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

COLIN D. DOUGHERTY
Counsel of Record
FOX ROTHSCHILD LLP
10 Sentry Parkway, Ste. 200
P.O. Box 3001
Blue Bell, PA 19422
(610) 397-6500
cdougherty@foxrothschild.com

Counsel for Petitioners FTS USA, LLC and UniTek USA, LLC

QUESTIONS PRESENTED

On June 21, 2017, the Sixth Circuit affirmed a Sixth Circuit panel holding 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 plaintiffs. Expressly disagreeing with a decision of the Seventh Circuit on nearly identical facts, the panel held that the Act is "less demanding" than Fed. R. Civ. P. 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, grounded in due process, that unless the sample is statistically representative, collective actions cannot be tried based upon 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. The Sixth Circuit, however, reversed and remanded for a recalculation of damages. After a subsequent appeal, the Sixth Circuit found that its remand was limited in scope and held that the District Court, *inter alia*, correctly declined to revise its earlier decision to enter an aggregate judgment.

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 upon testimony from a small subset of the putative Respondents, 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 Respondents.

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 and improperly resulted in an improper aggregate judgment.

3. Whether the District Court was authorized to enter an aggregate judgment in spite of the fact that recovery under the Fair Labor Standards Act is compensatory in nature and should be entered in individualized judgments.

PARTIES TO THE PROCEEDING AND RELATED CASES

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 and the following Respondents 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 Varner, 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; Littlejohn Opportunities GP, LLC; SG Distressed Opportunities Fund, LP; New Mountain Finance Corporation ("NMF Corp."); New Mountain Finance Holdings, LLC ("NMF Holdings"); Main Street Capital Corporation; G.D. Davis Capital Management, Inc.; Marblegate Special Opportunities Master Fund, L.P.; Pennant Park Floating Rate Capital, Ltd.; and Oxford Square Capital Corporation. 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 corporate parent, and FTS and UniTek are aware of no publicly held corporation that owns 10% or more of its stock.

The related cases are as follows:

- *Monroe v. FTS USA, LLC*, No. 2:08–cv–2100, U.S. District Court for the Western District of Tennessee. Judgment entered March 17, 2009.

- *Monroe v. FTS USA, LLC*, No. 14-6063, U.S. Court of Appeals for the Sixth Circuit. Judgment entered March 2, 2016.

- *Monroe v. FTS USA, LLC*, No. 14-6063, U.S. Court of Appeals for the Sixth Circuit. Judgment entered June 21, 2017.

- *Monroe v. FTS USA, LLC*, No. 2:08–cv–2100, U.S. District Court for the Western District of Tennessee. Judgment entered Sep. 16, 2019.

- *Monroe v. FTS USA, LLC*, Nos. 20-6289/6347, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Nov. 8, 2021.

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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 judgments of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit opinion under review (App. 1a-16a) is reported at 17 F.4th 664 (*Monroe III*). That Court's prior opinions are reported at 815 F.3d 1000 (*Monroe I*) (App. 114a-176a) and 860 F.3d 389 (*Monroe II*) (App. 40a-110a). Pertinent district court orders are reported at 257 F.R.D. 634 and 763 F. Supp. 2d 979. All other pertinent orders (19a-37a, 177a-199a) are unreported.

JURISDICTION

The Sixth Circuit entered judgment on November 8, 2021 (*Monroe III*). 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. 214a-239a.

STATEMENT

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, permits plaintiffs alleging violations of the statute's 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 (2013). To maintain either type of suit, plaintiffs must demonstrate that the putative class claimants share sufficient commonality, typicality, and cohesiveness such that a factfinder can accurately draw conclusions about the entire group from the evidence put forth by its representatives. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016).

This Court, in *Monroe II*, previously 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. App. 114a-176a. 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. 51a, 70-71a. Applying that diluted standard, the Sixth Circuit held that hundreds of employees asserting widely disparate theories of FLSA liability, based upon "inevitably individualized and distinct" proof, App. 51a-52aa, 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 upon supposedly "representative" witnesses handpicked by Respondents' 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.

The Sixth Circuit created a separate circuit conflict by holding that the Seventh Amendment

permitted the district court to decide damages unilaterally, without any jury finding on that issue, by averaging the *average* overtime worked by 17 of the plaintiffs who testified. As Judge Sutton explained in dissent, "[t]he Seventh Amendment bars this judge-run, average-of-averages approach." App. 105a.

The Sixth Circuit's rulings on certification, representative proof, and the jury-trial right in *Monroe II* contravene the FLSA and this Court's decisions. These errors and the direct circuit conflicts they create amply warrant this Court's review. FTS's prior petition for a writ of certiorari (after *Monroe II*) was denied. However, according to well-established precedent from this Court, that denial carries with it no implication on the merits.

The Sixth Circuit further exacerbated these errors in its ruling in *Monroe III* by affirming the District Court's aggregate judgment despite the fact that FLSA recovery is compensatory and should be entered in individualized judgments, which further justifies this Court's review.

The petition should be granted.

1. FTS performs cable installation and support for cable companies through technicians in field offices nationwide. App. 42a. 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. 43a, 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 from 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 upon how many jobs they complete in how many hours.

Technicians who work more than 40 hours per week receive overtime for each hour worked over 40. App. 47a. 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. *Ibid.*

Technicians are responsible for recording by hand the number of hours they work, both in the office and in the field. D.C. Dkt. 194-5, Page ID ## 2920-2922; D.C. Dkt. 194-9, Page ID ## 2964-2965. FTS policies forbid technicians from falsifying their timesheets and require that technicians sign their timesheets before submitting them to payroll. D.C. Dkt. 194-5, Page ID # 2921.

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. 45a. 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 those technicians. App. 45a.

Discovery revealed that the participating technicians asserted widely divergent theories of what Petitioners supposedly did wrong, and their allegations 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 more jobs), to perceptions that management discouraged overtime, to alleged directions from some supervisors at certain offices "to underreport." App. 93a (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, while 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 did not actually take; others claimed they were required to record half-hour lunch breaks whether or not taken; and still others conceded they correctly recorded lunch breaks. Finally, some technicians

claimed that they should have been paid for commuting time (which generally is *not* compensable), while others sought no compensation for such time.

3. Based upon the results from discovery, Petitioners filed a motion to decertify the collective action, D.C. Dkt. 193, which was denied. While acknowledging "variations" and "differences" in the facts affecting each Respondent, the district 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." D.C. Dkt. 193, at 25, 28. Respondents, however, did not offer a trial plan that identified any means of linking any of these methods to any individual Respondent, 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. These purportedly "representative" technicians testified about their alleged "off-the-clock" work, resulting from their own individual experiences. Several testifying technicians 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 worked and 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 these testifying technicians were representative of the nearly 300 nontestifying technicians.

Petitioners requested an instruction directing the jury to decide whether the testifying witnesses were representative of the other Respondents. D.C. Dkt. 260, Page ID # 5872. Petitioners also proposed a verdict form requiring detailed findings as to each testifying and nontestifying Respondent in order to secure Petitioners' "due process rights in the proper

adjudication of these claims." D.C. Dkt. 261, at 2.[1] 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." D.C. Dkt. 462, Page ID # 12156.

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," D.C. Dkt. 462, Page ID # 12154, D.C. Dkt. 462, Page ID # 12167, the district court agreed with Respondents. It 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." D.C. Dkt. 462, Page ID # 12164 (emphasis added). The court acknowledged that its decision was "contrary" to *Espenscheid v. DirectSat USA, LLC*, No. 09-cv-625, 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

[1] Petitioners' original form asked the jury to make findings on each distinct theory of liability that Respondents asserted for the class before trial. D.C. Dkt. 261-1. At trial, however, Respondents abandoned any pretense that they could prove the precise means by which each nontestifying Respondent was allegedly deprived of overtime, and instead sought only to prove "systematic shaving of overtime" through multiple, heterogeneous means. D.C. Dkt. 461, Page ID ## 12136-12137. While objecting that this "chang[e]" in "position" strengthened the need for the jury to "address each plaintiff" individually, D.C. Dkt. 461, Page ID ## 12137-12139, Petitioners continued to seek a jury finding on representativeness. D.C. Dkt. 462, Page ID ## 12158-12161.

substantially the same jobs—and which the Seventh Circuit has since affirmed. 705 F.3d 770.

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. 191a-195a, and accepted Respondents' proposal that the court *itself* determine damages *after* the jury was discharged. D.C. Dkt. 462, Page ID ## 12207-12208, 12210-12211, 12231-12233. 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. D.C. Dkt. 364-1, Page ID ## 7320-7322. 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. 108a (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 17 testifying witnesses—which varied widely from a low of 8 to a high of 24, D.C. Dkt. 364-1, Page ID ## 7320-7322 (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 upon their *own* calculation of damages. Respondents proposed that nontestifying Respondents be awarded damages by averaging the average weekly overtime hours found by the jury for 17 (of 18) testifying technicians—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. D.C. Dkt. 444, Page ID ## 10170-10171. The court adopted Respondents' proposal and entered judgment in the exact amount they requested—almost $4 million—"[b]ased upon the Plaintiffs' memoranda." App. 189a-190a.

Petitioners moved again for judgment as a matter of law, a new trial, and decertification, citing the Seventh Circuit's intervening decision in *Espenscheid*. D.C. Dkt. 405, 406, 441. The court denied these motions. App. 177a-188a.

6. Petitioners appealed 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 in *Monroe v. FTS USA, LLC*, 815 F.3d 1000 (6th Cir. 2016) (*Monroe I*). App. 114a-176a.[2]

a. The majority expressly rejected the Seventh Circuit's decision in *Espenscheid*—affirming denial of certification of workers of another UniTek subsidiary—as inconsistent "with Sixth Circuit precedent." App. 136a. "The difference between the Seventh Circuit's standard for collective actions and our own," the panel explained, "is the controlling distinction for the issues before us." App. 137a. 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. 124a. 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. 130a-131a (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. 131a.

