

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION**

JASON GUAJARDO, Individually	§	
And On Behalf of All Other Similarly	§	
Situated Persons	§	
	§	
Plaintiff,	§	CIVIL ACTION NO. 7:18-cv-00025-DC
	§	
v.	§	
	§	
BIRD ELECTRIC ENTERPRISES, LLC,	§	
	§	
Defendant.	§	

DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION TO COMPEL DISCOVERY

Defendant Bird Electric Enterprises, LLC (“Bird”) files this Response to Plaintiff’s Motion to Compel Discovery [Dkt. 56] (the “Motion”) as follows:

**I.
REVEVANT BACKGROUND**

The 30 Plaintiffs in this case worked for Bird in Department 16 as electricians. Generally, Department 16 electricians’ work is performed on customer job sites. Plaintiffs claim that they were required to report to Bird’s facility before and after working on the job sites and that they were not paid for such working time or drive time to and from job sites, totaling as much as 20 hours of unpaid overtime every week. See Plaintiff’s Original Complaint [Dkt. 1] (the “Complaint”), ¶¶ 2, 16, 23, 26. To the contrary, Bird paid Department 16 electricians for all hours worked, including *significant* amounts of overtime throughout their employment. Declaration of Kalyn Minnix (“Minnix Decl.”, attached hereto as Exhibit A), ¶ 3.

As represented in Plaintiffs’ Motion, Bird has worked extensively with Plaintiffs during this litigation to provide the information and documents requested. In fact, Bird has produced almost 6,300 Bates-labeled documents/pages so far, and its document production is continuing as

certain Plaintiffs just recently opted in. However, Bird raised reasonable objections to the three categories of documents sought by the Motion: customer invoices, Master Services Agreements between Bird and its customers, and all communications within and regarding Department 16 regarding hours and pay. Not only are certain of the documents not relevant, production of the documents would be overly burdensome and cumulative and/or the discovery requested is not proportional to the needs of the case.

II.
ARGUMENT AND CITATION TO AUTHORITY

Federal Rule of Civil Procedure 26 allows discovery of information that is both relevant to the claims or defenses in the case and is proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). In determining proportionality, courts look at “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” *Id.* A court, however, *must* limit discovery if it finds, in part, “that the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Fed. R. Civ. P. 26(b)(2)(C). It must also consider whether the burden or expense of the discovery likely outweighs the benefits. *Id.*; *Gomez v. O’Reilly Auto., Inc.*, No. EP-16-CV-00507-FM, 2017 WL 8728591, at *3 (W.D. Tex. Nov. 7, 2017).

A. Bird’s Customer Invoices are Not Relevant and Production Would be Overly Burdensome and Not Proportional to the Needs of the Case.

Plaintiffs seek production of invoices between Bird and its customers regarding the work performed by Plaintiffs, contending that these records are relevant to show the hours and locations worked by Plaintiffs. Motion, p. 5. Although Plaintiffs claim that these records constitute “routine FLSA discovery” (Motion, p. 5), Fed. R. Civ. P 26, and the proportionality requirement in

particular, suggests that a determination of discoverability should be made on a case-by-case basis. Fed. R. Civ. P. 26(b)(1) (listing factors to consider when determining proportionality).

First, Bird's customer invoices do not list the location where the services are performed. Minnix Decl., ¶ 4. Therefore, the documents are not relevant to show the locations where Plaintiff worked. In addition, although some invoices list the names and hours worked by individual employees, other invoices, such as those for some bid contracts, do not. *Id.* To the extent that invoices for Plaintiffs' work do not list the hours worked by the employee, those documents are not relevant to the issues in this case.

Second, to the extent the invoices show the hours Plaintiffs worked, production on that ground is unreasonably cumulative and duplicative and would be of minimal benefit to Plaintiff. Bird has produced (and will continue to produce, as applicable) information from its payroll system, which contains the hours Plaintiffs worked and were paid. The hours invoiced for Plaintiffs' work *are included* in that payroll information. *Id.* at ¶ 6. It is unnecessary for Plaintiffs to receive the information in multiple forms. In short, Plaintiffs' likely benefit of production is negligible because they have received (and will continue to receive) the information regarding number of hours worked.

Finally, the production of individual invoices would be extremely burdensome for Bird. Bird invoices customers on a weekly basis, and hundreds of invoices are sent each week. *Id.* at ¶ 5. Because of how the invoices are stored, they cannot be searched by name or by Department, but only by job number or invoice number. *Id.* Some job numbers have thousands of invoices. *Id.* For example, in order to obtain the invoices for one week for a Department 16 electrician, the following steps would have to be taken: (1) access the hours worked for the employee in the payroll system, which lists the job numbers; (2) manually compile all job numbers worked by the

employee in that week (which could be as many as 10-20 jobs); (3) individually search for each job number listed for the employee; and (4) review each individual invoice for the job number (and there could be thousands) for the name of the employee. *Id.* Bird estimates that it could take several hours per employee per week to gather invoices. *Id.* To do so for all 30 Plaintiffs for each week worked might take dozens of hours or more. This substantial expenditure of time and resources far outweighs the potential benefit of production, especially since information regarding hours worked is being and has been provided from a far less burdensome source. Because the information is available from “a more convenient, less burdensome, or less expensive” source, this discovery must not be permitted. Fed. R. Civ. P. 26(b)(2)(C).

