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CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NORMAN CODY and KRISTIAN DELGADO,
Plaintiffs,

-vs- **Case No. A-08-CA-031-SS**

BULWARK EXTERMINATING, L.L.C.,
Defendant.

ORDER

BE IT REMEMBERED on the 27th day of February 2009 the Court called the above-styled cause for a summary judgment hearing and the parties appeared through counsel. The Court addressed Defendant Bulwark Exterminating, L.L.C.'s Motion for Summary Judgment [#37], Plaintiffs Norman Cody and Kristian Delgado's Response [#42], and Defendant's Reply thereto [#46]. After the hearing, Defendant filed Supplemental Authority for its response [#53], Plaintiffs submitted a Motion for Leave to File Sur-Reply [#54], and Defendant objected to the request for leave to file a sur-reply [#56]. Plaintiffs' Motion for Leave to File Sur-Reply [#54] is GRANTED and both the sur-reply and the supplemental authority are considered by the Court. After reviewing the motion, the response, the reply, the sur-reply, the supplemental authority, counsels' arguments, the relevant law, and the case file as a whole, the Court enters the following opinion and order.

Background

I. Procedural History

On January 11, 2008, Plaintiffs Norman Cody and Kristian Delgado, on behalf of themselves and other employees and former employees of Defendant similarly situated, sued Bulwark

Exterminating, L.L.C., for unpaid overtime compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). Plaintiffs worked for Defendant as Pest Control Technicians. Defendant is an Arizona corporation and operates pest control businesses in several states. Plaintiffs allege Defendant failed to pay them at the time and a half rate for hours worked in excess of forty hours in one work week. Bulwark moves for summary judgment on all claims based on an exception to the FLSA under 29 U.S.C. § 207(i).

II. Bulwark's Compensation System

Defendant Bulwark pays its pest control technicians a flat fee based on the type of service completed. Def.'s Mot. for Summ. J. Ex. 1, [First] Decl. of Todd Martin ("First Martin Decl.") ¶ 6. Higher level technicians are paid slightly more per service. Def's Reply Ex. 1, [Second] Decl. of Todd Martin ("Second Martin Decl.") ¶ 2. Bulwark offers its customers several different types of services. When a new customer starts with Bulwark, or when a former customer returns, they receive an Initial Service ("IS") treatment, which includes more treatments than a regular service. *Id.* ¶ 8. An IS treatment costs approximately $85.00 for smaller houses and $115.00 for larger homes, and Bulwark pays the service technician $18.00-$19.00 for smaller homes and $20.00-$24.00 for larger homes. *Id.* Bulwark also offers "regular services" at various time intervals: monthly ("MO"), bi-monthly ("EOM"), quarterly ("QT"), or specific times selected by the customer, referred to as "other" ("OTH"). *Id.* Each of these services typically requires fewer treatments than an IS and take approximately 20 minutes to complete, half the time normally required for an IS. *Id.* According to Bulwark, regardless of the frequency of the service the contract amount starts at $35.00-$38.00 per visit ($41.00-$45.00 for a larger house). *Id.* ¶¶ 2-4. Bulwark's service technicians are paid $6.00-$6.25 per regular service ($8.00-$8.25 for a larger house). *Id.* Technicians also earned a flat

rate for specific, additional treatments and could earn commissions on sales to new customers. First Martin Decl. ¶ 14.[1] Bulwark provides technicians "commission reports" semi-monthly and with payroll checks, which set forth the number of each service performed, the "service commission" amount for each service, and the amount due, set forth as "Commission Earned." *Id.* ¶ 9.

With the exception of monthly services, Bulwark charges $20.00-$40.00 over the base service amount per regularly scheduled visit. Second Martin Decl. ¶¶ 5-6. According to Bulwark, "[t]he additional $20.00 [or $40.00] over the usual service visit charge is for the continuing warranty or guarantee that Bulwark provides." *Id.* Under this warranty/guarantee, Bulwark provides additional unscheduled services at the customer's request for no additional charge to the customer, referred to as "callbacks" ("CB"). *Id.* Although the customers are not charged for a callback, the service technicians receive $6.00-$8.00 per callback which, according to Bulwark, is paid "out of the additional warranty/guarantee amount paid by the customer." *Id.* ¶¶ 5-6, 12; First Martin Decl. Attach. A. Technicians are not paid more for a callback at a larger home because a callback typically involves only a "spot treatment" for a specific problem rather than the full regular service. Second Martin Decl. ¶ 11. The price charged for the warranty/guarantee varies based on the frequency of the regular services due to the likelihood callbacks will be required between scheduled visits. *Id.* ¶ 6.[2]

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[1]Bulwark does not contend its technicians earned a significant amount of their compensation from the flat rate paid for specific, additional treatments or sales commissions.

