

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRYSTAL DAVIS, Individually And On
Behalf of All Other Persons Similarly
Situated,

Plaintiffs,

v.

THE FOOTBRIDGE COMPANIES, LLC, *et*
al.,

Defendants.

C. A. No. 1:09-cv-11133-NG

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HER MOTION TO COMPEL

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The Fair Labor Standards Act (“FLSA”) requires employers to pay their employees at one and one-half times their regular rates of pay for hours worked in excess of forty in a workweek. 29 U.S.C. § 207(a). While certain types of employees (such as executive managers or professional employees) are exempt from the overtime requirements, the employer must generally guarantee these employees a minimum weekly salary in order to take advantage of these exemptions. 29 U.S.C. § 213(a)(1). In contrast, hourly employees are generally entitled to overtime pay. *Reich v. Waldbaum, Inc.*, 52 F.3d 35, 41 (2nd Cir. 1995) (the law has been “clear at all relevant times that employees compensated on an hourly basis are subject to the FLSA, and that the [executive, administrative, and professional exemptions are] inapplicable to such employees”). Because Defendants (“Footbridge”) here paid Plaintiff and the other potential class members by the hour, the traditional white-collar exemptions to the FLSA’s cannot apply.

Thus, Footbridge half-heartedly attempts to shoehorn Ms. Davis and her colleagues into the “computer professional” exemption which is one exemption which does permit the employee to be paid by the hour. 29 U.S.C. § 213(a)(17); Exhibit A to Heyman Declaration in Support of Plaintiff’s Motion to Compel (“Heyman Decl.”), Deposition of T. Springer, 30(b)(6) Witness for Footbridge, at p. 140, l. 7-12. However, this exemption applies only to highly sophisticated computer employees who work in *computer programming* and *computer systems analysis* positions. The computer professional exemption does not cover workers simply because their work “is highly dependent upon, or facilitated by, the use of computers and computer software programs (*e.g.*, engineers, drafters and others ...)[.]” 29 C.F.R. § 541.401. An “employee’s primary duty must require ‘theoretical and practical application of highly-specialized knowledge *in computer systems analysis, programming, and software engineering*’ not merely ‘highly-

specialized knowledge of computers and software.” *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 580 (6th Cir.2004) (emphasis in original).

Like the other hourly employees in the engineering and project controls segments of Defendants’ business operations, Ms. Davis did not design, develop, or create software. *See* Heyman Decl., Ex A at p. 114, l. 1-24. Nor did she write code. *Id.* at p. 53, l. 15-18. Ms. Davis merely used computer software to perform her job duties. *Id.*, p. 53, l. 19 - p. 54, l. 2. This type of work simply does not qualify for the computer professional exemption. 29 C.F.R. § 541.401. And Footbridge does not realistically argue to the contrary. Ms. Davis asked Footbridge to state the basis for any claim that she was exempt from the FLSA’s overtime requirements. *See* Exhibit B, Plaintiff’s First Set of Discovery (“Exhibit B”), at p. 6 (Interrogatory No. 3). Footbridge’s only response was:

“Defendants object to this interrogatory on the ground that it seeks disclosure of attorney work product and Defendants’ theory of the case. Defendants further object to this interrogatory as premature, as discovery has only recently commenced in this matter, and Defendants have the ability and right to plead all potentially applicable Defenses and Affirmative Defenses in their Answer, investigate and test them during the discovery process, and if necessary and appropriate, withdraw unsupported Defenses and Affirmative Defenses prior to trial.”

See Exhibit C, Defendants’ Objections and Responses to Plaintiff’s First Set of Discovery (“Exhibit C”), at p. 12-13. Footbridge failed to identify a single fact in its response, not even hazarding a guess as to the basis of any viable exemption defense.

Moreover, prior to this lawsuit, every hourly consultant in engineering and project controls was paid straight time for overtime (unless Footbridge’s *client* insisted otherwise). Heyman Decl., Ex A at p. 110, l. 19 – p. 113, l. 24. Since the lawsuit, however, every hourly

employee in engineering and project controls receives time and a half for overtime, regardless of job title. Heyman Decl., Ex A at p. 131, l. 11-14.

Faced with no legal or factual defense on the merits, Footbridge's litigation strategy here is to delay, and even outright deny, Ms. Davis access to information necessary to prosecute this collective action. This "delay as a defense" frustrates the remedial purposes of the FLSA. Not only does Footbridge lack a viable merits defense, but it also cannot realistically dispute the damages in this action. Unlike many overtime cases concerning "off the clock" work, Footbridge has accurate records of the hours worked by the employees. As a result, Footbridge knows exactly how much it owes to each worker. Hoping to keep the money they have improperly withheld, Defendants have opted to engage in the discovery shenanigans at issue here. That tactic is particularly inappropriate in this case because the stakes are high and the statute of limitations is running against all potential employees who may elect to participate in this FLSA collective action. The employees' claims here are not stereotypical class action claims for small payouts. While the amounts are not significant enough to lead individual employees to hire their own lawyers to prosecute individual claims, the amounts at issue are not chump change. Ms. Davis' own claim is for more than \$15,000 in unpaid overtime wages, and these damage awards are typically doubled under the FLSA. *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 35 (1st Cir. 2007) (double damages are "the norm" under the FLSA). These workers have a right to know about the hundreds of thousands of dollars owed to them by Footbridge.

