IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ERIC MICHAEL ROSEMAN, ALEXANDER LEE, and WILLIAM VAN VLEET, individually and on behalf of others similarly situated, Plaintiffs, v. BLOOMBERG L.P., Defendant.	Case No. 14-CV-2657 (DLC) (KNF)

PLAINTIFFS' PRE-TRIAL MEMORANDUM OF LAW

Respectfully Submitted

by

Getman, Sweeney & Dunn, PLLC
Dan Getman
Lesley Tse
Artemio Guerra
Meagan Rafferty
Edward Tuddenham
260 Fair Street
Kingston, NY 12401
(845) 255-9370

Counsel for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

I. INTRODUCTION

Plaintiffs submit this pre-trial memo to address the questions of law that will arise at trial. As set forth in the parties' joint pre-trial order, the issues that remain to be tried are 1) whether Bloomberg has met its burden to prove that Plaintiffs are plainly and unmistakably administratively exempt[1] from overtime pay under the Fair Labor Standards Act ("FLSA"), New York Labor Law and the California Labor Code; 2) if Plaintiffs are not administratively exempt, how many hours Plaintiffs worked outside of the office on average each week as shown by a just and reasonable inference; 3) if Plaintiffs are not administratively exempt, whether Bloomberg has met its burden to prove that Bloomberg entered into a clear, mutual understanding with Plaintiffs that the salary was meant to cover all hours worked, no matter how few or how many.

Plaintiffs are Analytics Representatives,[2] who staff Bloomberg's help desk[3] in New York and California providing technical support to Bloomberg's customers by answering individual users' questions about the Bloomberg Terminal.[4] This Court has already found that ADSK Reps' primary job duty is to "answer client questions about the Bloomberg Terminal." Doc. 307, p. 21. The question for the jury is whether that duty constitutes exempt administrative work. Requests for technical support come to the ADSK Reps primarily as chats through Bloomberg's instant

---

[1] Bloomberg originally asserted affirmative defenses of the administrative exemption, the computer exemption, and the highly-compensated employee exemption (see Doc. 106 at Fifth Defense). As set forth in the parties' joint pre-trial order, for various reasons, the administrative exemption remains the only exemption to be tried.

[2] Analytics Representatives are also known as "Reps", "ADSK Reps", "Help Desk Reps" and "Customer Service Reps."

[3] Bloomberg refers to Analytics as its "help desk." *Id.*

[4] The "Bloomberg Terminal" is the proprietary computer software which allows financial professionals and others to access Bloomberg's financial data streams, and to tally, filter, manipulate, or show this data in a variety of different ways.

messaging system, which is a function bundled with every Bloomberg Terminal. When a user hits the "help" button twice on the Bloomberg Terminal, it opens up a help chat with Analytics Reps.

ADSK Reps regularly work more than 40 hours per workweek, both at and outside the office. This Court has already held that the time that ADSK Reps are physically present in Bloomberg's offices, as indicated by Bloomberg's own badge in/out records ("badge time" or "badge hours"), is compensable work time. The badge time shows that in some weeks, Plaintiffs worked over forty hours a week, and that on some days, California Plaintiffs worked in excess of 8 hours in one day, at Bloomberg's offices. Badge hours do not include work hours off-site. Bloomberg pays Reps a salary and an annual bonus. It never pays them time and one-half premium for hours worked over 40 in a workweek,[5] claiming that Reps are administratively exempt, though it claims never to have evaluated or identified the "primary" or most important duty it hires Reps to perform, even though identification of the primary duty is essential to claiming employees are administratively exempt. Bloomberg bears the burden of proof on its administrative exemption defense. To carry its "heavy" burden, Bloomberg must show that Plaintiffs' primary duty of answering client questions about the Bloomberg Terminal clearly and unmistakably falls within the exemption. *See Siegel v. Bloomberg L.P.*, No. 13CV1351 DLC, 2015 WL 223781, at *3 (S.D.N.Y. Jan. 16, 2015). Since only the primary job duty matters in determining whether a position is exempt or not, all the different non-primary duties Reps perform are irrelevant. 29 C.F.R. §§ 541.200, 541.700.

[5] Indeed, from its founding in 1981 until 2013, Bloomberg did not pay a single one of its employees overtime premium pay.

As set forth below, under DOL regulations, DOL Opinion letters and all relevant case law interpreting the administrative exemption, the primary duty of answering client questions about the Bloomberg Terminal is not "administratively exempt" work. US Dept. Labor Opinion Letter, 2006 WL 3406603 (DOL WAGE-HOUR, Oct. 26, 2006); USDOL Op. Ltr., 2001 WL 1558967 (DOL WAGE-HOUR, May 11, 2001); USDOL Op. Ltr., 1999 WL 33210907 (DOL WAGE-HOUR, Nov. 5, 1999); USDOL Op. Ltr., 1999 WL 1788144 (DOL WAGE-HOUR, Aug. 19, 1999). Because Plaintiffs are not administratively exempt and because the badge time shows that Plaintiffs worked overtime in some weeks, Bloomberg is liable for overtime pay. In addition to on-site hours, Plaintiffs will show that they worked additional hours outside of the office each week. Because Bloomberg failed to keep proper time records, Plaintiffs need only show the amount and extent of that work as a matter of just and reasonable inference.[6]

This Court has already agreed that it will calculate the damages in this case based on jury findings, the parties' stipulations, and the parties' post-trial submissions. The jury will decide how overtime premiums are to be calculated. In this regard, the Court has already ruled that it is Bloomberg's burden to prove that it entered into a clear, mutual understanding with Plaintiffs that Plaintiffs salary was meant to cover all hours worked, no matter how few or how many. If it successfully carries that burden, overtime damages will be calculated using the so-called "fluctuating workweek" (FWW) method of calculating overtime (except for California class members as California law prohibits use of the FWW). If Bloomberg fails to meet its burden of showing such a clear understanding, overtime will be calculated using the default assumption that the salary was intended to compensate for 40-hours of work. Finally, Bloomberg has

---

[6] *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687 (1946).

stipulated that, if the administrative exemption does not apply, the Court should use a 3-year statute of limitations for Plaintiffs' FLSA claims, award the California class damages for the California waiting time claims, and award the New York class six years of liquidated damages.

II. JURY ISSUES PRESENTED

A. THE ADMINISTRATIVE EXEMPTION

The only liability issue to be tried in this case is Bloomberg's affirmative defense that Plaintiffs fall within the administrative exemption to the Fair Labor Standards, and New York and California labor laws.

1. The Exemption Is To Be "Narrowly Construed" and Applies Only To Workers Who Are "Plainly and Unmistakably" Exempt

The Supreme Court, this Circuit, and this District recognize that the purpose of the FLSA is to provide "specific minimum protections to individual workers and to ensure that each employee covered by the Act . . . receive[s] '[a] fair day's pay for a fair day's work' and [is] protected from 'the evil of "overwork" as well as "underpay."'" *Kavanagh v. Grand Union Co.*, 192 F.3d 269, 271 (2d Cir. 1999); *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728 (1981). In passing the FLSA, Congress intended to address long working hours that "are detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." *Barrentine*, 450 U.S. at 739. To protect against excessive hours of work and also to spread employment across the workforce, the FLSA requires that employers pay employees for hours in excess of 40 in a week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207 (a)(1); 29 U.S.C. § 202; *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948) (purpose of overtime provisions of the FLSA is to spread employment); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945) (same).

