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

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| **JASON GUAJARDO, Individually and On Behalf of All Others Similarly Situated,** | § | |
| | § | **Civil Action No.** |
| **Plaintiff,** | § | |
| | § | **7:18-CV-00025-DC** |
| **v.** | § | |
| | § | |
| **BIRD ELECTRIC ENTERPRISES, LLC** | § | |
| | § | |
| **Defendant.** | § | |

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**PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION TO COMPEL DISCOVERY**

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1. **Approximately 1.6 million dollars, plus fees and costs, are at stake in this case.**

Defendant claims, in wholly conclusory fashion, that production of the requested documents is not proportionate to the needs of the case. Although Defendant recognizes that "the amount in controversy" is relevant to determining whether the requested documents are relevant in determining proportionality, it does not describe how much is in controversy in this case. According to Plaintiff's calculations, Plaintiffs cumulative unpaid damages are $799,357.40. When doubled as potential liquidated damages, the total amount in controversy is $1,598,714.81. This figure excludes fees and costs, which are recoverable and continue to accrue. Compared to the large amount of money at stake in this case, Defendant's feeble arguments about the burden of collecting the requested documents (discussed in full below) are insufficient to avoid production of otherwise discoverable documents.

2. **The customer invoices are relevant and proportional to the needs of the case.**

Defendant argues the invoices are irrelevant because they do not list the location where the

work was performed. But the specific locations of work (e.g. Mentone, Texas) are not the only data in the invoices that might help establish the amount of unpaid drive time to and from the jobsite. For example, the invoices would surely list the name of the customer, narrowing the list of potential locations where the work would have been performed. The invoices also likely contain other information, including the name of the rig or site (e.g. Alameda State Unit 54-8-1), the oil lease number where the plaintiffs performed work (e.g. Oil Lease #049518), the job number[1], or the representative(s) of the customer for that particular work. Any of these categories of information, with very little additional investigation or discovery, would identify the location of the work and additional potential fact witnesses. For these reasons, the invoices are relevant, even if, as Defendant contends, they do not explicitly provide the specific location of the work. This is likely at least one reason that Department of Labor regulations require that employers retain them. S*ee* 29 CFR § 216.6(b) (requiring employers to retain "all customer orders or invoices received").

Also, Defendant admits that "some" invoices contain the names of its employees and their hours worked. Dkt. 57-1 ¶ 4. But Defendant contends Plaintiff is not entitled to this information because the hours listed on them are included in payroll documents, some (but not all) of which Defendant has produced. Dkt. 57 p. 2. Assuming that Defendant eventually produces all of the requested payroll information, Plaintiff contends that he is not required to take Defendant at its word. Indeed, the core of Plaintiff's case is that Defendant knew its electricians were working long hours for no pay. It is reasonable to permit Plaintiff to verify whether or not the Plaintiffs were compensated for the hours listed on the invoices.

Finally, Defendant claims collection of the invoices would be "extremely burdensome" and

1 Defendant admits that it keeps track of work performed by job number. Dkt. 57-1 ¶ 7.

"might take dozens of hours or more" to collect. *Id.* pp. 3-4. But given the potential recovery in this case of more than 1.5 million dollars plus fees and costs, "[d]ozens of hours or more" expended in discovery is not unduly burdensome or disproportionate to the needs of the case, and Defendant cites no authority that it is.

**3. The Master Service Agreements ("MSAs") are discoverable.**

Plaintiff claims that, in response to complaints about the off-the-clock work, Defendant's managers repeatedly told its electricians that Defendant would not pay for drive time or preparatory and concluding work because Defendant's customers did not pay for time. Dkt. 1 ¶ 31. This is not a valid reason under the FLSA for refusing to compensate employees for time worked. Plaintiff believes the MSAs will support his contention. And, unlike other categories of requested discovery, Defendant does not dispute this allegation in its Response.

Rather, Defendant claims the MSAs are not relevant because the "reason for not paying overtime is irrelevant to its liability." Dkt. 57 p. 4 (*citing 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). This is true for two-year liability without liquidated damages. But, as the *Higar* court acknowledged, the reason for the violation "may provide a later basis for modifying Plaintiffs' damages." *Higar*, 2018 WL 3849853, at *1. Here, Plaintiff requested such a modification in the form of liquidated damages. Dkt. 1, pp. 9-10. Liquidated damages are appropriate unless Defendant shows the violation "was in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]." 29 U.S. Code § 260. Plaintiff has also alleged that Defendant willfully violated the FLSA (Dkt. 1 ¶¶ 34, 37), which if true extends the statute of limitations from two to three years. *Id* § 255(a). Thus, whether Defendant's customers paid for drive time or preparatory and concluding work is relevant because it both (1)

supports Plaintiff's allegations that Defendant refused to pay for this time, and (2) illuminates the reason Defendant refused to pay for this time and supports liquidated damages and a willfulness finding.