Moreover, unlike a Rule 23 class action, the statute of limitations continues to run against employees until they affirmatively join a FLSA collective action. 29 U.S.C. § 256. Here, Footbridge has not only denied Plaintiff access to the information of other putative litigants in discovery, but have admitted it did not provide their employees notification of their rights as

required by 29 C.F.R. 516.4. Heyman Decl., Ex A at p. 107, l. 2-13. In fact, even *after* changing its policy, Footbridge carefully avoided informing its employees that the previous overtime policy was unlawful. Instead, Footbridge simply stated to its newly overtime eligible employees: “It was just a change made in policy.” Heyman Decl., Ex A at p. 43, l. 1-19.¹ Thus, Footbridge’s hourly consultants are unaware of their right to overtime pay. Footbridge’s obstructionist discovery tactics are transparent efforts to keep these employees in the dark as long as possible and should not be countenanced by the Court.

1. THE PARTIES MET AND CONFERRED.

Consistent with her obligations under the Federal and Local Rules, including Local Rule 37.1, Ms. Davis attempted to resolve this discovery dispute without involving the Court. She first conferred by telephone with Footbridge on November 6, 2009. Richard Burch participated in the conference on behalf of Ms. Davis and Douglas Hoffman participated on behalf of Footbridge. Because of the volume of objections to virtually every discovery request, the parties spent almost an hour conferring. Subsequent conferences did not yield any amended or supplemented responses and the parties are now at impasse.

2. THE APPLICABLE LEGAL STANDARDS

“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense[.]” FRCP 26(b)(1). This includes discovery of: (1) “the existence, description, nature, custody, condition, and location of any documents or other tangible things;” and (2) “the identity and location of persons who know of any discoverable matter.” *Id.* “Relevant information need not be admissible at the trial if the discovery appears reasonably

¹ Plaintiff expects that the circumstances here will support equitable tolling of the statute of limitations, but that issue is not presently before the Court.

calculated to lead to the discovery of admissible evidence.” *Id.* Though limits do exist, the Court is to “interpret liberally the discovery provisions of the Federal Rules of Civil Procedure to encourage the free flow of information among litigants[.]” *Heidelberg Americas, Inc. v. Tokyo Kikai Seisakusho, Ltd.*, 333 F.3d 38, 41 (1st Cir. 2003).

An FLSA claim may be brought “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b). This provision establishes an “opt-in” scheme in which potential plaintiffs must affirmatively notify the court of their intention to be a party to the class action. To determine whether potential plaintiffs are “similarly situated” for purposes of § 216(b), courts apply a two-step process. *See, e.g., Kane v. Gage Merchandising Servs., Inc.*, 138 F. Supp. 2d 212, 214 (D. Mass. 2001); *see also, Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). At the first step or notice stage, courts will provisionally certify a collective action based on a “lenient standard” if there are substantial allegations that the putative class members were victims of a single decision, policy, or plan that violated the law. *Id.* (quoting *Mooney*, 54 F.3d at 1214 & n.8). The second step occurs after discovery, when the defendant may file a motion for “decertification.” *See Reeves v. Alliant Techsystems, Inc.*, 77 F. Supp. 2d 242, 246-47 (D.R.I. 1999) (citing *Mooney*, 54 F.3d at 1214). At that stage, the Court will have more information to determine whether the plaintiffs are similarly situated.

3. ARGUMENT

A. Plaintiffs Are Entitled to Discovery In Order to Make the Showing Necessary for Conditional Certification.

Davis seeks to certify a collective action encompassing all hourly employees who Footbridge paid at straight time rates, instead of time and a half, for hours worked in excess of

forty in any workweek. While the standard for conditional certification is “lenient,” Ms. Davis will still need to provide the Court with “substantial allegations that the putative class members were victims of a single decision, policy, or plan that violated the law.” *Kane*, 138 F. Supp. 2d at 214.

Davis issued two document requests and an interrogatory seeking basic employment and contact information for the hourly consultants she believes are “similarly situated” to her. *See* Exhibit B at p. 4 (RFPs #1 & #2) and p. 6 (Interrogatory #1). However, Footbridge refuses to provide any class discovery whatsoever. Davis’ discovery requests, and Footbridge’s responses, are:

Document Request No. 1: Computer readable data identifying all Class Members by name, positions(s), job titles(s), location(s) of employment with Footbridge, employee number (if applicable), last known home address and telephone number.