The FLSA's overtime rules, "like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. Such a statute must not be interpreted or applied in a narrow, grudging manner." *Giles v. City of New York*, 41 F. Supp. 2d 308, 316 (S.D.N.Y. 1999) (quoting *Tenn. Coal, Iron & R.R. Co., et al. v. Muscoda Local No. 123, et al.*, 321 U.S. 590 (1944)); *see also Tony & Susan Alamo Found. v. Sec'y of Labor,* 471 U.S. 290, 296 (1985); *Bowrin v. Catholic Guardian Soc.*, 417 F. Supp. 2d 449, 457 (S.D.N.Y. 2006). "Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945).

Thus, the FLSA establishes a baseline that all employees are entitled to minimum wage and overtime. Employers may refuse to pay overtime or minimum wage only to those workers that the statute makes "plainly and unmistakably" exempt. *Walling*, 324 U.S. at 493 ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."). Employers must also track non-exempt employees' hours so that compliance with the act may be measured. 29 C.F.R. § 516.2. Employers that pay substandard wages, must pay employees back wages and liquidated damages, costs and attorneys' fees. 29 U.S.C. § 216(b).

Both New York and California have extended FLSA protections to their state's workers and offer protections additional to the FLSA. Both states' wage hour laws are generally interpreted consistently with the FLSA. *Martin v. Sprint United Mgmt. Co.*, 273 F. Supp. 3d 404, 444 (S.D.N.Y. 2017) ("[T]here is general support for giving FLSA and the New York Labor Law consistent interpretations.") (listing cases); *Moore v. Int'l Cosmetics & Perfumes, Inc.*, No. EDCV141179DMGDTBX, 2016 WL 7644849, at *15 (C.D. Cal. Mar. 17, 2016) ("Because 'the

California Labor Code was modeled on the FLSA ... the FLSA has persuasive authority for [a] Court's interpretation of the California Labor Code.'") (citations omitted). For that reason, and the fact that New York's and California's wage hour laws are, like the FLSA, remedial in purpose, *Beckman v. KeyBank*, N.A., 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("FLSA and NYLL are remedial statutes designed to protect the wages of workers."); *Heffelfinger v. Elec. Data Sys. Corp.*, No. CV 07-00101 MMM (EX), 2013 WL 12201050, at *4 (C.D. Cal. Feb. 26, 2013) ("California's overtime statutes are remedial in nature."), exemptions from those laws must also be narrowly construed and applied only to workers who plainly and unmistakably fall within the exemption terms. *Pray v. Long Island Bone & Joint, LLP*, No. 14CV5386SJFSIL, 2016 WL 9455557, at *9 (E.D.N.Y. Aug. 11, 2016), *quoting In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 150 (2d Cir. 2010) (Because FLSA and N.Y. labor laws "are remedial in nature, 'exemptions to the overtime pay requirements are narrowly construed against the employers seeking to assert them and their application is limited to those establishments plainly and unmistakably within their terms and spirit.'"); *Clougher v. Home Depot U.S.A., Inc.*, 696 F. Supp. 2d 285, 289 fn 4 (E.D.N.Y. 2010) (same); *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal.4th 785, 794 (1999) ("under California law, exemptions from statutory mandatory overtime provisions are narrowly construed").

Notably, including the "plainly and unmistakably" language used by the Second Circuit in *In re Novartis* in the jury instructions is not improper, as it does not elevate Bloomberg's burden of proof. As a court in this Circuit held:

> A party's evidentiary burden describes, in essence, the *quantity* of evidence that a proponent is required to present in order to prevail on an issue. To prove something by a preponderance of the evidence, the proponent must introduce a quantum of proof sufficient to push the factfinder over the line from less likely or equally likely to more likely than not. The "plainly and unmistakably" rule, on the other hand, is an essential part of the applicable legal standard that describes the

> *quality* of the evidence that is required to find an employee is exempt. It describes the kinds of things that the exemptions cover. The jury must consider both the quantity and quality of evidence when evaluating it and must therefore be instructed on both concepts. However, including an instruction about how to understand what quality of evidence should persuade the jury does not affect the employer's burden with respect to the quantity of evidence it is required to introduce.
>
> ***
>
> If the Court had not included the plainly and unmistakably language, its instruction would have given the jury only half of the understanding required to make an intelligent decision as to whether [the defendant] properly characterized the Plaintiffs as exempt. The Supreme Court has "held that [FLSA] exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments *plainly and unmistakably* within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960) (emphasis added); *see also Ramos v. Baldor Specialty Foods, Inc.*, 687 F.3d 554, 558 (2d Cir.2012); *Bilyou v. Dutchess Beer Distributors, Inc.*, 300 F.3d 217, 222 (2d Cir.2002)

Banford v. Entergy Nuclear Operations, Inc., 74 F. Supp. 3d 658, 674-75 (D. Vt. 2015), *aff'd in part, rev'd in part on other grounds*, 649 F. App'x 89 (2d Cir. 2016).

2. Bloomberg Bears The Burden of Proving Plaintiffs Fall Within The Exemption

"[B]ecause the FLSA's exemptions are affirmative defenses to minimum wage and overtime claims, an 'employer bears the burden of proving that its employees fall within an exempted category of the Act.'" *Jeong Woo Kim v. 511 E. 5th St., LLC*, 985 F. Supp. 2d 439, 444 (S.D.N.Y. 2013), *quoting Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 614 (2d Cir.1991). The burden is "a heavy one," *see Ryduchowski v. Port Auth. of New York & New Jersey*, 203 F.3d 135, 143 (2d Cir. 2000) (discussing exemptions to the Equal Pay Act provisions of the FLSA), as statutory exemptions are "narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 150 (2d Cir. 2010) (citations omitted); *Henderson v. Transp. Grp., Ltd.*, 09 CIV. 7328 (DLC), 2010 WL 2629568, *4 (S.D.N.Y. July 1,

2010) (Cote, J). Thus, it is Bloomberg's heavy burden of proof to show that Plaintiffs meet all requirements to qualify "plainly and unmistakably" under the administrative exemption of the FLSA.[7]

3. Plaintiffs' Primary Duty of Answering Client Questions About The Bloomberg Terminal Does Not Render Plaintiffs Administratively Exempt

The administrative exemption contained in 29 U.S.C. § 213(a)(1) is defined and delimited by the Secretary of Labor's regulations at 29 C.F.R. §§ 541.200 et seq. Those regulations make clear that an employee is subject to the exemption only if the following three elements are satisfied:

> (1) the employee is compensated on a salary basis;
>
> (2) the employee's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and,
>
> (3) the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200.[8,9] (There is no dispute that Plaintiffs were paid a salary and that their work constitutes "office or non-manual work." Thus, those issues need not be addressed in the jury instruction).

---

[7] Bloomberg also bears the burden of showing that Plaintiffs are administratively exempt under New York Labor Law and the California Labor Code. *Clougher v. Home Depot U.S.A., Inc.*, 696 F. Supp. 2d 285, 289 fn 4 (E.D.N.Y. 2010); *Metrow v. Liberty Mut. Managed Care LLC*, No. EDCV161133JGBKKX, 2017 WL 4786093, at *4 (C.D. Cal. May 1, 2017).

[8] The parties agree that Plaintiffs meet the salary prong of the administrative exemption under the FLSA, New York Labor Law and the California Labor Code, as they are compensated on a salary basis at a rate that meets the threshold salary requirements. The parties also agree that Plaintiffs' primary duty is the performance of office or non-manual work.