Applying these rules, the majority held that Respondents could proceed collectively based upon an

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[2] The Sixth Circuit set aside the district court's calculation of overtime pay because the district court had incorrectly calculated hourly wages by mistakenly using a 1.5 multiplier, instead of the 0.5 multiplier that federal piece-work regulations prescribe. App. 153a-157a.

overarching corporate "time-shaving" policy—that is, a "policy" to violate the FLSA by not paying for overtime. App. 130a-131a. 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. 130a. Because the 17 technicians 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. 145a.

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. 133a. 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." A.C. Dkt. 60-3, pp. 14-15. The panel also suggested that a "representative" trial was appropriate because Petitioners initially

agreed to limit certification-stage discovery to 50 technicians. A.C. Dkt. 60-3, pp. 17, 22.

Finally, the majority held that the district court had not violated the Seventh Amendment by determining damages 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. 154a (citation omitted). The majority asserted that requiring jury findings on liability and damages for each Respondent "would contradict certification of the case as a collective action in the first place." App. 153a. 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. 154a.

b. Judge Sutton dissented. App. 159a-176a (Sutton, J., dissenting). 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. 163a. As in *Espencheid*, Respondents' claims here "encompass[] multiple policies, each one corresponding to a different type of statutory violation and some to no violation at all." App. 164a. 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. 167a.

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. 170a-171a. The majority's assertion that Petitioners forfeited their Seventh Amendment objection by declining a second jury was simply "[n]ot true." App. 174a.[3]

7. This Court vacated the panel's decision and remanded for further consideration in light of its intervening decision in *Tyson*. App. 111a-112a. In *Tyson*, 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,

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[3] Petitioners sought rehearing *en banc* on the panel's decision. They argued that this Court's decision in *Tyson*, issued after the panel's decision, undercut its rulings. C.A. Dkt. 64-1. The Sixth Circuit denied rehearing, stating that "the issues raised in the petition were fully considered upon the original submission and decision of the case." App. 113a. Petitioners then timely filed a writ of certiorari with this Court.

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).

8. Upon remand from this Court, the panel kept its prior holdings in place in *Monroe v. FTS USA, LLC*, 860 F.3d 389 (6th Cir. 2017) (hereinafter, "*Monroe II*"). The Court again unanimously held that the District Court erred in its calculation of damages and remanded for a recalculation of same; a split panel also again upheld the District Court's certification rulings, allowance of representative testimony, and the use of an estimated-average approach. *Id.* at 416.

9. On November 12, 2019, the District Court granted Respondents' renewed motion for entry of judgment with damages, including post-judgment interest, ordered that judgment be entered in the total amount of $894,868.68, and entered judgment in accordance with that order. D.C. Dkt. 563; D.C. Dkt. 564.

10. On appeal to the Sixth Circuit, Petitioners argued that the District Court erred by entering judgment in favor of the 296 Respondents on an aggregate basis, rather than awarding each Respondent an individualized, personal judgment.

The Sixth Circuit, in *Monroe III*, affirmed the District Court's judgment and held that that the

District Court correctly declined to revise its earlier decision to enter an aggregate judgment. 17 F.4th 664.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Holdings in *Monroe II* On Representative Litigation Conflict With Multiple Lower-Court Decisions And This Court's Precedent.

The Sixth Circuit's earlier rulings in *Monroe II* upholding 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. That decision also contradicts this Court's prior rulings, and bedrock principles of due process. This Court's intervention is necessary to resolve these conflicts on these important questions. Petitioners' prior petition for a writ of certiorari after the *Monroe II* decision was denied. However, those same shortcomings were perpetuated once again when the Sixth Circuit issued its opinion in *Monroe III*.

A. The Decision In *Monroe II* Directly Conflicts With Seventh Circuit FLSA Case Law And Multiple Lower-Court Rulings On Proper Use Of Representative Proof.[4]

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[4] This Court's denial of Petitioners' prior application for a writ of certiorari following the decision in *Monroe II* does not imply anything about the Court's assessment of the merits of that appeal. *See Agoston v. Commonwealth of Pennsylvania*, 340 U.S. 844 (1950) ("The Court has stated again and again what the denial of a petition for writ of certiorari means and more

As the Sixth Circuit openly acknowledged, its decision in *Monroe I* 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 actually proven to be 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. 68a-69a. It could scarcely have done otherwise: *Espenscheid* involved nearly identical allegations, and similar "representative" witnesses handpicked by Respondents' 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. 95a.

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

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particularly what it does not mean. Such a denial, it has been repeatedly stated, 'imports no expression of opinion upon the merits of the case.'") (internal citations omitted). Those same issues from *Monroe II* underlie and enable the errors in *Monroe III*, the immediate subject of this Petition.

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.*; D.C. Dkt. 194-5, Page ID # 2921.

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.

Respondents 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. *Ibid.* To make *that* showing, Respondents at a minimum were required (but failed) to "explai[n] … 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 Respondents' counsel from "hand pick[ing]" *unrepresentative* Respondents 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, Respondents 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—reaching precisely the opposite result on essentially the same facts—conflicts with *Espenscheid*. App. 68a-69a. 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), upon which the court of appeals extensively relied here. *See* 705 F.3d at 772. The Sixth Circuit 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. 68a-69a. This express, outcome-dispositive circuit conflict on the interpretation of a frequently invoked federal statute alone suffices to warrant review.[5]

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[5] Despite explicitly acknowledging that the circuit conflict was "controlling," the Sixth Circuit halfheartedly attempted to factually distinguish *Espenscheid*—namely, that *Espenscheid* had reviewed a ruling decertifying a class and involved a larger group of plaintiffs. App. 69a. As Judge Sutton explained, these supposed distinctions do nothing to diminish the direct, outcome-determinative conflict on the legal standards that the majority conceded. App. 95a-96a.

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 to ensure typicality and cohesion. 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 *competent, 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 upon 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 have followed the same principle. In *Duran v. U.S. Bank Nat'l Ass'n*, the California Supreme Court rejected a plan to try 260 state-law wage-and-hour claims based upon a nonrandom sample of 21 plaintiffs. 325 P.3d 916 (Cal. 2014). "[D]ue concern for the parties' rights," *Duran* 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 Sixth Circuit's decision in *Monroe II* cannot be squared with these holdings. The district court certified a collective action premised upon the promise of representative proof and entered judgment based upon testimony of 18 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 18 technicians was chosen randomly; Respondents themselves handpicked those technicians based upon 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 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. Reflecting traditional equity practice, this Court has long held that representative 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).

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 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. 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. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *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 issue 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 Sixth Circuit's decision in *Monroe II* contravenes these core due-process requirements. Respondents did not and could not plausibly demonstrate that the testifying technicians were representative of the nearly 285 claimants who did not. Technicians at different field offices asserted starkly distinct "methods" by which their overtime was allegedly reduced (App. 77a)—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. 96a-97a. Respondents neither "attempt[ed] to prove" that any one means was employed "across the entire class," App. 99a-100a, 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 Respondents' handpicked subset of testifying technicians' alleged average weekly unrecorded hours—from 8 to 24, D.C. Dkt. 364-1, Page ID # 7321—*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, 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 believing that all employees were challenging a supposed company-wide "policy" to avoid paying overtime. App. 78a-78a. But as Judge Sutton explained, simply asserting abstract violations of law "at a dizzying level 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. 97a (Sutton, J., dissenting). The panel's holding that hazy allegations alone suffice leaves due process a dead letter.

Nor could Petitioners' constitutional rights be jettisoned simply because some undefined quantum of "sufficient common issues or job traits otherwise permit collective litigation." App. 66a. 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. 101a; *Sturgell*, 553 U.S. at 894. Because "sauce for one … should be sauce for the other," the ruling in *Monroe II* is "perilous for defendants *and* plaintiffs alike." App. 101a.

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 addressing "the potential for misuse of the class device." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989). 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).

This Court's opinion in *Tyson*, an FLSA collective-action case, 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 upon the purportedly representative evidence to prove her own individual case. *No* individual FTS technician could prove that he or she was denied overtime based upon testimony by 18 testifying technicians who asserted "various and conflicting theories of liability," App. 91a (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. 96a.

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 in *Monroe II* also conflicts with this Court's and others' precedent 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 Adoption of the Decision in *Monroe II* Creates A Conflict On Petitioners' Seventh Amendment Right To Have A Jury Determine Each Respondent's Damages.

The panel's holding adopting its decision from *Monroe II* 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 upon "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:

> [R]eceived 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 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 in *Monroe II* conflicts directly with these cases. Over Petitioners' objection, the District Court discharged the jury after finding liability and then calculated damages itself by extrapolating from the 17 technicians listed on the verdict form to the rest of the nearly 300 Respondents. The jury itself made no finding of damages *as to any of the Respondents*. 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 Respondents to approximate 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 in *Monroe II* Violates Petitioners' Seventh Amendment Right To A Jury Finding Of Each Respondent's Damages.

The court of appeals' affirmance of its damages holding in *Monroe II* is also deeply misguided on the merits and irreconcilable with *this* Court's prior holdings.

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); *see also Dimick*, 293 U.S. at 482 (finding that a court may never increase the amount of damages awarded by a jury); *Tyson*, 136 S.Ct. at 1049 ("persuasiveness" of purportedly representative proof remains "a matter for the jury")

These principles are dispositive. 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.

The jury never found that the testifying technicians were representative. And it could not possibly have determined whether the testifying technicians' damages were representative of other Respondents' 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. 106a-107a (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. 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 "benign underreporting," which cannot be a basis for damages. App. 95a (Sutton, J., dissenting); D.C. Dkt. 364-1, Page ID ## 7320-7322.