Defendants’ Response:

Defendants object to this Request on the basis that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence, in that it seeks individualized discovery concerning persons who have not opted in to this purported FLSA collective action. Defendants further object to providing this individualized discovery prior to conditional certification of a collective action. Subject to and without waiving these objections, and subject to an agreed-upon Stipulation of Confidentiality between the parties, Defendants will produce non-privileged responsive documents for plaintiff Crystal Davis.

Document Request No. 2: To the extent any Class Members are not identified by the electronic data produced in response to the first document request, any and all documents providing that information in hard copy.

Defendants’ Response:

Defendants object to this Request on the basis that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence, in that it seeks individualized discovery concerning persons who have not opted in to this purported FLSA collective action. Defendants further object to providing this individualized discovery prior to conditional certification of a collective action. Subject to and without waiving these objections, and subject to an agreed-upon Stipulation of Confidentiality between the parties, Defendants will produce non-privileged, responsive documents for plaintiff Crystal Davis.

Interrogatory No. 1: Identify each Class Member by name, position(s), job title(s), location(s) of employment with Footbridge, employee number (if applicable), last known home address and telephone number.

Defendants' Response:

Defendants object to this Request on the basis that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence, in that it seeks individualized discovery concerning persons who have not opted in to this purported FLSA collective action. Defendants further object to providing this individualized discovery prior to conditional certification of a collective action. Subject to and without waiving these objections, Defendants provide the following information for plaintiff Crystal Davis: Crystal Davis, 11739 Clayton Street, Thornton, CO 80233. Job Location: Hunt Refining, Houston, Texas.

This discovery “is necessary for the plaintiff to properly define the proposed class.” *See, e.g., Hammond v. Lowe’s Home Centers, Inc.*, 216 F.R.D. 666, 671 (D.Kan. 2003). It is “reasonably likely to yield support for plaintiff’s class allegations.” *Sjoblom v. Charter Communications, LLC*, 2008 WL 4276928, at *2 (W.D.Wis. Jan 4, 2008). Therefore, “lower courts addressing whether to permit discovery of the names and addresses of other similarly-situated employees in section 216(b) FLSA actions have almost universally permitted discovery of this information[.]” *Morden v. T-Mobile USA, Inc.*, No. 05-2112, 2006 WL 1727987, at *2 (W.D.Wash. June 22, 2006).²

1. Plaintiff’s Request is Limited to Those Individuals Who May Be Similarly Situated.

The Federal Rules specifically permit discovery of “the identity and location of persons who know of any discoverable matter.” Fed. R. Civ. P. 26(b)(1). The primary issue in this case at this point is whether other hourly consultants are “similarly situated” to Plaintiff. *See* Original Complaint (Dkt. 1). Ms. Davis limited her discovery requests to “persons who were, are or will be (A) employed by Footbridge within the three year period preceding the filing of the original

² *See also, Hodczak v. Latrobe Specialty Steel Co.*, 2009 WL 911224, at *6 (W.D.Pa. March 31, 2009) (courts “generally allow the representative plaintiffs to conduct limited discovery so that they may more carefully define the proposed class before seeking authorization to notify the putative class members or moving for conditional certification.”); *Acevedo v. Ace Coffee Bar, Inc.*, 248 F.R.D. 550, 554 (N.D.Ill. Feb. 25, 2008) (“Collective actions under Section 216(b) necessitate a broader scope of discovery in order to identify similarly situated employees who may wish to opt-in to the suit.”).

complaint in this action; and (B) paid by Footbridge the same hourly rate for all hours worked, including those in excess of forty (40) in a workweek.” See Exhibit B at p. 2, Instruction 3. These individuals obviously have relevant information such as, *e.g.*, whether they were paid “straight time for overtime,” whether they questioned or complained about the practice and, if so, what Footbridge said in response, etc. Davis intends to use this information in support of conditional certification as well as in establishing liability in this collective action. Thus, Footbridge’s suggestion that Plaintiff’s requests are “overbroad” or “not reasonably calculated to lead to admissible evidence” is demonstrably false.

2. *Producing Basic Employment Information for 75 Employees is Not Unduly Burdensome Where the Information Has Already Been Gathered.*

Footbridge challenges Ms. Davis’ request for basic employment and contact information related to the 70 to 80 potential class members on the grounds that it would be “unduly burdensome.” A claim of undue burden is suspect if the party has already compiled the relevant information for another purpose. *Cf. Bourne v. Town of Madison*, 2007 WL 951552, at *4 (D.N.H. March 27, 2007) (rejecting objection of undue burden because the party had already gathered the information for another lawsuit). The FLSA requires Footbridge to: (1) keep the information requested by Ms. Davis; and (2) be able to produce it “within 72 hours.” See 29 C.F.R. § 516.2(a)(1),(2) & (4) (employer must have a record of each employee’s full legal name, employee number, home address, occupation (job title), and home address of its workers) & 29 C.F.R. § 516.7(a) (employer must be able to produce the records within 72 hours). Thus,