[9] The parties agree that the New York Labor Law adopts the FLSA's administrative exemption. 12 N.Y.C.R.R. § 142-2. The parties also agree that the California Labor Code adopts the second

DOL regulations[10] define "primary duty" as follows:

> (a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. *The term "primary duty" means the principal, main, major or most important duty that the employee performs.* 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 (emphasis added). Although the percentage of an employee's time spent performing exempt versus nonexempt work is an "important" factor, it is not dispositive. *Martinez v. Hilton Hotels Corp.*, 930 F. Supp. 2d 508, 523-24 (S.D.N.Y. 2013); *see also Dalheim v. KDFW–TV*, 918 F.2d 1220, 1227 (5th Cir. 1990) ("the employee's primary duty will usually be what she does that is of principal value to the employer, not the collateral tasks that she may also perform, even if they consume more than half her time"). This Court has already determined that ADSK Reps' primary job duty is to "answer client questions about the Bloomberg Terminal." Doc. 307, p. 21. Thus, to succeed on its affirmative defense, Bloomberg must prove by a preponderance of the evidence that ADSK Reps' primary job duty of answering

---

and third prong of the FLSA's administrative exemption, along with two additional prongs. California Wage Order 4–2001, codified at 8 Cal. Code. Regs. § 11040.

[10] Congress conferred upon the USDOL the authority to "define and delimit" the administrative exemption. 29 U.S.C. § 213(a)(1). Because it is the USDOL's job to define the exemptions, the USDOL's regulations, interpretations and definitions are entitled to *Chevron* deference. *Saunders v. City of New York*, 594 F. Supp. 2d 346, 354 (S.D.N.Y. 2008) ("The U.S. Department of Labor ('DoL') has issued voluminous regulations to facilitate proper compliance with the overtime provisions of FLSA. Regardless of whether these rules are labeled as 'regulations' or 'interpretations,' they are entitled to *Chevron* deference."); *Doyle v. City of New York*, 91 F. Supp. 3d 480, 484 (S.D.N.Y. 2015) (as the DOL is tasked with administering the FLSA, and specifically tasked with promulgating regulations to implement exceptions, its definitions are entitled to *Chevron* deference).

client questions about the Bloomberg Terminal satisfies the two criteria that define the administrative exemption: (i) that it is "work directly related to management or general business operations" and (ii) work that "includes the exercise of discretion and independent judgment with respect to matters of significance."

4. Plaintiffs' Primary Duty Was Not Work Directly Related To Management Or General Business Operations

As for the first criterion, DOL regulations define "work directly related to management or general business operations":

> (a) … The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.[11]

---

[11] The regulation thus specifies that production work is not administrative work - "where an employee is primarily involved in producing the product of the company rather than 'servicing' the company, the administrative exemption does not apply." *Owens v. CEVA Logistics/TNT*, No. CIV.A. H-11-2237, 2012 WL 6691115, at *8 (S.D. Tex. Dec. 21, 2012) (denying employer's motion for summary judgment because defendant did not establish that employee's primary duty was distinguishable from work necessary to produce the employer's products and services) (citation omitted); *see also*, *Reich v. New York*, 3 F.3d 581, 587–89 (2d Cir.1993), *cert. denied*, 510 U.S. 1163 (1994) (police investigators conduct or "produce" criminal investigations and were thus non-exempt); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230-31 (5th Cir. 1990) (television station's producers, directors, and assignment editors "produced" newscasts, and were thus non-exempt). "In a service industry, production activities relate to the 'primary service goal' of the entity." *Parker v. Syniverse Techs., Inc.*, No. 8:10-CV-1635-T-30TBM, 2011 WL 3269639, at *7 (M.D. Fla. Aug. 1, 2011) *citing Cotten v. HFS–USA, Inc.*, 620 F. Supp. 2d 1342, 1348 (M.D. Fla.2009) (*citing Smith v. City of Jackson, Miss.*, 954 F.2d 296, 299 (5th Cir. 1992)) (employer's motion for summary judgment denied where employer's primary service goal was to provide access to telecommunications system and employee's job was to assist customers in routing signals by accessing employer's telecommunications system and was thus non-exempt work). As is necessarily implicated, the nature of the employer's business must be identified in order to ascertain whether an employee's work consisted of production work or administrative activities. *Bennett v. Progressive Corp.*, 225 F. Supp. 2d 190, 217 (N.D.N.Y. 2002).

Here, Plaintiffs work is, in effect, part of the product which Bloomberg sells to its customers – it provides the terminal and the means to understand and use its full functionality.

> (b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.
>
> (c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

29 C.F.R. § 541.201. DOL regulations go on to give examples of specific jobs that meet the requirements for the administrative exemption, including, *inter alia*, insurance claims adjusters, financial services advisors, and human resources managers who formulate or implement employment policies. 29 C.F.R. § 541.203.

Consistent with these regulation, the Second Circuit has recognized that "the 'essence' of an administrative job is that an administrative employee participates in 'the running of a business, and not merely ... the day-to-day carrying out of its affairs.'" *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 535 (2d Cir. 2009), *quoting Bratt v. County of Los Angeles*, 912

Bloomberg's business is to provide news and financial tools to financial companies and organizations around the world through the Bloomberg Terminal. A large part of the Bloomberg Terminal is 24/7 support for the software. Indeed, it is "a huge selling point to Bloomberg's Terminal." *Id*. Thus, ADSK Reps' primary duty of answering user questions regarding the functions on the Bloomberg Terminal is part and parcel of Bloomberg's products and services themselves, rather than servicing the company generally in an activity that every business must perform in order to function. *See Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 254, 264 (D. Conn. 2008) (work that relates to management or business operations "includes only activities 'clearly related to servicing the business itself,'" and "are not activities that involve what the day-to-day business specifically sells or provides, rather these are tasks that every business must undertake in order to function.").

F.2d 1066, 1070 (9th Cir.1990); *see also* USDOL Op. Ltr., 1997 WL 971811, at *2 (DOL WAGE-HOUR, Sept. 12, 1997) ("the test is whether the employees are engaged in carrying out the employer's day-to-day affairs rather than running the business itself or determining its overall course and policies …"advising the management" as used in the regulations is directed at advice on matters that involve policy determinations, i.e., how a business should be run or run more efficiently, not merely providing information in the course of the customer's daily business operation.").

Your Honor has previously found that Plaintiffs' primary job duty was "answer[ing] client questions about the Bloomberg Terminal." Doc. 307, p. 21. The evidence will show that answering client questions about the Terminal does not fit within the definition of the administrative exemption in § 541.201(a), because answering questions posed by Terminal users does not involve "assisting with the running the business itself or determining its overall course and policies." DOL Op. Ltr. 1997 WL 971811 at *2. Nor does it fit within any of the job duties listed in § 541.201(b), or any of the specific jobs listed in §541.203. While § 541.201(c) states that employees such as tax or financial consultants who advise and consult with their employer's customers about the running of the customer's business or determining the customer's overall course or policies, the more detailed job descriptions of such individuals contained in § 541.203(c) clearly show just how far Plaintiffs are from the kind of administrative advisor contemplated by the regulations. Consider, for example, the duties that make a financial consultant exempt:

> (b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption **if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products;**

> **and marketing, servicing or promoting the employer's financial products.** However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

29 C.F.R. § 541.203(b) (emph. added). Similarly, management consultants are exempt if they "study the operations of a business and propose changes to its organization." *Id.* §541.203(e).