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. 87a. That additional holding 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.). 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. *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (emphasis added); *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, 1239-40 (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. 57a-60a. Impaneling a second jury to decide damages thus

would necessarily entail reexamining the first jury's findings.

III. The Sixth Circuit's Affirmation of a Single, Collective Judgment Creates a Conflict As to Damages Calculations In Class Actions

The Sixth Circuit erred in refusing to vacate the District Court's entry of an aggregate judgment as inappropriate.

On November 12, 2019, the District Court entered judgment "in favor of 295 Plaintiffs . . . in the amount and manner as follows:

> a. Plaintiffs' overtime damages for 295 individuals totals $442,633.30;
> b. Plaintiffs' liquidated damages for 295 individuals totals $442,633.30; and
> c. Post-judgment interest from October 31, 2012 for 295 individuals totals $9,602.08."

D.C. Dkt. 563, Page ID # 1. Indeed, despite finding that an "aggregate judgment by this Court is appropriate," (D.C. Dkt. 542, Page ID # 8), the District Court *explicitly* referenced and relied upon an individual outline of damages, which was attached as Exhibit "A" to the District Court's Order on Judgment. D.C. Dkt. 563, Page ID ## 3-9. This form of judgment was entered in error and the Sixth Circuit compounded this error in finding that the District

Court "correctly declined to revise its earlier decision to enter an aggregate judgment." App. 12a.

Rather, each individual Respondent holds a unique interest in their unpaid overtime claims and each Respondent was allegedly individually harmed. *See Monroe II,* 860 F.3d at 414 ("FLSA actions for overtime are meant to be compensatory.") (citation omitted). Indeed, if, for example, one Respondent is judicially estopped from collecting their allegedly unpaid wages, the Court's aggregate damages award would not pass to another Respondent because FLSA recovery, as compensatory wages, is neither a penalty nor payable to another. *Ibid.* As demonstrated by the District Court's own reliance upon an *individualized* chart of damages, each Respondent's FLSA claim is separate and distinct, and should be adjudicated accordingly.

The Eleventh Circuit has considered the propriety of entering a final judgment awarding aggregate damages to a class and found that "this is not the ideal case for the entry of an aggregate final judgment, because several significant obstacles prevent the entry of such a judgment." *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1257 (11th Cir. 2003), *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (noting that "our consideration of whether an aggregate final judgment is appropriate in this case is complicated by the lack of case law pertaining to this issue"). In *Allapattah*, a class of gasoline dealers brought an action against their supplier, alleging the supplier breached various

sales agreements by overcharging the dealers. The Eleventh Circuit held that "the determination of the amount that each dealer was overcharged during the class period must take place on an individual basis, taking into account the amount of compensatory damages to which each dealer is entitled." *Id.* at 1257. The Eleventh Circuit explained that "the considerations that must be taken into account to calculate the correct amount of damages during the claims process reveal the obstacles to entering an aggregate judgment," including, *inter alia*, considering claims that are now barred or subject to reduction. *Ibid.* The Eleventh Circuit concluded:

> [T]he district court's decision not to enter an aggregate judgment was proper, because the judgment would not have expedited or simplified the claims process. Indeed, it appears that the entry of an aggregate judgment would complicate the claims process further, and we believe that the only real effect of entering an aggregate judgment in this case would have been to set aside a large pool of money, which would have accumulated interest while the claims process took place.

Ibid.

Similar concerns predominate this case and warrant reversal of the Sixth Circuit's affirmation of the aggregate judgment. Because a portion of Respondents' purported damages are for allegedly

unpaid wages, taxes and other payroll deductions must be removed from any such wages on an individualized basis (pursuant to individualized withholdings) and will generate individualized tax liability for each Respondent. Thus, any judgment entered against Petitioners must consist of a distinct, individual judgment for each and every Respondent. Just as in *Allapattah*, there is "no compelling justification for the entry of an aggregate final judgment in this case." The Sixth Circuit's approval of the District Court's entry of such a judgment creates a circuit conflict this Court can resolve by vacating the judgment and remanding with instructions to proceed with individualized judgments.

CONCLUSION

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

Respectfully submitted.

COLIN D. DOUGHERTY
FOX ROTHSCHILD LLP
10 Sentry Parkway, Ste. 200
P.O. Box 3001
Blue Bell, PA 19422
(610) 397-6500
cdougherty@foxrothschild.com

Counsel for Petitioners FTS USA, LLC and UniTek USA, LLC

February 7th, 2022

APPENDIX

APPENDIX A

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

File Name: 21a0252p.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/Cross-Appellants*, v. FTS USA, LLC and UNITEK USA, LLC, *Defendants-Appellants/ Cross-Appellees*.	No. 20-6289/6347

Appeal from the United States District Court for the Western District of Tennessee at Mephis.

No. 2:08-cv-02100—John Thomas Fowlkes, Jr., District Judge.

Decided and Filed: November 8, 2021

Before: SUTTON, Chief Judge; BOGGS and STRANCH, Circuit Judges.

* * *

OPINION

STRANCH, Circuit Judge. This Fair Labor Standards Act (FLSA) case has been litigated for over thirteen years. We have twice affirmed the district court's certification of a collective action and the determination by the jury and court that FTS and UniTek are liable under the FLSA. We reversed only as to two errors in calculating damages for Plaintiffs' piece- rate compensation and remanded for the sole purpose of recalculating damages without those errors. On remand, FTS and UniTek sought to raise a host of new attacks on the district court's judgment that were unrelated to our limited instruction to recalculate the hourly rate and correct the multiplier used to calculate damages. Recognizing that our remand was limited, the district court barred FTS and UniTek from raising most of those arguments. The court then recalculated damages and entered judgment for all but one opt-in Plaintiff, Valon Harlan, finding a lack of sufficient evidence to calculate damages. Following entry of judgment, the district court also substantially granted Plaintiffs' counsel's petition for attorney's fees.

On appeal, FTS and UniTek assert that the district court erred in foreclosing its arguments, contending that our remand was general in nature and thus allowed the district court to consider the merits of their list of new claims. FTS and UniTek

also argue that the district court abused its discretion in substantially granting attorney's fees to Plaintiffs. We **AFFIRM** the district court's judgment in all respects except as to its denial of judgment to Plaintiff Harlan, which we **REVERSE** and **REMAND** to the district court with instructions to enter judgment in favor of Plaintiff Harlan.

I. BACKGROUND

Because our prior opinions fully set forth the underlying facts, we here summarize only the pertinent parts of the lengthy procedural history of this case. In 2008, FTS technicians filed suit alleging that they were unlawfully deprived of overtime compensation for hours worked over the course of the prior three years. The district court authorized a collective action, and a total of 293 technicians ultimately opted into the collective action. In 2011, the case was tried to a jury that returned verdicts of liability against FTS and UniTek, finding that FTS Technicians worked in excess of 40 hours weekly without being paid overtime compensation and that FTS willfully violated the FLSA. The jury determined the average number of unrecorded hours worked per week by each testifying technician. Based on the jury's findings, the district court calculated damages for all technicians in the collective action and entered a judgment in 2012 based on calculation of the damages owed to each individual Plaintiff. In entering judgment for Plaintiffs, the district court applied a 1.5 multiplier for calculating uncompensated overtime.

In 2014, FTS appealed the district court's judgment on the following grounds: (1) The district court erred in certifying the collective action because the employees were not similarly situated; (2) the

court improperly allowed plaintiffs to prove liability as to all technicians based on testimony of an "unrepresentative few"; (3) the "trial-by-proxy procedure deprived FTS of its constitutional right to litigate individual defenses"; (4) the verdict form was flawed because the form did not require a finding about each technician for each week; (5) the court "impermissibly usurped" the jury's role in determining damages; (6) the district court's damages calculation was incorrect and based on unrepresentative testimony; and finally (7) the Seventh Amendment "requires" that any retrial on damages also include a new trial on liability. *See generally Monroe v. FTS USA, LLC*, 815 F.3d 1000 (6th Cir. 2016) (*Monroe I*). We upheld the district court's certification of the case as a collective action and its determination that sufficient evidence supports the jury's verdicts in favor of the class, affirming the court's judgment in all respects except as to the multiplier used to calculate the damages and the calculation of the technicians' hourly rate under the piece-rate compensation system. *Id.* at 1005, 1024. On the first issue, we found that the district court erred in applying a 1.5 multiplier, and instead should have used a 0.5 multiplier. *Id.* On the second, we found that the district court erred in failing to calculate the hourly rates to reflect the actual hours Plaintiffs worked. *Id.* Accordingly, we remanded the matter for the limited purpose of recalculating damages with the correct hourly rate and multiplier. *Id.*

FTS petitioned for a writ of certiorari. In light of its decision in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), decided after our opinion issued, the

Supreme Court vacated our judgment, and remanded for further consideration. *See FTS USA, LLC v. Monroe*, 137 S. Ct. 590 (2016). On remand, we concluded that *Tyson* supports our original decision and reaffirmed our prior holdings. *See Monroe v. FTS USA, LLC*, 860 F.3d 389, 393, 415–16 (6th Cir. 2017) (*Monroe II*).