Footbridge should already have the requested information (name, job title, employee number, address) in a readily accessible format.³

Footbridge does – in fact – have this information in an accessible format. Footbridge identified the approximately 70 to 80 employees impacted by the payroll policy at issue in this case. Heyman Decl., Ex A at p. 33, l. 3-23. Footbridge even calculated the number of overtime hours worked by these employees. *Id.*, at p. 71, l. 3 – p. 72, l. 23. Thus, it can hardly be an unreasonable burden for Footbridge to produce basic job and contact information for these individuals. Footbridge suggestion that Plaintiff’s requests are “unduly burdensome” is simply not credible.

3. *Conditional Certification is Not a Prerequisite to Discovery.*

Footbridge also claims it is not required to provide any information regarding the potential class members “prior to conditional certification of a collective action.” *See, e.g.*, Exhibit C at p. 3-4. “However, conditional certification is not a prerequisite to the turnover of information concerning the identities of potential class members.” *Fei v. WestLB AG*, 2008 U.S. Dist. LEXIS 33310, at *5 (S.D.N.Y. April 23, 2008) (collecting cases).⁴ In fact, courts often

³ Of course, failing to comply with the FLSA’s requirements would not excuse Footbridge from providing the information sought. Courts are “loathe to reward (and possibly encourage) poor record keeping by shielding companies with inefficient recording methods from discovery.” *Bridgell v. Saint Gobain Abrasives Inc.*, 233 F.R.D. 57, 61 (D.Mass. 2005); *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D.Mass. 1976) (“To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.”).

⁴ *See, e.g.*, *Acevedo v. Ace Coffee Bar, Inc.*, 248 F.R.D. 550, 553-554 (N.D.Ill.2008) (defendant ordered to provide the “names, last known home addresses and home telephone numbers, and email addresses of formerly and currently-employed” similarly situated individuals prior to certification); *Stillman v. Staples, Inc.*, 2007 U.S. Dist. LEXIS 58873, at *4 (D.N.J. July 30, 2007); *Allen v. Accredited Home Lenders*, 2007 U.S. Dist. LEXIS 87259, at *8-9 (M.D. Tenn. Apr. 23, 2007); *Wiegele v. Fed Ex*

compel disclosure of this information even where conditional certification is initially denied. *See, e.g., Flores v. Osaka Health SPA, Inc.*, 2006 WL 695675, at *4 (S.D.N.Y. March 16, 2006) (denying conditional certification without prejudice and ordering defendant to produce the contact information of the potential class members); *Smith v. Tradesman Intern., Inc.*, 289 F.Supp.2d 1369, 1372 (S.D.Fla. 2003) (same).

Compelling this discovery will assist the parties and the Court in “ascertain[ing] the contours of the action at the outset.” *Hoffman-La Roche v. Sperling*, 493 U.S. 165, 171 (1989). If the information concerning these individuals confirms they were subject to the same “straight time for overtime” policy applied to Plaintiff, Plaintiff will readily establish the modest factual showing necessary for conditional certification. If not, Plaintiff can “narrow the potential class from all of a defendant's employees to just those employees who can possibly claim to have been denied overtime under the same policy as allegedly affected Plaintiffs.” *Smith v. Sovereign Bancorp, Inc.*, 2003 WL 22701017, at *3 (E.D.Pa. Nov. 13, 2003).

B. Footbridge Must Provide the Basis for Its Assertion that Plaintiff and the Potential Class Members are Not “Similarly Situated.”

Ms. Davis challenges Footbridge’s policy of paying certain hourly workers straight time for overtime rather than the time and a half required by the FLSA (document 1, at ¶ 1). Both before and after the lawsuit, Footbridge treated these workers as a cohesive group for overtime. Prior to the lawsuit, Footbridge claims to have considered them all subject to the computer professional exemption. Heyman Decl., Ex A at p. 140, l. 7-12. After the lawsuit, Footbridge made a “change in policy” whereby all the workers in this group began receiving overtime pay.

Ground Pkg. Sys., 2007 U.S. Dist. LEXIS 9444, at *3 (S.D.Ca. Feb. 8, 2007); *Titre v. S.W. Bach & Co.*, 2005 WL 1692508, at *2 (S.D.Fla. July 20, 2005).

Heyman Decl., Ex A at p. 44, l. 19 – p. 46, l. 5; p. 131, l. 11-14. Footbridge nonetheless claims the proposed class of employees is not “similarly situated” (Docket No. 14, at 11th and 12th affirmative defenses). *See* 29 U.S.C. § 216(b) (an employee may bring a collective action on behalf of “others similarly situated”).

