

EXHIBIT D

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ERIC MICHAEL ROSEMAN, *et al.*,

4 Plaintiffs,

5 v.

14 Civ. 2657 (DLC)

6 BLOOMBERG L.P.,

7 Defendants.

Conference

8 -----x
9 New York, N.Y.
February 22, 2018
2:00 p.m.

10 Before:

11 HON. DENISE COTE,

12 District Judge

13
14 APPEARANCES

15 GETMAN, SWEENEY & DUNN PLLC
Attorneys for Plaintiffs

16 BY: DAN GETMAN
ARTEMIO GUERRA
17 LESLEY TSE

18 JONES DAY
Attorneys for Defendant

19 BY: TERRI L. CHASE
MATTHEW W. LAMPE

20 ALSO PRESENT:

21 MEAGAN RAFFERTY (Getman Sweeney)
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1 describing how the rest of the work was all done uncompensated.
2 That's the plaintiffs' proposal. They are claiming there was a
3 contract on those terms. As Mr. Getman says, that's their
4 theory, that's their claim. They bear the burden of proof to
5 prove that it is correct. And that is also consistent with,
6 you know, normal rules, traditional rules of civil procedure,
7 the plaintiff bears the burden of proof.

8 THE COURT: OK. Counsel, I think I have heard enough.

9 Thanks. Let me address this motion.

10 So, again, the context here is that the employer,
11 Bloomberg, contends that the analytics representatives were
12 exempt from the overtime requirements. If they prevail, and
13 they have the burden of proof on that and there is no dispute
14 about that, if they prevail, then this claim for overtime
15 compensation fails. The plaintiffs' claim fails.

16 If the jury finds, however, that these are nonexempt
17 employees, there will be a question of how to compute overtime
18 because, as nonexempt employees, the analytics representatives
19 were entitled to overtime pay.

20 So the papers discuss, your motion here, or the
21 plaintiffs' motion and the opposition, discuss these two
22 methods of calculation.

23 It's, I think, helpful to understand the context in
24 which that argument is being made to me. This is not an
25 argument that's being made when an employer treated the

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1 employee as a nonexempt employee entitled to overtime pay. In
2 that situation, if Bloomberg had acknowledged all along that
3 these were nonexempt employees, and, of course, wanting to
4 follow the law had considered how they should pay overtime
5 compensation for those who worked more than 40 hours a week,
6 they would have had two alternative methods available to them
7 to address that situation. If they preferred to have the
8 fluctuating workweek formulation and to eliminate any dispute
9 about the propriety of using that formulation, they could have
10 provided clear notice to the employee that that was the
11 formulation they were going to use.

12 We have an example of how an employer did that in a
13 recent decision issued by Judge Engelmayer just -- it might
14 have been yesterday -- in the *Thomas* case. I will give you the
15 civil docket number, 16 Civ. 8160. *Thomas v. Bed Bath &*
16 *Beyond*. In that case -- this was a summary judgment decision
17 that Judge Engelmayer wrote -- the employer provided a
18 compensation acknowledgement form describing in essence a base
19 salary system, base weekly salary to cover a workweek of no
20 less than 47 hours per week. Anyway, you will read the
21 decision. I think it's a very useful decision in many ways
22 with respect to the issues we face today.

23 So the motion that you have presented to me raises
24 several related issues:

25 Will the jury be able to decide that a fluctuating

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1 workweek analysis of an overtime pay claim is appropriate?

2 Yes, it is available.

3 What must be shown to make it available? There must
4 be a showing of a clear mutual understanding.

5 Who has the burden of showing that? The defendant in
6 this circumstance.

7 When the employer is taking the position at trial that
8 the employee was an exempt employee and loses that and then
9 wants to take advantage of a methodology for calculating
10 overtime pay which will advantage the defendant and
11 disadvantage the plaintiff and which it did not use as part of
12 its regular course of business of calculating overtime pay for
13 employees it acknowledged to be nonexempt, then it makes no
14 sense whatsoever to put the burden on the plaintiff. Only the
15 defendant in these circumstances has the motive and should have
16 the duty to prove the existence of something out of whole
17 cloth.

18 Nonetheless, the record may be appropriate for the
19 jury to find that this method, the FWW, fluctuating workweek
20 method, is the appropriate one here. You do not need a showing
21 of a formal written contract. All you need is proof of the
22 clear mutual understanding, and that proof can come in at trial
23 in any way that proof of any other business practice comes in.
24 There is no limitation.

25 And there is no burden for the defendant to show that

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1 any employee understood what the fluctuating workweek method
2 was or how the fluctuating workweek method works in a
3 calculation. Again, I refer you to the *Siegel* decision, which
4 both of you relied upon, as understanding what the content of
5 the burden will be. But the burden will be placed on the
6 defendant at this trial.

7 So let us move to the last issue. That is the
8 defendant's request to communicate with 16 employees who
9 currently work at Bloomberg as supervisors, but who are also
10 class members because they were analytics representatives at
11 one point in time and have not opted out of the class.

12 Now, there are many things to be said about this, and
13 I'm happy to hear argument, but I just want to make sure we
14 understand in a practical sense what we're expecting of this
15 individual, one of these 16.

16 They are a member of the class, didn't opt out. So
17 what they are seeking is a financial recovery from Bloomberg
18 for overtime pay they did not receive while they were analytics
19 representatives.

20 On the other hand, they're still at Bloomberg. I
21 expect they consider Bloomberg to be a fabulous employer in
22 many respects and hope for a long and happy career there.

23 So Bloomberg's counsel is asking to sit down with them
24 and say: Now, we know you are a class member and you want
25 money from Bloomberg; but, on the other hand, you are still