We again affirmed the certification of the collective action and the sufficiency of evidence supporting the jury's verdicts, and reversed only as to the hourly rate calculation and the use of a 1.5 multiplier, remanding the case for the purpose of correcting the arithmetic.[1] FTS petitioned this court for rehearing en banc, which was denied. FTS again sought certiorari review, which was also denied. *FTS USA, LLC v. Monroe*, 138 S. Ct. 980 (2018)

The case then returned to the district court for the specified recalculation of the judgment. On remand, FTS sought to raise a number of issues for the first time. FTS and UniTek contended that our remand allowed them to raise the following claims: that at least 42 Plaintiffs were barred from recovery under the doctrine of judicial estoppel because they failed to disclose their FLSA claims in bankruptcy proceedings; that the district court erred in entering a single, aggregate judgment, as opposed to individualized and separate, Plaintiff-by-Plaintiff judgments; and that there was insufficient evidence to support a verdict as to several opt-in Plaintiffs, including Plaintiff Harlan. Recognizing that we issued a limited remand, the district court rejected each of FTS and UniTek's

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[1] Because *Monroe II* represents our most recent mandate to the district court, our analysis in this opinion focuses exclusively on the mandate we issued in *Monroe II*.

arguments, except for their argument as to Harlan. The district court concluded that it should not enter judgment for Harlan because "the data used to calculate damages . . . is not the product of a just and reasonable inference supported by sufficient evidence." The district court entered judgment, incorporating a spreadsheet that once again contained a Plaintiff-by-Plaintiff calculation as to the damages owed to each individual Plaintiff

At the conclusion of the case, Plaintiffs' counsel petitioned the district court for attorney's fees and costs related to all the litigation, including fees related to the pretrial litigation that occurred prior to November 1, 2012 (which the district court had previously granted, and we did not disturb), fees for the appellate litigation (all of which occurred post-November 1, 2012), and a fee enhancement. The district court ultimately granted Plaintiffs' petition for pre- November 1, 2012, litigation fees and post-November 1, 2012, litigation fees, but denied the fee enhancement.

II. ANALYSIS

In this appeal, FTS and UniTek raise a number of challenges to the district court's judgment along with separate challenges regarding the attorney's fees awarded by the court. Plaintiffs, on the other hand, cross-appeal to raise one challenge to the district court's denial of judgment as to Plaintiff Harlan. We address the judgment-related arguments and the attorney's fees-related arguments in turn.

A. Judgment Related Arguments

FTS and UniTek principally challenge the district court's conclusion that our remand in *Monroe II* was limited. They argue that we issued a general remand in *Monroe II*, and therefore, the district court erred in refusing to bar various opt-in Plaintiffs from recovering any damages based on the doctrine of judicial estoppel and in failing to enter Plaintiff-by-Plaintiff judgments. In response, Plaintiffs assert that our remand in *Monroe II* was limited, and the district court could not consider FTS and UniTek's new claims. For the same reason, Plaintiffs contend that the district court erred in denying judgment to Plaintiff Harlan.

We review de novo the interpretation of our mandate. *United States v. Parks*, 700 F.3d 775, 777 (6th Cir. 2012). Addressing whether a district court complied with our mandate, we review the entirety of the previously entered opinion to determine whether the remand was limited. *See Carter v. Mitchell*, 829 F.3d 455, 463 (6th Cir. 2016).

The mandate rule binds a district court to the scope of the remand issued by the court of appeals. *See United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999). Put differently, "the mandate rule instructs that the district court is without authority to expand its inquiry beyond the matters forming the basis of the appellate court's remand." *Id.* An appellate court's remand can either be general or limited in scope, and that distinction governs the district court's authority on remand.

On general remand, a district court is free to address all matters as long as it remains consistent

with the appellate court's opinion. *See United States v. Moore*, 131 F.3d 595, 597 (6th Cir. 1997) (*Moore II*). An appellate court's general remand lacks explicit limitation; therefore, it does not limit the district court's review and allows de novo review of the matter. *Id.* at 597–98. By way of an example, we determined that a remand order "where an appellate court simply vacates a sentence and remands to the district court for 'resentencing'" is considered a general remand allowing "the district court to resentence the defendant de novo." *Id.* at 598 (citing *United States v. Young*, 66 F.3d 830, 836 (7th Cir. 1995); *United States v. Caterino*, 29 F.3d1390, 1394–95 (9th Cir. 1994); *United States v. Cornelius*, 968 F.2d 703, 705–06 (8th Cir.1992)).

By contrast, a limited remand "constrains" the district court's authority to the issue or issues specifically articulated in the appellate court's order. *Moore II*, 131 F.3d at 598. Critically, in issuing a limited remand, an appellate court "must sufficiently outline the procedure the district court is to follow. The chain of intended events should be articulated with particularity." *Campbell*, 168 F.3d at 268. In *United States v. Moore*, 76 F.3d 111, 114 (6th Cir. 1996) (*Moore I*), we remanded the case to the district court for further proceedings to determine whether the defendant "used or carried a firearm during and in relation to his drug trafficking offense." We concluded in *Moore II* that those instructions were sufficiently limiting such that they required adherence to that one issue, and the district court violated the mandate rule by exceeding the scope of the limited remand order. 131 F.3d at 599.

Our opinion in *Monroe II* specified a limited instruction to do just one thing: recalculate the damages using the 0.5 multiplier and the correct hourly rates based on piece-rate compensation. Indeed, our opinion clearly begins with the following: "We REVERSE *the district court's calculation of damages* and REMAND the case *for recalculation of damages consistent with this opinion*." *See Monroe II*, 860 F.3d at 393 (emphasis added). We reiterated that instruction at several points in the opinion. As to the hourly rate, we instructed the district court to recalculate the hourly rates "with the correct number of hours to ensure that FTS Technicians receive the pay they would have received had there been no violation." *Id.* As to the multiplier, after explaining why the district court erred in using the 1.5 multiplier, we specifically stated that we "reverse the district court's use of a 1.5 multiplier." *Id.* at 415. We concluded our analysis by ordering a remand "to the district court to recalculate damages consistent with this opinion." *Id.* And in remanding to the district court to recalculate damages, we explicitly noted that our mandate "does not necessitate a new trial on liability" and that we have the authority to "limit the issues upon remand." *Id.* In light of the foregoing, our instructions simply left no room for the district court "to expand its inquiry" to the other matters that FTS and UniTek sought to raise on remand, including judicial estoppel, the entry of-individual judgments, or the reevaluation of the sufficiency of evidence as to several Plaintiffs. *See Campbell*, 168 F.3d at 265. Our mandate in *Monroe II* was therefore a limited remand.

FTS and UniTek's reliance on *United States v. McFalls*, 675 F.3d 599 (6th Cir. 2012), to suggest that our remand was general, not limited, is misplaced.

Citing *Moore II*, 131 F.3d at 599, we reasoned that for a remand to be limited, the opinion must include language denoting a specific limitation. *McFalls*, 675 F.3d at 605. Our opinion in *McFalls* explained that the critical language in *Moore I* was: "We adhere to our previous opinion in all other respects." *Id.* (quoting *Moore I*, 76 F.3d at 114). That statement alone was a specific limitation that constrained the scope of the district court's review and thus was key to our determination that the remand was limited. *Id.* It therefore followed that in *McFalls*, where we had not included such limiting language in our original order, our remand was general in nature, not limited. *Id.* at 605–06. By contrast, we included such limiting language here, along with specific instructions to recalculate damages with the correct hours and multiplier. Critically, like our mandate in *Moore I*, our mandate in *Monroe II* not only reversed the district court's *calculation* of damages, but after extensive analysis, also affirmed the district court's judgment in all other respects—*i.e.*, as to collective action certification, liability, and the use of an estimated-average approach. *Monroe II*, 860 F.3d at 407–11 (affirming district court on liability-related arguments). Our decision in *Monroe II* left open only one issue on remand—the recalculation of damages with the correct hours and multiplier—and nothing more. *McFalls* therefore does not contravene our conclusion that our remand was in fact limited.

FTS and UniTek further contend that even if the remand was limited, judicial estoppel falls within the scope of that limited remand. Our opinion in *JPMorgan Chase Bank, N.A. v. Winget*, 678 F. App'x 355 (6th Cir. 2017), addresses this point. There, we grappled with the interplay between the mandate rule

and the doctrine of judicial estoppel. Following our limited remand to do just one thing—enter judgment in plaintiff's favor on a single count—defendants raised the same argument as FTS and UniTek, that the plaintiff was judicially estopped from pursuing its monetary claim due to a representation to the bankruptcy court. *Id.* at 359–60. The district court in *Winget* denied the defendants' motion for estoppel, recognizing that our opinion had limited the remand to the discrete issue specified—entering judgment for the plaintiff on a single count—and consideration of the affirmative defense of judicial estoppel fell beyond the scope of that remand. *Id.* On appeal, we affirmed the district court's ruling, reasoning that our limited remand did not contemplate the possibility of the judicial estoppel defense, much less that the district court would conduct any further proceedings or entertain any additional arguments. *Id.* at 360–61. The same applies here.

As in *Winget*, our remand in *Monroe II* was limited by specific instructions. We remanded to the district court to recalculate the existing judgment, not relitigate liability or consider further arguments. Our limited remand did not contemplate the judicial estoppel issue, nor did it give the district court the opportunity to entertain that issue. And for these same reasons, the aggregate judgment and sufficiency of the evidence issues also fall outside the scope of the

limited remand.[2] Thus, the reasoning in *Winget* supports the conclusion that our limited remand bars FTS and UniTek from raising their new claims.

In sum, because we find that the district court was constrained on remand to the specific issues enumerated in Monroe II, we conclude that the mandate rule barred FTS and UniTek from raising arguments on judicial estoppel, aggregate judgment, and sufficiency of the evidence—all of which were outside the scope of our limiting instructions—on remand. The district court was correct in rejecting consideration of judicial estoppel. And it correctly declined to revise its earlier decision to enter an aggregate judgment. Based on our instructions for a limited remand, however, the district court erred in reassessing the sufficiency of the evidence as to Harlan.

