APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1897 (L)
(1:17-cv-03066-JKB)

FAUSTINO SANCHEZ CARRERA; JESUS DAVID MURO; MAGDALENO GERVACIO

Plaintiffs - Appellees

v.

E.M.D. SALES INC.; ELDA M. DEVARIE

Defendants - Appellants

No. 21-1924
(1:17-cv-03066-JKB)

FAUSTINO SANCHEZ CARRERA; JESUS DAVID MURO; MAGDALENO GERVACIO

Plaintiffs - Appellants

v.

E.M.D. SALES INC.; ELDA M. DEVARIE

Defendants – Appellees

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1897

FAUSTINO SANCHEZ CARRERA; JESUS DAVID MURO; MAGDALENO GERVACIO

Plaintiffs - Appellees

v.

E.M.D. SALES INC.; ELDA M. DEVARIE

Defendants - Appellants

Appeal from the United States District Court for the District of Maryland, at Baltimore. James K. Bredar, Chief District Judge. (1:17-cv-03066-JKB)

Argued: March 8, 2023 Decided: July 27, 2023

Before WYNN, HARRIS, and HEYTENS, Circuit Judges.

Affirmed by published opinion. Judge Harris wrote the opinion, in which Judge Wynn and Judge Heytens joined.

ARGUED: Eduardo Samuel Garcia, STEIN SPERLING BENNETT DEJONG DRISCOLL PC, Rockville, Maryland, for Appellants/Cross-Appellees. Omar Vincent Melehy, MELEHY & ASSOCIATES LLC, Silver Spring, Maryland, for Appellees/Cross-Appellants. **ON BRIEF**: Jeffrey M. Schwaber, STEIN SPERLING BENNETT DEJONG DRISCOLL PC, Rockville, Maryland, for Appellants/Cross-Appellees. Andrew Balashov, MELEHY & ASSOCIATES LLC, Silver Spring, Maryland, for Appellees/Cross-Appellants.

PAMELA HARRIS, Circuit Judge:

The plaintiffs in this case are three sales representatives who alleged that their employer, a food-products distributor, did not pay them the overtime wages to which they were entitled under the Fair Labor Standards Act ("FLSA" or "Act"). Their employer defended on the ground that the plaintiffs fell within the Act's "outside sales" exemption, which excuses overtime pay for employees who work outside the office and whose primary duty is making sales.

After a nine-day bench trial, the district court found that the plaintiffs were indeed owed overtime pay because their employer had failed to prove, by clear and convincing evidence, that they came within the outside sales exemption. The court also awarded liquidated damages to the plaintiffs, finding that the employer had not shown objectively reasonable grounds for the challenged pay practices. At the same time, the court concluded, the plaintiffs had not shown that their employer willfully violated the Act, which meant that damages were calculated consistent with the standard

two-year statute of limitations and not the extended three-year period for willful violations.

Both parties now appeal: The employer challenges the district court's liability finding and its award of liquidated damages, and the plaintiffs cross-appeal the court's willfulness finding and attendant application of the two-year statute of limitations. For the reasons given below, we affirm the district court's judgment in all respects.

I.

A.

We begin by outlining the statutory and regulatory provisions relevant to this appeal. Among the protections the FLSA provides employees is overtime pay, or the right to be paid at time and a half for work above the maximum hours set by the Act, generally 40 hours per week. 29 U.S.C. § 207(a); *see Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012). There are, however, multiple exemptions from this requirement, *see* 29 U.S.C. § 213, including the "outside sales" exemption, which excludes from § 207(a)'s protections any worker "employed . . . in the capacity of outside salesman," 29 U.S.C. § 213(a)(1).

Congress did not define the term "outside salesman" in the FLSA. Instead, it expressly delegated that task to the Department of Labor ("DOL"). *See id.* Under DOL's regulations – which no party challenges here – an "outside salesman" is an employee whose "primary duty is [] making sales" and who "customarily and regularly" works away from the employer's place of business in performing that primary duty. *See* 29 C.F.R. § 541.500(a).

Everyone agrees that the employees in this case, who worked for a company that distributes food products to grocery stores, satisfied the second part of this definition, in that they regularly worked outside the office while servicing stores on their assigned routes. Our focus is on the first part of the definition, limiting the exemption to employees whose "primary duty" is the making of sales. DOL's outside sales regulation incorporates the general regulatory definition of "primary duty" as the "principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.500(b) (incorporating definition at 29 C.F.R. § 541.700). But the regulations also provide guidance specific to sales: Work performed "incidental to and in conjunction with the employee's own outside sales or solicitations" – including promotional work – counts as exempt "outside sales work." 29 C.F.R. § 541.500(b) (emphasis added); *see* 29 C.F.R. § 541.503(a) (discussing promotional work). But "promotional work that is incidental to sales made, or to be made, by *someone else*" is not treated as exempt sales work in applying the "primary duty" standard. 29 C.F.R. § 541.503(a) (emphasis added).

An employer who violates the FLSA's overtime-pay requirement is liable for unpaid wages and, generally, for an equal amount in liquidated damages. 29 U.S.C. § 216(b). The FLSA "plainly envisions that liquidated damages . . . are the norm." *Mayhew v. Wells*, 125 F.3d 216, 220 (4th Cir. 1997). But a court "may, in its sound discretion, award no liquidated damages" if "the employer shows to the satisfaction of the court" that its violation "was in good faith and that [it] had reasonable grounds for believing" that its pay practices complied with the FLSA. 29 U.S.C. § 260.

One other provision bears on the calculation of damages here. The statute of limitations for FLSA claims usually is two years, putting a "limit on employers' exposure" to liability for unpaid wages and liquidated damages. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132 (1988). But that period is extended to three years if a plaintiff can show that his employer's violation of the Act was "willful." 29 U.S.C. § 255(a); *see Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 357–58 (4th Cir. 2011).

B.

1.

The plaintiffs in this case are Faustino Sanchez Carrera, Magdaleno Gervacio, and Jesus David Muro, all of whom worked as sales representatives for E.M.D. Sales Inc. ("EMD"). EMD is a distributor of Latin American, Caribbean, and Asian food products to chain and independent grocery stores, operating in the Washington, D.C., metropolitan area. As a direct store delivery vendor, EMD delivers its products directly to grocery stores (rather than to retail warehouses) and provides supplementary services on-site, including stocking and "conditioning" the shelves at those stores.

Each plaintiff sales representative was assigned to service a "route" of stores. As noted above, the parties agree that the plaintiffs spent most of their time out of the office and traveling their routes. At their assigned stores, the plaintiffs' daily tasks included restocking the shelves with EMD products, replenishing depleted products, removing damaged and expired items from the shelves, and issuing credits to the serviced stores for removed items – tasks the plaintiffs described as inventory

management. The plaintiffs also were responsible for submitting orders from the stores for additional EMD products.

The plaintiffs' routes included both chain stores and independent groceries. The parties agree that servicing chain stores was at least half of the plaintiffs' job, and the district court found that the plaintiffs spent most of their time at those stores. That division of labor matters: While the plaintiffs could make at least some of their own sales to the independent groceries on their routes, sales opportunities were more limited – to a degree hotly contested by the parties – at chain stores, where high-level negotiations between corporate buyers and EMD management generally determined what products the stores would carry.

2.

In 2017, the plaintiffs sued EMD and its Chief Executive Officer, Elda Devarie, alleging that they were denied overtime wages in violation of the FLSA. According to the plaintiffs, they worked roughly 60 hours per week as sales representatives, paid on a commission basis instead of hourly and without overtime compensation. The employees sought both unpaid overtime wages and liquidated damages, *see* 29 U.S.C. § 216(b), and argued that their back wages and damages should be calculated consistent with the three-year statute of limitations for "willful" violations of the FLSA, *see id.* § 255(a).

The defendants did not dispute that the plaintiffs worked for more than 40 hours a week without overtime pay. Instead, the defendants argued that they were not liable for overtime wages because their sales

representatives qualified as "outside salesm[e]n" under § 213(a)(1)'s exemption. And even if there had been an FLSA violation, they argued, the court should decline to award liquidated damages because they had reasonable grounds for believing that no overtime pay was due, and it should apply only the standard two-year statute of limitations for non-willful violations.

The parties filed cross-motions for summary judgment on these issues, and in a thoroughly reasoned opinion, the district court denied the motions. *See Carrera v. E.M.D. Sales, Inc.* (*Carrera I*), 402 F. Supp. 3d 128 (D. Md. 2019). The court first addressed the burden of proof by which the defendants were required to establish their entitlement to the outside sales exemption. Relying on circuit precedent, *see, e.g.*, *Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993), the plaintiffs argued for a "clear and convincing" standard of proof. The defendants, on the other hand, cited the Supreme Court's then-recent decision in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), which rejected a canon of construction calling for a narrow interpretation of the FLSA's exemptions, and argued for a lower "preponderance of the evidence" standard. The district court agreed with the plaintiffs, explaining that "nothing in the *Encino* decision relates to evidentiary burdens [or] even mention[s] the phrase 'preponderance of the evidence.'" *Carrera I*, 402 F. Supp. 3d at 146. That left the court bound, it concluded, by "longstanding Fourth Circuit precedent" dictating that an employer must prove its entitlement to an FLSA exemption by clear and convincing evidence. *Id.*

The district court then took up what it identified as the "crux of the parties' dispute": whether the "primary

duty" of EMD's sales representatives was to make sales, and, specifically, whether sales representatives could make sales at the chain stores in which they spent most of their time. *Id.* at 136–37, 147–48. According to the plaintiffs, the orders they took for EMD products at chain stores were controlled by sales terms already negotiated by management; their time was spent only on promotional and inventory-management activities – restocking and rearranging products, issuing credits, taking orders – that were incidental to sales made at higher levels and therefore outside the scope of the exemption. *Id.*; *see* 29 C.F.R. § 541.503(a). The defendants took a different view, contending that sales representatives retained latitude to make sales at chain stores by securing additional space for EMD products. *Carrera I*, 402 F. Supp. 3d at 147. Because the record gave rise to a genuine dispute of fact on this question, the district court denied both parties' summary judgment motions. *Id.* at 148–49.

The district court also found that fact disputes precluded summary judgment with respect to liquidated damages and the appropriate limitations period. As to liquidated damages, the court determined that there was a genuine dispute regarding the objective reasonableness of EMD's pay practices, centered on CEO Devarie's alleged failure to inform herself of the actual job responsibilities of EMD's sales representatives. *Id.* at 151. And the same record evidence, the court concluded, created a genuine dispute over Devarie's willfulness in failing to pay overtime to sales representatives. *Id.* at 151–52.

The case then went forward to a nine-day bench trial before the district court. At its close, the district court ruled for the plaintiffs on liability, finding that the

defendants had not proved by clear and convincing evidence that their sales representatives were covered by the outside sales exemption. *Carrera v. E.M.D. Sales, Inc.* (*Carrera II*), No. JKB-17-3066, 2021 WL 1060258, at *5–7 (D. Md. Mar. 19, 2021). At chain stores, the district court found, the defendants had not shown that the plaintiffs could make their own sales; instead, they simply submitted orders to fill space or stock displays "already negotiated by EMD's management." *Id.* at *6. And while there might be some room, at some stores, to sell additional space for EMD products – and "EMD would undoubtedly welcome" those efforts – any such work would be "ancillary to sales representatives' primary responsibility" of "keeping shelves full, keeping shelves clean, and placing orders promptly," all incidental to sales "already negotiated and executed" by EMD management. *Id.* at *7. As for independent stores, the court found, while the plaintiffs did make sales in those groceries, the defendants had not established that sales, rather than inventory management, was their "primary" responsibility. And in any event, the court reasoned, because the plaintiffs spent most of their time at chain stores, their "*overall* primary duty" could not be the making of sales. *Id.*

The court awarded the plaintiffs both their unpaid overtime wages and liquidated damages. As to liquidated damages, it found that the defendants had not carried their "substantial burden" of showing good faith or objectively reasonable grounds for their pay practices under § 260. *Id.* at *8 (quoting *Mayhew*, 125 F.3d at 220); *see* 29 U.S.C. § 260. Central to the court's determination was CEO Devarie's trial testimony, which revealed that the defendants had not investigated and did not have

actual knowledge of EMD's sales representatives' daily job responsibilities. *Id.* The court declined, however, to extend the standard two-year statute of limitations for FLSA claims to three years, finding that the defendants' "error was one of neglect, not recklessness or willful misbehavior." *Id.*; *see* 29 U.S.C. § 255(a) (extending limitations period for "willful" violations). Here, too, the court put great weight on Devarie's testimony, finding her to be "impermissibly but credibly uninformed on the topic of how the FLSA applied" to her company's sales representatives. *Id.*

EMD and Devarie timely appealed the district court's liability finding and its award of liquidated damages. The plaintiffs then filed a timely cross-appeal, challenging the district court's finding that the defendants' FLSA violation was not "willful" for purposes of extending the limitations period.

II.

A.

We turn first to the district court's liability finding. The defendants challenge that finding on one ground only: that the district court erred as a matter of law in holding them to a "clear and convincing" standard of proof in showing that their employees were covered by the outside sales exemption. We review that question de novo, *see Everett v. Pitt Cnty. Bd. of Educ.*, 678 F.3d 281, 288 (4th Cir. 2012), and because we agree with the district court, we affirm its liability finding.

Our starting point here is straightforward. As the district court explained, it is well established in our circuit that when an employer defends an FLSA action on the ground that its employee falls within a § 213 exemption, it

bears the burden of proof on that question (a point no party contests) and must carry that burden under the "clear and convincing evidence" standard. *See, e.g.*, *Shockley*, 997 F.2d at 21 ("Employers must prove by clear and convincing evidence that an employee qualifies for exemption."); *Desmond v. PNGI Charles Town Gaming*, 564 F.3d 688, 691 (4th Cir. 2009) ("[The employer] bore the burden of proving, by clear and convincing evidence, that the [employees'] jobs fell within the administrative exemption." (citation omitted)). Undaunted, the defendants present two arguments for why the district court nevertheless erred in applying that standard – instead of the lower "preponderance of the evidence" standard – to their case.

We may dispense briefly with the first. According to the defendants, while our court may have *said* "clear and convincing," it did not "consciously adopt[]" that standard – meaning, as we understand it, that the court has not adequately explained its imposition of this heightened burden of proof, so its holdings may be overlooked. But that is not how panel precedent works. Indeed, we have explained as much in precisely this context: In *Desmond*, too, a defendant employer urged us to depart from our precedent on the burden of proof, citing critiques from other circuits. But as we reminded the defendant, "this Court unequivocally held that the proper standard is clear and convincing evidence" in *Shockley*, and one "panel cannot overrule the decision of a prior panel." *Desmond*, 564 F.3d at 691 n.3. "[A]bsent contrary law from an en banc or Supreme Court decision," all parties here – the defendants, the district court, and this panel – are bound by Fourth Circuit precedent establishing the burden of proof for FLSA exemptions. *Taylor v. Grubbs*, 930 F.3d

611, 619 (4th Cir. 2019).

That brings us to the defendants' second and more substantial argument: that there is indeed contrary Supreme Court law superseding our precedent, in the form of the Supreme Court's 2018 decision in *Encino Motorcars*. There, the Court rejected the principle that exemptions to the FLSA should be construed narrowly. 138 S. Ct. at 1142. That principle, the Court held, was not a "useful guidepost for interpreting the FLSA." *Id.* The Act's "exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement" itself, the Court concluded, and "there is no reason to give them anything other than a fair (rather than a 'narrow') interpretation." *Id.* (alteration omitted). It follows, the defendants argue, that there also is no reason for a heightened clear and convincing standard of proof, rendering our prior case law "untenable" under *Encino Motorcars*. *See United States v. Banks*, 29 F.4th 168, 175 (4th Cir. 2022) (explaining that panel precedent is not binding if it "subsequently proves untenable considering Supreme Court decisions" (internal quotation marks omitted)).