Defendant further argues that collecting the pertinent MSAs would be unduly burdensome; but its supporting evidence of the alleged burden is anemic. Dkt. 57 p. 5; Dkt. 57-1 ¶ 7. Unlike the invoices, Defendant does not even provide a time estimate to collect the responsive MSAs. *Id.* Rather, it simply states there *could* be "dozens" of MSAs per Plaintiff, which would have to be collected manually. *Id.* Without more evidence, this vague description of the process could take just minutes to complete. And the "dozens" of the MSAs per Plaintiff might overlap such that the same "dozens" of MSAs for one Plaintiff might also the same "dozens" of MSAs for another or all other Plaintiffs. Defendant's evidence does not sufficiently describe an undue burden such that Plaintiff should be denied otherwise discoverable information.[2]

**4. The requested communications are proper and should be compelled.**

In its Response, Defendant claims that *some* of the topics of the requested communications—"hours worked," "unpaid working time," and "payment of wages for uncompensated time"—are overbroad because they relate to "all hours worked" instead of just overtime hours worked. Dkt. 57 p. 5. This argument is transparently wrong—communications that relate to uncompensated non-overtime hours worked are relevant whether Plaintiff's in fact performed work (particularly work during overtime hours)—off the clock, a fact Defendant denies

[2] Defendant claims it "offered to stipulate as to whether certain customers pay for drive time (to the extent that is relevant to Plaintiff's claims), making production of the [MSAs] completely unnecessary." Dkt. 57 p. 5. Defendant has made no such offer. In its communications with Plaintiff's counsel, Defendant stated that, "to the extent that the issue of customer payment or non-payment for drive time becomes a relevant fact in the case, Bird Electric is willing to discuss a stipulation on that point." Dkt. 56-6 p. 17. Defendant has not offered to make any stipulation; it has offered only to "discuss a stipulation" only when the "issue of customer payment or non-payment for drive time becomes an issue in in the case." *Id.* Had Defendant actually proposed a sufficient stipulation, Plaintiff would have no need to compel the MSAs.

and which relates directly on Plaintiff's allegation of willfulness. *See, e.g.*, Dkt. 57, p. 1. And communications regarding all hours worked are relevant because off-the-clock hours, regardless of whether they were worked before or after an individual had already worked forty hours for the week, push later-worked hours into overtime hours.

Defendant further argues that the request for communications is overbroad because the group of custodians—Plaintiffs, their supervisors or managers, and the non-plaintiff Department 16 electricians—number about 250 people and "could" result in a large number of documents. Dkt. 57 at p. 5. This is really an undue burden argument, not an overbreadth objection. As this Court has held, communications involving similarly-situated non-plaintiffs in FLSA cases are discoverable. *Kilmon v. Saulsbury Industries, Inc.*, MO:17-CV-99, 2018 WL 5800757, at *7-8 (W.D. Tex. Feb. 28, 2018). It is thus Defendant's obligation to prove undue burden. *Crow v. ProPetro Services, Inc.*, No. MO:15-CV-00149-RAJ-DC, 2016 WL 9776368, at *7 (W.D. Tex. June 6, 2016) (stating that "[a] party resisting discovery must show how the requested discovery was overly broad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden."). Defendant's principal argument here is that the *number* of such individuals would make complying with the request "cumbersome." Dkt. 57 p. 6. But Defendant has not introduced *any evidence* of what the search would entail. In fact, Defendant has not even made an argument, much less provided any evidence, as to what sort of efforts would be necessary to compile the requested communications. *Id.* (rejecting undue burden objection because the "Defendant ha[d] not made any representations as to what sort of efforts would be necessary to compile the information Plaintiff request[ed]"). Therefore, Defendant's remaining objections fail and the Court should order that the communications be produced.

## V. CONCLUSION AND PRAYER

Plaintiff respectfully requests that the Court award the relief outlined in the proposed Order submitted with his Motion. Plaintiff requests any other relief to which he is entitled.

Respectfully submitted,

MORELAND VERRETT, P.C.

By: */s/ Daniel A. Verrett*

Daniel A. Verrett
State Bar No. 24075220
daniel@morelandlaw.com
**MORELAND VERRETT, P.C.**
The Commissioners House at Heritage Square
2901 Bee Cave Road, Box L
Austin, Texas 78746

Edmond S. Moreland, Jr.
State Bar No. 24002644
edmond@morelandlaw.com
**MORELAND VERRETT, P.C.**
700 West Summit Drive
Wimberley, Texas 78676
Telephone: (512) 782-0567
Telecopier: (512) 782-0605

**ATTORNEYS FOR PLAINTIFF**

## CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of March, 2019, I electronically submitted the foregoing document for filing using the Court's CM/ECF system, which will serve a true and correct copy of the foregoing document upon counsel of record.

*/s/ Daniel A. Verrett*
Daniel A. Verrett