B. Attorney's Fees

FTS and UniTek also challenge the district court's decision to award appellate attorney's fees from the previous appeal. First, they contend that Plaintiffs "waived" the opportunity to do so because they did not petition this court for the appellate attorney's fees in the first instance. And second, in the alternative, they

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[2] With respect to the sufficiency of evidence as to Harlan, the district court distinguished Harlan's case from the other Plaintiffs on the grounds that it was not supported by actual time records, only by testimony and data of other workers. Review of the sufficiency of evidence as to Harlan, however, falls outside the scope of our remand. *Monroe II* explicitly affirmed both the sufficiency of the evidence, 860 F.3d at 407–11, and the use of the estimated averages approach, particularly where the insufficiency is due to the employer's failure to keep adequate records, *id.* at 412–13.

contend that the district court abused its discretion in substantially awarding attorney's fees because Plaintiffs were not the prevailing party at the appellate stage of the litigation.

We review a district judge's decision to grant or deny attorney's fees under the abuse of discretion standard. *See Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 708 (6th Cir. 2020).

Our binding precedent squarely addresses FTS and UniTek's waiver argument on appellate attorney's fees. In *Smith v. Detroit Bd. of Educ.*, we held that in making awards for appellate services, "the district court is the forum to which the application for attorney fees ought to be addressed." 728 F.2d 359, 359 (6th Cir. 1984). We explained that "it is the preferred practice for attorney fee matters to be addressed by the district court in light of its fact-finding capability." *Id.* at 360 (citing *Greer v. Holt*, 718 F.2d 206 (6th Cir. 1983)). Here, Plaintiffs properly filed their petition for attorney's fees in the district court and that court was correct in concluding that Plaintiffs did not waive their ability to request appellate attorney's fees.

FTS and UniTek contend that we implicitly overruled that approach in *Keene v. Zelman*, 337 F. App'x 553, 558 (6th Cir. 2009), and *Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir. 1994). But *Keene* is non-precedential and neither opinion directly addresses the proper forum for a petition for attorney's fees in the first instance. Rather, they both dealt with substantive issues of whether a party was actually entitled to attorney's fees, so we remanded the cases to the district court to determine whether a party was entitled to appellate attorney's fees. *See Fegley*, 19

F.3d at 1134–36; *Keene*, 337 F. App'x at 558. In any case, *Smith* is directly on point, has not been overruled, and its determination that the district court is the preferred forum for attorney's fees is binding precedent.

FTS and UniTek also contend that the district court abused its discretion by awarding fees attributed to the appeal or by not substantially reducing them because Plaintiffs were not a prevailing party on appeal. In FLSA actions, 29 U.S.C. § 216(b) specifies that "[t]he court in such action[s] 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." A trial court "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *United Slate, Tile, & Composition Roofers, Damp & Waterproof Workers Ass'n, Local 307 v. G&M Roofing & Sheet Metal Co.,* 732 F.2d 495, 502 (6th Cir. 1984) (applying Hensley v. Eckerhart formulation to attorney's fees under § 216 of the FLSA). The FLSA provides for attorney fees "to insure [sic] effective access to the judicial process" for plaintiffs with valid wage and hour grievances and to "encourage the vindication of congressionally identified policies and rights." Id. at 502–03.

A "prevailing party" is a party who succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (emphasis added). Nonetheless,

> failing to obtain every dollar sought on behalf of his [or her] clients does not automatically mean a lawyer's fees should

> be reduced. . . . [T]he jury concluded that [plaintiffs] had not proved all of the damages they claimed. This does not necessarily mean that the lawyers are entitled to less fees; it merely means that the lawyers aimed higher than they hit, which . . . is a sound tactic.

Bankston v. Illinois, 60 F.3d 1249, 1256 (7th Cir. 1995); *see also Garcia v. Tyson Foods, Inc., 770 F.3d 1300,* 1311 (10th Cir. 2014) (upholding substantial fee award even though the jury awarded only 8% of the damages sought by plaintiffs in FLSA suit). And as *Fegley* reminds, "we have 'upheld substantial awards of attorney's fees even though a plaintiff recovered only nominal damages.'" 19 F.3d at 1135 (quoting *Posner v. The Showroom, Inc.,* 762 F.2d 1010, 1985 WL 13108 at *2 (6th Cir. 1985) (unpublished table decision)).

Plaintiffs were the "prevailing party" in the litigation and on appeal. Plaintiffs prevailed completely as to liability—*i.e.*, in demonstrating that FTS and UniTek violated the FLSA—and we affirmed that conclusion twice on appeal. That Plaintiffs failed to obtain "every dollar sought" on appeal does not nullify their overwhelming success on appeal, their status as a prevailing party, or their entitlement to attorney's fees. *See Bankston*, 60 F.3d at 1256. Moreover, it does not automatically reduce the fees to which Plaintiffs' attorneys are entitled, a determination which is left to the district court to make. *See Hensley*, 461 U.S. at 433. As the district court correctly pointed out, "[t]he complexity of this FLSA case, the length of the appeals process, and Plaintiffs' success in protecting the jury's verdict

while prevailing in every issue aside from the judgment calculation, leads the [c]ourt to conclude that appellate fees are warranted."

Because the district court correctly concluded that Plaintiffs were a prevailing party on appeal, "[i]t remains for the district court to determine what fee is 'reasonable.'" *Hensley*, 461 U.S. at 433. "In determining fee awards, courts should not 'become green-eyeshade accountants,' but instead must content themselves with 'rough justice.'" *Rembert v. A Plus Home Health Care Agency LLC*, 986 F.3d 613, 618 (6th Cir. 2021) (quoting *Carter v. Hickory Healthcare, Inc.*, 905 F.3d 963, 970 (6th Cir. 2018)). We see no reason to disturb the district court's determination as to fees, and FTS and UniTek set forth no additional argument to conclude otherwise. Accordingly, we conclude that the district court did not abuse its discretion in setting the attorney's fees award for the work performed during the time covered by the Plaintiffs' application for fees.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's judgment in all respects except as to its denial of judgment to Plaintiff Harlan; we **REVERSE** the district court's denial of judgment to Plaintiff Harlan and **REMAND** to the district court with instructions to enter judgment in favor of Plaintiff Harlan. Because this action has been ongoing for over thirteen years, we instruct the district court to act expeditiously in finalizing this case.

* * *

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 20-6289/6347

EDWARD MONROE, FABIAN MOORE, and TIMOTHY WILLIAMS,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees/Cross-Appellants,

v.

FTS USA, LLC and UNITEK USA, LLC,

Defendants-Appellants/ Cross-Appellees.

Before: SUTTON, Chief Judge; BOGGS and STRANCH, Circuit Judges

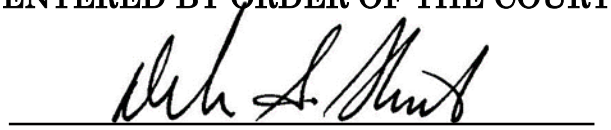
JUDGMENT

On Appeal from the United States District Court for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED in all respects except as to its denial of judgment to opt-in plaintiff Valon Harlan, which we REVERSE and REMAND for expedited proceedings consistent with the opinion and instructions of this court.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

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 all others similarly situated,	)	Case No. 2:08-cv-02100 -JTF-cgc
Plaintiffs,	)	
v.	)	
FTS USA, LLC and UNITEK USA, LLC,	)	
Defendants.	)	

ORDER ON PLAINTIFFS' SHOWING OF CAUSE TO ENTER JUDGMENT ON BEHALF OF FORTY-TWO (42) PLAINTIFFS

Before the Court is the above-named Plaintiffs' October 5, 2018 Showing of Cause to Enter Judgment on Behalf of Forty-Two (42) Plaintiffs, filed as a result of the September 25, 2018 Order instructing Plaintiffs

to show cause as to why the forty-two (42) Plaintiffs taken issue with in the Order are entitled to judgment. (ECF No. 544; *see* ECF No. 542.) Defendants' filed their Response to "Plaintiffs' Showing of Cause to Enter Judgment on Behalf of Forty-Two (42) Plaintiffs" on October 12, 2018. (ECF No. 546.) This supplemental briefing follows from Plaintiffs' Motion for Entry of New Judgment with Damages filed on May 8, 2018. (ECF No. 510.) For the reasons below, the Court finds that judgment should be entered for some of the Forty-Two (42) Plaintiffs but not all.

FACTUAL BACKGROUND AND PROCEDURAL POSTURE

The Sixth Circuit provided the following factual and procedural background for this case:

> 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[d] 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, [the court of appeals] 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 [the court of appeal's] opinion, and remanding the case to [the court of appeals] for further consideration in light of *Tyson Foods, Inc. v. Bouaphakeo*, [136 S. Ct. 1036] (2016), which the Supreme Court decided after [the appellate court] issued [its] opinion.

Monroe v. FTS USA, LLC, 860 F.3d 389, 393 (6th Cir. 2017).

The case was reversed and remanded to this Court for recalculation of damages. *Id.* at 393, 416.

ANALYSIS

Bankruptcy-Related Judicial Estoppel and Gap Filling

Plaintiffs submit that this Court should enter judgment for Plaintiffs against whom Defendants assert issues of bankruptcy-related judicial estoppel or gap-filling, "because Defendants' arguments are outside the limited scope of remand[, without exception,] and because Defendants waived those arguments by not raising them on appeal." (*See* ECF No. 544, 2–3.) Defendants oppose Plaintiffs'

assertions, arguing that the issues of judicial estoppel and improper substitution of evidence of damages with attorney estimates and averages are properly before this Court, as they were raised in response to Plaintiffs' "motion for entry of new judgment with new damages" and bar entry of judgment for the subject Plaintiffs. (*See* ECF No. 546, 6 (emphasis omitted).) Plaintiffs' arguments are well-taken.

Limited Remand Rule

The Court finds that, pursuant to the limited remand component of the mandate rule, Defendants' assertions regarding issues of bankruptcy-related judicial estoppel and gap-filling are outside the scope of the appellate court's remand and, accordingly, may not be considered by this Court. The Sixth Circuit, in quoting a case from the Second Circuit, explained the mandate rule as follows:

> The mandate rule "compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." Likewise, where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so.