"We do not lightly presume that the law of the circuit has been overturned," *see Taylor*, 930 F.3d at 619, or rendered "no longer tenable," *see United States v. Brown*, 67 F.4th 200, 217 (4th Cir. 2023) (Heytens, J., concurring in the judgment) (outlining "high standard" applied to the inquiry). And here, we cannot agree with the defendants that it is impossible to reconcile our clear and convincing burden of proof with *Encino Motorcars*. *Encino Motorcars* is a case about statutory interpretation, and a canon of construction – now rejected – that mandated a narrow reading of the scope of the FLSA's exemptions.

As the district court observed, *see Carrera I*, 402 F. Supp. 3d at 146, that is distinct from the question of what burden of proof an employer bears in proving the facts of its case – here, what EMD's employees actually *do* on the job, and whether they can make sales at the independent stores where they spend most of their time. *See Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1156–58 (10th Cir. 2012) (distinguishing between evidentiary burdens as to factual questions and statutory-construction principles that govern the legal scope of the FLSA's exemptions); *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 506–08 (7th Cir. 2007) (same). And because these are distinct concepts, it is entirely possible for us to read our precedent "harmoniously" with *Encino Motorcars*, *see Taylor*, 930 F.3d at 619, giving a fair, not narrow, legal construction to the FLSA's exemptions, *see* 138 S. Ct. at 1142, while also requiring employers to prove the facts that would put their employees within those exemptions by clear and convincing evidence.

Perhaps this court will want to revisit the appropriate evidentiary standard for FLSA exemptions in light of the Supreme Court's reasoning in *Encino Motorcars* and what can be extrapolated from it. But that is a choice that "belongs to the en banc Court rather than this panel." *See Brown*, 67 F.4th at 217–18 (Heytens, J., concurring in the judgment). At present, we are bound to conclude that the district court properly applied the law of this circuit in requiring the defendants to prove their entitlement to the outside sales exemption by clear and convincing evidence. Accordingly, we affirm the district court's finding that the defendants are liable under the FLSA for unpaid overtime compensation. *See Carrera II*, 2021 WL 1060258, at *9.

B.

We turn next to the parties' respective challenges to the district court's damages award. As to each, we affirm the district court's judgment.

First, the defendants contend that the district court erred in awarding liquidated damages after finding that they had not acted in good faith or demonstrated reasonable grounds for believing their pay practices complied with the FLSA. *See Carrera II*, 2021 WL 1060258, at *8. We review an award of liquidated damages under the FLSA only for an abuse of discretion. *McFeeley v. Jackson St. Ent., LLC*, 825 F.3d 235, 245 (4th Cir. 2016). Indeed, liquidated damages are "the norm" under the FLSA, *see Mayhew*, 125 F.3d at 220, and district courts are expressly vested with discretion when it comes to making exceptions: Only if an employer can "show to the satisfaction of the court" that he acted in "good faith" or had "reasonable grounds" for believing he was in compliance with the FLSA may the court, "in its sound discretion," deny liquidated damages. 29 U.S.C. § 260; *see also Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 132 (4th Cir. 2015). The employer's threshold burden, we have explained, is a "substantial" one, *Mayhew*, 125 F.3d at 220, and even if he meets it, liquidated damages still may be awarded at the district court's discretion, 29 U.S.C. § 260.

Here, after a nine-day bench trial, the district court concluded that the defendants had not carried their substantial burden of establishing good faith or objectively reasonable grounds for believing that their sales representatives were excepted from the FLSA's overtime-pay requirement. *Carrera II*, 2021 WL 1060258, at *8. Critical to this determination was the court's

finding, based on Devarie's testimony, that the defendants had failed to investigate the daily tasks of EMD's sales representatives and, as a result, lacked actual knowledge of their job responsibilities. *Id.* The court recognized that the employees' compensation structure was negotiated by their union and that Devarie had consulted with accountants regarding the FLSA. But because the defendants had not informed themselves of their employees' daily activities, the court reasoned, they could not have had "objectively reasonable grounds" for believing that the plaintiffs' actual job duties put them within the FLSA's outside sales exemption. *Id.*

We see no basis for finding an abuse of discretion here. There is ample evidence in the record to support the court's finding that the defendants had only an "aspirational" and not a "concrete" sense of what their sales representatives did and, specifically, their ability to make sales at chain stores. *Id.* And the district court was within its discretion in determining that without that knowledge, the defendants were not in a position to make a good faith or objectively reasonable judgment that the plaintiffs qualified as "outside salesm[e]n" under the FLSA's exemption. *Cf. McFeeley*, 825 F.3d at 245 ("If mere assumption amounted to good faith and reasonable belief of compliance, no employer would have any incentive to educate itself and proactively conform to governing labor law.").

The plaintiffs, for their part, argue that the district court erred in declining to extend the FLSA's standard two-year limitations period to three years, based on its finding that the defendants' FLSA violation was not "willful." *See* 29 U.S.C. § 255(a). Here, the burden is on the plaintiffs to show willfulness, meaning that the

employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA." *Desmond*, 630 F.3d at 358 (alteration omitted). A district court's finding that an employer did not act willfully is a finding of fact, not to be disturbed unless clearly erroneous. *Martin v. Deiriggi*, 985 F.2d 129, 136 (4th Cir. 1992). And when a willfulness finding is "tied closely to a trial court's witness credibility determinations, appellate courts give great deference to the trial court's factual findings." *Id.*

This is just such a case. Again, the district court relied critically on CEO Devarie's testimony, which it credited, to find that the defendants acted unreasonably but not willfully in violating the FLSA. Devarie, the district court concluded, was "impermissibly but credibly uninformed" on the application of the FLSA to her sales representatives; her failure to inform herself was negligent, but it did not amount to reckless or willful misbehavior. *Carrera II*, 2021 WL 1060258, at *8. Giving "great deference" to that finding, *see Martin*, 985 F.2d at 136 – made by the district court after its "careful consideration of the full trial record," *see Carrera II*, 2021 WL 1060258, at *8 – we find no clear error and affirm the district court's determination.

Finally, to the extent the parties each argue that the district court's findings as to good faith and reasonableness (for liquidated damages) and willfulness (for the limitations period) are in conflict, they are mistaken. To be sure, a finding that a defendant did not act willfully in violating the FLSA might support a determination that the defendant acted reasonably and in good faith, *see, e.g.*, *Roy v. County of Lexington*, 141 F.3d 533, 548 (4th Cir. 1998), and, of course, the opposite is also

true. But the two need not go hand in hand. It can be the case *both* that an employer was unable to show an objectively reasonable basis for its pay practices *and* that the employer did not intentionally or recklessly underpay. *Desmond*, 630 F.3d at 358 (explaining that negligent, i.e., unreasonable, conduct "is insufficient to show willfulness"); *see also Braxton v. Jackson*, 782 F. App'x 240, 245 (4th Cir. 2019) (per curiam) (affirming district court finding of lack of good faith despite jury finding that defendants did not act willfully). Indeed, the FLSA clearly contemplates as much, establishing as the default rule both the award of liquidated damages – predicated on the absence of objective reasonableness – and a two-year statute of limitations – predicated on a non-willful violation. Accordingly, we see no inconsistency in the district court's rulings on these matters.

Finding no reversible error regarding the district court's award of liquidated damages or application of the two-year statute of limitations, we affirm as to both.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

FAUSTINO SANCHEZ CARRERA, *et al.*, **Plaintiffs,** **v.** **EMD SALES, INC., *et al.*,** **Defendants.**	**CIVIL NO. JKB-17-3066**

MEMORANDUM

Plaintiffs Faustino Sanchez Carrera, Magdaleno Gervacio, and Jesus David Muro, current and former sales representatives at E.M.D. Sales, Inc. ("EMD"), brought this suit against Defendants EMD and EMD Chief Executive Officer Elda M. Devarie for failing to pay them overtime wages, as required by the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* (the "FLSA" or the "Act"). Defendants argued that Plaintiffs constituted outside salespeople under the FLSA and were accordingly exempt from the statute's wage and overtime requirements. Upon consideration of all the evidence presented at a two-week bench trial in March 2021, the Court found that Plaintiffs did not qualify as exempt outside salespeople and that Defendants' failure to pay them overtime wages violated the FLSA. (*See* ECF No. 219.)

In an Order issued on May 13, 2021, the Court found Defendants jointly and severally liable for Plaintiffs' unpaid withheld minimum and overtime wages, plus liquidated damages under 29 U.S.C. § 216(b). (*See* ECF No. 239.) Defendants now move to alter or amend the portion of the Court's Order awarding liquidated damages. (Mot. Amend, ECF No. 242.) Defendants' motion is ripe, and no hearing is required. *See* Local Rule 105.6 (D. Md. 2021). For the reasons set forth below, Defendants' Motion to Amend (ECF No. 242) will be denied.

I. Background[1]

Founded by Ms. Devarie in 1995 and incorporated in 1997, EMD distributes Latin American, Caribbean, and Asian food products to chain and independent grocery stores in the Washington, D.C. metropolitan area. As a direct store delivery vendor, EMD delivers its products to stores and provides supplementary services, including stocking and conditioning shelves, at those stores. Mr. Carrera and Mr. Gervacio are current sales representatives at EMD, and Mr. Muro was a sales representative at EMD until August 2017.

By all accounts, sales representatives spend most of their time outside of EMD's main office, servicing stores on their preassigned routes. EMD assigns each of its sales representatives a sales route comprised of both chain and independent stores and provides each with a personal digital assistant device, which allows them to place orders for EMD products. Sales representatives

[1] The key findings of fact and conclusions of law are set forth in more detail in the Court's Memorandum Opinion from March 19, 2021. (ECF No. 219.)

are not paid an hourly wage. Instead, pursuant to collective bargaining agreements negotiated by the United Food and Commercial Works Union, Local 400 (the "Union") and EMD, sales representatives' compensation is based entirely on commissions on their sales of EMD products.

The central question litigated at trial was whether sales representatives' primary duty consisted of making sales of EMD products. If making sales was their primary duty, the sales representatives would constitute outside salespeople under the FLSA's exemption for wage and overtime requirements. *See* 29 C.F.R. § 541.500. At trial, Plaintiffs testified that sales representatives' primary responsibility is essentially inventory management, with daily tasks including re-stocking, replenishing depleted products, removing damaged and expired items from the shelves, and issuing credits to the serviced stores for removed items. By contrast, Ms. Devarie and other members of EMD's management team emphasized that the main responsibility of sales representatives is to sell EMD products. EMD Sales Director Freddy Urdaneta testified that being a sales representative requires leveraging relationships with store managers and knowledge about stores to make sales of additional products. Ms. Devarie and Mr. Urdaneta both framed their testimony in aspirational terms, emphasizing that the main limitation on sales representatives' ability to sell is their own initiative. Even so, Ms. Devarie acknowledged that she did not know how sales representatives allocate their time across the various stores on their routes. Nonetheless, Ms. Devarie testified that she believed that the compensation structure for EMD sales representatives complied with the FLSA

because it was negotiated by the Union, and she relied on the advice of two accountants, and reviewed material from the Department of Labor in crafting the job responsibilities of sales representatives.

Although Plaintiffs acknowledged that it is possible for sales representatives to make their own sales of EMD products at independent stores, the parties disputed whether sales representatives can make their own sales of EMD products at chain stores, which comprise at least half of Plaintiffs' business. According to the testimony of Plaintiffs, as well as representatives from chain stores serviced by EMD, sales representatives are not permitted to sell directly to chain store managers. Instead, Plaintiffs introduced evidence that chain store managers are given "planograms," which are detailed diagrams indicating where to place items on shelves, and plans for non-planogrammed movable displays. In response, Defendants relied on the testimony of non-Plaintiff sales representatives and the *de bene esse* deposition of a former corporate buyer at a chain store to contend that sales representatives had abundant opportunities to make their own sales to chain stores. The Court accredited Defendants' proffered testimony as establishing that there may be some divergence between chain store corporate policy and practice, such that chain store managers may occasionally be persuaded by sales representatives to diverge from the pre-set planograms and plans for movable displays.

In its Memorandum Opinion from March 19, 2021, the Court found that although Defendants established that Plaintiffs make their own sales at independent stores and might make some of their own sales at chain stores, Defendants failed to demonstrate by clear and convincing

evidence that Plaintiffs' *primary* duty as sales representatives is making sales at either chain or independent stores. (ECF No. 219 at 13.) Accordingly, Defendants' failure to pay Plaintiffs overtime wages violated the FLSA because Defendants failed to prove that Plaintiffs constituted outside salespeople under the statutory exemption. (*Id.* at 14.) Further, the Court found that Plaintiffs were entitled to liquidated damages under the FLSA because Defendants did not establish that they acted in good faith, nor that they had objectively reasonable grounds for believing that Plaintiffs' compensation structure was FLSA-compliant. (*Id.* at 14–16 (citing 29 U.S.C. §§ 216(b), 260).) The Court declined, however, to extend the standard two-year statute of limitations under the FLSA to three years because it found that Defendants' statutory violation was not willful. (*Id.* at 16–17 (citing 29 U.S.C. § 255(a)).)

II. Legal Standard

"Federal Rule of Civil Procedure 59(e) permits the district court to reconsider a decision in certain circumstances." *Hughley v. Matthew Carpenter, P.A.*, Civ. No. JKB-19-1950, 2020 WL 6703717, at *1 (D. Md. Nov. 13, 2020) (quoting *Ross v. Early*, 899 F. Supp. 2d 415, 420 (D. Md. 2012)). In the Fourth Circuit, "Rule 59(e) motions can be successful in only three situations: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Zinkand v. Brown*, 478 F.3d 634, 637 (4th Cir. 2007) (internal quotation marks omitted).

With respect to the third situation, "[c]lear error or manifest injustice occurs where a court has patently misunderstood a party or has made a decision outside the

adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Wagner v. Warden*, Civ. No. ELH-14-0791, 2016 WL 1169937, at *3 (D. Md. Mar. 24, 2016) (internal citations and quotation marks omitted); *see also South Carolina v. United States*, 232 F. Supp. 3d 785, 799 (D.S.C. 2017) (defining "manifest injustice" as "[a] patent misunderstanding or misapprehension of the facts or arguments, so as to warrant a finding of manifest injustice," which "occurs only where such error was indisputably obvious and apparent from the face of the record").

Although Rule 59(e) "permits a district court to correct its own errors," it "may not be used [ ] to raise arguments which could have been raised prior to the issuance of the judgment, nor may [it] be used to argue a case under a novel legal theory that the party had the ability to address in the first instance." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (citing *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995)). Indeed, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Id.* (internal citations and quotation marks omitted).

III. Analysis

Defendants assert that the Court's decision to award liquidated damages under the FLSA constituted clear error and allege that amendment of the Judgment in relevant part is necessary "to prevent manifest injustice." (Mot. Amend at 6.) In their Motion to Amend, Defendants argue that they acted in good faith and had reasonable grounds for believing that Plaintiffs were exempt outside salespeople for the purposes of the FLSA. (*Id.* at 2.)

Defendants assert that their good faith is proven by "the Court's decision that EMD's conduct was not willful, the arms-length [sic] union negotiations, the consultation with accountants and the lack of complaints regarding overtime wages." (*Id.* at 6.) Further, Defendants contend that the applicability of the FLSA exemption presented a close question, and accordingly, "even in the absence of a reversal on the question of liability, there is more than sufficient evidence for this Court to find that EMD's actions were based on objectively reasonable grounds." (*Id.* at 24.)

