agree with her and to the extent that you did disagree with what she did, obviously we would certainly contend that it would be – we just need to reassemble a jury just for damages.

Cases routinely get remanded from appellate courts; and they can get, you know, they can in effect get remanded by a District Court for a new trial on damages only.

It happened in – it was slated to happen in the Burlington Northern v. White case that we held many years ago –

THE COURT: Right.

MR. RYAN: – on the punitive damages issue. Remember the Sixth Circuit said come back with punitives only.

But that's all that – that can all be addressed in a Rule 50(b) motion if they want to continue to make those legal arguments.

What's before the Court to do now is to simply enter a judgment in a monetary amount. What we've proposed to do and Ms. Prakash – and I don't think I'm [Tr. 10] misspeaking – I think we had discussed amongst ourselves to get that to your Honor by the 13th of July.

Is that right?

MS. PRAKASH: Yes, that's right.

THE COURT: Okay. I've got the unrecorded hours, and I've always had the list 'cause I took them in that day. It was David Lighting, 12; Matthew Dyke – so forth.

Do you have enough to do that then?

MR. RYAN: Right.

THE COURT: To do a calculation?

MR. RYAN: What was entered into record evidence was literally – and I'll just use that Mr. Monroe as an example.

THE COURT: Sure.

MR. RYAN: Every single work week we know exactly what Mr. Monroe made, and that was en-

tered into evidence. We also know when he was actually paid and the hours that he was paid for. That was entered into evidence.

Literally the only component, the only missing ingredient, which is why Judge Donald did what she did in an effort to, you know, not keep us there, you know, anymore than we had to, was to have the jury decide the off-the-clock hours.

[Tr. 11]

THE COURT: Right. So, as to Edward Monroe, it was 10 hours per week that was off the clock.

MR. RYAN: Right. So, in his calculation he just gets 10 additional hours added to his total; and, you know, it's math from there to determine his additional overtime that he's owed.

And in some weeks it makes a difference. In other weeks it doesn't because they never worked under – never even with the additional hours they didn't work over 40.

THE COURT: Right.

MR. RYAN: And we sent these calculations to the defendants back in last fall.

So, we're ready to – we're ready to go. We've been patient and understand the defendants have and respect their arguments, you know, but again, what we're talking about now won't preclude them from raising these same arguments.

THE COURT: What do we do on the willful violation situation?

MR. RYAN: Well, that's, you know, a jury's finding in our favor and that only –

THE COURT: Right. Right. Right.

MR. RYAN: Instead of a two-year period, look-back period, it will be a three-year look-back [Tr. 12] period.

THE COURT: Correct.

MR. RYAN: They can – those are – they've got a – you know, they certainly, I guess, would have their arguments post-trial on the post-entry of judgment on willfulness. They make them like they make any other argument.

THE COURT: Okay. Then what about the fee issue, the fees issue?

MR. RYAN: Well, once the judgment gets entered, Rule 54 gives us 14 days; and I think we can get it together. We may need to – what we've been doing lately – and I think District Courts like this – is we submit the amount to the defendant and essentially have a short window of negotiations to determine if it's agreeable or acceptable or if they think that we're wrong here; in other words, a consultation period.

So, if you could give us 30 days from once the judgment's entered, that would give us enough time to discuss. In other words, they may agree that, you know, really the only issue is the rates sought or they may agree that there's no issue on the rates but there's an agreement as to time spent. So, I think we could hopefully work a lot of that stuff out if you could give us 30 days from the entry of judgment.

[Tr. 13]

THE COURT: Okay. Let me run down some – okay. That sounds pretty reasonable.

MR. DOUGHERTY: Your Honor, Colin Dougherty again, if I may.

THE COURT: Sure.

MR. DOUGHERTY: And I agree that Mr. Ryan and Ms. Prakash did provide us their calculations previously but one of the issues we've had, you know, obviously, we don't agree with the 17 people whose hours but, you know, even for the sake of argument, if Mr. Ryan is correct that all you need is the hours – and we don't agree with that. There's no hours reported for 280-plus class members and there's been, again, no expert testimony about extrapolation or how you handle it and it doesn't address it.