United States v. O'Dell, 320 F.3d 674, 679 (6th Cir. 2003) (emphasis omitted) (quoting *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001)).

As seen above, "The mandate rule has two components—the limited remand rule, which arises

from action by an appellate court, and the waiver rule, which arises from action (or inaction) by one of the parties." *Id.* at 679. "The basic tenet of the limited remand component of the mandate rule is that a 'district court is bound to the scope of the remand issued by the court of appeals.'" *Id.* (quoting *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999)). Regarding remands, appellate courts are authorized to give either a general or limited remand. *Id.* "[T]o determine whether a remand is limited or general, [courts] look to the purpose of the rule—encouraging finality and discouraging wasteful litigation—and 'the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.'" *O'Dell*, 320 F.3d at 679 (quoting *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994)).

A limited remand, as opposed to a general remand, must clearly convey an intent to limit the scope of the district court's review. *Id.* at 681; *United States v. Guzman*, 48 F. App'x 158, 161(6th Cir. 2002). In considering the presence or absence of limiting language, context matters, meaning this Court must read "mandating language" with the analysis offered in the opinion. *O'Dell*, 320 F.3d at 681; *United States v. Campbell*, 168 F.3d 263, 267–68 (6th Cir. 1999). The Court also points to the case of *United States v. Santonelli*, 128 F.3d 1233 (8th Cir. 1997), an appellate court opinion from the Eighth Circuit cited in and relied upon by the Sixth Circuit in both *O'Dell* and *United States v. Moore*. *O'Dell*, 320 F.3d at 681; *United States v. Moore*, 131 F.3d 595, 599–600 (6th Cir. 1997). As held in *Santonelli* and discussed in *O'Dell* and *Moore*, the following mandate was that of a limited remand: "'we affirm Santonelli's conviction

on all counts, vacate his sentence and remand his case to the district court for resentencing.'" *O'Dell*, 320 F.3d at 681 (quoting *United States v. Byrne*, 83 F.3d 984 (8th Cir. 1996), *aff'd sub. nom. United States v. Santonelli*, 128 F.3d 1233 (8th Cir. 1997)). To conclude that such a mandate was a limited mandate, however, it is evident that the court did not consider the mandating language before it in a vacuum but read the mandate with the analysis offered in the opinion. *Santonelli*, 128 F.3d at 1237. The analysis identified and took issue with certain incorrect information considered in Santonelli's sentencing. *Id.* at 1236. The court pointed to this information and, in effect, held that its analysis was fused with its mandating language and amounted to a limited remand, *i.e.*, one that was not open-ended. *Id.* at 1237.

Also, for purposes of analysis, the Court provides the relevant language from the appellate court remanding the above-styled matter to this Court:

> 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.

Monroe, 860 F.3d at 415–16.

Specifically, the appellate court took issue only with the overtime multiplier used by this Court (using a 1.5 multiplier, as opposed to a .5 multiplier) and this

Court's methodology in determining the applicable regular rate for calculating damages (dividing each Plaintiff's total earnings for a workweek by the recorded hours worked in that week only and not by both recorded and unrecorded hours). *See id.* Said errors, which are discussed in the paragraphs of the appellate court's opinion immediately preceding the quote above, are purely formulaic and do not necessitate the receipt of new evidence or new testimony. *Id.* at 413–14 (referencing the errors as ones in methodology). Thus, it is apparent that the remand clearly limits the scope of the proceedings here to a recalculation of damages, favoring a finding that the remand is limited. *McCreary-Redd*, 407 F. App'x 861, 871 (6th Cir. 2010) (holding that a finding of limited remand was supported where mandating language limited the scope of subsequent proceedings to "pleading anew").

Further, the mandate does not involve multiple issues, but only one general issue that is divisible into two sub-issues. As seen in the explicit language of the remand, this Court's certification of this case as a collective action, allowance of representative testimony at trial to prove liability, and use of an estimated-average approach to ascertain the number of hours to be compensated for calculating damages, are not and cannot become an issue here—those matters are decided. *Monroe*, 860 F.3d at 406–413. The issue here is that of calculating damages using the correct statutorily provided multiplier and formula. *See id.* at 414–15. Thus, multiple issues are not involved in this remand, favoring a finding that the remand here is limited.

It is clear that the appellate court's reason for the remand was not for the district court to receive new evidence challenging the evidentiary proof for or otherwise lodging undeveloped defenses to an award of damages but merely to employ the right formula when calculating damages. Thus, the Court finds that the appellate court's mandate is that of a limited remand and that, pursuant to the limited remand rule of the mandate rule, Defendants' assertions regarding issues of bankruptcy-related judicial estoppel and gap-filling are outside the scope of the appellate court's remand and may not be considered by this Court.

Waiver Rule

Alternatively, even if this Court could consider the evidence and arguments submitted by Defendants, the Court finds persuasive Plaintiffs' argument that the issues of bankruptcy-related judicial estoppel and gap-filling are waived and should not be considered because the issues were not raised on appeal and/or are referred to in a perfunctory manner, unaccompanied by some effort at developed legal argument or analysis. Although it appears that the parties attempt to cabin the source of the waiver argument here, (*compare* ECF No. 544, 4, *with* ECF No. 546, 4–5), this is of no real consequence, as the Court considers Plaintiffs' waiver argument as invoking concerns over the application of the "waiver rule" (a subpart of the mandate rule), which may be raised *sua sponte*. *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 758 F. App'x 392, 397 n.2 (6th Cir. 2018).

Under this waiver rule, "A party that fails to appeal an issue 'waive[s] his right to raise the[] issue[]

before the district court on remand or before this court on appeal after remand.'" *JGR, Inc. v. Thomasville Furniture Indus.*, 550 F.3d 529, 532 (6th Cir. 2008) (quoting *United States v. Adesida*, 129 F.3d 846, 850 (6th Cir. 1997)). To determine whether a party failed to appeal an issue, courts look to the party's notice of appeal, given that Fed. R. of App. P. 3(c)(1)(B) requires that a notice of appeal must "designate the judgment, order, or part thereof being appealed[.]" Fed. R. App. P. 3(c)(1)(B); *JGR, Inc.*, 550 F.3d at 532. This is important because, "[a]lthough a notice of appeal should be given a liberal construction, *Smith v. Barry*, 502 U.S. 244, 248 (1992), a court of appeals has jurisdiction only over the areas of a judgment specified in the notice of appeal as being appealed." *JGR, Inc.*, 550 F.3d at 532.

On appeal, Defendants challenged 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 (particularly the allowance of representative testimony at trial to prove liability and the use of an estimated-average approach to calculate damages), the jury instruction on computing time, and the district court's calculation of damages (namely, that the district court took the calculation of damages away from the jury in violation of the Seventh Amendment and used an improper and inaccurate methodology by failing to recalculate each technician's hourly rate and by incorrectly applying a 1.5 multiplier). *See Monroe*, 860 F.3d at 396–413. These arguments are the only ones reflected in Defendants' original appellate brief and supplemental brief. Brief of Defendants-Appellants, *Monroe v. FTS USA, LLC*, 14-6063 (6th Cir. Apr. 10, 2015); Supplemental Brief

of Defendants-Appellants, *Monroe v. FTS USA, LLC*, 14-6063 (6th Cir. Mar. 6, 2017). Importantly, however, Defendants never raised the issues of bankruptcy-related judicial estoppel or gap-filling and the accuracy/viability of certain evidence used to calculate damages, apart from general argument against the use of averages and representative proof not specific to any Plaintiff(s). Further, it appears that in arguing the inapplicability of the mandate rule, Defendants admit that these issues were not raised on appeal. (ECF No. 546, 4.)

Although Defendants attempt to assert that the waiver argument is inapplicable because arguments dealing with bankruptcy-related judicial estoppel did not exist, the argument is not well-taken. (*Id.* at 5 n.1 ("Notably, while Plaintiffs argue that Defendants should have objected to the first entry of judgment on the basis of judicial estoppel, approximately two-thirds of the bankruptcy Plaintiffs' proceedings were not dismissed or discharged until after October 31, 2012, the date of judgment entered by this trial Court."); *see generally* ECF No. 397 (judgment entered October 31, 2012).) In essence, Defendants argue that because some of the bankruptcy Plaintiffs' proceedings were not dismissed or discharged until after an entry of judgment in this case, the arguments of bankruptcy-related judicial estoppel, as a whole, did not exist. Defendants neither explain nor provide caselaw in support of how such a fact would render the bankruptcy-related judicial estoppel argument unavailable on appeal. Moreover, Defendants concede that their argument does not apply to at least one third of Plaintiffs (ECF No. 546, 5 n.1), meaning Defendants were able to appeal the bankruptcy-

related judicial estoppel issue they now assert regarding at least some of the Plaintiffs, but they did not. For example, although it appears that the last Plaintiff to join this action did so on October 19, 2009, (ECF No. 148), Plaintiff John Bennett filed for Chapter 7 bankruptcy on July 8, 2010 and was granted a discharge on October 14, 2010. (ECF No. 546-1.) Likewise, Plaintiff Patrick Hauge filed for Chapter 7 bankruptcy on February 8, 2011, and was discharged on May 18, 2011. (ECF No. 546-11.) Moreover, Defendants rejected an opportunity at trial to have a jury trial on damages. *Monroe*, 860 F.3d at 414. As a result, Defendants waived the argument.