[2]Plaintiffs argue the Defendant's warranty/guarantee justification for the price differential between the various levels of scheduled service visits is a "sham" and "a *post hoc* justification for the substantial price differential." Pls.' Sur-Reply at 4. However, Plaintiffs do not provide any evidence to dispute the fact that the more time between scheduled visits, the more likely a customer will request a callback visit. Nor do Plaintiffs dispute Bulwark provides its customers a warranty/guarantee, provides customers callback service visits without additional charge, and pays its technicians for callback visits.

Bulwark controls the distribution of work to its technicians. First Martin Decl. ¶ 3. Bulwark pest control technicians are based out of a branch office where they receive chemicals and "route information for schedule planning and coordinating customer visits." *Id.* ¶ 5. Technicians can also work out of home offices. *Id.* Customers contact Bulwark "to establish or change arrangements for pest control services." *Id.* Based on customer requests, Bulwark assigns its technicians on a daily basis to a route containing the customers to receive pest control treatment. Pls.' Resp. Ex. 5, Dep. of Julian Alvizo ("Alvizo Dep.") at 86:21–87:1; Pls.' Resp. Ex. 3, Dep. of Kristian Delgado ("Delgado Dep.") at 58:11-15. The routes are predetermined three days to one week in advance. Pls.' Resp. Ex. 1, Dep. of Todd Martin ("Martin Dep.") at 81:22-25. Customers are scheduled in time blocks. Pls.' Resp. Ex. 7, Decl. of Julian Alvizo ("Alvizo Decl.") ¶ 5; Pls.' Resp. Ex. 6, Decl. of Kristian Delgado ("Delgado Decl.") ¶¶ 6-7. Unless a technician receives permission from the customer, they may not start their service until the beginning of the time block. Martin Dep. at 93:24–94:5. Bulwark does not maintain a pool of customers needing service for any technicians who complete the services on their route early, but additional services could be picked up if requested on an ad hoc basis. *Id.* at 86:18–88:15.

Analysis

I. Summary Judgment Standard

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In deciding summary judgment, the Court construes all facts and inferences in the light most favorable to the nonmoving party. *Richter v. Merchs. Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir. 1996). The standard for determining whether to grant summary judgment "is not merely whether there is a

sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990).

Both parties bear burdens of production in the summary judgment process. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). First, the moving party has the initial burden of showing there is no genuine issue of any material fact and judgment should be entered as a matter of law. FED. R. CIV. P. 56(c); *Celotex*, 477 U.S. at 322–23; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The nonmoving party must then come forward with competent evidentiary materials establishing a genuine fact issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson*, 477 U.S. at 256–257. However, "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden." *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996).

II. The Fair Labor Standards Act

Under the FLSA, all covered employees must be paid one and one-half times their regular rate of pay for hours worked in excess of forty hours per week. 29 U.S.C. § 207(a)(1). An employer who violates this provision can be held liable for unpaid overtime compensation plus an equal amount as liquidated damages. 29 U.S.C. § 216(b). Employees may bring suit under the FLSA on their own behalf and on behalf of all those who are "similarly situated." *Id.* Similarly situated plaintiffs may "opt into" the suit, as distinguished from the "opt-out' approach employed in class actions under Federal Rule of Civil Procedure 23. *Wilks v. The Pep Boys*, Cause No. 3:02-0837, 2006 U.S. Dist. LEXIS 69537, at *7-8 (M.D. Tenn. Sept. 26, 2006), *aff'd*, 278 F. App'x 488 (6th

Cir. 2006). Employers are exempt from the overtime requirements under 29 U.S.C. § 207(a), however, if they meet the requirements of 29 U.S.C. § 207(i).

III. Section 207(i) Exemption

Defendant argues an exception to the FLSA applies to pest control technicians like Plaintiffs and bars their claims. 29 U.S.C. § 207(i) states:

> Employment by retail or service establishment. No employer shall be deemed to have violated subsection (a) by employing any employee at 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 6, and (2) more than half of his compensation for a representative period (not less than one month) **represents commissions** on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

29 U.S.C. § 207(i) (emphasis added). All but one of the Section 207(i) requirements are undisputed by the Plaintiffs. Plaintiffs do not dispute Bulwark qualifies as a "retail or service establishment." Nor do Plaintiffs dispute they were paid in excess of one and a half times the minimum hourly wage under 29 U.S.C. § 206. Nor do Plaintiffs dispute they received more than half of their compensation from what Bulwark alleges represents commissions. The sole dispute is over whether Bulwark's method of calculating the Plaintiffs' payment constitutes a "bona fide commission" under 29 U.S.C. § 207(i).