Plaintiffs here did nothing remotely similar to these exempt consultation duties. They did not collect and analyze information about customers' businesses or consult with customer management about the running of the customer's business or advise management as to the advantages or disadvantages of different policies or products. In fact, Plaintiffs were specifically *prohibited* from providing Bloomberg's customers with financial advice.

Far from answering questions about the operation of Bloomberg's customers' businesses or advising them about their operations, Plaintiffs' question answering simply helped customers operate the Terminal successfully and efficiently. Such customer service was part and parcel of the Terminal itself -- Bloomberg's primary marketplace offering -- since the Terminal would not have been as attractive to customers without Plaintiffs' assistance in using its many complicated functions. In an opinion cited with approval by the Second Circuit and the Southern District,[12] the Ninth Circuit clearly recognized that customer assistance of this kind lies at the heart of a technology company's non-exempt market-place offerings:

> Phase Metrics . . . exist[s] to design, manufacture, and sell test equipment. But… its equipment is 'technologically advanced.' Customers require installation, training, and service assistance in order successfully to operate the equipment and are unlikely to buy such equipment unless there is such assistance. Customer service activities, therefore, go to the heart of Phase Metrics' marketplace offerings, not to the internal administration of Phase Metrics' business (or that of its customers)").

---

[12] *Davis v. J.P. Morgan Chase Co*, 587 f.3d 529, 536 (2d Cir. 2009); *Klein v. Torrey Point Group, LLC*, 979 F. Supp. 2d 417, 428 (S.D.N.Y. 2013);

Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1128 (9th Cir. 2002). If the reference to Phase Metrics in the above quote were changed to Bloomberg LLC it would fit the facts of this case perfectly. Bloomberg sells a technologically advanced Terminal that requires service assistance to operate successfully and efficiently. Bloomberg clearly recognizes that customers would not buy the Terminal without such assistance since it literally incorporates Plaintiffs' services into the Terminal itself through the Terminal's "Help" button -- a button which allows users to instantly open a "chat" with one of the Plaintiffs to obtain answers to his or her questions. Plaintiffs are simply an animate (and hopefully more helpful) version of the "help" tab that appears at the top of every "Microsoft Word" program. Such help is an integral part of the Terminal that one buys, just as the help tab is an integral part of a Word program. As a result, Plaintiffs and their question-answering services are literally part of Bloomberg's marketplace offering. They certainly are not a separate administrative service designed to assist customers with the management and running of their businesses.

The conclusion that Plaintiffs' primary duty of answering technical questions about the Terminal is not "administrative" work is further supported by numerous DOL opinion letters that uniformly hold that computer help desk workers are not administrative. *See, e.g.,* USDOL Opinion Letter, 2001 WL 1558967 (DOL WAGE-HOUR, May 11, 2001) at *2 (employees who spent 80% of time providing support services to local businesses designing computer solutions to fit the client's need at a variety of local businesses, which involved analyzing current equipment and software, identifying equipment and software needs, determining a scope of work for implementation and integration of old with new, and continuing with support of hardware and software after implementation; who worked without direct supervision; and whose workweeks differed in projects and responsibilities dependent upon clients' needs was not exempt from

FLSA under the administrative exemption because the employee did not design, create or modify the systems or programs and thus did not meet the duties requirements for any of the exemptions.); USDOL Opinion Letter, 1999 WL 33210907 (DOL WAGE-HOUR, Nov. 5, 1999) at *2 (employee who was primarily responsible for network activities; oversaw other Information Technology Department personnel; performed computer hardware and software troubleshooting; prepared status reports; trained and mentored staff; and researched and assisted with network problem solving was not exempt from FLSA under the administrative exemption); USDOL Opinion Letter, 1999 WL 1788144 (DOL WAGE-HOUR, Aug. 19, 1999) at *1 (employees who primarily install computer systems and train customers on installed software; train employees on customers' specialized computer software; manipulate and modify software settings and specifications (e.g. toolbars and setup) to fit and respond to customer needs; install, debug, troubleshoot, and convert data from old systems to new conversions; and test customer modems; and conduct customer follow-up visits to ensure customer satisfaction; but who do not write programs or develop software are not exempt from the FLSA under the administrative exemption. "These individuals perform technical tasks, which do not constitute making or implementing policy, or the performance of management functions, necessary for the application of the exemption."). These DOL opinion letters interpreting ambiguous DOL's administrative exemption regulations are entitled to controlling deference. *Auer v. Robbins,* 519 U.S. 452, 461 (1997) (deferring to DOL *amicus* brief); *Belt v. EmCare Inc.*, 444 F.3d 403, 416 (5th Cir. 2006) (granting controlling deference to DOL Opinion Letter).

Because Plaintiffs' primary job duty of answering client questions about the Bloomberg Terminal did not involve running customer businesses or advising management on policy determinations, and because the question answering function filled by Plaintiffs was, quite

literally, incorporated into the Terminal itself – Bloomberg's primary market place offering -- Plaintiffs do not plainly and unmistakably fall within the administrative exemption.

5. Plaintiffs' Primary Duty Does Not Include the Exercise of Discretion and Independent Judgment With Respect to Matters of Significance

Plaintiffs' primary duty of answering client questions about the Bloomberg Terminal also fails to meet the second prong of the administrative exemption -- that an employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance to management or the general business operations of the employer or the employer's customers. 29 C.F.R. § 541.200(a)(3); USDOL Op. Ltr., 2006 WL 3406603 (DOL WAGE-HOUR, Oct. 26, 2006) at *4 (referring to fact that primary duty must include "the exercise of discretion and independent judgment with respect to matters of significance to management or general business operations of the employer."). Thus, even if an employee exercised independent judgment and discretion, if it was not with respect to matters of significance with respect to management or general business operations, the employee would not fall under the administrative exemption. *See Pippins v. KPMG, LLP*, 759 F.3d 235, 240-41 (2d Cir. 2014). ("[I]n th[e] context [of the administrative exemption], the deployment of discretion and judgment is manifested by the authority to formulate, affect, interpret or implement the employer's management policies or its operating practices. . .").

"The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." 29 C.F.R. § 541.202(e). The technical complexity of the work is irrelevant to the discretion and judgment prong of the exemption – which focuses instead on the choosing of competing courses on matters of significance.

> Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b).

Under this definition, Plaintiffs' primary job duty of answering client questions about the Bloomberg Terminal in no way involves the exercise of discretion and judgment about matters of significance, let alone about matters of significance to management or general business operations. Responding to individual user questions using various sources such as FAQs, training materials, databases of previous chat history or Help Pages located in the Bloomberg Terminal, as Plaintiff did here, was nothing more than the use of preexisting materials and personal skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. The fact that terminal users and Reps primarily communicate by chat is itself indicative of the lack of significance as well.