Upon a court's finding that a defendant has violated the FLSA, the statute permits the recovery of both unpaid wages and "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). When a plaintiff prevails on a FLSA claim, awarding liquidated damages is "the norm." *Mayhew v. Wells*, 125 F.3d 216, 220 (4th Cir. 1997). A court may refuse to order liquidated damages only if the defendant meets her burden of demonstrating "to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that [s]he had reasonable grounds for believing that [her] act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. Absent a finding of the defendant's good faith, a court is required to award liquidated damages under the statute. Courts "place a 'plain and substantial burden' upon the employer" to make this statutory showing of good faith. *Mayhew*, 125 F.3d at 220 (quoting *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 357 (4th Cir. 1994)). Determining whether an employer exercised good faith or had reasonable grounds for her belief that she was not in violation of the FLSA is an objective inquiry, 29 C.F.R. § 790.22, and "establishing

either element is sufficient to satisfy the statute," *Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 132 (4th Cir. 2015).

In order to demonstrate good faith, an employer may not simply show "ignorance of the prevailing law or uncertainty about its development." *Lockwood v. Prince George's Cnty.*, 58 F. Supp. 2d 651, 658 (D. Md. 1999), *aff'd, Lockwood v. Prince George's Cnty.*, 217 F.3d 839 (4th Cir. 2000) (Table). Rather, an employer must "first take active steps to ascertain the dictates of the FLSA and then move to comply with them." *Id.*; *see also Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 712 (E.D.N.C. 2009) (quoting *Roy v. Lexington*, 141 F.3d 533, 548 (4th Cir. 1998)) ("The good faith defense requires that an employer provide adequate proof that it did not take an 'ostrichlike' approach to the FLSA by 'simply remain[ing] blissfully ignorant of FLSA requirements.'"). Courts consider contextual factors that indicate an employer's objective good faith, including "the complexity of the issues, the history of the collective bargaining agreements, and the fact that the [defendant's] compensation practice has been known to the parties for many years and the subject of bargaining." *Koelker v. Mayor and City Council of Cumberland*, 599 F. Supp. 2d 624, 638 (D. Md. 2009).

Defendants fall short of meeting their heavy burden of demonstrating clear error or manifest injustice in the Court's award of liquidated damages in this case. In their Motion to Amend, Defendants largely re-brief arguments that they made at trial, and while Defendants identify factors that are *relevant* to a finding of good faith or objectively reasonable grounds, they fail to effectively address the Court's key conclusion that Defendants did

not investigate the actual daily tasks of sales representatives, and that Ms. Devarie's testimony revealed her lack of knowledge as to what sales representatives' daily responsibilities actually entail. (*See* ECF No. 219 at 15.)

In their Reply, Defendants argue both that "Ms. Devarie's purported failure to know Plaintiffs' precise job duties is not dispositive," and that even if Defendants were required to investigate the job responsibilities of sales representatives, Ms. Devarie had the requisite knowledge regarding sales representatives' daily tasks. (*See* Reply to Mot. Amend at 2–5, ECF No. 259.) The Court disagrees with both contentions. First, Defendants mischaracterize the Court's analysis as hinging on whether Ms. Devarie knew "the precise job duties of Plaintiffs at all times." (*Id.* at 2.) To the contrary, the Court found, based on Ms. Devarie's testimony at trial, that she could describe the sales representatives' duties only at a high degree of generality, and that she did not know how often sales representatives actually made their own sales at chain stores, let alone more specific details regarding sales representatives' schedules. Indeed, Defendants cite no authority for the proposition that an employer can be found to have acted in good faith or had objectively reasonable grounds for belief that her conduct complied with the FLSA where she did not have actual knowledge of her employees' responsibilities.

Further, Defendants do not establish that the Court's conclusion that Ms. Devarie did not know the actual job responsibilities of sales representatives was based on any misapprehension of fact. *See South Carolina v. United States*, 232 F. Supp. 3d at 799 (emphasis added) (defining "manifest injustice" as "[a] patent misunderstanding or

misapprehension of the facts or arguments"). Defendants argue that Ms. Devarie knew the actual job responsibilities of sales representatives because she was EMD's first sales representative and because her trial testimony established that the mission of sales representatives at EMD is to sell. (*Id.* at 4.) Defendants do not explain how Ms. Devarie's knowledge of her own role when she founded EMD in 1995 would inform her as to the responsibilities of the thirty-five sales representatives now employed by EMD more than twenty-five years later. Indeed, as Ms. Devarie testified at trial, EMD did not even begin servicing chain stores until 1997. (Opp'n to Mot. Amend Ex. A at 14–15, ECF No. 247-1.) Additionally, as the Court pointed out in its March 19 Memorandum Opinion, Ms. Devarie's testimony regarding the *mission* of sales representatives was largely aspirational in nature and did not establish the *actual* responsibilities of sales representatives. (*See* ECF No. 219 at 15.)

In short, Defendants do not identify the requisite clear error or manifest injustice to set aside the Court's finding that Defendants did not demonstrate good faith or objectively reasonable grounds for believing that their conduct complied with the FLSA. Absent this showing, the Court reiterates that it is required to award Plaintiffs liquidated damages.

IV. Conclusion

For the foregoing reasons, an Order will issue denying Defendants' Motion to Alter or Amend Judgment (ECF No. 242).

DATED this 12th day of July, 2021.

BY THE COURT:

/s/
James K. Bredar
Chief Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FAUSTINO SANCHEZ CARRERA, *et al.*, **Plaintiffs,** **v.** **EMD SALES, INC., *et al.*,** **Defendants.**	**CIVIL NO. JKB-17-3066**

ORDER

For the reasons set forth in the foregoing Memorandum, Defendants' Motion to Alter or Amend Judgment (ECF No. 242) is hereby DENIED.

DATED this 12th day of July, 2021.

BY THE COURT:

/s/
James K. Bredar
Chief Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

FAUSTINO SANCHEZ CARRERA, *et al.*, **Plaintiffs** **v.** **EMD SALES, INC., *et al.*,** **Defendants**	**CIVIL NO. JKB-17-3066**

ORDER

The Court accepts the Parties' Joint Status Report (ECF No. 237) with respect to the issues of damages and pre- and post-judgment interest. Accordingly, the Court finds that Defendants Elda M. Devarie and EMD Sales, Inc. are jointly and severally liable for the Plaintiffs' unpaid withheld minimum and overtime wages, plus liquidated damages pursuant to 29 U.S.C. § 216(b), based on Defendants' violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* in the total amount of $303,876.57 plus post-judgment interest at the rate set forth in 28 U.S.C. § 1961(a). Defendants are liable to Plaintiff Faustino Sanchez Carrera in the amount of $108,837.18; to Plaintiff Magdaleno Gervacio in the amount of $177,425.71; and to Plaintiff Jesus David Muro in the amount of $17,613.68.

In light of the foregoing, the parties are hereby ORDERED to meet and confer and file a joint submission—to the extent they are able—briefing the

Court regarding costs and reasonable attorney's fees. The parties shall file such joint submission by May 26, 2021.

DATED this 12 day of May, 2021.

BY THE COURT:

James K. Bredar
James K. Bredar
Chief Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FAUSTINO SANCHEZ CARRERA, et al., **Plaintiffs** **v.** **EMD SALES, INC., et al.,** **Defendants**	**CIVIL NO. JKB-17-3066**

MEMORANDUM OPINION

Plaintiffs Faustino Sanchez Carrera, Magdaleno Gervacio, and Jesus David Muro, current and former sales representatives at E.M.D. Sales, Inc. ("EMD"), claim that Defendants EMD and EMD Chief Executive Officer ("CEO") Elda M. Devarie failed to pay them overtime wages as required by the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* (the "FLSA" or the "Act").[1] Plaintiffs seek back wages, liquidated damages, costs and reasonable attorney's fees, and a permanent injunction to prevent Defendants from continuing to violate the FLSA. (Second Am. Compl. at 6–7, ECF No. 169.) Defendants argue that Plaintiffs are subject to the FLSA's outside sales exemption, which exempts employees from overtime pay so long as (1) their primary duty is making sales and

[1] Plaintiffs initially also named E&R Sales and Marketing Services, Inc. ("E&R") as a defendant in this case. The Court granted E&R's motion for summary judgment (*see* ECF Nos. 114, 115), and accordingly, only EMD and Ms. Devarie remain as defendants.

(2) they generally work outside of the office in furtherance of those sales. 29 C.F.R. § 541.500(a).

The Court held a bench trial in this matter from March 1 through March 11, 2021. Upon consideration of all the evidence presented, the Court finds that Defendants are jointly and severally liable to Plaintiffs for Defendants' failure to pay overtime wages. Plaintiffs are entitled to liquidated damages because Defendants failed to demonstrate good faith or reasonable grounds for believing that their conduct was in accordance with the FLSA. However, Plaintiffs did not demonstrate that Defendants' violation of the Act was willful, and as a result, Plaintiffs' claim is subject to the FLSA's standard two-year statute of limitations. The Court denies Plaintiffs' request for a permanent injunction against Defendants. In light of these rulings, the parties are directed to meet and confer and file a joint submission—to the extent they are able—briefing the Court regarding (1) damages, (2) pre- and post-judgment interest, and (3) costs and reasonable attorney's fees by March 26, 2021.

I. Key Findings of Fact[2]

Founded by Ms. Devarie in 1995 and incorporated in 1997, EMD distributes Latin American, Caribbean, and Asian food products to chain and independent grocery stores in the Washington, D.C. metropolitan area. As a direct store delivery vendor, EMD delivers its products directly to stores and provides supplementary services, including stocking and conditioning shelves, at those stores. In addition to Ms. Devarie, EMD's employees

[2] An official transcript of the proceedings at trial is not yet available. Accordingly, in summarizing its findings of fact, the Court draws from its internal record of the testimony and evidence presented.

include about thirty-five sales representatives, seven key account managers, Marketing Manager Roberto Devarie, and Sales Director Freddy Urdaneta. Ms. Devarie also owns E&R Sales and Marketing Services, Inc., a separate company that provides EMD with merchandising services after EMD delivers products to its customers. Mr. Carrera and Mr. Gervacio are current sales representatives at EMD, and Mr. Muro was a sales representative at EMD until August 2017.

Plaintiffs testified that they regularly work—or worked, in Mr. Muro's case—around sixty hours per week as sales representatives. EMD assigns each of its sales representatives a sales route comprised of both chain and independent stores and a personal digital assistant ("PDA") device, which allows them to place orders for EMD products. EMD does not track the hours that sales representatives work, and based on Defendants' stipulation to Plaintiffs' Exhibits 7, 8, and 9, Defendants apparently do not dispute Plaintiffs' testimony about their hours. Sales representatives are not paid an hourly wage. Instead, pursuant to collective bargaining agreements negotiated by the United Food and Commercial Works Union, Local 400 (the "Union") and EMD, sales representatives' compensation is based entirely on commissions on sales of EMD products. (*See* Pl. Exs. 82, 83.)

By all accounts, sales representatives spend most of their time outside of EMD's main office servicing stores on their routes, but the parties dispute whether sales representatives' primary duty is to make sales of EMD products. Plaintiffs testified that sales representatives' primary responsibility is essentially inventory management, with daily tasks including re-stocking,

replenishing depleted products, removing damaged and expired items from the shelves, and issuing credits to the serviced stores for removed items. By contrast, Ms. Devarie and other members of EMD's management emphasized that the main responsibility of sales representatives is to sell EMD products. Being a sales representative, Mr. Urdaneta explained, requires leveraging relationships with store managers and knowledge about stores to make sales of additional products. Ms. Devarie and Mr. Urdaneta both framed their testimony in aspirational terms—emphasizing that the main limitation on sales representatives' ability to sell is their own initiative. Even so, Ms. Devarie acknowledged that she does not know how sales representatives allocate their time across the various stores on their routes.

Sales representatives are subject to minimal oversight by EMD. One of the few mechanisms by which EMD provides its sales representatives with regular feedback is through a color-coding system on the PDA devices—which indicates a sales representative's performance based on orders placed for EMD products—on a scale from green (high) to red (low). Mr. Urdaneta testified that Mr. Gervacio and Mr. Carrera are both generally between green and yellow, and that when Mr. Muro was employed by EMD, he was generally between yellow and red. Sales representatives may also be subject to suspension for failing to service their stores, according to the testimony of members of EMD's management.

A core issue in the parties' dispute is whether sales representatives can make their own sales of EMD products at chain stores, which comprise at least half of Plaintiffs' business, based on the testimony of Ms.

Devarie, Plaintiffs, and other sales representatives. EMD establishes its business relationships with chain stores at the highest levels of its organization, through meetings between key account managers or members of EMD's management and chain store corporate category buyers. At these meetings, EMD representatives persuade chain stores to buy their products and negotiate quantity, price, and other terms. These initial meetings are critical for a couple of reasons, according to the testimony of chain store corporate representatives. First, they allow vendors to introduce new items to chain stores, which cannot sell items that have not been entered into the store's inventory system and received a stock keeping unit ("SKU") number. Second, these meetings allow vendors to negotiate product placement in a chain store's merchandising plan, which is highly detailed and set by corporate representatives.

The testimony of current and former chain store corporate category buyers and store managers served by EMD, including Walmart, Safeway, Giant Food, and Shoppers Food, established that chain store managers are given "planograms,"[3] which are detailed diagrams indicating where to place items on shelves, and plans for non-planogrammed movable displays. Both in policy and practice, store managers are not permitted to deviate from the planogram or order additional displays, according to Cynthia Volk, a former category buyer at Giant Food, and Christopher Krawchuk, a former category manager at Safeway. Walmart store manager Jigsa Eshete and Giant Food store manager Stephen Ramsawaksingh likewise testified that they are not empowered to grant requests to place products in spaces

[3] Walmart's "modulars" are synonymous with "planograms."

beyond those in the planogram or requests for additional movable displays. Accordingly, the testimony of Mr. Eshete and Mr. Ramsawaksingh suggests that chain store managers would not be receptive to solicitations by EMD sales representatives to buy additional products beyond the plan set forth by corporate.

For their part, Defendants contend that there are abundant opportunities for sales representatives to make their own sales in chain stores. For instance, EMD sales representative Mayra Palma testified that the goal of a sales representative at a chain store is to make additional sales beyond what EMD's management has already negotiated, and EMD sales representative Juan Pablo Barreno testified that he has been successful in negotiating additional shelf space for EMD products at Giant Food, Walmart, and Shoppers Food. Likewise, EMD sales representative Maria de Lourdes explained that she always tries to negotiate for more space at chain stores. Defendants also rely on the *de bene esse* deposition testimony of Tanjulan Major, a former buyer at Walmart for Prep Sauces and Dressings, who testified that although Walmart store managers are not supposed to make changes to the modular plan, sometimes they do. Ms. Major highlighted the impracticality of chain store corporate representatives monitoring store managers' compliance with modular plans, explaining that she did not have control over 4,700 Walmart stores nationwide. The Court accredits this testimony as establishing that in some instances, at certain stores, there may be some divergence between corporate policy and practice such that chain store managers may not always follow planograms and plans for movable displays.

By contrast, EMD's relationship with independent

stores is much less structured and generally involves fewer levels of the corporate hierarchy. Sales representatives are encouraged to open new accounts and to increase both the type and quantity of EMD products sold by existing accounts. In fact, Mr. Muro testified that he recalled adding an independent store as an EMD client by stopping by that store on his sales route. However, Mr. Muro testified that, although independent store managers were not subject to the same ordering restrictions as chain store managers, he was often unsuccessful at selling to independent stores because they lacked the storage space to buy in bulk from EMD.