Ms. Davis is hard-pressed to understand any basis for this assertion and Footbridge refuses to provide one. The discovery requests and responses at issue are:

Document Request No. 14: All documents concerning Footbridge’s claim that Plaintiff is not “similarly situated” to other employees with respect to matters alleged in the Complaint (see Answer at 11th Affirmative Defense).

Defendants' Response:

Defendants object to this request on the grounds that it seeks information protected by the attorney work product doctrine and attorney-client privilege. Defendants further object to this request as premature, as discovery has only recently commenced in this matter, and Defendants have the ability and right to plead all potentially applicable Defenses and Affirmative Defenses in their Answer, investigate and test them during the discovery process, and if necessary and appropriate, withdraw unsupported Defenses and Affirmative Defenses prior to trial. Subject to and without waiving their objections, and subject to an agreed-upon Stipulation of Confidentiality between the parties, Defendants refer Plaintiff to documents produced in response to these requests.

Document Request No. 15: All documents concerning Footbridge’s claim that “[c]urrent and former employees of Defendants are not similarly situated for the purposes of the FLSA” (see Answer at 12th Affirmative Defense).

Defendants' Response:

Defendants object to this request on the grounds that it seeks information protected by the attorney work product doctrine and attorney-client privilege. Defendants further object to this request as premature, as discovery has only recently commenced in this matter, and Defendants have the ability and right to plead all potentially applicable Defenses and Affirmative Defenses in their Answer, investigate and test them during the discovery process, and if necessary and appropriate, withdraw unsupported Defenses and Affirmative Defenses prior to trial. Subject to and without waiving their objections, and subject to an agreed-upon Stipulation of Confidentiality between the parties, Defendants refer Plaintiff to documents produced in response to these requests.

Interrogatory No. 6: State the basis for Footbridge's claim that Plaintiff is not "similarly situated" to other employees with respect to matters alleged in the Complaint (see Answer at 11th Affirmative Defense).

Defendants' Answer:

Defendants object to this interrogatory on the ground that it seeks disclosure of attorney work product and Defendants' theory of the case. Defendants further object to this interrogatory as premature, as discovery has only recently commenced in this matter, and Defendants have the ability and right to plead all

potentially applicable Defenses and Affirmative Defenses in their Answer, investigate and test them during the discovery process, and if necessary and appropriate, withdraw unsupported Defenses and Affirmative Defenses prior to trial.

Interrogatory No. 7: State the basis for Footbridge's claim that "[c]urrent and former employees of Defendants are not similarly situated for the purpose of the FLSA" (See Answer at 12th Affirmative Defense).

Defendants' Answer:

Defendants object to this interrogatory on the ground that it seeks disclosure of attorney work product and Defendants' theory of the case. Defendants further object to this interrogatory as premature, as discovery has only recently commenced in this matter, and Defendants have the ability and right to plead all potentially applicable Defenses and Affirmative Defenses in their Answer, investigate and test them during the discovery process, and if necessary and appropriate, withdraw unsupported Defenses and Affirmative Defenses prior to trial.

The requested discovery is clearly relevant to the issue of whether Ms. Davis and the potential class members are similarly situated.

Footbridge cannot hide behind the work product privilege. On the most basic level, the discovery rules simply do not permit Footbridge to engage in trial by ambush by raising a defense but refusing to provide discovery related to it. Footbridge obviously intends to contest Ms. Davis' motion for conditional certification. Plaintiff is entitled to know the factual basis of Defendant's position. The discovery requests here do not seek "disclosure of matters which would likely remain inviolate in the bosom of the lodge; they merely accelerate disclosure of matters that would probably be revealed in due course." *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1016 (1st Cir. 1988).

Under these circumstances, Footbridge must set forth the basis for its assertion that Ms. Davis is not "similarly situated" to the potential class members. Ms. Davis can then test Footbridge's assertions in discovery, in her motion for conditional certification and/or at trial. She should not be forced to guess at the facts which Defendant contends render her different from other Footbridge hourly employees. Discovery is designed to eliminate, to the extent

possible, litigation by surprise. *Flag Fables Inc. v. Jean Ann's Country Crafts and Flags, Inc.*, 730 F.Supp. 1165, 1187 (D.Mass. 1989) (“fundamental purpose of discovery ... is to eliminate the element of surprise...”). Therefore, the Court should direct Footbridge to provide complete answers to Document Requests 14 & 15, as well as Interrogatories 6 & 7.

C. Discovery of Wages and Hours is Relevant to this Wage and Hour Case.

It is difficult to conceive of discovery more relevant to an FLSA collective action than discovery regarding the wages paid to and hours worked by the affected employees. These records are a fundamental part of every FLSA case. *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603, 607 (5th Cir. 1966) (wage and hour records are a “fundamental” part of the FLSA). After all, FLSA plaintiffs must demonstrate they performed work for which they were not properly compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946). Where, as here, an employer has accurate wage and hour records, employees can “easily discharge [t]his burden by securing the production of those records.” *Id.*, at 688.