DOL, itself, has consistently taken the position that the job of assisting users with computer issues, even complex ones, does not involve the exercise discretion and independent judgment with respect to matters of significance within the meaning of the administrative exemption. *See* USDOL Opinion Letter, 2006 WL 3406603 (DOL WAGE-HOUR, Oct. 26,

2006) at *4 ("The primary duty of the IT Support Specialist you describe consists of installing, configuring, testing, and troubleshooting computer applications, networks, and hardware. Maintaining a computer system and testing by various systematic routines to see that a particular piece of computer equipment or computer application is working properly according to the specifications designed by others are examples of work that lacks the requisite exercise of discretion and independent judgment within the meaning of the administrative exemption. . . . Such work does not involve formulating management policies or operating practices, committing the employer in matters that have significant financial impact, negotiating and binding the company on significant matters, planning business objectives, or other indicators of exercising discretion and independent judgment with respect to matters of significance discussed in 29 C.F.R. § 541.202(b)."); USDOL Opinion Letter, 1999 WL 33210907 (DOL WAGE-HOUR, Nov. 5, 1999) (senior network administrator who "assists the User Support Manager with projects; assumes responsibility for network activities, and oversees other Information Technology Department (ITD) personnel; performs computer hardware, software, Novell 4.11 and other operating system installations, tuning, troubleshooting and system integration of related components; maintains assigned priorities and prepares status reports; schedules work pertaining to network problems and software upgrades; assists the User Support Manager with training and mentoring of staff; and researches and assists the User Support Manager with network problem solving" does not exercise discretion and independent judgment of the kind required for the exemption).

Giving deference to DOL's regulations and interpretations, as they must, the courts have consistently held that neither help desk employees with the primary job of providing technical support to computer users, nor call center employees with the primary job of answering user

questions are exercising independent judgment and discretion on matters of significance. For example, in *Siegel v. Bloomberg*, Your Honor found on summary judgment that help desk employees whose primary duty was to provide technical support to other Bloomberg employees were not exempt under the administrative exemption of the FLSA because they did not exercise independent judgment and discretion on matters of significance:

> Here, neither the level of importance nor consequence of the work plaintiffs performed rises to the level of a "matter of significance." Plaintiffs did not have authority to formulate, affect, interpret, or implement management policies or operating practices. Plaintiffs did not carry out major assignments in conducting the operations of the business. Plaintiffs did not perform work that affected business operations to a substantial degree. Plaintiffs did not have authority to commit Bloomberg in matters that had significant financial impact. Plaintiffs did not have authority to waive or deviate from established policies and procedures without prior approval. Plaintiffs did not have authority to negotiate and bind Bloomberg on significant matters. Plaintiffs did not provide consultation or expert advice to management. Plaintiffs were not involved in planning long- or short-term business objectives. Plaintiffs did not investigate or resolve matters of significance on behalf of management. And plaintiffs did not represent Bloomberg in handling complaints, arbitrating disputes, or resolving grievances.
>
> . . . . The record lacks evidence either of plaintiffs' involvement in planning Bloomberg's long-term or short-term business objectives, or of plaintiffs' carrying out major assignments or committing major financial resources in the conduct of Bloomberg's business.
>
> . . . .
>
> Bloomberg attempts to distinguish *Martin* [*v. Indiana Michigan Power Co.*, 381 F.3d 574 (6th Cir.2004)] by pointing out that, there, the plaintiff did not decide or recommend when equipment needed to be serviced and replaced; by contrast, says Bloomberg, plaintiffs here exercised that sort of discretion and judgment. This distinction serves to highlight what has already been assumed: plaintiffs here exercised discretion and judgment. But it does not speak to the fact that this discretion and judgment was not exercised with respect to matters of significance.

Siegel v. Bloomberg L.P., No. 13CV1351 DLC, 2015 WL 223781, at *4–5 (S.D.N.Y. Jan. 16, 2015) (Cote, J).

In *Jackson v. Bloomberg*, Judge Oetken recognized that Global Customer Service (GCUS) Representatives, whose primary job duty was to answer phone calls for Bloomberg and to determine where to route the calls within the company, were similar to other call center employees who have generally been found to be non-exempt from the FLSA.

> On the present record, GCSRs are less like the plaintiffs in *Haywood* and *Verkuilen* and more like call technicians, which have generally been deemed non-exempt. *See, e.g., Ribot v. Farmers Ins. Group*, 2013 WL 3778784 (C.D.Cal. July 17, 2013) (certifying class of customer service representatives in call centers for FLSA and state overtime claims); *Kritzer v. Safelite Solutions, LLC*, 2012 WL 1945144 (S.D.Ohio May 30, 2012) (certifying settlement class of customer service representatives for same); *see also Martin v. Ind. Mich. Power Co.*, 381 F.3d 574, 576–78 (6th Cir.2004) (directing summary judgment in favor of help-desk IT employee on administrative exemption); *Bruner v. Sprint/United Mgmt.*, 2007 WL 2436667, at *1 (D.Kan. Aug. 22, 2007) (recognizing call center customer specialists to be non-exempt).

Jackson v. Bloomberg, L.P., 298 F.R.D. 152, 167 (S.D.N.Y. 2014). In *Jackson*, Bloomberg eventually withdrew its affirmative defense that GCUS Reps were exempt from overtime under the FLSA. *See Jackson v. Bloomberg*, Case No. 13-cv-02001 (JPO)(GWG) (S.D.N.Y.), Dkt. 75 at ¶ 2. This Court subsequently approved a settlement between the parties. *See id.*, Dkt. 120.

These rulings in the other Bloomberg cases are in line with other court rulings around the country finding that neither help desk employees with the primary job duty of resolving computer problems nor call center employees with the primary job duty of providing customer support are exempt from the overtime provisions of the FLSA. *See e.g., Bobadilla v. MDRC*, 03 CIV. 9217, 2005 WL 2044938 (S.D.N.Y. Aug. 24, 2005) (employees who assisted other employees with basic computer problems, including those related to personal computers, Microsoft Word and Excel, printers, email accounts, and laptops, providing users with access to certain parts of network, not exempt from overtime pay); *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574 (6th Cir. 2004) (directing summary judgment for help-desk IT employee on

administrative exemption); *Allen v. Enabling Techs. Corp.*, No. CV WMN-14-4033, 2016 WL 4240074, at *7 (D. Md. Aug. 11, 2016) ("In general, employees who provide basic assistance with computer problems are not exempt from the FLSA's overtime provisions."); *Longlois v. Stratasys, Inc.*, 88 F. Supp. 3d 1058 (D. Minn. 2015) (employee, who performed installation and maintenance services for three-dimensional printers at client sites, was not exempt from FLSA under administrative exemption; employee's main duty was to provide technical support to customers, rather than to perform management or general business operations, 85% of employee's day was troubleshooting for and interfacing with customers, employee exercised no discretion, and he followed checklists and manuals provided by employer); *Decker v. Smithville Communications, Inc.*, No. 1:11-CV-0005, 2012 WL 4116996 (S.D. Ind. Jul 18, 2012) (denying summary judgment to employer because help desk functions are not administratively exempt); *Hunter v. Sprint Corp.*, 453 F. Supp. 2d 44, 48, 52 (D.D.C. 2006) (denying summary judgment on the employer's administrative exemption claims because the record indicated that the employee who "respond[ed] to telephone inquiries from clients who were having technological difficulties with [defendant's] internet services" "functioned as a technically proficient help-desk employee whose primary duty was customer service"); *Turner v. Human Genome Science., Inc.*, 292 F. Supp. 2d 738, 745, 747 (D. Md. 2003) (although employees responsible for troubleshooting and correcting hardware and software problems and network connectivity issues utilized "knowledge and skill to solve computer problems, primary duties did not involve discretion or independent judgment as required" under administrative exemption); *Burke v. County of Monroe*, 225 F. Supp. 2d 306, 320 (W.D.N.Y. 2002) (employees whose work included installing and operating computer networks, analyzing hardware and software problems, testing, and problem solving did "highly-skilled work," but these were "routine duties without

requirement of discretion and independent judgment" under administrative exemption); *Eicher v. Advanced Bus. Integrators, Inc.*, 151 Cal. App. 4th 1363, 1370, 61 Cal. Rptr. 3d 114, 117 (2007) (administrative exemption did not apply where plaintiff spent half of his time in office and half on-site at customers' venues, and where he devoted majority of his work time in training customer employees on employer's computer software and troubleshooting computer software when he was engaged in implementation on customer's site and spent majority of his time, when in employer's office, performing customer service work). Indeed, every single court to consider the question has found that help desk employees whose primary job duty is to respond to user inquiries and problems and call center employees whose primary job duty is to provide customer support are not exempt from the FLSA. There exists no decision to the contrary.