The Court finds that the above holding is the more sensical approach. To hold otherwise would allow gamesmanship because a defendant could delay or avoid paying a judgment against them by not raising certain arguments on appeal and in various proceedings with the hope that, after some passage of time, death, bankruptcy, or some other event would lessen or render inapplicable the judgment against them. *Johnson v. City of Memphis*, Nos. 00-2608-STA-tmp, 04-2017-STA-tmp, 04-2013-STA-egb, 2016 U.S. Dist. LEXIS 61598, at *18 (W.D. Tenn. May 10, 2016) ("A party who could have sought review of an issue or a ruling during a prior appeal is deemed to have waived the right to challenge that decision thereafter, for it would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.") (quoting *United States v. Adesida*, 129 F.3d 846, 850 (6th Cir. 1997); *see O'Dell*, 320 F.3d at 680 (noting that the purpose of the mandate rule is to encourage finality and discourage wasteful

litigation). Thus, the Court cannot now review new arguments challenging the evidence used in calculating damages, as Defendants could have sought review of this issue or ruling during a prior appeal.

To the degree Defendants assert that the issue of bankruptcy-related judicial estoppel is really one of standing and, thus, not waivable, the Court disagrees. "The [alleged] standing problem here—whether a debtor or only a bankruptcy trustee has the right to prosecute legal claims related to the bankruptcy estate—is better characterized as a real-party-in-interest question governed by [Fed. R. Civ. P.] 17." *Kimberlin v. Dollar Gen. Corp.*, 520 F. App'x 312, 314 (6th Cir. 2013); *see also Mullins v. Automotive*, No. 1:17cv135, 2018 U.S. Dist. LEXIS 55163, at *3 (S.D. Ohio Mar. 31, 2018). A real party in interest defense may be waived by failure to raise the defense in a timely fashion. *See Kimberlin*, 520 F. App'x at 314; *see also United HealthCare Corp. v. Am. Trade Ins. Co.*, 88 F.3d 563, 569 (8th Cir. 1996) ("Because the requirements in Rule 17(a) are for the benefit of the defendant, we have held that an objection on real party in interest grounds should be raised with reasonable promptness in the trial court proceedings. If not raised in a timely or seasonable fashion, the general rule is that the objection is deemed waived." (quoting *Sun Refining & Mktg. Co. v. Goldstein Oil Co.*, 801 F.2d 343, 345 (8th Cir. 1986))).

Defendants "real-party-in-interest argument" is asserted here on remand for the first time; thus, Defendants waived the argument. Although Defendants have done themselves no favors by failing to develop this issue, "the Sixth Circuit explain[s] that

the better approach is to bypass th[e real-party-in-interest] analysis—which [usually] requires resolving several thorny issues of bankruptcy law—and instead resolve the judicial-estoppel issue." *Mullins*, 2018 U.S. Dist. LEXIS 55163, at *3 (referencing *Kimberlin v. Dollar Gen. Corp.*). As seen above, the Court finds that Defendants waived any argument regarding bankruptcy-related judicial estoppel.

Plaintiffs Williams and Moore

Even with the conclusion that the gap-filling arguments made by Defendants relating to Plaintiffs Williams and Moore are waived, the Court finds that issuing judgment as to these Plaintiffs is inappropriate at this time, as Plaintiffs' calculations appear to have formulaic errors. For example, Antwaine D Thomas, for the March 8, 2008 workweek, had 19.5 recorded overtime hours, 13.47 unrecorded hours (averaged from the testifying technicians), and received an overtime wage rate of $3.50. In the payroll records, Thomas's assumed overtime wages paid are calculated by multiplying his overtime wage rate by his recorded overtime hours, and his overtime damages owed are calculated by multiplying his overtime wage rate by his unrecorded overtime hours. (*See* ECF No. 529-2, 210.) Accordingly, Thomas's assumed overtime wages paid were calculated at $68.25 (19.5 X 3.50), and his overtime damages owed

for the week were calculated at $47.15 (13.47 X 3.50). [3] 1 (*Id.*) That formula, however, is not consistently used in Plaintiffs Williams's and Moore's calculations. For example, during Plaintiff Danny Alex Williams's November 3, 2007 workweek, Williams worked 2.5 recorded overtime hours, 13.47 unrecorded hours (averaged from the testifying technicians), and received an overtime wage rate of $2.93. Mimicking the formula applied to Thomas, Williams's assumed overtime wages paid would be the product of 2.5 X 2.93, *i.e.*, 7.33, and his overtime wages owed the product of 13.47 X 2.93, *i.e.*, 39.47. However, Plaintiffs assert that Williams's assumed overtime wages paid is $15.90 and that his overtime wages owed is $30.81. (ECF No. 544-5, 2.) Similar problems are seen in the calculations for Moore. Regarding Moore's July 21, 2007 workweek, the payroll records indicate that Moore worked 3 recorded overtime hours, had 8 unrecorded hours (per his testimony), and received an overtime wage rate of $2.58. (*Id.* at 1; ECF No. 364, 2.) Accordingly, Moore's assumed overtime wages paid would be the product of 3 X 2.58, *i.e.*, 7.74, and his overtime damages owed would be 8

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[3] As another example, Thomas Anthony North, for the November 1, 2008 workweek, had 6.5 recorded overtime hours, 13.47 unrecorded hours (averaged from the testifying technicians), and received an overtime wage rate of $3.50. (544-3, 6.) In the payroll records, Thomas's assumed overtime wages paid are calculated by multiplying his overtime wage rate by his recorded overtime hours, and his overtime damages owed are calculated by multiplying his overtime wage rate by his unrecorded overtime hours. (*See id.*) Accordingly, Thomas's assumed overtime wages paid are calculated at $22.75 (6.5 X 3.50), and his overtime damages owed for the week were calculated at $47.15 (13.47 X 3.50). (*Id.*)

X 2.58, *i.e.*, 20.64. The spreadsheet submitted, however, provides that Moore's assumed overtime wages paid is $16.27 and that his overtime wages owed are $12.06. (ECF No. 544-5, 1.) Accordingly, judgment as to Plaintiffs Williams and Moore is not appropriate at this time.

Plaintiff Harlan

The Court finds that the data used to calculate damages for Plaintiff Valon Harlan is not the product of a just and reasonable inference supported by sufficient evidence, such that judgment for Harlan is not appropriate. In an employment dispute under the FLSA, "An employee [must] prove both uncompensated work and its amount[.]" *Monroe*, 860 F.3d at 398. "[W]here [an] 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." *Id.* at 389–99 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)).

To show that Harlan in fact performed overtime work for which he was improperly compensated, Plaintiffs note that Harlan stated on August 4, 2009, that he sometimes worked over forty (40) hours a week. (ECF No. 126-1; *see also* ECF No. 544, 11.) Subsequent to Harlan's above statement, the parties provided records and stipulated to them as complete payroll records. Plaintiffs contend, however, that these payroll records were not complete. (ECF No. 383

at 3, n.3; *see also* ECF No. 544, 12–13.) As a result, to show the extent of his individual damages, Plaintiff Harlan used, in part, assigned averages for weeks of eligibility within the statutory period, the same average unrecorded hours worked for all non-testifying Plaintiffs (13.47 hours), an average regular rate, [and] an average unrecorded overtime hours worked[.]" (ECF No. 383 at 3, n.3.) Notably, it does not appear that all of the data used in these calculations is the product of a just and reasonable inference supported by sufficient evidence, as the information is not derived from the similarly-situated, testifying technicians, *i.e.*, representative employees (other than the average unrecorded hours worked). *See Monroe*, 860 F.3d at 411–13 (noting and upholding the validity of using information pertaining to testifying witnesses to make estimates and calculations for similarly situated employees who did not testify). Although, as Plaintiffs contend, Defendants are barred from asserting or have otherwise waived the ability to assert evidentiary-like challenges to the data contained within the payroll records, outside formulaic issues. Thus, the Court finds that it should not enter judgment for Plaintiff Harlan.

Deceased Plaintiffs

Plaintiffs submit that this Court should enter judgment for the three (3) deceased Plaintiffs identified—Howard, Austin, and Dowdy—with the judgment passing to their next of kin, since Plaintiffs prevailed in this suit and judgment was affirmed well before Defendants raised any suggestion of their deaths. (ECF No. 544, 9.) Plaintiffs additionally submit that Defendants' suggestions of death are improper, as they were not served upon the deceased's

successors or personal representatives. (*Id.* at 10 n.5.) Defendants counter that Plaintiffs failed to demonstrate that the deceased Plaintiffs are entitled to judgment because Defendants properly provided suggestions of death to Plaintiffs' lawyers more than ninety (90) days ago, triggering Plaintiffs' ninety (90) days to file a motion for substitution, which Plaintiffs have not done. (ECF No. 546, 13–14.)

The Court finds that, at this time, entering judgment for the three (3) deceased Plaintiffs is not appropriate. Federal Rule of Civil Procedure 25(a) governs the substitution of parties upon the death of a litigant. Fed. R. Civ. P. 25(a). Rule 25(a)(1) states as follows:

> If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Fed. R. Civ. P. 25(a)(1).

Two steps are required for the ninety-day (90) period to commence: (i) a statement noting death, *i.e.*, suggestion of death, must be made upon the record, which is not satisfied by mere reference to a party's death in court proceedings or pleadings; and (ii) the suggestion of death must be served upon the other parties and the deceased's successors or personal representatives as provided in Fed. R. Civ. P. 5. Fed. R. Civ. P. 25(a)(3); *Bauer v. Singh*, No. 3:09-cv-194,

2011 U.S. Dist. LEXIS 8543, at *4 (S.D. Ohio Jan. 28, 2011); *see In re Aredia & Zometa Prods. Liab. Litig.*, Nos. 03-06-0974, 03-06-0745, 2011 U.S. Dist. LEXIS 91426, at *2–3 (M.D. Tenn. Aug. 16, 2011). However, "If the deceased's successor [or personal representative] is a non-party, then the suggestion of death must be served in accordance with Rule 4." *Singh*, 2011 U.S. Dist. LEXIS 8543, at *3–4. After the above two requirements are met, and thus, the ninety-day (90) period for filing a motion to substitute commences, a motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. Fed. R. Civ. P. 25(a)(3). If the motion is not made within ninety (90) days after service of a suggestion of death, the action by or against the decedent must be dismissed. Fed. R. Civ. P. 25(a)(1).