As an affirmative defense to the requirements of the FLSA, the defendant has the burden of proving the application of an exemption. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). Circuit courts are split, however, over whether the Section 207(i) exemption must be proven by "clear and affirmative evidence." *See Birdwell v. City of Gadsden*, 970 F.2d 802, 805 (11th Cir. 1992) ("The defendant must prove applicability of an exemption by "clear and affirmative

evidence."); *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984) (same); *but see McGrath v. City of Philadephia*, 864 F. Supp. 466, 474 (E.D. Penn. 1994) (stating burden of proving exception was by a preponderance of the evidence and *Donovan*, on which *Birdwell* relies, was "implicitly overruled by" *Lamon v. City of Shawnee*, 972 F.2d 1145, 1153-54 (10th Cir. 1992)); *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 506 (7th Cir. 2007) ("nothing in the statute, the regulations under it, or the law of evidence justifies imposing a requirement of proving entitlement to the exemption by 'clear and affirmative evidence.'"). The Court agrees there is no basis for application of a higher, and ambiguous, "clear and affirmative evidence" burden for establishing an exemption to the FLSA. The Seventh Circuit in *Yi* describes in detail the creation of this additional burden over time based on misconstructions of prior cases. *Yi*, 480 F.3d at 506-08. Furthermore, as the *Yi* court points out, the presumption in federal court is that "the burden of proof in federal civil cases is proof by a preponderance of the evidence." *Id.* at 507. However, while the Court finds the proper burden to be proof by a preponderance of the evidence, the Court also recognizes application of the higher "clear and affirmative evidence" standard would not change the outcome of the Defendant's motion for summary judgment. The Court remains mindful that "[e]xemptions from the FLSA are to be construed narrowly against the employer." *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1137 (5th Cir. 1988).

a. Meaning of "Commission"

The FLSA does not define the term "commission." *Yi*, 480 F.3d at 508. "About all that is clear is that the word need not be used for the exemption to be applicable." *Id.* The Eleventh Circuit described the case law addressing the definition of the term as "sparse" and existing statutory and regulatory references as "vague." *Klinedinst v. Swift Investments, Inc.*, 260 F.3d 1251, 1254 (11th

Cir. 2001). Despite the relative lack of authority on the issue, two conflicting lines of cases have emerged. The first line of cases requires a compensation system to be "proportional to the charges passed on to customers" in order to qualify as a commission. *Wilks*, 2006 U.S. Dist. LEXIS 69537 at *48; *Huntley v. Bonner's, Inc.*, Cause No. C02-1004L, 2003 WL 24133000, at *6-10 (W.D. Wash. Aug. 14, 2003). Adopting this position in part, Plaintiffs argue a pay system must satisfy two requirements in order to constitute a bona fide commission: (1) the employee must be able to increase his income by working more efficiently and (2) the employee's pay must be proportionate to the income the company receives. Pls.' Resp. at 1. The second line of cases, endorsed by the Defendant, adopts a broader interpretation of the term under which a commission payment system is one which gives employees an "incentive to hustle," or, in other words, "a system that increases compensation based in large measure on results." *Yi v. Sterling Collision Centers, Inc.*, Cause No. 04 C 3138, 2006 U.S. Dist. LEXIS 35900, at *22 (N.D. Ill. May 17, 2006), *aff'd*, 480 F.3d 505 (7th Cir. 2007); *Klinedinst*, 260 F.3d at 1256; Def.'s Mot. for Summ. J. at 8-9.