Ms. Davis served discovery regarding the wages paid to, and hours worked by, the hourly consultants who were paid straight time for overtime. Despite the obvious relevance of this information, Footbridge refuses to provide any substantive response. Consider Ms. Davis’ requests and Footbridge’s responses:

Document Request No. 3: Computer-readable data showing the wages and/or other compensation Footbridge paid to Class Members, including but not limited to all payroll records, personnel record(s), check registers and paystubs.

Defendants’ Response:

Defendants object to this Request on the basis that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence, in that it seeks individualized discovery concerning persons who have not opted in to this purported FLSA collective action. Defendants further object to providing this individualized discovery prior to conditional certification of a collective action. Subject to and without waiving these objections, and subject to an agreed-upon Stipulation of Confidentiality between the parties, Defendants will produce non-privileged, responsive documents for plaintiff Crystal Davis.

Document Request No. 4: Computer-readable data showing the hours worked by Class Members, including but not limited to all payroll records, personnel record(s), time clock records (including all computer and written records, as well as back-up records) and work schedules.

Defendants' Response:

Defendants object to this Request on the basis that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence, in that it seeks individualized discovery concerning persons who have not opted in to this purported FLSA collective action. Defendants further object to providing this individualized discovery prior to conditional certification of a collective action. Subject to and without waiving these objections, and subject to an agreed-upon Stipulation of Confidentiality between the parties, Defendants will produce non-privileged, responsive documents for plaintiff Crystal Davis.

Footbridge's refusal to answer this discovery borders on the ridiculous.

First, under the law, Footbridge must be able to produce this information promptly. *See* 29 C.F.R. § 516.2(a)(6)-(8) (employer must have records of the wages paid to, and hours worked by, its employees) & 29 C.F.R. § 516.7(a) (employer must be able to produce the records within 72 hours). Second, Footbridge keeps this information in computerized format. Heyman Decl., Ex A at p. 50, l. 5 - p. 51, l. 17. In fact, it has used this information to perform its own damage calculations for the 70 to 80 employees at issue here. Heyman Decl., Ex A at p. 65, l. 13-16; p. 71, l. 3 – p. 72, l. 14. Footbridge's assertions of irrelevance, overbreadth and undue burden are obviously frivolous given it has gathered and analyzed the very same information Plaintiff seeks in preparation of its defense of this action.

Moreover, Footbridge has it exactly backwards in asserting that this discovery should not be permitted until after potential class members have joined this lawsuit. It should be noted at the outset that Footbridge had, and lost, the opportunity to argue that certain discovery concerning conditional certification or damages should be bifurcated or phased. The parties' joint statement, which was adopted by the Court without modification in its scheduling order, did not purport to limit or phase discovery in any way. *See* Fed.R.Civ.P. 16(b)(3)(B)(ii) (order may

“modify the extent of discovery”); Local Rule 16.1(D)(1) (parties must submit a joint statement that takes “into account the desirability of conducting phased discovery...”). That scheduling order may not be modified now except for good cause. Fed.R.Civ.P. 16 (b)(4). There is no good cause to restrict or phase discovery in this action.

On the contrary, there are important reasons to allow the discovery at this time. The Supreme Court has made it clear that the benefits of a collective action “depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.” *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (emphasis added). To make an “informed” decision about whether to participate in a lawsuit, a party must know what is at stake. By class action standards, the individual stakes in this case are high. The potential class members need to know this is not a typical class action where winning would mean a few dollars or a coupon. Rather, the individual damages run into the thousands, even tens of thousands, of dollars. Ms. Davis’ claim, including liquidated damages, exceeds \$30,000. With the requested discovery, the potential class members’ damages can be calculated to the penny. These damages figures can then be supplied to potential class members so they can make an informed choice about whether to participate in this lawsuit. Therefore, the Court should compel the discovery requested in Document Requests Nos. 3 & 4.

D. Plaintiff is Entitled to Discovery on Footbridge’s Affirmative Defenses.

A party may “obtain discovery regarding any non-privileged matter that is relevant to any party’s claim *or defense*.” FRCP 26(b)(1) (emphasis added).

1. Footbridge Must Provide the Basis – If Any - for Its Exemption Defense.

As noted above, Ms. Davis and the other hourly consultants are presumptively entitled to overtime pay. *See, e.g., Astor v. U.S.*, 79 Fed.Cl. 303, 308 (Fed.Cl. 2007). In its Answer, Footbridge suggested it could rebut this presumption by stating Ms. Davis “falls under one or more of the exemptions to the overtime requirements of the FLSA” (Docket No. 14, at affirmative defense 14). Since the applicability of an exemption would act as a bar to her claim, Ms. Davis served discovery on Footbridge seeking the basis for its alleged exemption defense. Despite raising this affirmative defense and bearing the burden of proof⁵, Footbridge responded as follows:

Document Request No. 16: All documents concerning Footbridge’s claim that Plaintiff “falls under one or more of the exemptions to the overtime requirements of the FLSA” (see Answer at 14th Affirmative Defense).