II. The Fair Labor Standards Act

The primary purpose of Congress in enacting the FLSA was "to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). Pursuant to the Act, employers must "compensate employees for hours in excess of 40 per week at a rate of 1 ½ times the employees' regular wages." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012) (citing 29 U.S.C § 207(a)).

Several categories of employees, including outside salespersons, are exempt from the FLSA's overtime requirements. 29 U.S.C.A. § 213. The rationale underlying the outside sales exemption is that an outside salesman is unrestricted in the hours he works, and accordingly, is free to earn as much or as little as his ability and ambition allow. *See Jewel Tea Co. v. Williams*, 118 F.2d 202, 207–08 (10th Cir. 1941). Further, practically speaking, the outside salesman "is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per

day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman." *Id.* at 208.

The term "outside salesman" is not defined by statute; instead, Congress "delegated authority to the [Department of Labor (DOL)] to issue regulations" defining the term. *Christopher*, 567 U.S. at 147. The Supreme Court has identified three regulations that are "directly relevant" to the outside salesman exemption: the general regulation, the sales regulation, and the promotion-work regulation. *Id.* at 148. The general regulation states that an outside salesman is an employee:

> (1) Whose primary duty is: (i) making sales . . . or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

29 C.F.R. § 541.500. In other words, "an outside salesman is any employee whose primary duty is making any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." *Christopher*, 567 U.S. at 148. The parties in this case dispute both whether Plaintiffs make sales within the meaning of the FLSA, and if so, whether making sales is Plaintiffs' primary duty.

The sales regulation provides that the FLSA's definition of "sales" "include[s] the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." *Id.* at 148–49

(quoting 29 C.F.R. § 541.501(b)).

"[T]he promotion-work regulation identifies '[p]romotion work' as 'one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed.'" *Id.* at 149 (quoting 29 C.F.R. § 541.503(a)). "Promotional work that is actually performed incidental to and in conjunction with *an employee's own outside sales* or solicitations is exempt work," but "promotional work that is incidental to *sales made, or to be made, by someone else* is not exempt outside sales work." 29 C.F.R. § 541.503(a) (emphases added). Relevant to the case at hand, the DOL provides the following example of an individual whose work would not qualify as exempt under the outside salesman exemption:

> Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. *The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales.* Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

29 C.F.R. § 541.503(c) (emphasis added). Accordingly, for

Plaintiffs' work of re-arranging, restocking, and removing products at chain stores to qualify as exempt, it must be incidental to their work of directly making sales.

The DOL defines a "primary duty" as "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). As the DOL has explained:

> Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

Id. "The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee." 29 C.F.R. § 541.700(b). If an employee spends more than half of his or her time "performing exempt work," he or she "will generally satisfy the primary duty requirement." *Id.*

The Sixth Circuit has also identified 29 C.F.R. § 541.504, titled "Drivers who sell," as a relevant regulation when determining whether food product

salespersons are subject to the FLSA's outside sales exemption. *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 582 (6th Cir. 2014). This regulation identifies relevant factors:

> [A] comparison of the driver's duties with those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; description of the employee's occupation in collective bargaining agreements; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; and proportion of earnings directly attributable to sales.

29 C.F.R. § 541.504(b). This Court will consider these factors in evaluating whether Plaintiffs qualify as outside salespersons and, consequently, are exempt from the FLSA's protection.

III. Analysis

Plaintiffs brought suit against Defendants for failure to pay overtime wages under the FLSA. (*See* Second Am. Compl. ¶ 17, ECF No. 169.) To succeed on a FLSA claim, a plaintiff must (1) establish that he was employed by the defendant, (2) demonstrate that he worked overtime hours for which he was not properly compensated, and (3) prove the amount and extent of his overtime work as a matter of just and reasonable inference. *Davis v. Food*

Lion, 792 F.2d 1274, 1276 (4th Cir. 1986) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)). Upon such a showing by Plaintiffs, the burden shifts to Defendants "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Anderson*, 328 U.S. at 687–88.

Apparently, the parties do not dispute that Plaintiffs established the three elements of a FLSA claim. The parties agree that all three Plaintiffs have at one time been employed by EMD as sales representatives and that Defendants do not pay sales representatives overtime wages. Additionally, the Court finds that Plaintiffs bear their burden of establishing both that they worked overtime hours without proper compensation as well as the amount and extent of such overtime work as a matter of just and reasonable inference. Indeed, at trial Defendants stipulated to Plaintiffs' Exhibits 7, 8, and 9, which detail the hours that each Plaintiff worked per week for the relevant time period. The Court construes Defendants' stipulation as confirming the *accuracy* of Plaintiffs' representations with respect to how many hours they worked per week. Even to the extent that Defendants do not stipulate to the accuracy of these figures, however, the Court finds that Plaintiffs' evidence regarding the amount and extent of their overtime is accurate because Defendants submit nothing to rebut Plaintiffs' evidence.

A. The Outside Sales Exemption

Defendants argue that they are not required to pay Plaintiffs overtime wages because Plaintiffs constitute outside salespersons and are thus exempt from the Act's overtime wage requirement. Defendants bear the burden

of demonstrating the applicability of the FLSA's outside sales exemption by clear and convincing evidence. *See Jones v. Va. Oil Co.*, 69 F. App'x 633, 636 (4th Cir. 2003). Indeed, in pleading an exemption to the FLSA, "the employer bears not only the burden of proof, but also the burden on each element of the claimed exemption." *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 578 (6th Cir. 2004) (internal citation omitted).

In order to determine whether Plaintiffs are outside salespeople for purposes of the FLSA, the Court considers (1) whether Plaintiffs make sales in their roles as sales representatives, and (2) whether making sales is Plaintiffs' primary duty.

The Supreme Court has explained that the Act's definition of "sales" is broad and encompasses all "arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity." *Christopher*, 567 U.S. at 164. In *Christopher v. SmithKline Beecham Corporation*, the Supreme Court determined that pharmaceutical sales representatives constitute outside salespersons for purposes of the FLSA upon a finding that their primary duty is to "[o]btain[] a nonbinding commitment from a physician to prescribe one of respondent's drugs." *Id.* at 165. Other courts have explained, however, that "[t]he unique regulatory environment of the pharmaceutical industry makes evident why *Christopher*'s holding does not readily transfer to other industries." *See, e.g.*, *Hurt v. Commerce Energy, Inc.*, 973 F.3d 509, 519 (6th Cir. 2020).

This Court finds *Killion v. KeHE Distributors, LLC* instructive. 761 F.3d 574 (6th Cir. 2014). In that case, the Sixth Circuit found that the district court erred in determining that the plaintiffs were outside salespeople

as a matter of law, where the plaintiffs were at the bottom of a four-tiered structure of employees involved in selling the defendant's products at chain stores. *Id.* at 584. The plaintiffs were responsible for determining the quantities of products to order as well as writing and transmitting orders for subsequent delivery. *Id.* As in the case at bar, the plaintiffs in *Killion* "presented substantial evidence that the [defendant's] account managers actually control the volume through 'plan-o-grams' and restrictions on reordering," and that the plaintiffs were generally not able to order products beyond what had already been arranged by the defendant's account managers. *Id.* The court found that in such circumstances, "[t]he fact that the plaintiffs hit the order buttons on their electronic devices . . . is not enough to magically transform their jobs from inventory management to 'sales.'" *Id.*; *see also Hurt v. Com. Energy, Inc.*, 973 F.3d 509, 518 (6th Cir. 2020) (quoting *Christopher*, 567 U.S. at 149) (cautioning that "exempt status should not depend on technicalities, such as 'whether it is the sales employee or the customer who types the order into a computer system and hits the return button' or whether the order is filled by a jobber rather than directly by the employer")).

Further, the *Killion* court found that, even assuming the plaintiffs made their own sales, selling was not the plaintiffs' primary duty because "it appear[ed] that the vast majority of the plaintiffs' time [was] spent stocking and cleaning shelves." *Killion*, 761 F.3d at 585. Further, memoranda produced by the defendant's management indicated that those plaintiffs' responsibilities included ordering products; stocking products; maintaining backroom conditions; removing expired products from the shelves; reconciling invoices; and reviewing products that

went out of stock. *Id.* The Sixth Circuit found that, "[f]rom this broad range of responsibilities alone," a fact-finder could conclude that the plaintiffs' primary duty was not making sales. *Id.*

1. Making Sales

Upon consideration of the evidence in this case, the Court finds that, although Defendants established by clear and convincing evidence that Plaintiffs make sales at independent stores, Defendants do not carry the same burden with respect to whether Plaintiffs make their own sales at chain stores. The Court concludes that merely submitting orders on PDA devices to fill planogrammed space or to stock displays that were already negotiated by EMD's management and chain stores' corporate representatives does not constitute a sale for purposes of the FLSA. On the other hand, a Plaintiff would make his own sale if he placed an order for EMD products beyond the scope of such high-level negotiations—either by selling a new *type* of product or by selling products *outside* of the spaces already negotiated by EMD's management. Defendants concede that chain store managers are never able to sell new *types* of products without first clearing them with their corporate offices and receiving the requisite SKU number. However, Defendants point to the testimony of other sales representatives, EMD's management, and Ms. Major to support their argument that sales representatives regularly sell additional products beyond the planograms and displays negotiated by EMD's management at chain stores. This proof is rebutted by the testimony of other chain store corporate representatives, including Ms. Volk from Giant Food and Mr. Krawchuk from Safeway, and store managers, such as Mr. Eshete from Walmart, who

all testified that chain stores' corporate offices afford store managers no leeway to stray from the planogram or to set up unsanctioned displays. Based on all this evidence, the Court finds that Defendants have demonstrated that there is a *possibility*—but not clear and convincing evidence—that sales representatives can make their own sales at chain stores.

2. Primary Duty

Although Defendants established that Plaintiffs do make their own sales at independent stores and might make some of their own sales at chain stores, Defendants have failed to demonstrate by clear and convincing evidence that Plaintiffs' *primary duty* as sales representatives is making sales at either chain stores or independent stores. By contrast, consideration of all the evidence presented in this case suggests that sales representatives are tasked primarily with executing the terms of sales that were previously made by EMD's management and key account managers. The Court accredits Plaintiffs' testimony with demonstrating that sales representatives are primarily occupied with keeping shelves full, keeping shelves clean, and placing orders promptly. The fact that sales representatives are subject to suspension for failure to carry out these duties further illustrates that EMD regards servicing stores as a key responsibility of sales representatives. Indeed, EMD's commission scheme for sales representatives does not differentiate between orders placed to fill chain store space previously negotiated by EMD's management and orders for space beyond what was negotiated by EMD's management. This suggests that, although EMD would undoubtedly welcome the efforts of its sales representatives to sell products beyond the

planogrammed spaces in chain stores, such efforts are ancillary to sales representatives' primary responsibility: ensuring that EMD receives the full benefit of the bargain obtained by EMD's key account managers and management.

Further, Plaintiffs' stocking and shelf-conditioning efforts do not constitute exempt work for purposes of the promotion-work regulation. *See* 29 C.F.R. § 541.503(a). Rather, as the Court noted previously, *see supra* Part III.A.1, these responsibilities appear to be incidental to sales that were already negotiated and executed by EMD's key account managers or management.

At independent stores, the Court finds that, although making sales could theoretically be the primary duty of some sales representatives, Defendants did not demonstrate by clear and convincing evidence that this is *Plaintiffs'* primary duty. In any event, based on Plaintiffs' testimony, the Court finds that they spend or spent the bulk of their time at chain stores. Accordingly, even if Defendants had proven by clear and convincing evidence that making sales is Plaintiffs' primary duty at independent stores, this would not suffice to establish that Plaintiffs' *overall* primary duty as EMD sales representatives is to make sales.

B. Liquidated Damages

The FLSA permits recovery of both unpaid wages and "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). When a plaintiff prevails on a FLSA claim, awarding liquidated damages is "the norm." *Mayhew v. Wells*, 125 F.3d 216, 220 (4th Cir. 1997). A court may refuse to order liquidated damages only if the defendant meets his burden of demonstrating "to the

satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. Courts "place a 'plain and substantial burden' upon the employer" to make this statutory showing. *Mayhew*, 125 F.3d at 220 (quoting *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 357 (4th Cir. 1994)). Determining whether an employer exercised good faith or had reasonable grounds for his belief that he was not in violation of the FLSA is an objective inquiry, 29 C.F.R. § 790.22, and "establishing either element is sufficient to satisfy the statute," *Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 132 (4th Cir. 2015).

In order to demonstrate good faith, an employer may not simply show "ignorance of the prevailing law or uncertainty about its development." *Lockwood v. Prince George's Cnty.*, 58 F. Supp. 2d 651, 658 (D. Md. 1999), *aff'd Lockwood v. Prince George's Cnty.*, 217 F.3d 839 (4th Cir. 2000) (Table). Rather, an employer must "first take active steps to ascertain the dictates of the FLSA and then move to comply with them." *Id.*; *see also Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 712 (E.D.N.C. 2009) (quoting *Roy v. Cnty. of Lexington,* 141 F.3d 533, 548 (4th Cir. 1998)) ("The good faith defense requires that an employer provide adequate proof that it did not take an 'ostrichlike' approach to the FLSA by 'simply remain[ing] blissfully ignorant of FLSA requirements.'"). Courts consider contextual factors that indicate an employer's objective good faith, including "the complexity of the issues, the history of the collective bargaining agreements, and the fact that the [defendant's] compensation practice has been known to the parties for

many years and the subject of bargaining." *Koelker v. Mayor and City Council of Cumberland*, 599 F. Supp. 2d 624, 638 (D. Md. 2009).

The Court finds that Defendants have failed to carry their "substantial burden" of demonstrating good faith or objectively reasonable grounds. Defendants point to the fact that Plaintiffs' commission-based compensation structure was negotiated by the Union, that Ms. Devarie relied on the advice of two accountants regarding the FLSA, and that she reviewed material from the DOL to establish that Defendants acted in good faith. Defendants' failure to investigate the actual daily tasks of sales representatives, however, is dispositive to finding that Defendants acted in good faith or had reasonable grounds to believe that they were in compliance with the FLSA. The Court determined that Ms. Devarie's testimony regarding sales representatives' duties was aspirational in nature and revealed her lack of knowledge as to what sales representatives' daily responsibilities actually entail. Without having a concrete sense of Plaintiffs' daily schedules, Defendants could not have objectively reasonable grounds for believing that sales representatives are covered by the FLSA's outside sales exemption. *See* 29 C.F.R. § 790.22. Accordingly, Plaintiffs are entitled to an award of liquidated damages under 29 U.S.C. § 216(b).

C. Statute of Limitations

The standard statute of limitation for a FLSA claim is two years, but it is extended to three years for "a cause of action arising out of a willful violation." 29 U.S.C. § 255(a). To demonstrate willfulness, Plaintiffs bear the burden of proving that Defendants had actual or constructive notice "of the existence and general

requirements of the FLSA." *Chao v. Self Pride, Inc.*, 232 F. App'x 280, 287 (4th Cir. 2007) (unpublished opinion). A violation is willful if an employer "either 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). Mere negligence or unreasonableness, without evidence of recklessness, does not establish willfulness. *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 358 (4th Cir. 2011) (internal citation omitted). Instead, a party demonstrates willfulness by "choosing to remain ignorant of legal requirements or by learning of those requirements and disobeying them." *Self Pride*, 232 F. App'x at 287.