The jury, again, was not asked to address, you know, things like plaintiffs put on the record that, you know, they weren't seeking recovery for Mr. Lighting's time when he was in Tennessee; but then there's another individual from that same location that they are seeking time for and others.

So, again, this is kind – this goes back to why we just have not been able to agree and did not agree when this was originally proposed and throughout this process. If your Honor's inclined to allow them to file a [Tr. 14] motion, we, you know, we would respond.

THE COURT: Right. Well, I've got to do something and we can't just – can't just let it sit.

What do you think we ought to do?

MR. DOUGHERTY: As I said, your Honor, I think the only thing that's left from the defendants' perspective would be to enter judgment –

THE COURT: Well, I don't think we could do that because Judge Donald – whether Judge Donald

was right or not right, she clearly indicated to the parties that they did not need to do certain things at the time of the trial, including get the final determination on the amount of the damages.

You agree with that, right?

MR. DOUGHERTY: Well, I actually disagree with that, your Honor. She allowed them to do what they requested. I don't think she blessed it, to use plaintiffs' counsel's words. She allowed them do a request and repeatedly said, "This will be addressed; defendants' arguments will be addressed in my Rule 50 opinion," which she addressed and then stated, you know, which is her most recent voice on this issue, she stated no fewer than four times that the jury was to determine damages and didn't.

We see it as it's an element of an FLSA claim, [Tr. 15] and plaintiffs have failed to meet that burden.

MR. RYAN: Your Honor, respectfully, she approved of the verdict form. I mean, that's – I don't need to say anymore than that.

THE COURT: Right. She did approve of the verdict form. I mean, I'm sure that's the case 'cause I was certainly told that. Okay. Well, I need a little more constructive approach from the defense because –

MR. DOUGHERTY: Well, your Honor, to go back to Mr. Ryan's point, it's the same point. It's who has the burden for the post-trial motions. You know, if your Honor did enter judgment on behalf of defendants, then plaintiffs also have the right to file post-trial motions and deal with it appropriately.

So, we're saying we believe it is what's correct. You know, Mr. Ryan said what he believed was correct and then felt we could address it via post-trial attack. It's the same position other than we think that's what's left.

THE COURT: Okay. All right. What, Mr. Ryan, what about this 280 folks that aren't part of the verdict form?

MR. RYAN: Well, your Honor, the representative – representativity issue and the collective nature of this case was ruled on multiple [Tr. 16] times, not only when Judge Donald denied the motion for proposed decertification but also when we put forward our proposed trial plans during trial. I know defendant is upset that the case was allowed to be tried on a representative basis, but that's what happens in these cases. They have gone to trial over the years, you know, based on a representative nature for obvious reasons.

Occasionally they do actually go to trial and this was one of them and there is – again, if they want to argue that the type of proof that came in at trial would require decertification post-verdict, they can argue that. There's precedent out there for them to argue. They're well aware of that.

But, again, we see those as issues that are most appropriately raised in a Rule 50(b) motion; and we're happy to address them because we feel that, you know, the proof that came in at trial's certainly sufficient.

THE COURT: You're ready to file a motion very shortly then; is that right?

MR. RYAN: Yes, your Honor, motion for entry of damages in X amount.

THE COURT: Sure. Okay. Well, then – sorry.

Tell me again: When you want to do that? By 25 the 13th.

[Tr. 17]

MR. RYAN: Yes, your Honor.

THE COURT: Then a response, obviously, right, from the defense.

MR. DOUGHERTY: Yes, your Honor.

THE COURT: Okay. So, by July the 13th we'll get the motion.

And then we'll get the response.

And when do you want to respond? Because I suppose technically it could be pretty fast.

MR. DOUGHERTY: I think, your Honor, I think the rules allow – what's 14 plus 3? I mean, that's fine unless your Honor wants –

THE COURT: I was looking at the 30th. Let me see if that works out right. That's seven, eight – that's about right. 30th?