"[T]ypically in retail or service establishments commission payments are keyed to sales." *Klinedinst*, 260 F.3d at 1255 (quoting 29 C.F.R. § 779.413(b)). *Wilks* and *Huntly* take this maxim one step further by requiring a compensation system be "proportional to the charges passed on to customers" in order to qualify as a commission. *Wilks*, 2006 U.S. Dist. LEXIS 69537 at *48; *Huntley*, 2003 WL 24133000 at *6-10. *Wilks* involved a "flat-rate compensation system" which involved paying auto repairman a flat rate per "labor hour" for each service job performed. *Id.* at *49-50. The "labor hours" for a particular service were calculated based on "predetermined standards as to how long each job should take to complete" rather than how long an employee actually worked on the job. *Id.* at *49. Thus, the employees were paid the same amount per service

job regardless of whether the service required more, less, or the same amount of time as the predetermined "labor hours" for the job. *Id.* The *Wilks* court concluded the plaintiffs were not paid a "commission" under this plan because the defendant failed to demonstrate "proportionality between the plaintiffs' flat-rate wages and the charges passed on to customers." *Id.* at *55. The plaintiffs in the *Huntley* case, also auto repairmen, were paid in essentially the same manner as the *Wilks* plaintiffs except "labor hours" were referred to as "book hours." *Huntley*, 2003 WL 24133000 at *2-3. As the *Huntley* court recognized, under this plan an "experienced technician" who could "complete jobs in less time than the 'book' provides is paid for more hours than actually worked and can take on additional jobs to increase his or her net hourly income." *Id.* at *2. According to *Huntley*, "[i]t is beyond dispute that a 'flat rate' compensation system can be a commission-based system." *Id.* at *5. However, relying on Section 21h04(d) of the U.S. Department of Labor's Field Operations Handbook, the *Huntley* court determined "the amount paid to the employee must be a 'certain proportion' of the charge to the customer, regardless of whether the pay rate is 'expressed in terms of so many dollars and cents per "flat rate" hour' or 'in terms of a percentage of the charge to the customer.'" *Id.* at *7.

The *Wilks* and *Huntley* "proportionality" requirement is contradicted by both the Department of Labor and two cases, *Klinedinst* and *Yi*. Section 21h04(d) of the Department of Labor's Field Operations Handbook states:

> Some auto service garages and car dealerships compensate mechanics and painters on the following basis: The painter or mechanic gets so much a "flat rate" hour for the work he or she performs. A "flat rate" hour is not an actual clock hour. The painter or mechanic may work only 7, 8, or 9 hours a day and still receive credit for 10, 11 or 12, etc., flat rate hours depending upon how much work he or she has done. Each job is assigned a certain number of hours for which the customer is charged, regardless of the actual time it takes to perform the job. The employee is given a certain proportion of that charge expressed in terms of so many dollars and cents per "flat rate" hour rather than in terms of a percentage of the charge

> to the customer. **The dealer does not change the employee's share per flat rate hour if the charge to the customer is changed.** In such situations Wage-Hour will not deny that such payments represent "commissions on good or services" for purposes of Sec. 7(I) (*see* IB 778.117 and 779.413(b)). Such employment will qualify for exemption under Sec. 7(I) provided all the other tests of the exemption are met.

Field Operations Handbook, Section 21h04(d) (emphasis added).[3] This is the same section relied on by *Huntley*. 2003 WL 24133000 at *7. This section, however, directly contradicts *Huntley*'s imposition of a strict "proportionality" requirement. The Field Operations Handbook explicitly anticipates that the employee's compensation may not change when the charge to the customer changes and yet still qualify as a commission. Furthermore, both *Klinedinst* and *Yi* involve flat-rate pay systems essentially identical to the systems in *Wilks* and *Huntley*, wherein the plaintiffs were paid a flat rate per a job's predetermined "flag hours," regardless of the number of hours actually worked. *Klinedinst*, 260 F.3d at 1253; *Yi*, 2006 U.S. Dist. LEXIS 35900 at *8-9. In *Klinedinst*, the Eleventh Circuit found this payment system to constitute commissions. 260 F.3d at 1256. In reaching this conclusion, the Eleventh Circuit notes the compensation system "is a method of providing employees with an incentive to 'hustle' to finish their jobs in order to obtain a larger number of jobs for greater compensation." *Id.* at 1254-55. The Eleventh Circuit makes no mention of any "proportionality" requirement. Both the district court and Seventh Circuit reach the same conclusion in *Yi*. 2006 U.S. Dist. LEXIS 35900 at *20; 480 F.3d at 510-11. The district court concluded that "a system that increases compensation based in large measure on results is the essence of this elusive concept called commission." *Yi*, 2006 U.S. Dist. LEXIS 35900 at *20.

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[3]The Filed Operations Handbook is not entitled to *Chevron* deference, but can be persuasive. *Klinedinst*, 260 F.3d at 1255.

Neither the district court nor the Seventh Circuit requires "proportionality" between the amount paid to the employee and the charge to the customer.