Although the Court finds that Defendants' failure to investigate sales representatives' daily job responsibilities was unreasonable, *see supra* Part III.B, Plaintiffs do not demonstrate that such failure rose to the level of knowledge or reckless disregard such that Defendants' FLSA violation was willful. *See Desmond*, 630 F.3d at 358. The Court reaches this finding after careful consideration of the full trial record, and especially the testimony of Ms. Devarie, who was impermissibly but credibly uninformed on the topic of how the FLSA applied to her business. Her error was one of neglect, not recklessness or willful misbehavior. As a result, Plaintiffs' claims are subject to the FLSA's standard two-year statute of limitations.

IV. Permanent Injunction

In their Second Amended Complaint, Plaintiffs also sought a permanent injunction barring Defendants from committing further violations of the FLSA. (Second Am. Compl. at 7.) Plaintiffs did not raise this issue at the trial, but even if they had, the Act does not provide for "a

private right of action to enjoin wage-and-hour violations and, to the contrary, grants all such authority to the Department of Labor." *Mich. Corrs. Org. v. Mich. Dep't of Corrs.*, 774 F.3d 895, 903 (6th Cir. 2014). Accordingly, the Court denies Plaintiffs' request for a permanent injunction against Defendants.

V. Damages, Pre- and Post-Judgment Interest, and Costs and Reasonable Attorney's Fees

In light of these rulings, the parties are directed to meet and confer and file a joint submission—to the extent they are able—briefing the Court regarding (1) damages, (2) pre- and post-judgment interest, and (3) costs and reasonable attorney's fees. The parties' submission with respect to damages must include discussion of the time period during which damages should be awarded, the formula to be applied in calculating Plaintiffs' damages, and the amount of damages. Such briefing should reflect the Court's findings that Defendants are liable for liquidated damages, *see supra* Part III.B, and that Plaintiffs' claims are subject to the FLSA's standard two-year statute of limitations, *see supra* Part III.C. The briefing must be confined to the evidence presented in Plaintiffs' Exhibits 7, 8, and 9, to which Defendants stipulated. The parties shall file such joint submission by March 26, 2021.

VI. Conclusion

For the foregoing reasons, an Order shall enter finding that Defendants are liable to Plaintiffs under the Act, Plaintiffs are entitled to an award of liquidated damages, and Plaintiffs' claim is subject to the FLSA's standard two-year statute of limitations. The Court denies Plaintiffs' request for a permanent injunction

against Defendants. In light of these rulings, the parties are directed to meet and confer and file a joint submission—to the extent they are able—briefing the Court regarding (1) damages, (2) pre- and post-judgment interest, and (3) costs and reasonable attorney's fees by March 26, 2021.

DATED this 19th day of March, 2021.

BY THE COURT:

/s/ JAMES K. BREDAR
James K. Bredar
Chief Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FAUSTINO SANCHEZ CARRERA, et al., **Plaintiffs** **v.** **EMD SALES, INC., et al.,** **Defendants**	**CIVIL NO. JKB-17-3066**

ORDER[1]

For the reasons stated in the foregoing Memorandum Opinion, it is hereby ORDERED that:

1. Defendants are jointly and severally liable for their failure to pay Plaintiffs overtime wages in violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* (the "FLSA").
2. Defendants must pay liquidated damages pursuant to 29 U.S.C. § 216(b).
3. Plaintiffs' claims are subject to the FLSA's standard two-year statute of limitations under 29 U.S.C. 255(a).
4. The Court DENIES Defendants' request for a permanent injunction barring Defendants from

[1] A final Order and Judgment will issue upon the Court's determination of the damages, pre- and post-judgment interest, and costs and attorney's fees to be awarded in this case.

committing further violations of the FLSA.

5. In light of these rulings, the parties are directed to meet and confer and file a joint submission—to the extent they are able—briefing the Court regarding (1) damages, (2) pre- and post-judgment interest, and (3) costs and reasonable attorney's fees. The parties' submission with respect to damages must include discussion of the time period during which damages should be awarded, the formula to be applied in calculating Plaintiffs' damages, and the amount of damages. Such briefing should reflect the Court's findings that Defendants must pay liquidated damages and that Plaintiffs' claims are subject to the FLSA's standard two-year statute of limitations. The briefing must be confined to the evidence presented in Plaintiffs' Exhibits 7, 8, and 9, to which Defendants stipulated. The parties shall file such joint submission by March 26, 2021.

DATED this 19th day of March, 2021.

BY THE COURT:

/s/ JAMES K. BREDAR
James K. Bredar
Chief Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FAUSTINO SANCHEZ CARRERA, et al.,	
Plaintiffs	
v.	
EMD SALES, INC., et al.,	**CIVIL NO. JKB-17-3066**
Defendants	

MEMORANDUM

Plaintiffs Faustino Sanchez Carrera, Jesus David Muro, and Magdaleno Gervacio filed suit against Defendants E.M.D. Sales, Inc. ("EMD"), E&R Sales and Marketing Services, Inc. ("E&R"), and Elda M. Devarie, alleging a violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA" or "the Act"), for failure to pay overtime wages. Plaintiffs seek back wages, liquidated damages, costs and reasonable attorneys' fees, and a permanent injunction to prevent Defendants from continuing to violate the FLSA. 29 U.S.C. §§ 216(b), 217. Now pending before the Court are Defendants' Motion for Summary Judgment (ECF No. 97), Plaintiffs' Cross-Motion for Partial Summary Judgment (ECF No. 104), Plaintiffs' Motion to Seal Exhibit 15 of Plaintiffs' Motion for Partial Summary Judgement (ECF No. 106), and Plaintiffs' Motion to Strike Defendants' Summary Judgment Exhibits G9, G10, G11 and G12 in their entirety and Exhibit G ¶¶ 14-17 (ECF No. 109). No hearing is

required. *See* Local Rule 105.6 (D. Md. 2018). For the reasons set forth below, the Defendants' Motion for Summary Judgment will be granted in part and denied in part, Plaintiffs' Cross-Motion for Partial Summary Judgment will be denied, Plaintiffs' Motion to Seal will be denied, and Plaintiffs' Motion to Strike will be granted in part and denied in part.

I. Background

Mr. Carrera and Mr. Gervacio are sales representatives for EMD, a company that distributes Latin American, Caribbean, and Asian food products to stores throughout the Washington metropolitan area. (Def. M.S.J. Mem. at 1, ECF No. 97-1; Pl. M.S.J. Exh. 1 ¶ 1, Exh. 7 ¶ 1, ECF. No. 104.) Mr. Muro worked as an EMD sales representative until August 2017. (Pl. M.S.J. Exh. 8 ¶ 1.) Elda Devarie is EMD's President and Chief Executive Officer. (Def. M.S.J. Exh. A at 4.) Ms. Devarie also owns E&R, a separate company which provides EMD with merchandising services once EMD delivers products to its customers. (Def. M.S.J. Mem. at 3; Pl. M.S.J. Mem. at 6, Exh. 16 at 36, ECF No. 108.) Plaintiffs allege that Defendants failed to pay them overtime wages pursuant to the FLSA. Defendants argue that Plaintiffs are subject to the FLSA's outside sales exemption, which exempts employees from overtime pay so long as their primary duty is making sales and they generally work outside of the office in furtherance of those sales. 29 C.F.R. § 541.500(a).

Sales representatives at EMD are represented by the United Food and Commercial Works Union, Local 400 ("Union"). (Def. M.S.J. Mem. at 2, Exh. B.) As provided in the Union Agreement negotiated between the Union and Ms. Devarie, a sales representative's entire salary

derives from commissions for the sale of EMD products. (Def. M.S.J. Exh. B at 12.) Sales representatives spend most of their time outside of the office visiting the stores on their route, and EMD does not track the hours sales representatives work. (Def. M.S.J. Mem. at 5, Exh. B at 12; Pl. M.S.J. Exh. 16 at 42, 45.) Twice a week, EMD holds conference calls for the sales representatives, which "are directed at specific EMD products that should be pushed by the outside sales representatives and other issues designed to help the sales representatives increase their sales of EMD products to their customers." (Def. M.S.J. Exh. G ¶ 8.) Sales representatives also attend a sales meeting at EMD every three weeks, which includes information on new EMD products and products EMD is "pushing" to stores, as well as updates on sales representatives' personal sales performance. (*Id.* ¶ 7.)

EMD provides food products to independent stores as well as larger chain stores, such as Walmart and Giant Food. (*See, e.g.*, Pl. M.S.J. Exh. 2 ¶ 4, Exh. 12.) EMD's sales representatives can try to open new accounts by pitching EMD products to independent stores, thereby adding stores to their sales route and increasing their sales. (*See* Pl. M.S.J. Exh. 1 ¶ 31; Def. M.S.J. Exh. C at 120:3-9.) At chain stores, by contrast, other EMD employees, including Ms. Devarie and her son, Roberto Devarie, establish the initial business relationship and negotiate floor space for EMD products at that time. (Pl. M.S.J. Exh. 1 ¶ 7. *See also* Pl. M.S.J. Exh. 2 ¶ 12, Exh. 3 ¶ 12.) In addition to sales representatives, EMD also employs key account managers, who negotiate prices and space allotments with EMD's chain store customers. (Pl. M.S.J. Exh. 1 ¶ 7.) Key account managers also work to convince chain stores to purchase new products from

EMD in addition to those they already sell. (*Id.*) At chain stores, the role of the sales representative is to arrange products, stock and condition shelves, take orders for new products, and try to obtain more space for EMD on the salesfloor and thereby sell more products. (Pl. M.S.J. Exh. 1 ¶¶ 3-7, Exh. 11.)

While it is undisputed that EMD sales representatives have unlimited ability to sell EMD products to independent stores (*see* Pl. M.S.J. Exh. 16 at 72), the parties dispute whether sales representatives can sell additional products or gain additional shelf space at chain stores. Chain stores rely on planograms, which are detailed maps of the products on the salesfloor, to determine what products to sell and where to place these products in the store. (*See e.g.,* Pl. M.S.J. Ex. 2 ¶ 6 (discussing planograms at Giant Food), Exh. 12 ¶ 15 (discussing planograms at Walmart), Exh. 3 ¶ 17 (discussing planograms at Safeway).) These planograms are created at the corporate level, and store managers have little to no leeway to alter the placement or mix of products as dictated by the planogram. (*See, e.g.*, Pl. M.S.J Ex. 2 ¶¶ 13, 15-16, Exh. 12 ¶ 15, Exh. 3 ¶ 17.) Accordingly, Plaintiffs state that only in "rare" situations are sales representatives able to negotiate for more space to sell additional products at chain stores. (Pl. M.S.J. Mem. at 4; *see* Pl. M.S.J. Exh. 7 ¶ 7.) Instead of making their own sales at chain stores, Plaintiffs state that they are simply taking orders to restock products or refill space that was already sold by another EMD employee. (Pl. M.S.J. Exh. 1 ¶¶ 4-5, Exh. 7 ¶¶ 4-5, Exh. 8 ¶¶ 4-5.) Plaintiffs explain that over the last five years they have spent at least 97% of their time servicing chain stores, and that over 96% of their total product volume ordered and

stocked during this time has derived from these chain stores. (PL M.S.J. Exh. 1 ¶ 2, Exh. 7 ¶ 2, Exh. 8 ¶ 2, Exh. 9.) Therefore, Plaintiffs argue, their ability to secure any sales on their own is extremely limited. (Pl. M.S.J. Mem. at 3-4.)

Defendants contest this characterization of the sales representative's job and provide declarations from other sales representatives stating that they have been successful in negotiating additional space for EMD products in chain stores. (Def. M.S.J. Exh. D at 45-49.) Juan Pablo Barreno, who has been a sales representative at EMD for twenty years, testified he spends 80% of his time on sales, and only 20% on "packing up" tasks. (*Id.* at 164:1-2.) He testified that building relationships with store managers has helped him to sell more EMD products. (*Id.* at 161–63.) Another sales representative, Mayra Palma, testified that her relationship with the grocery manager also enabled her to gain additional display space for EMD products at Giant Food. (Def. M.S.J. Exh. F at 62-64.) Mr. Barreno explained that while his ability to place more products on the shelf at chain stores is limited due to planograms, he is not limited in his ability to order additional products for the floor. He explained that while the shelves can only hold so much product, "we can create more space if we want," and "if we can create a secondary location, then we can send one case, twenty, thirty cases." (Def. M.S.J. Exh. D at 153-54.) Mr. Barreno did note, however, that over the last few years stores have started reducing the amount of "back stock" they will hold for the floor (*id.* at 154-55), making this more difficult.

The crux of the parties' dispute is whether the primary duty of sales representatives is to make sales.

(Def. M.S.J. Mem. at 3; Pl. M.S.J. Mem. at 3.) Plaintiffs state their primary duty is not making sales, but rather is "perform[ing] labor-intensive promotional activities which are incidental to sales made by other EMS personnel at chain stores, such as re-stocking, ordering and perform[ing] related functions, including replenishing depleted product, physically stocking product, conditioning space, and writing credits for expired or damaged product they remove." (Pl. M.S.J. Mem. at 3-4; *see also* Pl. M.S.J. Exh. 1 ¶ 5, Exh. 11 at 9.) Defendants state that the primary duty of sales representatives is making sales and that they are "responsible for the sale of EMD products in their assigned stores." (Def. M.S.J. Mem. at 3.)

II. Evidentiary Issues

Before the Court considers the merits of the parties' cross-motions for summary judgment, the Court first considers the parties' challenges to the proffered evidence.

a. Plaintiffs' Motion to Strike

Plaintiffs have filed a motion to strike Exhibits G9-G12 and parts of Exhibit G from Defendants' motion for summary judgment and supporting memorandum of law. (Pl. Mot. Strike, ECF No. 109.) Exhibit G9 is a spreadsheet titled "Total Sales Reps – Total Accounts," which contains the total dollar amount of sales representatives' product sales for 2015 to 2018. (ECF No. 97-18.) Exhibit G10 is a report on sales representatives' gross wages for 2015 to 2018 which contains data on sales representatives' commissions during those years. (ECF No. 97-19.) Exhibit G11 is a sales report for another sales representative, Miguel Perez, for the years 2014 to 2017.

(ECF No. 97-20.) Exhibit G12 is an email from Ivan Aguilar (an EMD employee) to Elda Devarie and Carmen Perez (another EMD employee) containing what is purportedly a list of new stores opened by the three Plaintiffs. (ECF No. 97-21.) Plaintiffs argue that these exhibits should be excluded under Federal Rule of Civil Procedure 37 and Federal Rule of Evidence 1006. Defendants argue that these exhibits are properly admissible business records.

Plaintiffs also argue that Exhibit G ¶¶ 14-17, the Affidavit of Freddy Urdaneta Olivares (ECF No. 97-9), should be stricken because they contain lay opinion testimony which is not based on Mr. Urdenata's personal knowledge, in violation of Federal Rule of Evidence 701. (Pl. Mot. Strike Mem. at 8-9.) Defendants contest this characterization of Mr. Urdenata's affidavit and state that his responsibilities as EMD's Sales Director demonstrate that he has personal knowledge about the statements contained in his affidavit. (Mot. Strike Resp. at 3-4, ECF No. 110.) The Court will address each of these challenges in turn.

1. Exhibits G9-G11

Plaintiffs argue that Exhibits G9-G11 should be stricken because Defendants refused to provide discovery into sales and commissions made by sales representatives other than Plaintiffs during discovery, even though Plaintiffs specifically asked for this information. (Pl. Mot. Strike Mem. at 1, 3.) Rule 37(c) states: "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Though Defendants argue in

response that these exhibits should be admitted as business records (Mot. Strike. Resp. ¶ 11), Rule 37 contains no exception for business records.[1] Fed. R. Civ. P. 37.