MR. DOUGHERTY: That would be fine, your Honor.

THE COURT: July 30th it was essentially. We got some days in there.

So, you'll respond by then and then knowing – they may need to file a brief reply and we allow those now.

So, do you want to get your reply in? When do you want to get that in then?

MR. RYAN: A week, your Honor.

THE COURT: That's right. So, that will be [Tr. 18] August the 6th. Okay. We'll take a look at it in that way. That's just – that's fine. That's not a problem.

And do you have any idea what your number's likely to be, Mr. Ryan? Or you've got your colleague there, too. I don't want to leave her out.

MR. RYAN: Ms. Prakash.

THE COURT: Ms. Prakash?

MS. PRAKASH: You know, I don't remember the exact number, your Honor; but I do remember that it was greater than 3 million as far as I recall.

THE COURT: Okay. Okay. Just give me an idea. It does look like based on these numbers it would be pretty substantial. Okay. You'll have it all broken down. I'll be able to look at it.

You're going to be able to do that, Ms. Prakash; is that right? You did that part of the work?

MS. PRAKASH: Well, your Honor, along with Mr. Ryan and Ms. Srey, who's not here today, we've already done the calculations. I just don't have them in front of me. We can write up a calculation based on how they were done. It's based on the regulation and Judge Donald's ruling based on the 1.5 multiplier.

THE COURT: I'm trying to remember on the other cases you'd been on who had the laboring oar. It seemed [Tr. 19] like it might be Ms. Srey. I don't know.

MR. RYAN: Nichols Kaster has a team of CPAs apparently in the back office.

No, I'm teasing. They've – it's a nice, easy-to-read spreadsheet and I could read it. So ...

THE COURT: Okay. That will be fine. That will get us – get the issues properly developed.

I think that's about the only way we can get them properly put together, it looks like.

Defense counsel, anything else on that? That's the procedure it looks like we ought to follow; and you can still make some arguments along the way, as I understand it.

I'm a little thrown off by the idea that – I mean, I did misunderstood what – misunderstand, I think, what I understood Judge Donald had done.

You have different views of that; is that right?

MR. DOUGHERTY: That is correct, your Honor.

This is Colin Dougherty again.

I just – you know, part of our position, obviously, is to be clear for any type of post-trial appellate record –

THE COURT: Sure.

MR. DOUGHERTY: – the position defendants have [Tr. 20] had and, you know, are not waiving it or changing their position. So, your Honor's ordering the brief, that's fine; and we will file our brief by the 30th.

THE COURT: Okay. That's what we'll do, and we'll take a look at that.

Then I understand once I resolve that issue and what I'm trying to ask, I think, Mr. Dougherty, was I was trying to understand: Are you intending to mak-

ing any other arguments other than to directly address the motion submitted by plaintiffs' counsel?

MR. DOUGHERTY: Not at this time, your Honor. I don't think we have a vehicle or mechanism for that. Obviously once judgment is entered, we would have post-trial briefing that we could file; but until that point, we don't have a judgment.

THE COURT: I got you. I think I'm okay there. I think that's a good course of action.

Let's – I think we'll have to do these and then, of course, once we enter the – once we view everything and, assuming that we enter an order at that time, assuming that's what we decide we need to do, then if we get that order entered, it will trigger a couple of things including an application for fees from plaintiffs. They'll have to get that in. It will trigger post-judgment motions from the defense. I think that's [Tr. 21] it.

Anything else?

MR. DOUGHERTY: Not at this time from the defense, your Honor.

THE COURT: Good deal.

Mr. Ryan, anything else?

MR. RYAN: No, your Honor.

Thank you.

THE COURT: We'll in short order send out these dates. Thanks very much.

MR. DOUGHERTY: Thank you, your Honor.

Have a nice day.

THE COURT: You, too. Thank you.

(Whereupon the proceedings adjourned.)