The Court finds nothing in the statute, regulations, or relevant agency interpretations which requires strict adherence to a proportionality requirement for a compensation system to qualify as a commission for purposes of the § 207(i) exemption. Rather, the Court agrees with the *Yi* and *Klinedinst* courts that a commission is characterized by an incentive to finish a job "in order to obtain a larger number of jobs for greater compensation," or, in other words, to base compensation on results rather than hours worked. *Klinedinst*, 260 F.3d at 1254-55; *Yi*, 2006 U.S. Dist. LEXIS 35900 at *20.

This is not to say every flat-rate compensation system will qualify as a commission. Compensation which provides an incentive to sell a specific type of product rather than a larger number of sales, known as a spiff, have been found to not qualify as a commission for purposes of the FLSA. *Early-Simon v. Liberty Medical Supply, Inc.*, Cause No. 05-14059-CIV-MOORE/LYNCH, 2007 U.S. Dist. LEXIS 37518, at *20-22 (S.D. Fla. May 23, 2007). Perhaps more importantly, the work performed and the facts surrounding a flat-rate pay system may determine whether it qualifies as a commission or not. If a worker is paid a flat rate for a job which requires the same amount of time regardless of the worker's skill or efficiency, then the payment would be more akin to an hourly rate than a commission.[4] Similarly, if an employer controls the work performed to such a degree that the flat-rate pay system in fact provides little or no incentive

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[4]For example, an instructional employee, such as an aerobics instructor, paid a flat fee per lesson, would not qualify for the § 207(i) exemption because, generally, such lessons have a set time length and an instructor could not increase the number of lessons taught by teaching faster and more efficiently.

to work faster or more efficiently, then the compensation may not qualify as a commission. Thus, while a compensation system may on its face provide the necessary incentive, in practice any incentive to work faster or more efficiently may be lacking.

b. Application to Bulwark's Compensation System

As discussed above, Bulwark pays its pest control technicians a flat fee based on the type of service completed. First Martin Decl. ¶ 6. Bulwark's system closely approximates the flat rate pay systems found to constitute commissions in *Klinedinst* and *Yi*. Although Bulwark's technicians' pay is not determined by a predetermined number of "flag," "book," or "labor" hours, they are paid a predetermined amount for completion of a particular type of job.[5] Technicians earn a different amount depending on the specific job performed. For an Initial Service, Bulwark pays the service technician $18.00-$19.00 for smaller homes and $20.00-$24.00 for larger homes. Second Martin Decl. ¶ 8. For regular service visits, Bulwark's pays technicians $6.00-$6.25 per service ($8.00-$8.25 for a larger house). *Id.* ¶¶ 2-4. Service technicians also receive $6.00-$8.00 per callback service, even though the customers are not charged for the visit. *Id.* ¶¶ 5-6, 12; First Martin Decl. Attach. A.[6]

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[5]Predetermining the number of flag, book, or labor hours a job will take is the functional equivalent of presetting an employee's compensation for a specific type of job.

[6]The Court also notes the technicians' compensation can be expressed as a proportion of the charge to the customer. As the Defendant points out, the technician's compensation for an Initial Service is approximately 20-23 percent of the charge to the customer (17-21 percent for a larger home). Second Martin Decl. ¶ 8. Technician's compensation for a scheduled service visit is approximately 15-17 percent of the charge to the customer (17-19 percent for a larger home), excluding the cost of Bulwark's warranty/guarantee. *Id.* ¶¶ 3-4. The proportion of the payment for a callback to the charge to the customer for Bulwark's warranty/guarantee would fluctuate based on the number of callbacks requested between visits. *Id.* ¶ 12. These calculations, however, illustrate the absurdity of defining a commission solely based on whether the employee's payment is proportional to the charge to the customer. After the fact, every payment could be characterized as a specific proportion of the charge.