Exclusion of evidence does not require "a finding of bad faith or callous disregard of the discovery rules." *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003). Though district courts have "broad discretion" to decide whether a failure to disclose was substantially justified or harmless, the Fourth Circuit has held courts "should" consider five factors:

> (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent· to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the non-disclosing party's explanation for its failure to disclose the evidence.

Id. at 597. As the parties who declined to disclose this information during discovery, Defendants bear the burden to establish that nondisclosure was substantially justified or harmless. *Wilkins v. Montgomery*, 751 F.3d 214, 222 (4th Cir. 2014).

During discovery, Plaintiffs specifically asked for documents containing information on sales representatives' commissions and sales. (Pl. Mot. Strike

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[1] Though Defendants state that Exhibits G9, G10, and G12 are business records (Mot. Strike. Resp. ¶ 11), the Court believes Defendants meant to refer to Exhibit G11 and not Exhibit G12. Regardless, because business records are not excluded from the dictates of Rule 37, the typo is of no import.

Mem. at 3.) Defendants argue that the information contained in Exhibits G9-11 is not a surprise because Plaintiffs "had ample opportunity to and did discover this information through the voluminous ESI discovery that occurred in this case." (Mot. Strike Resp. ¶ 3.) In support of this, Defendants cite to the affidavit of Nicholas Blackmore, attached as Exhibit 10 to Plaintiffs' cross-motion for summary judgment. (Pl. M.S.J. Exh. 10.) Mr. Blackmore explains how he made certain calculations based on "an Excel file" Defendants produced which contained data related to sales made by sales representatives from 2014 to 2015. (*Id.* ¶¶ 5-6.) As Plaintiffs highlight, Mr. Blackmore's affidavit refers to one document with information from 2014 to 2015. (Mot. Strike Reply at 1-2.) Defendants do not assert that any other information related to non-Plaintiff sales representatives' sales or commissions was produced during discovery, nor do they identify any documents they produced which contain such information. Instead, Defendants argue that Plaintiffs could have deposed other sales representatives on these topics. (Mot. Strike Resp. ¶ 10.) Not only did Plaintiffs not have access to the data in question during the depositions, but discovery had also been "effectively limit[ed] . . . to the Plaintiffs only" and Defendants affirmatively redacted information about other sales representatives' sales from the documents they did provide during discovery. (Mot. Strike Reply at 3, Ex. B, Ex. C, Ex. D; Order, ECF No. 38.) The Court therefore finds that the factor of surprise argues in favor of exclusion of these exhibits.

Defendants do not address any of the remaining factors. Defendants have not offered any explanation for their failure to disclose this information prior to the close

of discovery and the filing of summary judgment motions, which argues strongly in favor of exclusion. Nor have Defendants addressed the ability of Plaintiffs to cure the surprise, which Plaintiffs assert would require re-opening discovery and further delaying adjudication of this case. (Pl. Mot. Strike Mem. at 4). Defendants also failed to address the disruption to the trial schedule that would result from permitting such evidence to be. introduced at this point. While there is no trial scheduled at this time, Defendants did not produce this information until they filed their opening summary judgment motion. Potentially re-opening discovery and allowing supplemental briefing would likely delay the trial in this matter, but since there is no trial date set this factor only leans slightly in favor of exclusion. *See e.g., Jones v. Chapman*, Civ. No. ELH-14-2627, 2017 WL 2266221, at *6-7 (D. Md. May 24, 2017) (finding no abuse of discretion in striking an expert report produced seven months before trial but only two weeks before summary judgment motions); *MCI Commc'ns Servs., Inc. v. Am. Infrastructure-MD, Inc.*, Civ. No. GLR-11-3767, 2013 WL 4086401, at *9 (D. Md. Aug. 12, 2013) (finding this factor was "split" between the two parties when information was first produced "in the midst of competing cross-motions for partial summary judgment" but no trial date had been set). Lastly, Defendants fail to address the relative importance of the evidence at issue. Based on the Court's review of the record, the Court does not find that these exhibits are dispositive or would alter its conclusions. Other admissible exhibits contain general information on sales representatives' sales and commissions, which are sufficient to inform the court that sales representatives' commissions vary based on the products they sell. (*See, e.g.,* Def. M.S.J. Exh. B at 12.)

Defendants have failed to address most of the factors that courts consider in determining whether to exclude evidence. Accordingly, the Court finds that Defendants have failed to meet their burden to demonstrate Exhibits G9-11 should not be excluded under Rule 37.[2] Because Defendants have not shown their failure to produce this information during discovery was substantially justified or harmless, the Court will grant Plaintiffs' motion to strike Exhibits G9-G11 to Defendants' motion for summary judgment.

2. Exhibit G12

Exhibit G12 is an email from EMD employee Ivan Aguilar to Elda Devarie and another EMD employee. Mr. Aguilar's email contains several charts with data about new accounts opened by the three Plaintiffs. Mr. Aguilar writes, "Below you will find all the stores that were open in Retalix for each sales rep." (Def. M.S.J. Exh. G12 at 1.) Defendants do not provide a certification from Mr. Aguilar. Instead, Defendants rely on a supplemental affidavit from EMD's Sales Director, Mr. Urdaneta, to certify this document. (Mot. Strike Resp. at 3, Exh. H.) In his supplemental affidavit, Mr. Urdaneta states that "[Mr.] Aguilar specifically references that the information was obtained through 'Retalix' which is a software application that EMD uses to manage its data base [sic]. Information in EMD's data base, like the information in Aguilar's email to Ms. Devarie, and the e-mail is kept in the ordinary course of business and is accurate and reliable as a business record." (*Id.* Exh. H ¶ 6.)

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[2] Because the Court strikes these exhibits under Federal Rule of Civil Procedure 37, it does not need to address whether such records would be inadmissible under Rule 1006.

Plaintiffs argue that Exhibit G12 should be stricken because it is an unauthenticated, unsworn statement. (Pl. Mot. Strike Mem. at 6, 8.) However, exhibits need not be in admissible form to be considered at summary judgment, provided they could be put in admissible form. Fed. R. Civ. P. 56(c)(2); *Kurland v. ACE Am. Ins. Co.*, Civ. No. JKB-15-2668, 2017 WL 354254, at *3 n.2 (D. Md. Jan. 23, 2017). Here, Plaintiffs do not allege that Exhibit G12 could not be made admissible by trial, nor do Defendants provide any information suggesting they would be unable to properly authenticate this information. Because nothing suggests this information could not be put in an admissible form at trial, the Court denies Plaintiffs' motion to strike Exhibit G12.[3]

3. Exhibit G

Plaintiffs have also asked the Court to strike four paragraphs of Freddy Urdaneta's affidavit (Def. M.S.J. Exh. G). Plaintiffs argue that these paragraphs contain lay opinion testimony which is not based on Mr. Urdaneta's personal knowledge. (Pl. Mot. Strike Mem. at 8-9.) It is well established that "summary judgment

[3] Defendants argue that Exhibit G12 is admissible as a business record. However, the mere fact that this email was sent within a business is not sufficient to qualify it as a business record. *United States v. Cone*, 714 F.3d 197, 220 (4th Cir. 2013). In addition, nothing in Mr. Urdaneta's affidavit suggests compiling a report like the one contained in Exhibit G12 about the three Plaintiffs is a routine business practice at EMD, as opposed to something done solely for litigation. *See Certain Underwriters at Lloyd's v. Sinkovich*, 232 F.3d 200, 205 (4th Cir. 2000) ("The absence of trustworthiness is clear ... when a report is prepared in the anticipation of litigation because the document is not for the systematic conduct and operations of the enterprise but for the primary purpose of litigating."). Regardless, the Court need not address this argument because it finds that there is no reason the email could not be put in admissible form at trial.

affidavits cannot be conclusory or based upon hearsay." *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996) (citations omitted). Mr. Urdaneta's affidavit "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

Mr. Urdaneta is the Sales Director and former Marketing Manager for EMD. (Def. M.S.J. Exh G ¶ 2.) In this role, he says he is "familiar with the various sales activities that EMD uses to help support its outside sales representatives sell more EMD products to independent stores and supermarket chains, cash and carry wholesalers and restaurants." (*Id.* ¶ 3.) Mr. Urdaneta explains he is "personally familiar with the sales efforts and performance of the Outside Sales Representatives who work at EMD," and "[t]he performance of the Outside Sales Representatives are regularly reviewed in EMD's Sales Meetings and weekly conference calls." (Mot. Strike Resp. Exh. H ¶ 3.) Mr. Urdaneta also explains, "[a]s EMD's Sales Director, on a regular basis, I review the individual sales performance of the individual Outside Sales Representatives by tracking their sales through EMD's sales records ... I can and do use information from that data base to track an individual's sales to EMD's customers." (*Id.* at ¶ 4.)

This Court has held that an "affiant's personal knowledge may be based on review of files, if the testimony states facts reflected by the files and does not give 'inferences, opinions and surmises.'" *Howard Acquisitions, LLC v. Giannasca New Orleans, LLC*, Civ. No. WDQ-09-2651, 2010 WL 3834917, at *3 (D. Md. Sept. 28, 2010) (quoting *Lee v. N.F. Invests., Inc.*, Civ. No. 99-

426, 2000 WL 33949850, at *5 n.2 (E.D.Mo. Mar. 15, 2000)). However, the Fourth Circuit has cautioned that affidavits based on the review of documents have "questionable value" where there is not "direct, personal knowledge of the underlying facts." *Sutton v. Roth,* 361 F. App'x 543, 550 n.7 (4th Cir. 2010).

As explained above, the Court excludes Exhibits G9-G11 from consideration under Rule 37. Accordingly, the Court will also exclude Exhibit G ¶¶ 14-16 to the extent the information within those paragraphs is based on Exhibits G9-G11 and not Mr. Urdaneta's personal knowledge. Fed. R. Civ. P. 37(c). On separate grounds, the Court also strikes Mr. Urdaneta's statement in ¶ 15: "If all of the outside sales representatives were only performing the same merchandising services, there would not be such a wide variation in the annual commissions earned by the outside sales representatives." (Def. M.S.J. Exh. G ¶ 15.) Mr. Urdaneta stated during his deposition that he does not track what component of sales representatives' sales derive from their own personal efforts versus those that derive from the efforts of other EMD employees to negotiate space or sales. (Pl. M.S.J. Exh. 29 at 77.) Accordingly, the Court will strike this portion of ¶ 15 on the separate ground that it is a Jay opinion not based on Mr. Urdaneta's personal knowledge as required by Federal Rule of Civil Procedure 56.

The Court declines to strike Exhibit G ¶ 17, which contains information about the new accounts opened by Plaintiffs as listed in Exhibit G 12. As explained above, the Court found that the information in Exhibit G12 may be made admissible for trial. *Supra* 9-10. Mr. Urdaneta's testimony in ¶ 17 "states facts reflected by the files." *Howard Acquisitions*, Civ. No. WDQ-09-2651, 2010 WL

3834917, at *3. Mr. Urdaneta states that Plaintiffs opened a certain number of new accounts, as provided in Exhibit G12, which provide "opportunities to sell additional EMD products and increase [their] commission[s]." (Def. M.S.J. Exh. G ¶ 17). In ¶ 9, Mr. Urdaneta explains that sales representatives' "commission payments [are] based on the Collective Bargaining Agreement EMD has with the Union. The more EMD products they sell, the more commissions they earn." (*Id.* ¶ 9.) Mr. Urdaneta also establishes through his job description as Sales Director that he has personal knowledge about sales representatives' general performance. Accordingly, the Court declines to strike ¶ 17.

In summary, the Court will grant Plaintiffs' motion to strike Exhibits G9-G11 and Exhibit G ¶¶ 14-16 to the extent these paragraphs are based on information from Exhibits G9-G11 and not on Mr. Urdaneta's personal knowledge. The Court will also strike the last sentence of ¶ 15 because it is not based on Mr. Urdaneta's personal knowledge. The Court will deny Plaintiffs' motion to strike Exhibit G12 and Exhibit G ¶ 17.

4. Plaintiffs' Exhibits 2, 3, 4, 5, 6, 10, 12, and 13

Defendants also claim that Plaintiffs' Exhibits 2, 3, 4, 5, 6, 12, and 13 are inadmissible because they are not based on the declarants' personal knowledge. (Def. M.S.J. Reply at 9-12.) Rule 56 requires that affidavits submitted in support of summary judgment motions be based on personal knowledge and "show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). "[S]tatements based solely on information and belief" are not sufficient to meet the standards of Rule 56. *Cottom v. Town of Seven Devils*, 30

F. App'x 230, 234 (4th Cir. 2002). Affidavits "contain sufficient information ... to establish that the affiants' statements [a]re made based on personal knowledge" where the affidavits contain "a description of the affiants' job titles and duties" and there is no evidence the "affiants were not competent to testify." *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 135 n.9 (4th Cir. 2002). There is no requirement affidavits specifically state they are based on personal knowledge when these requirements are met. *Id.*

Defendants first claim that Exhibits 2-6 and 12-13 are not based on the personal knowledge of the declarant. Defendants state that these affidavits contain some identical language and it is "clear" they were prepared by attorneys and not the declarants themselves, citing to specific passages in Exhibits 4, 5, 6, 12, and 13.[4] (Def. M.S.J. Reply at 9-10.) However, "most declarations submitted in connection with civil litigation in state and federal courts are prepared by attorneys for clients and witnesses, and thereafter executed by the clients and/or witnesses under penalty of perjury." *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 959 (C.D. Cal. 2015), *aff'd sub nom. Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), *and aff'd sub nom. Briseno v. ConAgra Foods, Inc.*, 674 F. App'x 654 (9th Cir. 2017); *see also, Kourouma v. Holder*, 588 F.3d 234, 242-243 (4th Cir. 2009) (finding no impact on credibility where asylum applicant's affidavit was substantially similar to that of a separate applicant). Therefore, the fact that the declarations at issue here use similar language and may have been prepared by an attorney does not mean those affidavits

[4] Defendants do not explain why Exhibits 2 and 3 fail to meet the Rule 56 standard.

are inaccurate or not based upon the declarants' personal knowledge, as required by Rule 56.

Second, Defendants claim that Exhibits 4 and 12 are inadmissible because the declarants state their testimony is based on "my understanding," (Pl. M.S.J. Exh. 4 ¶ 13), and "information and belief" (Pl. M.S.J. Exh. 12 ¶¶ 12, 17), which Defendants argue is not the same as being based on personal knowledge. (Def. M.S.J. Reply at 10.) With regards to Exhibit 4, the Declaration of Robert Weschler, Mr. Weschler explains that it is his "understanding" that EMD sales representatives perform a variety of duties at Safeway stores, including writing orders, arranging EMD products, and ensuring EMD products are tagged with the correct price. (Pl. M.S.J. Exh. 4 ¶ 13). As Mr. Weschler explains earlier in his affidavit, he has worked for Safeway for approximately 40 years and has served as a store director for half of that time. (*Id.* ¶ 4.) Mr. Weschler states he has been familiar with EMD for five years and that EMD sends sales representatives to his store twice a week. (*Id.* ¶¶ 5, 11.) He also describes the work he has observed EMD sales representatives doing and discusses how he places orders with them. (*Id.* ¶¶ 19-21.) Based on Mr. Weschler's job experience and history working with EMD, Mr. Weschler has established that his statements were based on personal knowledge.