In *Longlois v. Stratasys, Inc., supra.,* the district court found on summary judgment that the plaintiff employee, whose primary duty was to perform installation and maintenance services for three-dimensional printers manufactured by the defendant employer, was not administratively exempt from the FLSA, in part because he did not exercise independent judgment and discretion in carrying out his primary duty:

> The record demonstrates that, to install and service printers, Longlois followed checklists and manuals provided to him by Stratasys. Even when a broken printer presented a difficult or unfamiliar problem, Longlois used his skill and experience—what he called in his deposition his "instinct"—to apply and adapt the techniques and procedures in those materials to it. In fact, Stratasys itself summed it up well when it pointed out that "Longlois testified that there could be 'endless' amount of things wrong with a 3D printer and that he was creative in performing his job duties. At the end of the job, Longlois would simply make sure he did everything on the checklist."

88 F. Supp. 3d 1058, 1069 (D. Minn. 2015). Here, in answering user questions about the functions on the Bloomberg Terminal, ADSK Reps also used a wide variety of company created resources, e.g., historic chats, Help Pages, FAQs, training materials, etc. to find the correct

answer. If they were presented with a difficult or unfamiliar problem, they simply used skill and experience to apply and adapt the techniques and procedures in those resources to get an answer or pass the question along to someone else who knew the answer. *Id*. As in *Longlois*, this solving of technical problems with computer software or hardware is not the exercise of independent judgment and discretion. *See also Turner v. Human Genome Sci.*, Inc., 292 F. Supp. 2d 738, 747 (D. Md. 2003) (employees deciding how and when to address and resolve computer system problems, deciding order in which to perform different duties, and following or choosing between set of "techniques, procedures, repetitious experience, and specific standards to perform their work" were not exercising discretion under administrative exemption of the FLSA); *Burke v. Cty. of Monroe*, 225 F. Supp. 2d 306, 320 (W.D.N.Y. 2002) ("[The plaintiffs] did not decide what software was loaded, or whether to update the software on a particular system. They performed highly-skilled work when troubleshooting problems, but this is not evidence of discretion and independent judgment.").

Further, any discretion or independent judgment that Plaintiffs may have exercised in answering user questions regarding functions within the Bloomberg Terminal, for example deciding what function to suggest to a user first, was related solely to that individual Terminal user, and thus was not related to matters of significance or directly related to the to the management or general business operations of Bloomberg or its customers. *See Siegel v. Bloomberg L.P.*, No. 13CV1351 DLC, 2015 WL 223781, at *4 (S.D.N.Y. Jan. 16, 2015) (fielding inquiries from single employees about their technical support needs is not exercise of discretion or independent judgment with respect to matters of significance).

Similar to the *Jackson* case, the ADSK Reps here can be distinguished from the plaintiff in *Verkuilen v. Mediabank, LLC*, 2010 WL 2011713 (N.D. Ill. May 19, 2010), aff'd, 646 F.3d

979 (7th Cir. 2011). *Verkeuilen* has little to do with this case except it involves another software company – there providing software specific to the advertising industry. The District Court in *Verkuilen* found that as an Account Manager, "Verkuilen's primary duty was to act as a liaison between Mediabank and its customers, facilitating the customers' use of Mediabank's software." *Id.,* at *3. In that role, she did the customer relationship management for her employer. Answering individual user tech support questions, which Reps do here, is not administering the relationship between the employer and its customers. Judge Posner writing for the Seventh Circuit explained the difference succinctly in Verkuilen's appeal when he distinguished the exempt Account Manager at MediaBank from a non-exempt help desk such as Reps staff here. Judge Posner wrote: "The [exempt] account manager is not … a technician sitting at a phone bank fielding random calls from her employer's customers." *Verkuilen v. MediaBank, LLC,* 646 F.3d 979, 982 (7th Cir. 2011).

> The manager of a customer's account has to learn about the customer's business and help MediaBank's software engineers determine how its software can be adapted to the customer's needs.
>
> The account manager is not a salesman for Best Buy or a technician sitting at a phone bank fielding random calls from her employer's customers—instead she's on the customer's speed dial during the testing and operation of the customer's MediaBank software. As the intermediary between employees of advertising agencies struggling to master complex software and the software developers at MediaBank, she has to spend much of her time on customers' premises training staff in the use of the software, answering questions when she can and when she can't taking them back to MediaBank's software developers, and then explaining their answers to the customer and showing the customer how to implement the answers in its MediaBank software. Identifying customers' needs, translating them into specifications to be implemented by the developers, assisting the customers in implementing the solutions—in the words of MediaBank's chief operating officer, account managers are expected to "go out, understand [the customers' requirements], build specifications, understand the competency level of our customers. Then they will build functional and technical specifications and turn it over to ... developers who will then build the software, ... checking in with the account manager, making sure what they are building is ultimately what the customer wanted."

> Thus the plaintiff's primary duty was directly related to the general business operations both of her employer and (as in a consulting role) of the employer's customers.

Verkuilen, 646 F.3d at 982. Reps here do sit at a phone bank handling calls and chats, and they do not have a primary duty to "build functional and technical specifications and turn it over to ... developers who will then build the software, ... checking in with the account manager, making sure what they are building is ultimately what the customer wanted." *Id.* Bloomberg's Research and Development teams may do this work, but Analytics Reps do not, and Bloomberg does not claim that they do. Because Bloomberg cannot show that Plaintiffs fall plainly and unmistakably within the administrative exemption, Bloomberg is liable to Plaintiffs for overtime pay.

B. HOURS OF WORK

This Court has already ruled that Plaintiffs' "badge hours," which indicate when they were on-site at Bloomberg's offices, constitute Plaintiffs compensable work time at the office. However, Plaintiffs worked additional hours off-site, which Bloomberg did not track in violation of its statutory obligations. Accordingly, the jury will be asked to decide the average number of hours per week that Plaintiffs worked off-site. The burden of proof with respect to these work hours falls on Plaintiffs, but the burden is not a heavy one. As the Supreme Court held in *Anderson v. Mt. Clemens Pottery Co.*,

> When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was

> improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. at 687. "Consistent with *Anderson*, an employee's burden in this regard is not high. It is well settled among the district courts in this Circuit, and we agree, that it is possible for a plaintiff to meet this burden through estimates based on his own recollection." *Kuebel v. Black & Decker, Inc.*, 643 F.3d 352, 362 (2d Cir. 2011).

Once Plaintiffs have presented evidence sufficient to allow the jury to infer their hours of work,

> The burden then shifts to the employer 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. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Anderson, 328 U.S. at 687-688. Because it is Bloomberg's obligation to record the hours its employees work, and because Bloomberg has failed to record those hours:

> The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of s 11(c) of the Act. And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances.

Anderson, 328 U.S. at 688 (1946).