Defendants' Response:

Defendants object to this request on the grounds that it seeks information protected by the attorney work product doctrine and attorney-client privilege. Defendants further object to this request as premature, as discovery has only recently commenced in this matter, and Defendants have the ability and right to plead all potentially applicable Defenses and Affirmative Defenses in their Answer, investigate and test them during the discovery process, and if necessary and appropriate, withdraw unsupported Defenses and Affirmative Defenses prior to trial. Subject to and without waiving their objections, and subject to an agreed-upon Stipulation of Confidentiality between the parties, Defendants refer Plaintiff to documents produced in response to these requests.

Interrogatory No. 3: State the basis for any exemption from the Fair Labor Standards Act (FLSA) claimed by Footbridge with respect to Plaintiff and/or any Class Member(s) (see Answer at 14th Affirmative Defense).

Defendants' Answer:

Defendants object to this interrogatory on the ground that it seeks disclosure of attorney work product and Defendants' theory of the case. Defendants further object to this interrogatory as premature, as discovery has only recently commenced in this matter, and Defendants have the ability and right to plead all potentially applicable Defenses and Affirmative Defenses in their Answer, investigate and test them during the discovery process, and if necessary and appropriate, withdraw unsupported Defenses and Affirmative Defenses prior to trial.

⁵ Exemptions are affirmative defenses on which the employer bears the burden of proof. *Lemieux v. City of Holyoke*, 641 F.Supp.2d 60, 63 (D.Mass. 2009). Further, any claimed exemption is narrowly construed against the employer. *See, e.g., Jackson v. McKesson Health Solutions LLC*, 2004 WL 2453000, at *3 (D.Mass. Oct. 29, 2004).

Plaintiff attempted (unsuccessfully) to obtain substantive responses during a meet and confer with Footbridge's counsel. However, Footbridge refused to provide the Rule 11 basis for its affirmative defense. In fact, Footbridge stated that Rule 11 did not apply to affirmative defenses.

Footbridge is simply incorrect. An attorney signing an answer is making certain representations to the Court. In particular, the attorney represents any affirmative defenses "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." FRCP 11(b)(2). The attorney is also representing that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." FRCP 11(b)(3). Thus, Footbridge was required to have a good faith basis for its affirmative defenses. *Aetna Casualty and Surety Co. v. Kellogg*, 856 F.Supp. 25, 33 (D.N.H.1994) (counsel failed make reasonable inquiry into whether the affirmative defenses asserted were "warranted by existing law").

Ms. Davis is entitled to discovery regarding the basis for Footbridge's exemption defense. *See, e.g., Beauperthuy v. 24 Hour Fitness USA, Inc.*, 2009 WL 3809815, at *6 (N.D.Cal. Nov. 10, 2009). Footbridge must inform "Plaintiff of the exemptions (and the facts supporting those exemptions) on which it currently intends to rely[.]" *See, e.g., Titre v. S.W. Bach & Co.*, 2005 WL 1692508, at *1 (S.D.Fla. July 20, 2005) (overruling employer's objection that discovery into its exemption defense was "premature"). If, after discovery, Footbridge changes its position, it may supplement or amend its answers. *Id.* What Footbridge cannot do is assert an "exemption" defense now without any hint of the purported evidence supporting such a defense. Plaintiff is unable to determine the proper scope of inquiry during the discovery phase of the litigation, wasting the resources of the parties and eventually the Court.

2. Plaintiffs are Entitled to Discover the Basis for Footbridge's Good Faith Defense(s) and Its Claim that It Did Not Act Willfully.

Employees who are improperly denied overtime wages can recover “liquidated damages” in addition to their back wages. 29 U.S.C. § 216(b). “[L]iquidated damages are normally awarded in cases where an FLSA violation has been established, and it is the employer’s burden to show why that general practice should not be followed.” *O'Brien v. Town of Agawam*, 482 F.Supp.2d 115, 120 (D.Mass.2007)). The burden on the employer “is a surprisingly heavy one[.]” *Murphy v. Town of Natick*, 516 F.Supp.2d 153, 161 (D.Mass. 2007). The employer must demonstrate “it acted in good faith and had reasonable grounds for believing that its acts did not violate the FLSA.” *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 35 (1st Cir. 2007). This generally requires the employer to demonstrate “that it solicited an opinion from the Department of Labor regarding the employment practice at issue, or relied on the advice of informed counsel.” *Murphy*, 516 F.Supp.2d at 161 (quoting *O'Brien*, 482 F.Supp.2d at 120).⁶

Liquidated damages are not dependent on a finding that the employer acted willfully. *Reich v. Newspapers of New England, Inc.*, 834 F.Supp. 530, 542 (D.N.H. 1993) *aff'd* 44 F.3d 1060 (1st Cir. 1995). The standard for determining good faith is different from that used to determine willfulness. *Id.* The plaintiff bears the burden of proving the employer “knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.” *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). If an employer acted willfully, an award of liquidated damages is mandatory. *Singer v. City of Waco, Tex.*, 314 F.3d 813, 823 (5th

⁶ Even if the employer makes this showing, the district court retains the discretion to award liquidated damages. 29 U.S.C. § 260.