B. Bird Should Not Be Required to Produce its Master Service Agreements with its Customers.

Bird’s Master Services Agreements with its Customers have no relevance to this case. Plaintiffs contend that production is necessary because Plaintiffs were allegedly told that Bird would not pay for drive time or “off the clock” time because Bird’s customers do not pay for such time. Plaintiffs’ argument misses the mark. Whether *Bird’s customers pay Bird* for certain time is separate and distinct from the issues in this lawsuit—whether *Bird failed to pay Plaintiffs* for overtime worked. The FLSA is a strict-liability statute, so if a plaintiff can show he was not paid overtime when it was owed, an employer’s reason for not paying overtime is irrelevant to its liability. *See Higar v. Task Force of Texas, LLC*, No. 217CV00060JRGRSP, 2018 WL 3849853, at *1 (E.D. Tex. July 12, 2018), report and recommendation adopted, No. 217CV00060JRGRSP, 2018 WL 3837862 (E.D. Tex. Aug. 11, 2018) (stating that because the FLSA is strict liability an employer’s motivation or intent is not relevant to determine a violation). In contrast, as long as Bird pays Plaintiffs overtime as required, it is immaterial whether or not Birds’ customers pay Bird for that time.

Moreover, the burden on Bird to produce the Master Services Agreements outweighs any likely benefit of such production. Like the customer invoices, Bird would have to compile all job numbers on which Plaintiffs worked and then manually locate the Master Services Agreement pertaining to each job number. Minnix Decl., ¶ 7. There could be dozens of Master Services Agreements per Plaintiff. *Id.* Because the terms of Bird's agreements with its customers does not have any bearing on whether Plaintiffs actually worked unpaid overtime, the burden outweighs any benefit of production. Notably too, Bird has offered to stipulate as to whether certain customers pay for drive time (to the extent that is relevant to Plaintiffs claims), making production of the Master Services Agreements completely unnecessary.

C. Plaintiffs' Request for Communications Regarding All of Department 16 Is Too Broad and Is Overly Burdensome.

Plaintiffs seek wide-ranging communications with and regarding any electrician in Department 16 on virtually any topic having to do with employee pay and working hours for a span of more than three years. In that time period, around 250 electricians worked in Department 16. Although Bird has agreed to provide the communications requested with or regarding Plaintiffs, it has not agreed to produce such documents as to the remaining approximately 220 employees who have not filed consents in this lawsuit.

Plaintiffs argue that these documents are relevant because they would show whether Bird failed to compensate "Department 16 electricians for all hours worked and whether it did so willfully." Motion, p. 7. As an initial matter, as an unpaid overtime claim, the relevant issue is whether Bird paid *Plaintiffs* all *overtime* they worked not whether Bird paid *Department 16 electricians* for all *hours* worked. Relatedly, the requests are overbroad because they seek documents beyond the overtime claims in this suit, such as documents regarding "hours worked," "unpaid working time," (Request No. 14) and "payment of wages for uncompensated time"

(Requests Nos 83-85) for all Department 16 electricians. In the Complaint, however, Plaintiffs do not claim to be owed wages for any working time except unpaid overtime under the FLSA. *See* Complaint, ¶ 37. Unlike the documents sought in the *Kilmon* case cited by Plaintiffs—where the documents were limited to “failure to pay overtime” in an overtime case—here Plaintiffs seek a broader range of documents not limited to claims involving overtime. Motion, p. 7; *Kilmon v. Saulsbury Indus., Inc.*, MO:17-CV-99, 2018 WL 5800757, at *8 (W.D. Tex. Feb. 28, 2018).

The scope of requests is overbroad too because Plaintiffs ask for documents that would encompass almost any communication with or about 250 employees over three years regarding pay or hours. This could encompass an enormous volume of documents, searching for a veritable needle in the haystack. Plaintiffs contend that the documents are necessary to show that Bird’s alleged FLSA violation was willful, but Plaintiffs themselves allege facts regarding willfulness. *See* Complaint, ¶ 31 (that they “communicated with their managers about the Drive Time and Off the Clock Time.”). Thus, the cumbersome effort of gathering, reviewing, and producing communications for over 250 people would be unnecessary and burden would far outweigh the benefit.

III. CONCLUSION

For the reasons set forth herein, Bird respectfully requests that the Court deny Plaintiffs’ Motion in full and award Bird any other relief to which it may be entitled.

[signature on following page]

Date: March 21, 2019

Respectfully submitted,

/s/Molly M. Jones

Brett L. Myers

State Bar No. 00788101

brett.myers@wickphillips.com

Molly M. Jones

State Bar No. 24100271

molly.jones@wickphillips.com

WICK PHILLIPS GOULD & MARTIN, LLP

3131 McKinney Avenue, Suite 100

Dallas, Texas 75204

Telephone: (214) 692-6200

Facsimile: (214) 692-6255

***ATTORNEYS FOR DEFENDANT
BIRD ELECTRIC ENTERPRISES, LLC***

CERTIFICATE OF SERVICE

On March 21, 2019, the foregoing document was electronically submitted with the clerk of court for the U.S. District Court, Western District of Texas, using the electronic case filing system of the court. I hereby certify that all counsel have been served electronically or by another manner authorized by Federal rule of Civil Procedure 5(b)(2).

/s/Molly M. Jones

Molly M. Jones