Pursuant to *Anderson*, courts have long recognized that the recollections of a limited number of plaintiffs regarding their estimated hours of work are sufficient to establish the hours for non-testifying plaintiffs. *See Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985) ("Courts have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees."). *See also,*

Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233 (11th Cir. 2008) (7 workers testimony on behalf of class of 1,424 not unfair); *Mclaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (five workers' representative testimony suffices for non-testifying workers). Indeed, in *Mt. Clemens* itself the damages for 300 employees were established based on the time estimates of 8 employees. 149 F.2d 461 (6th Cir. 1945) *rev'd* 328 U.S. 680. In an FLSA case involving truck drivers, the court calculated the hours of work for 61 drivers based on the load records and estimates of 14 testifying drivers and awarded damages to another 40 drivers (for whom no load records existed) based on the average hours of the other 61 worked. *Herman v. Hector I Nieves Transport, Inc.*, 91 F. Supp. 2d 435, 440-441 (D.P.R. 2000).

Notably, such representative proof need not be a statistically valid sample. In *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), the Supreme Court rejected an employer's claim that its employees' representative proof lacked statistical validity: "Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury. Reasonable minds may differ as to whether the average time [the plaintiffs' expert] calculated is probative as to the time actually worked by each employee. Resolving that question, however, is the near-exclusive province of the jury." Accordingly, this Court correctly rejected Bloomberg's argument that the jury must decide whether Plaintiffs who testify at trial are representative of the entire class and "agree[d] with the plaintiffs" that they must merely show "as a matter of just and reasonable inference" the approximate hours per week that the Plaintiffs worked off-site. *See also Monroe v. FTS USA, LLC*, 860 F.3d 389, 401, 413-414 (6th Cir. 2017) *cert. denied*, No. 17-637, 2018 WL 942457 (Feb. 20, 2018) (rejecting argument that Plaintiffs had to provide a statistically valid sample to prove damages and upholding jury instruction that the jury's findings

regarding the average hours of the testifying plaintiffs would "be deemed by inference" to apply to the non-testifying class members).

C. WHETHER BLOOMBERG IS ENTITLED TO HAVE DAMAGES CALCULATED USING THE FLUCTUATING WORKWEEK METHOD[13]

1. A Weekly Salary is Presumed to Cover 40 Hours

Where an employee receives a flat weekly salary, there is "'a rebuttable presumption that [the] weekly salary covers 40 hours." *Rosendo v. Everbrighten Inc*., No. 13cv7256JGK-FM, 2015 WL 1600057, at *3 (S.D.N.Y. Apr. 7, 2015); *Herrara v. 12 Water St. Gourmet Café, Ltd*., No. 13-cv-4370(JMF)(RLE), 2016 WL 1274944, at *5 (S.D.N.Y. Feb. 29, 2016) ("'Unless the contracting parties intend and understand the weekly salary to include overtime hours at the premium rate,' courts understand the weekly salary to cover only the first 40 hours.") (quoting *Giles v. City of New York*, 41 F. Supp. 2d 308, 317 (S.D.N.Y. 1999)); *Moon v. Kwon*, 248 F. Supp.

---

[13] Importantly, the fluctuating work week method is inapplicable to the claims of the California class. California does not recognize the application of the fluctuating work week method to the determination of the overtime rate.

> California law generally requires that, when a court or employer calculates the overtime rate of compensation for a salaried full-time employee, the individual's regular weekly salary is divided by 40. Cal. Labor Code § 515(d) ("For the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40 th of the employee's weekly salary."); see 2002 Update to 1998 DLSE Enforcement Policies and Interpretations Manual, § 48.1.5.4. The DLSE's justification for its approach (as opposed to the "fluctuating work week" approach) is that California's "premium pay for overtime is to ... create a disencentive to employers to impose overtime on employees," and that dilution of that premium would lessen the disincentive.

Marlo v. United Parcel Serv., Inc., CV 03-04336 DDP RZX, 2009 WL 1258491, at *2 (C.D. Cal. May 5, 2009).

2d 201, 207 (S.D.N.Y. 2002) (finding there is a rebuttable presumption under the FLSA "that a weekly salary covers 40 hours").

Bloomberg argues that this presumption should not apply and that overtime damages should be calculated using the fluctuating work week method. This Court has already held that, in order to be entitled to that method of calculation, Bloomberg bears the burden of proving that Bloomberg entered into a "clear mutual understanding" with Plaintiffs that their weekly salary was intended to cover all hours worked, no matter how few or how many. Bloomberg will not be able to meet its burden, as there was no clear mutual understanding, i.e., affirmative agreement, between Plaintiffs' and Bloomberg that Plaintiffs' weekly salary was mean to cover all hours worked. If Bloomberg fails to carry its burden of showing that it entered into such an agreement with the Plaintiffs, overtime damages will be calculated on the assumption that the salary covers 40 hours of work as indicated by the cases cited above.

2. A Clear, Mutual Understanding Requires Proof of That Bloomberg Took Affirmative Steps To Create Such An Understanding

In order to create a "clear mutual understanding" Bloomberg must have taken affirmative steps to create such an understanding. After all, the word "mutual" means "directed by each toward the other or others; reciprocal." MUTUAL, Black's Law Dictionary (10th ed. 2014). The employer cannot create a mutual understanding by doing nothing and simply assuming that its employees understand its intentions; there is nothing mutual about an employer's unilateral assumptions. Nor would it be sufficient for the employer to wait until it is sued and then ask employees at time of trial what they understood because, again, the requirement is a mutual understanding, not a unilateral one expressed after the fact.

A "mutual understanding" is, in essence, an agreement, however informal it may be. Indeed, Black's Law Dictionary defines an "agreement" as "[a] mutual understanding between

two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons. AGREEMENT, Black's Law Dictionary (10th ed. 2014). Thus in *Klein v. Torrey Point Grp., LLC*, 979 F. Supp. 2d 417, 438 (S.D.N.Y. 2013) the court held that use of the FWW requires a showing that the parties "have mutually agreed that a flat weekly wage would compensate the employee for all his hours.") (emphasis added). As Judge Failla explained in *Klein* "damages outcome in misclassification cases should be driven by a factual inquiry into the actual agreement between the parties." *Klein,* 979 F. Supp. 2d at 439 (emphasis added) citing *Urnikis–Negro v. Am. Family Prop. Servs.,* 616 F.3d 665, 678-79 (7th Cir. 2010). *See also, Herrara,* 2016 WL 1274944, at *5, report and recommendation adopted, No. 13-CV-4370 (JMF), 2016 WL 1268266 (S.D.N.Y. Mar. 31, 2016) (rejecting use of FWW, and utilizing 40 hour method because employer "did not appear or otherwise present any evidence of a contract or other agreement to establish a fluctuating workweek."); *Berrios v. Nicholas Zito Racing Stable, Inc.,* 849 F. Supp. 2d 372, 395 (E.D.N.Y. 2012) (denying summary judgment on FWW issue because plaintiffs "deny they entered into any sort of employment agreement [regarding the salary]" and "Defendants' own bookkeeper also testified no special verbalized employment agreement existed between the parties.").

As the Court recognized, the agreement need not rise to the level of a "formal written contract." Proof of an agreement or mutual understanding may consist of nothing more than the employer informing its employees (orally or in writing) that the salary is intended to cover all hours of work coupled and the employees tacit agreement evidence by his continuing to work thereafter. *See, e.g., Thomas v. Bed Bath and Beyond,* No. 16civ8160 (PAE), 2018 WL 1027437 (S.D.N.Y. Feb. 21, 2018) (finding FWW notice provided by employer to employees was sufficient to manifest a clear, mutual agreement). But however informal the agreement may be,

Bloomberg must still prove some affirmative steps on its part to agree to a "mutual understanding." Absent such proof no agreement or mutual understanding could possibly exist.