In Exhibit 12, the Declaration of Jigsa Eshete, Mr. Eshete explains that he has been the general manager for a Walmart store since 2017, and prior to that served as a co-manager for six years. (Pl. M.S.J. Exh. 12 ¶ 3). He states he is "familiar with Iberia Foods," which "supplies products to my [s]tore," and that he has seen Mr. Carrera in his store "for the purpose of ordering, re-ordering and/or stocking the shelves with products supplied by

Iberia Foods."[5] *(Id.* ¶¶ 11, 13.) However, he states that he "had never heard of EMD" before being contacted for a deposition. (*Id.* ¶ 7.) Defendants challenge two paragraphs in Mr. Eshete's Declaration. Mr. Eshete states in his Declaration, "[b]ased on information and belief, Iberia Foods is a Direct Service Distribution ... supplier that distributes or sells food and other related products to Walmart." (*Id.* ¶ 12). Mr. Eshete further states, "[b]ased on information and belief, Iberia Foods hires EMD Sales, Inc. as a third party vendor to service the space allotted to each of them." (*Id.* ¶ 17). Plaintiffs respond that Mr. Eshete's description of his overall job duties demonstrates that he has personal knowledge of the information contained in ¶¶ 12 and 17.

"[S]tatements based solely on information and belief do not satisfy the requirements of Rule 56." *Cottom*, 30 F. App'x at 234. Because ¶ 17 does not contain any information suggesting Mr. Eshete's statement about Iberia's relationship with EMD comes from his own knowledge and job experience—and he admits he had not heard of EMD prior to his involvement in this case—the Court finds that ¶ 17 is inadmissible. Similarly, the court finds that ¶ 12 is also inadmissible. Mr. Eshete fails to explain how he had personal knowledge that Iberia Foods was a direct service distribution supplier, and instead relied "on information and belief" for this fact, in contravention of Rule 56. Though Mr. Eshete explains he is responsible for "overseeing the operations of the entire

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[5] Iberia Foods is food manufacturer and distributor. (Pl. M.S.J. Exh. 6 ¶ 4.) EMD purchases products from Iberia and then resells and distributes those products in the mid-Atlantic region. (*Id.* ¶ 5.) At Walmart, "Iberia develops and maintains an exclusive direct relationship and engages EMO to service the stores." (*Id.* at 6.)

store" (Pl. M.S.J. Exh. 12 ¶ 4), and "for making sure that the entire [store] is properly and adequately stocked" (*id.* ¶ 6), nothing in his affidavit states that Mr. Eshete has knowledge about the distribution strategies used by companies supplying products to Walmart.

As to the general argument that Mr. Eshete's declaration is not based on personal knowledge because he had never heard of EMD prior to being contacted for a deposition, his statements are based on observations which did not require him to know for which company Mr. Carerra or the other EMD sales representatives he saw were employed. (*See, e.g., id.* ¶¶ 21, 24.) Therefore, it is clear the remainder of Mr. Eshete's declaration is based on his personal observations, and the fact that Mr. Eshete had not heard of EMD prior to his involvement in this case does not alter that conclusion.

If a portion of an affidavit is deemed inadmissible, the court may strike only that portion and admit the remaining admissible portions of the affidavit. *See Evans*, 80 F.3d at 962; Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure§ 2738 (3d ed. 2006) ("The court will disregard only the inadmissible portions of a challenged affidavit and consider the rest of it"). Therefore, the Court will only exclude ¶¶ 12 and 17 of Exhibit 12.

Third, Defendants argue that Exhibit 10, the affidavit of Nicholas Blackmore, cannot be admitted under Federal Rule of Evidence 1006 to authenticate the data summaries he created, attached as Tabs A-K of his affidavit. (Def. M.S.J. Reply at 10-11.) Defendants argue that Mr. Blackmore does not provide information about his "educational background or experience that would suggest, let alone establish, that he is competent to

prepare" these summaries. (*Id.* at 10.) However, there is no requirement that Plaintiffs provide this information in order for Tabs A-K to be admissible. Instead, Rule 1006 permits data summaries into evidence if 1) the data being summarized is "voluminous," 2) the summarization is "an *accurate* compilation of the voluminous records sought to be summarized," and 3) the underlying evidence being summarized is "otherwise admissible in evidence." *United States v. Janati*, 374 F.3d 263, 272 (4th Cir. 2004).

In his affidavit, Mr. Blackmore lists the documents he received from the Defendants which he used in making his summaries. (Pl. M.S.J. Exh. 10 ¶¶ 2, 5.) In addition, he states that the order data he relied on was mailed to the Defendants on May 20, 2019. *(Id.* ¶ 18). Defendants do not contest that the order data on which Mr. Blackmore relied is voluminous, which is supported by Mr. Blackmore's assertion that the data contained thousands of rows of data. (*Id.* ¶¶ 4, 6.) Nor do Defendants argue that the data on which he relied would be inadmissible. Defendants only argue that Mr. Blackmore's summaries may not be accurate. However, not only does Mr. Blackmore clearly describe his process of calculation for the summaries provided in each Tab (*id.* ¶¶ 4, 6-17), but Mr. Blackmore also separately mailed the underlying documents to Defendants to enable them to check the accuracy for themselves (*id.* ¶ 18). Nothing in Defendants briefing suggests they have found any issues with the accuracy of Mr. Blackmore's calculations. Therefore, because Mr. Blackmore's affidavit establishes that the records he summarizes are voluminous, the summary is accurate, and the underlying records are otherwise admissible, Tabs A-K are admissible under Federal Rule of Evidence 1006.

In conclusion, the Court will strike ¶¶ 12 and 17 from Plaintiffs' Exhibit 12 to their cross-motion for summary judgment. The Court will also grant Plaintiffs' motion to strike with regards to Defendants' Exhibits G9-G11, as well as ¶¶ 14-16 of Exhibit G to the extent these paragraphs rely on information from these stricken exhibits and not the declarant's personal knowledge. The Court will also strike the last sentence of Exhibit G ¶ 15.

The Court will now consider the merits of the parties' summary judgment briefings based on these rulings.

III. Cross-motions for Summary Judgment

a. Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing predecessor to current Rule 56(a)). The burden is on the moving party to demonstrate the absence of any genuine dispute of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). If sufficient evidence exists for a reasonable jury to render a verdict in favor of the party opposing the motion, then a genuine dispute of material fact is presented and summary judgment should be denied. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to the opposing party. *Scott v. Harris*, 550 U.S. 372, 378 (2007); *Iko v. Shreve*, 535 F.3d 225, 230 (4th Cir. 2008). Still, the opposing party must present those facts and cannot rest on denials. The opposing party must set forth specific facts, either by affidavit or other evidentiary

showing, demonstrating a genuine dispute for trial. Fed. R. Civ. P. 56(c)(1). Furthermore, the opposing party must set forth more than a "mere ... scintilla of evidence in support of [his] position." *Anderson,* 477 U.S. at 252.

b. Fair Labor Standards Act Liability

The FLSA was enacted in order to provide employees with certain protections against their employers. *See Morrison v. Cty. of Fairfax*, 826 F.3d 758, 761 (4th Cir. 2016). Pursuant to the Act, employers must "compensate employees for hours in excess of 40 per week at a rate of 1 ½ times the employees' regular wages." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012) (citing 29 U.S.C § 207(a)). Several job categories, including outside salesmen, are exempt from the FLSA's overtime requirements. 29 U.S.C.A. § 213. The FLSA defines "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition," 29 U.S.C.A. § 203(k), but the Act does not directly define the term "outside salesman." *Christopher*, 567 U.S. at 147. Congress instead "delegated authority to the [Department of Labor (DOL)] to issue regulations" defining the term. *Id.* at 147.

The Supreme Court has identified three regulations that are "directly relevant" to the outside salesman exemption: the general regulation, the sales regulation, and the promotion-work regulation. *Id.* at 148. The general regulation states that an outside salesman is an employee:

> (1) Whose primary duty is: (i) making sales ... or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or

> customer; and (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

29 C.F.R. § 541.500. In other words, "an outside salesman is any employee whose primary duty is making any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." *Christopher*, 567 U.S. at 148. "The sales regulation restates the statutory definition of sale ... and clarifies that '[s]ales within the meaning of [29 U.S.C. § 203(k)] include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.'" *Id.* at 148-49 (quoting 29 C.F.R. § 541.501(b)).

"[T]he promotion-work regulation identifies '[p]romotion work' as 'one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed.'" *Id.* at 149 (quoting § 541.503(a)). "Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work," but "promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." 29 C.F.R. § 541.503(a). Relevant to the case at hand, the DOL provides the following example of an individual whose work would not qualify as exempt under the outside salesman exemption:

> Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults

> with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. ***The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales.*** Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

29 C.F.R. § 541.503(c) (emphasis added). For Plaintiffs' work re-arranging, restocking, and removing products at chain stores to qualify as exempt, it must be incidental to their own sales.

The main disagreement in the cross-motions for summary judgment is about whether a sales representative's primary duty is sales. Primary duty is "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). As the DOL has explained:

> Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from

> direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

29 C.F.R. § 541.700(a). "The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee." 29 C.F.R. § 541.700(b). If an employee spends more than half the time "performing exempt work," he "will generally satisfy the primary duty requirement." *Id.*

The Sixth Circuit has also identified 29 C.F.R. § 541.504, titled "Drivers who sell," as a relevant regulation when determining whether food product salesmen qualify as outside salesman. *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 582 (6th Cir. 2014). This regulation provides several factors for courts to consider when deciding whether drivers qualify for the outside sales exemption. 29 C.F.R. § 541.504(b). These factors include:

> a comparison of the driver's duties with those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; description of the employee's occupation in collective bargaining agreements; the employer's specifications as to qualifications for hiring; sales training; attendance at

> sales conferences; method of payment; and proportion of earnings directly attributable to sales.

Id. Because DOL considers these factors relevant as to whether drivers qualify as outside salesman, this Court will also consider them in evaluating whether Plaintiffs qualify as outside salesmen and, consequently, are exempt.

The parties dispute the burden Defendants bear to demonstrate that the outside sales exemption applies to Plaintiffs. Defendants argue they need only prove the exemption applies by a preponderance of the evidence, and cite to *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), for this proposition. (Def. M.S.J. Reply at 2.) However, nothing in the *Encino* decision relates to evidentiary burdens, nor does it even mention the phrase "preponderance of evidence." Plaintiffs argue that Defendants must instead prove that the outside sales exemption applies by clear and convincing evidence. (Pl. M.S.J. Mem. at 16-17.) This is in line with longstanding Fourth Circuit precedent. *See, e.g., Jones v. Va. Oil Co.*, 69 F. App'x 633, 636 (4th Cir. 2003) ("An employer bears the burden of establishing by clear and convincing evidence that an employee qualifies for an exemption from FLSA's requirements.") (citing *Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir.1993)). Multiple courts in this district have continued to apply the "clear and convincing" standard post-*Encino*, and this Court sees no reason to depart from that settled law. *See, e.g., Lovo v. Am. Sugar Ref, Inc.*, Civ. No. RDB-17-418, 2018 WL 3956688, at *7 (D. Md. Aug. 17, 2018), *appeal dismissed*, No. 18-2013, 2018 WL 7500305 (4th Cir. Sept. 21, 2018); *Estrada v. Ecology Servs. Refuse & Recycling,*

LLC, Civ. No. GLR-17-496, 2018 WL 3458563, at *2 (D. Md. June 12, 2018).[6]

c. Analysis

1. Employer

To succeed on a FLSA claim, "a plaintiff must ... show that he was 'employed' by the defendant/employer." *Davis v. Food Lion*, 792 F.2d 1274, 1276 (4th Cir. 1986). The parties do not dispute that Plaintiffs were employed by EMD and Ms. Devarie. The parties do dispute whether Plaintiffs were employed by E&R. Plaintiffs state in a letter to Judge Coulson regarding a discovery dispute that Mr. Carrera "performed work for E&R in 2014 and 2015." (ECF No. 38-1 at 2.) However, Defendants stated in their interrogatory responses, under the penalty of perjury, that Plaintiffs never worked for E&R. (Def. M.S.J. Exh. A at 5). Plaintiffs' single statement in one letter about a discovery dispute is nothing more than a "scintilla of evidence," which provides insufficient grounds to deny a defendants' adequately supported summary judgment motion. *Anderson*, 477 U.S. at 252. Because there is no "evidence on which the jury could reasonably find for the plaintiff" on this issue, the Court grants Defendants' summary judgment motion as it relates to E&R. *Id.*

2. Sales

To qualify for the outside salesmen exemption, Plaintiffs must make sales as defined by the FLSA.

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[6] Defendants argue that reliance on *Killion*, 761 F.3d 574, is misplaced because it employs the clear and convincing standard as opposed to the preponderance of evidence standard. As this Court explained, *Encino*, 138 S. Ct. 1134, did not alter the relevant evidentiary standard and therefore *Killion* remains persuasive authority. *Supra* 21-22.

Christopher, 567 U.S. at 148. There is ample evidence in the record that the sales representatives in this case do in fact make some sales. Sales representatives' salaries are based solely on commissions, which are derived from net sales of EMD products. (Def. M.S.J. Exh. B at 12.) In addition to servicing stores that already purchase EMD products, Ms. Devarie explained that sales representatives also pitch EMD products to new stores and therefore have "the opportunity to open as many accounts as he or she wishes." (Def. M.S.J. Exh. C at 120:3-9.) Ms. Devarie testified that how much sales representatives sell is based in part on their own efforts and is not based solely on the sales work of other EMD employees or dictated by a planogram. (*See* Def. M.S.J. Exh. C at 140:8-13 ("You can have a very good store with good velocity, and you can have a lousy sales representative that doesn't — you know, is not motivated to sell much, and they will put a minimum number of cases in the store. Because they make the decision of how much to order."), 189:1-190:8 (describing the planogram as a "foot in the door" for a "great sales rep").) Mr. Barreno, an EMD sales representative of twenty years, testified that he spends 80% of his time on sales. (Def. M.S.J. Exh. D. 164:1.) Mr. Barreno also said that there are opportunities for sales representatives to secure additional space for EMD products at chain stores (*id.* at 154:11-14), and that he has personally been successful in doing so (*id.* at 97:8-21 (explaining that over half his revenue from one Shoppers store comes from extra space he has negotiated).)

Plaintiffs do not dispute that they make some sales, such as selling new products to independent stores. (Pl. M.S.J. Mem. at 9, Exh. 1 ¶ 31.) But while Plaintiffs

acknowledge that sales representatives should attempt to secure more space for EMD products at the chain stores they service, they claim they are "almost never successful" in doing so (Pl. M.S.J. Mem. at 9). Furthermore, Plaintiffs argue that they are not making sales when they take orders to restock products in store space that was originally secured by other EMD employees. (*Id.* at 8.) Plaintiffs argue that these orders, as well as the associated product restocking and rearrangement, are incidental to sales made by others, and therefore do not qualify as outside sales under DOL regulations. *See* 29 C.F.R. § 541.503(c). Plaintiffs present affidavits from a range of chain store buyers which confirm that they have little to no discretion to grant EMD sales representatives more space for EMD products and are instead controlled by the already-negotiated planogram.[7] (Pl. M.S.J. Exhs. 4, 12, 13.)