Here, there is no evidence that any suggestion of death was served upon the deceased Plaintiffs' successors or personal representatives. Accordingly, under Rule 25(a), the ninety-day (90) time period has not commenced. *See, e.g.*, *In re Aredia & Zometa Prods. Liab. Litig.*, 2011 U.S. Dist. LEXIS 91426, at *2–3. Nonetheless, Plaintiffs filed Affidavits from relatives of Howard and Austin identifying themselves as next of kin, (ECF Nos. 544-6 & 544-7), and, in effect, ask that these Affidavits be treated as motions for substitution. (*See* ECF No. 544, 9–10.) Although Plaintiffs did not file a sworn statement from Dowdy's successor or personal representative, they ask that his damages award be held in escrow for a period of fourteen (14) days, during which Plaintiffs will file such a sworn statement or inform the Court that his claim may be dismissed. (ECF No. 544, 9–10.)

Upon consideration, the Court instructs Plaintiffs Howard, Austin, and Dowdy to make their requests pursuant to a motion for substitution within fourteen (14) days from the date of this Order, in accordance with Rule 25, or otherwise inform the Court that the claims may be dismissed. Until that time, the damages award for the three deceased Plaintiffs—Howard, Austin, and Dowdy—will be held in escrow.

CONCLUSION

For the foregoing reasons, the Court finds that judgment should be entered for all of the above-referenced forty-two (42) Plaintiffs, excluding Plaintiffs Fabian Moore, Danny Williams, Valon Harlan, Jimmy Howard, Brad Austin, and Danny Dowdy. It is **ORDERED**, however, that Plaintiffs shall correct the calculations found problematic by the Court regarding Plaintiffs Moore and Williams and submit a corrected Summary of Damages Sheet and Weekly Damage Calculation Spreadsheet; submit the proper motion(s) for substitution regarding Plaintiffs Howard, Austin, and Dowdy; and, if necessary, otherwise inform the Court that the claims regarding any of the five (5) Plaintiffs accounted for through the above instruction may be dismissed.

IT IS SO ORDERED this 16th day of September 2019.

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

APPENDIX C

No. 14-6063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD MONROE, ET AL.,	)	
	)	
Plaintiff-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.

*Judge Donald recused herself from participation in this ruling.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/
Deborah S. Hunt, Clerk

APPENDIX D

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, *Plaintiff-Appellees*, v. FTS USA, LLC, and UNITEK USA LLC, *Defendants-Appellants*.	No. 14-6063

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 [Ty- son] 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 al- so stated that FTS executives circulated and re- viewed 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 de- certify 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 or- der—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

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

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 over- time 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 over-time 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 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.

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[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.

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 bi- furcate 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 Pro- cedure § 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 poli- cy, 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 time-sheets." *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 un-

paid 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 over- time 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). Al- so 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 don-

ning 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 rea- sonable 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 be- cause 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 pro- duce 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 super- visors 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 repre- sentative 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 un-

derlying 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 un- der 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 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 underre-

porting 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 under- pay 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 unrecorded hours they worked, but that they were denied that right by the allowance of representative testimony and an estimated-average approach. Sev-

eral 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 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 re- fused 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").

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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.

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 thesample 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 re- liable 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 sit-

uated 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 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 im- properly 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. *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 time-

sheets" 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 require-

ments 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 tri- al 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 time-shaving 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 non- testifying 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 ap- plying *Mt. Clemens*, this finding is applied to the entire Plaintiff class to determine the amount of over- time 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 dis- approval 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 deliber- ate 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 in- structions 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 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 Wal- lace 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 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, there- fore, 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' over- time 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 multi- plier 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 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 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 (per- haps 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 re- port 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 "be- cause [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 *Espen-scheid*. 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 in- structed 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 sub-classes 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 re- quired, 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 rep-

resentative 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 be- cause the company urged me to be efficient). Plain- tiffs 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 rep- resented *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* at12. 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 un- clear. *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 be- tween *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 situ-

ated" 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 un- lawful 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 employes, 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 award- ed 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 ap- propriate 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 compelled 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 aver- age, as their testifying peers. That is a *factual finding* about the number of hours worked by each plain- tiff. 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 damag- es determination as a matter of "arithmetic," a "for- mulaic 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 plain- tiffs 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 other- wise. *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 over- time compensation." R. 463 at 28. This instruction told the jury only that, if it found liability with re- spect 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 be- tween. 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 defend- ants 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 E

Supreme Court of the United StatesNo.

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 there- to.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petitionfor writ of certiorari is granted. The judgment of the above court is vacated with costs, and the case is re- manded 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 Mon- roe, 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 F

No. 14-6063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD MONROE, ET AL.,	)	
	)	
Plaintiff-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.

ENTERED BY ORDER OF THE COURT

s/

Deborah S. Hunt, Clerk

*Judge Donald recused herself from participation in this ruling.

APPENDIX G

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, *Plaintiff-Appellees*, v. FTS USA, LLC, and 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, and 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, Al-

abama, 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 falsi-

fied 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 al- so stated that FTS executives circulated and re- viewed 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 de- certify 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

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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.

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 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 re- lief, 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 over- time 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.

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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.

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 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 bi- furcate 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 sit-

uated 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 over- time 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 im- possible 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 un- compensated 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 im- properly 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 bur- den 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 *Her- man 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 im- properly 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 un- der 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 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 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 man- agers 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 defend-

ants' 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, there- fore, 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 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 explaining how they intended to prove up their case"). The opinion additionally references no evidence simi- lar to that supporting the time-shaving policy here. And the proposed, but not agreed-upon, representative

[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.

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 sup- port 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 re- liable 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 ap- proximate, damages. *Id.* at 688.Liability

FTS and UniTek challenge the district court's al- lowance 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 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 over- time 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 pre- sent 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 re-

spect 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 evi-

dence); *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 areowed 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 non- testifying 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 over- time 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 dis- approval 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 reason-

able 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 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 Mali- za 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 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 multi- plier 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 Amend- ment." *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.

I. 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 check- list 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 supervi-

sors 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 (per- haps 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 con- clude 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 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 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 be- cause 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 mis- calculated 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 im- possible 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 over- time 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 sub-classes 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 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 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 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. 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 ex- tent 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 ob- jection 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 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. 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 "un- lawful 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 as-

sess 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 employees 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 "formulaic 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 other- wise. *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 over-time 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 dis-

trict 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 defend- ants 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 claims.

The majority seeing things differently, I respectfully dissent.

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 others similarly situated*, 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 val-

ue 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 over- time 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 over-

time 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; 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).

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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.

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. (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, Defend- ants 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 Defendants' 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 re- quires 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 entitled to a new trial based upon the Sixth Circuit opin- ion *White v. Baptist Mem'l Health Care Corp.*, No. 11-5717, 2012 WL 539261 (6th Cir. Nov. 6, 2012); 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, contend-

ing 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). Defend- ants 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 un- timely 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

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 others similarly situated*, 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 J

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 others similarly situated, Plaintiffs, v. FTS USA, LLC and UNITEK USA, LLC, Defendants.	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 work- day 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

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[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).

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 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 *An-*

derson, *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 inap-

propriate.

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 previously 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 DISTRICTJUDGE

APPENDIX K

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 others similarly situated,	CIVIL ACTION
Plaintiffs,	No. 2:08-cv-2100 The Honorable Bernice B. Donald
v.	
FTS USA, LLC and UNITEK USA, LLC,	
Defendants.	

ORDER DENYING DEFENDANTS' 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 repre-

sent 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 L

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 others similarly situated,	**Case No. 2:08-cv-02100 BBD-dkv**
Plaintiffs,	
v.	
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 Magis-

trate 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 M

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 others similarly situated, Plaintiffs, v. FTS USA, LLC and UNITEK USA, LLC, Defendants.	No. 08-cv-02100

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-productivework 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, Defend- ants 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 himselfor 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. PepBoys, 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 com- plaints 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 circumstances 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 dis-

position 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 condition- ally 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 suf-

ficient 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 inthe judicial notice because, as the parent company, itdoes not directly employee any technicians. Def.'s Resp. at 18. Further, Defendants claim that Plain- tiffs 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 ap-

> propriate 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 Plain- tiffs are erroneously listed as being "employed astechnicians" 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 piece-rate 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 certificationis granted.

III. Conclusion

For the reasons set forth herein, the Court RECOMMENDS that Plaintiffs' request for conditional certification be GRANTED and that a hearing beheld on Plaintiffs' request for discovery of putative class members' identities and on the manner andsubstance 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 N

29 U.S.C. § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employeespursuant 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 ofpetroleum 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 ofthe guaranty which are also in excess of the maxi- mum 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 heis 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 be- half 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 pay-

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

ment are determined at the sole discretion of the employer at or near the end of the period and not 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 be-

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

come exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by 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 title(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 being 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 representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation

representing com- missions, all earnings resulting from the application of a bona fide commission rate shall be deemed com- missions 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 (including 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 ag-

gregate 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 ap- plies, 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 work- week 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 pre-scribed 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 employee 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 com- pensation 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 inter- state 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 employed in performing the different employment shall be excluded by the public agency in the calculation ofthe hours for which the employee is entitled to over- time 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 re- medial education that is—

(1) provided to employees who lack a high school diploma or educational attainment at the eighthgrade 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 pur- pose.

(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 feesand 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 over- time 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 anycourt of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensationand an equal amount as liquidated damages. The right

provided by subsection (b) of this section tobring 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 up- on the filing of a complaint by the Secretary in an action under this subsection in which a recovery issought of unpaid minimum wages or unpaid over- time compensation under sections 206 and 207 ofthis 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 thecase 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 sec tion 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.

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[1] See References in Text note below.

[2] So in original. Probably should be "section".

(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

(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 $1,100for 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.