D. WHETHER THE VIOLATION WAS WILLFUL

Bloomberg has stipulated that, if the jury rejects its administrative exemption defense, damages, including liquidated damages, should be calculated as if the jury had found Bloomberg's violations to be willful. With this concession, it is unnecessary for the jury to decide this issue.

III. DAMAGE CALCULATION ISSUES

The Court has indicated that, if the jury rejects Bloomberg's exemption defense, it will calculate damages based on the jury's factual findings regarding the average hours Plaintiffs worked per week outside the office and its findings with respect to the existence, *vel non*, of a mutual understanding and the parties post-trial submissions. Calculation of damages will require the Court to make legal determinations regarding the applicable statute of limitations, Plaintiffs entitlement to liquidated damages under the FLSA and NY labor law, and elements of damages unique to the California class.

A. STATUTE OF LIMITATIONS

In light of Bloomberg's concession that its violations should be treated as if there were a finding of willfulness, the three-year statute of limitation applies to Plaintiffs FLSA claims allowing them to recover overtime for the period commencing three years prior to the filing of each Plaintiffs consent to sue form. 29 U.S.C. § 255. *See* Doc 388 at 7 (Bloomberg concession that three-year statute applies to Plaintiffs FLSA claims).

The statute of limitations under the New York Labor Law is six years with no showing of willfulness required. *He v. Home on 8th Corp.*, No. 09 CIV. 5630 GBD, 2014 WL 3974670, at *6 (S.D.N.Y. Aug. 13, 2014), *citing* N.Y. Lab. Law §§ 198(3), 663(3) (2009). The limitation

period for the class was tolled by the filing of a class action complaint. *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553, 94 S. Ct. 756, 766, 38 L. Ed. 2d 713 (1974). As a result, because Plaintiffs asserted New York Labor Law claims in their initial complaint, Plaintiffs' New York Labor Law claims run from six years prior to the filing of the initial complaint, or April 14, 2008.

In California, the statute of limitations for violations of the Labor Code is three years. Cal. Civ. Proc. Code § 338. The statute of limitations for violations of California's Unfair Competition Law is four years. Cal. Bus. & Prof. § 17208. For the reasons set forth in Plaintiffs' Motion for Relation Back, Doc 378, which will not be repeated here, the Third Amended Complaint relates back to the filing of the original complaint resulting in liability for Labor Code violations from April 14, 2011 and for Unfair Competition Law violations from April 14, 2010.

B. THE COURT SHOULD AWARD LIQUIDATED DAMAGES

Prior to November 24, 2009, § 198(l-a) provided that employees could recover liquidated damages of twenty-five percent of wages owed if they could show their employers willfully violated the law. *See Ji et al. v. Belle World Beauty, Inc. et al.,* No. 603228 (N .Y. Sup. Cnty. Aug. 24, 2011), at *4. On November 24, 2009, an amendment to § 198(1–a) removed the willfulness requirement and placed the burden on employers to avoid liquidated damages by demonstrating good faith ("the 2009 Amendment"). *See* Ch. 372, Laws of N.Y.2009, § 1.[14]

[14] L.2009, c. 372, § 1, eff. Nov. 24, 2009 effective Nov. 24 2009 the liquidated damages provision was changed, to "the commissioner shall assess against the employer the full amount of any such underpayment, and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." N.Y. Lab. Law § 198 (McKinney). Prior to that effective date, the statute read: "the court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was willful, an additional amount as

However, in light of its stipulation that damages should be calculated as if the jury had found willfulness, Bloomberg concedes that Plaintiffs are entitled to full liquidated damages on their New York claims beginning on April 14, 2008. Doc 388 at 8. Similarly, inasmuch as Bloomberg has waived any good faith defense to FLSA liquidated damages, Plaintiffs are also entitled to liquidated damages on their FLSA claims.

C. CALIFORNIA DAMAGES

1. California Waiting Time Damages

Under California Labor Code § 203(a), if an employer willfully fails to pay wages due within 72 hours after the termination of employment, the employer is liable for waiting time penalties.[15] *Stallsmith v. Linder Psychiatric Grp., Inc.*, No. 2:15-CV-0667 CKD, 2016 WL 5870794, at *3 (E.D. Cal. Oct. 7, 2016). The failure to pay does not have to be done with a malicious or fraudulent intent. *Id. citing Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 325 (2005). Bloomberg concedes that, if the jury finds overtime liability under the California Labor Code, then the California Waiting Time Class is entitled to waiting time penalties.

---

liquidated damages equal to twenty-five percent of the total amount of the wages found to be due."

> The Court begins with the mental-state question prompted by the November 24, 2009 amendment to the NYLL. Prior to that date, an employee could recover liquidated damages for unpaid wages "only if th[at] employee could prove that the employer's failure to pay the wage required by [[A]rticle 6 of the NYLL] was willful." *Inclan*, 95 F.Supp.3d at 504 (internal quotation marks and citation omitted). But beginning on November 24, 2009, the NYLL required *employers* to demonstrate that they acted in good faith in order to avoid paying liquidated damages. *Jrpac*, 2016 WL 3248493, at *34.

Gamero v. Koodo Sushi Corp., No. 15 CIV. 2697 (KPF), 2017 WL 4326116, at *18 (S.D.N.Y. Sept. 28, 2017).

[15] California Labor Code section 203 allows the employee to continue to accrue wages "from the due date thereof" for up to 30 days "until paid or until an action therefor is commenced." Cal. Lab. Code § 203(a). Accordingly, California Plaintiffs' waiting time claims (for terminated employees) should be calculated using a proration for 30 additional days of the daily wages due.

2. California Daily Overtime Damages

As a matter of law, California Class Members are entitled to daily overtime pay at a rate of time and one-half the regular rate (i) for work in excess of eight hours in one workday, (ii) for work in excess of 40 hours in any one workweek, and (iii) for the first eight hours worked on the seventh day of work in any one workweek. Cal. Lab. Code. § 510. Any work in excess of 12 hours in one day is to be compensated at twice the regular rate of pay for California employees. *Id.* And any work in excess of eight hours on any seventh day of a workweek is calculated at twice the regular rate of pay. *Id.* Plaintiffs' badge hours will show daily and weekly hours worked on-site at Bloomberg's offices. Once the jury has determined the average number of off-site hours worked per week by the California Plaintiffs, those hours may be apportioned over the seven days of the week and added to their badge hours to determine individual entitlement to daily overtime for work in excess of eight hours and 12 hours per day and for work on a seventh day.

IV. CONCLUSION

For the foregoing reasons, this Court should direct a verdict in Plaintiffs' favor if Bloomberg fails to create a jury issue with respect to the administrative exemption and, even if it adduces sufficient evidence to create a jury issue on that question, which Plaintiffs do not believe that it can, Plaintiffs will be entitled to a judgment in their favor if Bloomberg fails to carry its burden of proof on that issue.

Dated: March 16, 2018

Respectfully Submitted

/s/ Lesley Tse

Getman, Sweeney & Dunn, PLLC
Dan Getman
Lesley Tse

Artemio Guerra
Meagan Rafferty
Edward Tuddenham
260 Fair Street
Kingston, NY 12401
(845) 255-9370

Counsel for Plaintiffs