In a similar case, the Sixth Circuit found that a jury could reasonably determine that individuals mainly

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[7] For example, Mr. Weschler, a store director for Safeway, states that, while the store is planogrammed, he has discretion to determine which products are displayed in forty "Shadowbox Displays" throughout his store. (Pl. M.S.J. Exh. 4 ¶¶ 8, 15.) However, he explains his discretion has "become more and more limited over the last three to five years" due to Safeway's decision to institute "Mandatory Displays" in his store. (*Id.* ¶ 16.) He also explains that his personal relationship with sales representatives has no bearing on his decisions to order additional products. (*Id.* ¶ 18.) Mr. Ramsawaksingh, a store manager at Giant Foods, explains that no store managers at his store may "entertain solicitations from representatives from EMD ... or any other ... Vendor/Supplier." (Pl. M.S.J. Exh. 13 ¶ 25.) Similarly, Mr. Eshete, a general manager at Walmart, states he does not have permission from Walmart "to entertain any solicitation" from EMD employees. (Pl. M.S.J. Exh. 12 ¶ 23.)

placing orders for products in space that was already planogrammed were not making sales under the FLSA. *Killion*, 761 F.3d at 584. The plaintiffs in *Killion* were also permitted to "cold-call on smaller independent retailers and solicit them to purchase [defendants'] products." *Id.* at 578. Like Plaintiffs here, the plaintiffs in *Killion* alleged that they were "generally unsuccessful" in acquiring more space for products at planogrammed stores and stated that other employees were responsible for negotiating the planogrammed space in question. *Id.* at 584. The court observed, "The fact that the plaintiffs hit the order buttons on their electronic devices ... is not enough to magically transform their jobs from inventory management to 'sales.'" *Id.*

At the summary judgment stage, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255. Here, Plaintiffs have presented compelling testimony from both EMD employees and chain store employees attesting to the difficulty if not impossibility for sales representatives to make sales at chain stores that are not merely incidental to the sales work of other EMD employees. However, viewing the evidence in a light most favorable to Defendants, the Court finds that Defendants have presented evidence—particularly testimony of other sales representatives—which creates a genuine dispute of fact on the issue of whether sales representatives are able to make sales at chain stores. Because it is not the job of the Court to weigh the evidence during summary judgment, the Court cannot decide as a matter of law that Plaintiffs are or are not making sales at chain stores. The Court therefore denies Defendants' and Plaintiffs'

motions for summary judgment.

Because a genuine dispute exists regarding whether Plaintiffs are able to, and in fact do, make "sales" under the FLSA when they are taking orders at planogrammed chain stores, the Court is also unable to determine whether sales are a sales representatives' primary duty. If Plaintiffs are making sales when they take orders at chain stores, it may follow that the merchandising work they do, such as arranging products and cleaning up shelf space, would be incidental to their own sales, and therefore would be exempt outside sales work under the FLSA. In that case, it would seem clear that Plaintiffs' primary duty is making sales. If, on the other hand, Plaintiffs are effectively unable to acquire any additional space at chain stores for EMD products and are simply replenishing products that other EMD employees have already sold, then the fact that Plaintiffs spend almost all their time servicing chain stores would suggest that sales are not Plaintiffs' primary duties. If this is the case, then the task for the factfinder would be to determine whether the fact that some sales representatives have made additional sales at chain stores transforms the job into one primarily concerned with sales. Based on the evidence presented to the Court, the Court finds it unlikely that Plaintiffs' primary duty is sales if the orders Plaintiffs make at chain stores do not qualify as "sales" under the FLSA.

Because there is a genuine dispute of material fact on the issue of whether Plaintiffs make sales when they take orders, and accordingly whether the primary duty of sales representatives is making sales, Plaintiffs' and Defendants' summary judgment motions on this issue will be denied.

d. Liquidated Damages

The FLSA permits recovery of both unpaid wages and "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). Liquidated damages for overtime violations are "the norm." *Mayhew v. Wells*, 125 F.3d 216, 220 (4th Cir. 1997). However, courts have discretion under the FLSA to decline to award liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to [the violation] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C.A. § 260. Determining whether an employer exercised good faith or had reasonable grounds for his belief that he was not in violation of the FLSA is an objective inquiry, 29 C.F.R. § 790.22, and "establishing either element is sufficient to satisfy the statute," *Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 132 (4th Cir. 2015).

It is the employer's burden to demonstrate he is entitled to this defense. *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 375 (4th Cir. 2011). The employer has a "'substantial burden'" to show good faith or reasonable grounds for believing pay practices to be FLSA-compliant. *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 357 (4th Cir. 1994) (quoting *Richard v. Marriott Corp.*, 549 F.2d 303, 306 (4th Cir. 1977), *cert. denied,* 433 U.S. 915 (1977)). "'Good faith' in this context requires more than ignorance of the prevailing law or uncertainty about its development. It requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them." *Lockwood v. Prince George's Cty.*, 58 F. Supp. 2d 651, 658 (D. Md. 1999), *aff'd Lockwood v. Prince George's Cty.,* 217 F.3d 839 (4th Cir.

2000) (quoting *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 71 (2d Cir.1997)).

The record is clear Defendants knew about the existence of FLSA's exemption for outside sales representatives. (Def. M.S.J. Exh. C at 83-87.) The record is also clear that Ms. Devarie reviewed material from the DOL and relied on the advice of two accountants in determining that sales representatives were exempt outside salesmen under the Act. (*Id.*) However, Plaintiffs argue that Defendants failed to investigate the actual daily tasks of sales representatives, which prevented Defendants from accurately determining whether they were covered by the outside sales exemption. (Pl. M.S.J. Mem. at 34.). In addition, Plaintiffs state that even after Ms. Devarie became aware of Plaintiffs' challenges to their exemption status, she never hired an attorney to offer an opinion on the issue of exemption. (Pl. M.S.J. Reply at 17, Exh. D ¶ 5; Def. M.S.J. Exh. C at 100-03.)

Defendants assert that the fact EMD's pay practices were incorporated into a collective bargaining agreement is "dispositive on the question of an employer's good faith." (Def. M.S.J. Mem. at 28.) While the existence of a collective bargaining agreement is a factor to consider in determining whether a party exhibited good faith in complying with the FLSA, it is not the only relevant factor. Defendants' citation to *Kaelker v. Mayor of Cumberland (Maryland)*, 599 F. Supp. 2d 624, 638 (D. Md. 2009) confirms as much. In *Kaelker,* the court declined to award liquidated damages due to "the complexity of the issues" involved, "the history of the collective bargaining agreements, and the fact that the City's compensation practice has been known to the parties for many years and the subject of bargaining." *Id.* The existence of the

collective bargaining agreement was just one factor that ultimately tilted the court in the employer's favor. However, though the existence of a collective bargaining agreement is not dispositive, it should be granted substantial consideration in determining whether Plaintiffs should receive liquidated damages:

> While an employee cannot waive his right to overtime under the FLSA, the fact that Plaintiff agreed and understood that he could not claim unapproved overtime weighs heavily in the determination of fairness with regard to liquidated damages, as well as the employer's good faith in denying the overtime. An employee who has chosen to bypass a policy to which he has agreed should not obtain a premium on any recovered overtime payments.

Ekeh v. Montgomery Cty., Civ. No. JKS-12-2450, 2016 WL 3523685, at *3 (D. Md. June 28, 2016).

Plaintiffs argue that Defendants' failure to seek advice from the DOL or an attorney with expertise on the FLSA demonstrates a lack of good faith, especially after Ms. Devarie received complaints from employees and this lawsuit was initiated. (*See* Pl. M.S.J. Mem. at 31; Pl. M.S.J. Reply at 17.) However, an employer "need not seek an opinion letter" from the DOL "to avoid paying liquidated damages later." *Roy v. Cty. of Lexington*, 141 F.3d 533, 548-49 (4th Cir. 1998) (citing *Burnley v. Short*, 730 F.2d 136, 140 (4th Cir. 1984)). Nor must an employer always consult an attorney to be found to have acted in good faith. *See, e.g.*, *Burnley*, 730 F.2d at 140 (sustaining finding that employer acted in good faith based on his "reliance on [industry] newsletters to keep informed of

FLSA coverage combined with the transitory and marginal FLSA coverage" to which his business was subject). While this circuit has affirmed that consultation with an attorney contributes to a finding of good faith, *see, e.g., Mountaire Farms*, 650 F.3d at 375-76, this Court declines to hold that the failure to consult an attorney automatically negates a finding of good faith.

Plaintiffs also argue that Defendants did not show good faith because Ms. Devarie said she did not know what Plaintiffs did on a day-to-day basis in their jobs. (Pl. M.S.J. Exh. 16 at 103:20-104:10.) Ms. Devarie explained that no one knows the answer to that question because Plaintiffs "are outside sales representatives, which manage their time, they manage the number of stores that they visit, the hours, and how they run them. So I don't know when they're starting and I don't know when they're finishing and I don't know how they run their route." *(Id.* at 104:4-10.) In other words, Ms. Devarie was not saying she did not know what sales representatives' duties were; rather, she did not know exactly how sales representatives spent time carrying out their duties each day. In addition, Ms. Devarie testified that she did discuss the "specific duties" of sales representatives with her accountant when originally determining whether they qualified under the outside salesman exemption. (*Id.* at 84:8-10.)

There are several factors contributing to a finding of good faith here, including the complexity of the issues involved, the fact that sales representatives' salaries resulted from negotiations with the Union, and Ms. Devarie's multiple consultations with accountants and review of the FLSA factsheet. While it would seem unlikely that a jury would find Defendants evinced a lack of good faith in failing to pay Plaintiffs overtime wages,

the Court finds that Plaintiffs have raised a dispute of material fact based on Ms. Devarie's failure to investigate sales representatives' daily job responsibilities. Accordingly, the Court is unable to determine that no reasonable jury could find in favor of Plaintiffs on the issue of Defendants' good faith. The Court therefore denies the Defendants' and Plaintiffs' motions for summary judgment on this issue.

e. Statute of Limitation

The standard statute of limitation for FLSA claims is two years, but it is extended to three years for willful violations. 29 U.S.C. § 255(a). The issue of willfulness is typically a question of fact. *Calderon*, 809 F.3d 111, 130 (4th Cir. 2015). The burden is on the employee to prove willfulness, i.e., "that the employer 'knew or showed reckless disregard for the matter of whether its conduct'" violated the Act. *Mountaire Farms*, 650 F.3d at 375 (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)). An employer recklessly disregards the Act's requirements "if the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry." 29 C.F.R. § 578.3(c)(3). A "good-faith but incorrect assumption that a pay plan complied with the FLSA in all respects" is not a willful violation. *Mould v. NJG Food Serv. Inc.*, 37 F. Supp. 3d 762, 772 (D. Md. 2014) (quoting *Richland Shoe*, 486 U.S. at 135). Mere negligence or unreasonableness does not establish willfulness without evidence of recklessness. *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 358 (4th Cir. 2011) (citing *Richland Shoe*, 486 U.S. at 135); *Richland Shoe,* 486 U.S. at 135 n.13. Instead, a party demonstrates willfulness by "choosing to remain ignorant of legal

requirements or by learning of those requirements and disobeying them." *Chao v. Self Pride, Inc.*, 232 F. App'x 280, 287 (4th Cir. 2007) (unpublished table decision).

The Court concludes that both Plaintiffs and Defendants failed to meet their burden to show that there is no genuine dispute of material fact as to whether Defendants' failure to pay overtime wages was willful. Though Ms. Devarie's failure to consult a lawyer after receiving complaints from Plaintiffs and her failure to thoroughly investigate the actual job duties of the sales representatives raise questions as to whether or not she recklessly disregarded the FLSA's requirements, the same evidence the Court identified as relevant to a finding of good faith creates a genuine dispute over Ms. Devarie's willfulness. The issue for the factfinder at trial will be to determine how much Ms. Devarie knew about Plaintiffs' jobs, and whether that knowledge was sufficient to allow her to determine whether they were exempt outside salesmen. Accordingly, the Court denies Plaintiffs' and Defendants' summary judgment motions on the issue of willfulness.

IV. Plaintiffs' Motion to Seal

Plaintiffs have asked the Court to seal Exhibit 15 of Plaintiffs' Cross-Motion for Partial Summary Judgment. (Pl. Mot. Seal, ECF No. 106.) Plaintiffs state that Exhibit 15, the "Walmart Grocery Merchandise Agreement: General Supplier Information" between EMD and Walmart, contains confidential information, including "sensitive trade secrets or other confidential research, development, or commercial information" related to non-party Walmart. (*Id.* at 1-2.) Plaintiffs explain Exhibit 15 was marked as "Confidential" pursuant to the Court's Order Regarding Confidentiality of Discovery Material

(ECF No. 59). (*Id.* at 1). Plaintiffs argue that no alternatives to sealing would provide "sufficient protection" because Walmart's "privacy interests substantially outweigh public disclosure." (*Id.* at 1-2.)

The public has a First Amendment right of access to documents submitted to a court in support of or in opposition to a motion for summary judgment. *Va. Dep't of State Police v. Washington Post*, 386 F.3d 567, 578 (4th Cir. 2004) (citing *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)). Accordingly, the court must provide the public with "notice of the request to seal and a reasonable opportunity to challenge the request." *Washington Post*, 386 F.3d at 576. The proponent of sealing such documents must "articulate a compelling interest that outweighs the strong presumption of public access." *Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014). The party requesting the sealing must provide specific reasons in support of its position, and the court must consider less drastic alternatives to sealing. *Washington Post*, 386 F.3d at 575-76. "A corporation may possess a strong interest in preserving the confidentiality of its proprietary and trade-secret information, which in turn may justify partial sealing of court records." *Doe*, 749 F.3d at 269 (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)).

Here, Plaintiffs have not explained in any detail why redaction of sensitive portions of Exhibit 15 would be insufficient to provide Walmart with protection for its alleged trade secrets. Plaintiffs have also not provided specific reasons why all the information in Exhibit 15 must be sealed, beyond a general statement that Walmart has a privacy interest in its confidential material. While this may be true, the standard for sealing a document to which

the public has a First Amendment right of access requires more information from Plaintiffs—specifically, exactly which elements and sentences of the document warrant sealing, and exactly why. Therefore, the Court will deny Plaintiffs' motion to seal.

V. Conclusion

For the foregoing reasons, an Order shall enter granting in part and denying in part Defendants' Motion for Summary Judgment; denying Plaintiffs' Motion for Summary Judgment; granting in part and denying in part Plaintiffs' Motion to Strike; and denying Plaintiffs' Motion to Seal.

DATED this 20 day of August, 2019.

BY THE COURT:

James K. Bredar
James K. Bredar
Chief Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

FAUSTINO SANCHEZ CARRERA, et al., **Plaintiffs** **v.** **EMD SALES, INC., et al.,** **Defendants**	**CIVIL NO. JKB-17-3066**

ORDER

For the reasons set forth in the foregoing memorandum, the Court enters the following

1. The Defendants' Motion for Summary Judgment (ECF No. 97) is hereby GRANTED IN PART and DENIED IN PART. The motion is GRANTED with respect to E&R Sales and Marketing Services, Inc.
2. The Plaintiffs' Cross-Motion for Partial Summary Judgment (ECF No. 104) is hereby DENIED.
3. The Plaintiffs' Motion to Strike Defendants' Summary Judgment Exhibits G9, G10, G11 and G12 in their entirety and Exhibit G ¶¶ 14-17 (ECF No. 109) is GRANTED IN PART and DENIED IN PART. The motion to strike is GRANTED with respect to the following:
    - Exhibits G9, G10, and G11 are stricken from Defendants' Motion for Summary Judgment.

- Exhibit G ¶¶ 14-16 are stricken from Defendants' Motion for Summary Judgment to the extent they are based on stricken Exhibits G9, G10, and G11 and not on the declarant's personal knowledge.
- The last sentence of Exhibit G ¶ 15 is stricken.

4. The Plaintiffs' Motion to Seal Exhibit 15 of Plaintiffs' Motion for Partial Summary Judgement (ECF No. 106) is DENIED.

DATED this 20 day of August, 2019.

BY THE COURT:

James K. Bredar
James K. Bredar
Chief Judge