Cir. 2003). In addition, the statute of limitations is extended from two years to three. 29 U.S.C. § 255(a).

Ms. Davis alleges Footbridge's violation of the FLSA was willful. Footbridge denies its violation was willful and asserts "Plaintiffs claims are barred to the extent that Defendants' actions have been taken in good faith in conformity with and reliance upon established rulings, administrative regulations and interpretations and/or advice of counsel" (Docket No. 14, at 3rd and 5th affirmative defenses). When Ms. Davis served discovery aimed at these issues, however, Footbridge responded as follows:

Document Request No. 9: All documents which Footbridge reviewed in determining how to pay the Class Members.

Defendants' Response:

Defendants object to this Request to the extent it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections, and subject to an agreed-upon Stipulation of Confidentiality between the parties, Defendants will produce non-privileged responsive documents relevant to plaintiff Crystal Davis.

Document Request No. 11: All "rulings, administrative regulations and interpretations and/or advice of counsel" that Footbridge acted in "conformity with and reliance upon" (see Answer at 3rd Affirmative Defense).

Defendants' Response:

Defendants object to this request on the grounds that it seeks information protected by the attorney work product doctrine and attorney-client privilege. Defendants further object to this request as premature, as discovery has only recently commenced in this matter, and Defendants have the ability and right to plead all potentially applicable Defenses and Affirmative Defenses in their Answer, investigate and test them during the discovery process, and if necessary and appropriate, withdraw unsupported Defenses and Affirmative Defenses prior to trial.

Interrogatory No. 2: State the basis for Footbridge claims to have acted in "reliance upon" and/or "in conformity with" "rulings, administrative regulations and interpretations and/or advice of counsel" (see Answer at 3rd Affirmative Defense).

Defendants' Answer:

Defendants object to this interrogatory on the ground that it seeks disclosure of attorney work product and Defendants' theory of the case. Defendants further object to this interrogatory as premature, as discovery has only recently commenced in this matter, and Defendants have the ability and right to plead all potentially applicable Defenses and Affirmative Defenses in their Answer, investigate and test them during the discovery process, and if necessary and appropriate, withdraw unsupported Defenses and Affirmative Defenses prior to trial.

Interrogatory No. 8: State the basis for Footbridge's claims that any violation of the Fair Labor Standards Act was not willful (see Docket No. 14, at 5th affirmative defense).

Defendants' Answer:

Defendants object to this interrogatory on the ground that it seeks disclosure of attorney work product and Defendants' theory of the case. Defendants further object to the extent this interrogatory requires Defendants to render a legal conclusion. Defendants further object to this interrogatory as premature, as discovery has only recently commenced in this matter, and Defendants have the ability and right to plead all potentially applicable Defenses and Affirmative Defenses in their Answer, investigate and test them during the discovery process, and if necessary and appropriate, withdraw unsupported Defenses and Affirmative Defenses prior to trial. Subject to and without waiving this objection, Defendants state that they did not knowingly violate the FLSA as described in the Complaint.

It is beyond cavil that discovery into why Footbridge paid its hourly consultants straight time for overtime is appropriate. To begin, this information is relevant to the proper scope of this collective action. If Footbridge willfully violated the FLSA, employees who left Footbridge more than two, but less than three, years ago will indisputably remain members of the class. Consultants whose tenures extend beyond two years will be able to recover at least one additional year of damages. A willful violation would also require an award of double damages.

Moreover, Footbridge cannot hide behind the work product privilege. Footbridge's 3rd Affirmative Defense specifically identifies "advice of counsel" as grounds for its "good faith" defense (Docket No. 14). The assertion of an advice of counsel defense waives the work-product privilege. *Saint-Gobain/Norton Indus. Ceramics Corp. v. General Elec. Co.*, 884 F.Supp. 31, 34 (D.Mass. 1995). After all, "the only way plaintiff can attack the defendants' advice of counsel defense is by having access to circumstances and factors surrounding the advice." *Id.* (citation omitted). Because Footbridge put the advice of its counsel at issue, it cannot hide behind the work product privilege. Accordingly, Plaintiff's Motion to Compel should be granted in full.

Respectfully submitted,

Dated: December 18, 2009

/s/ Todd S. Heyman

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's ECF system.

/s/ Todd S. Heyman
Todd S. Heyman