On its face, Bulwark's compensation system appears to encourage efficiency and provide an incentive for technicians to finish a job quicker in order to obtain more jobs and greater compensation. Simply put, under the plan the more services a technician completes, the more money he makes. In practice, however, the record is far from clear as to whether a technician could, in fact, obtain more jobs and greater income by working faster or more efficiently as opposed to working more days or more hours. Bulwark exercised a large degree of control over the technicians' schedules, limiting their ability to benefit by working faster or more efficiently. As the Plaintiffs point out, Bulwark uses a routing system whereby each technician's daily services are predetermined and scheduled in time blocks. Alvizo Dep. at 86:21–87:1; Delgado Dep. at 58:11-15; Martin Dep. at 81:22-25; Alvizo Decl. ¶ 5; Delgado Decl. ¶¶ 6-7. Technicians were required to abide by the time blocks unless they received permission from a customer to deviate. Martin Dep. at 93:24–94:5. Furthermore, although disputed by the Defense, the Plaintiff has presented evidence indicating requests for additional services were rarely, if ever, accommodated. Pls.' Resp. Ex. 2, Dep. of Norman Cody ("Cody Dep.") at 96:25–97:4; Pls.' Resp. Ex. 4, Dep. of Roderick McLennan ("McLennan Dep.") at 38:17–40:13; Delgado Dep. at 58:11–59:16, 60:11–62:24. There is also evidence in the record that technicians' route sheets, on occasion, would require a specific amount of time for a particular service and technicians were required to spend at least fifteen minutes per regular monthly service. Martin Dep. at 99:13-21; Pls.' Resp. Ex. 14; Alvizo Decl. ¶ 5. Bulwark does not maintain a pool of customers needing service for any technicians who complete the services on their route early. Martin Dep. at 86:18–88:15.

Based on the summary judgment record, a material issue of fact exists as to whether Bulwark's compensation system constitutes a "bona fide commission" system under the FLSA.

Given the high level of control Bulwark exercises over the scheduling and distribution of service calls, a jury could find the compensation system does not in fact provide Bulwark's technicians any incentive to complete their jobs quickly in order to obtain a larger number of jobs for greater compensation nor base compensation on "results" rather than hours worked. The Court thus DENIES Defendant Bulwark's motion for summary judgment.

IV. Conditional Class Certification

On August 22, 2008, Plaintiffs filed a Motion for Conditional Collective Action Certification and for Notice to Putative Class Members [#17]. The Defendant opposed the motion for conditional class certification solely on the grounds that it was entitled to an exemption under Section 207(i). Def.'s Resp. to Pls.' Mot. for Cond. Collective Action Cert. [#23]. Defendant also objected to the form of the Plaintiffs' proposed notice. On September 22, 2008, the Court carried Plaintiffs' motion for conditional class certification pending the outcome of the Defendant's motion for summary judgment based on the Section 207(i) exemption. Order of Sept. 22, 2008 [#33] at 5-6. Having addressed the exemption and denied the Defendant's motion for summary judgment, there remains no basis for denying Plaintiffs' motion for conditional class certification, which the Court therefore GRANTS. Plaintiffs requested additional time to confer with the Defendant regarding the form of the notice to be sent to putative class members. The Court thus orders the parties to confer regarding the form of the notice and orders the Plaintiffs to submit an amended notice within eleven (11) calendar days of the date of this order.

Conclusion

In accordance with the foregoing:

IT IS ORDERED that Plaintiffs' Motion for Leave to File Sur-Reply [#54] is GRANTED.

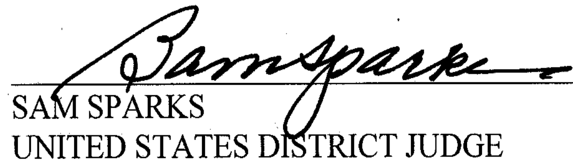
IT IS FURTHER ORDERED that Defendant Bulwark Exterminating, L.L.C.'s Motion for Summary Judgment [#37] is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Conditional Collective Action Certification and for Notice to Putative Class Members [#17] is GRANTED. Regarding the notice to putative class members, the Court ORDERS the parties to confer regarding the form of the notice and ORDERS the Plaintiffs to submit an amended notice within eleven (11) calendar days of the date of this order.

IT IS FINALLY ORDERED that Plaintiffs' Unopposed Motion for Modification of Paragraphs 3 and 4 of the Court's Scheduling Order [#48] is GRANTED. The parties shall file all amended or supplemental pleadings and shall join additional parties **no later than thirty (30) days after the deadline for individuals to opt into this lawsuit has expired**. Parties asserting claims for relief shall file their designation of potential witnesses, testifying experts, and a list of proposed exhibits, and shall serve on all parties, but not file, a summary of testimony of any witness who will present any opinion in trial in an expert report **no later than thirty (30) days after the deadline for individuals to opt into this lawsuit has expired**. Parties resisting claims for relief shall file their designation of potential witnesses, testifying experts, and a list of proposed exhibits, and shall serve on all parties, but not file, a summary of testimony of any witness who will present any opinion in trial in an expert

report **no more than fifteen (15) days later**. All other requirements of the Court's Scheduling Order remain in effect.

SIGNED this the 23rd day of March 2009.



SAM SPARKS
UNITED STATES DISTRICT JUDGE