

362 F.Supp.2d 624, 150 Lab.Cas. P 34,982

United States District Court,

D. Maryland.  
Leslie F. ROGERS et al.

v.

SAVINGS FIRST MORTGAGE, LLC et al.

No. CIV.A. WMN-03-2984.

March 16, 2005.

**Background:** Former loan officers for residential mortgage company brought action seeking additional compensation under the federal Fair Labor Standards Act (FLSA), and under the Maryland Wage Payment and Collection Law. Parties filed cross motions for partial summary judgment.

**Holdings:** The District Court, [Nickerson](#), Senior District Judge, held that:

- (1) in assessing employer's compliance with the minimum wage requirements of FLSA, loan officers' commissions would be apportioned over the workweeks encompassed in the semi-monthly pay period in which the commissions were "earned," as defined by employer;
- (2) company was not a private motor carrier for purposes of FLSA's "motor carrier" exemption;
- (3) loan officers were entitled to liquidated damages under FLSA;
- (4) denying loan officers promised year-end bonuses on ground that they were not employed on June 30th of the year following the calendar year in which their loans were closed, as required by terms of bonus plan, would violate Maryland Wage Payment and Collection Law; and
- (5) determinations of whether employer had a bona fide reason for failing to pay wages upon loan officers' terminations and whether award of treble damages was warranted under Maryland law were for jury.

Plaintiffs' motion granted in part and denied in part; defendant's motion denied.

### **MEMORANDUM**

[NICKERSON](#), Senior District Judge.

Before the Court are cross motions for partial summary judgment. Paper Nos. 44 (Plaintiffs') and 46 (Defendants'). The motions are fully briefed. Upon a review of the motions and the applicable case law \*627 the Court determines that no hearing is necessary (Local Rule 105.6) and that Plaintiffs' motion will be granted and Defendants' denied.

## ***I. FACTUAL AND PROCEDURAL BACKGROUND***

Plaintiffs <sup>FN1</sup> were formerly employed as loan officers for Defendant Savings First Mortgage, LLC (SFM). They bring this action seeking additional compensation under the federal Fair Labor Standards Act of 1938, [29 U.S.C. §§ 201 et seq. \(FLSA\)](#), and under the Maryland Wage Payment and Collection Law, [Md.Code Ann., Lab. & Empl. §§ 3-501 et seq.](#) (Wage Payment Law). In addition to SFM, Plaintiffs have named Harry Korotki as a Defendant. Mr. Korotki is the president and sole owner of SFM. <sup>FN2</sup>

<sup>FN1</sup>. This action was initially filed by Leslie F. Rogers as the sole plaintiff. The Complaint has been amended twice to add thirty-eight additional Plaintiffs, but Plaintiffs have subsequently stipulated to the dismissal of eight of those individuals. Thus, there are currently thirty-one Plaintiffs remaining in this action.

<sup>FN2</sup>. The Second Amended Complaint also added as defendants four additional individuals who were SFM officers or managers during the relevant time period. Plaintiffs subsequently stipulated to the dismissal of these additional defendants.

Defendants initially asserted counterclaims against some of the Plaintiffs but those counterclaims have also been voluntarily dismissed.

Defendant SFM is a residential mortgage company. During the period September 1, 1999, through July 31, 2004, SFM employed more than 680 loan officers who used company-supplied leads to solicit homeowners interested in refinancing their home mortgages. Loan officers' duties include: performing mortgage surveys and evaluations; evaluating credit and developing loan proposals; presenting the proposals to the potential borrowers; preparing loan application documents and obtaining necessary pre-approvals; meeting with the borrowers to complete the application process; communicating settlement details; and arranging the loan closing. Once the application packet is completed and signed, the loan file is turned over to a separate processing department to process the loan and handle the file through closing.

Under SFM's compensation agreement, loan officers received no salary or hourly wage. The principal compensation paid to a SFM loan officer was the commissions on loans originated by that loan officer. <sup>FN3</sup> Payment of those commissions was made on a bi-monthly basis, but commissions were only paid on loans that had gone to closing. Loan officers also all signed a "Restrictive Covenant and Non-Disclosure Agreement" that provided that if his or her employment was terminated, whether voluntarily or involuntarily, no commissions would be paid on loans that closed after the date of termination.

<sup>FN3</sup>. New loan officers had the option of electing to receive a base salary of \$375.00 for the first twelve weeks of employment in exchange for a lower commission rate.

In addition to commissions, loan officers could also earn "year-end" bonuses. Year-end bonuses were calculated based upon the profit that a loan officer generated in the given

calendar year. Those bonuses were not paid, however, until June 30th of the following calendar year. If the loan officer was not still employed as of that date, “for any reason whatsoever, whether termination from employment is/was voluntary or involuntary,” the year end bonus would be forfeited in its entirety. See Defs.’ Exh. 11, “2003 Loan Officer Bonus Program.” Finally, loan officers could be eligible for a bonus for referring someone to the company who became a loan officer. \*628 These “referral bonuses” equal 5% of the gross profit of fundings that occur in the second, third, and fourth months of the new loan officer’s employment.

Plaintiffs allege that very often they were required to work more than 40 hours in a given workweek. They further allege that, for each of the Plaintiffs, there was a large number of pay periods for which they did not receive any compensation at all because no loans closed during that pay period. Several Plaintiffs also complain that, pursuant to the above summarized policies, they were denied commissions on loans that closed after their termination (“terminal commissions”), as well as year-end bonuses that were not paid because they were not still employed on June 30th of the following year. In the Second Amended Complaint, Plaintiffs identify the following categories of compensation and damages to which they assert they are entitled:

- Overtime compensation at 1.5 times the employee’s regular rate of pay for those hours worked over 40 per workweek, pursuant to the FLSA (Count I);
- Recovery of underpayments for workweeks where Plaintiffs’ wages fell below the federal minimum wage of \$5.15 per hour, again pursuant to the FLSA (Count II);
- Liquidated damages under Counts I and II in an amount equal to the backpay awards, as authorized in [29 U.S.C. § 216\(b\)](#); <sup>FN4</sup>

[FN4](#). In Count III of the Second Amended Complaint, Plaintiffs sought damages equal to three times the overtime and minimum wage underpayments from Counts I and II, along with attorneys’ fees and costs pursuant to [§ 3-507.1\(b\)](#) of the Wage Payment Law. Plaintiffs have stipulated that they are not entitled to treble damages in connection with their minimum wage and overtime claims and accordingly, it is appropriate that Count III be dismissed.

- Unpaid commissions and bonuses, pursuant to [§ 3-501\(c\)\(2\)\(ii\)](#) of the Wage Payment Law, along with treble damages and attorneys’ fees and costs under [§ 3-507.1\(b\)](#) (Count IV).

Each of these categories of damages is the subject of the summary judgment motion filed by Plaintiffs or Defendants, or as to some categories, both.


## II. SUMMARY JUDGMENT STANDARD

Pursuant to [Rule 56\(c\) of the Federal Rules of Civil Procedure](#), summary judgment is appropriate where “there is no genuine issue as to any material fact and ... the moving party is entitled to summary judgment as a matter of law.” [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). For purposes of summary judgment, a dispute about a fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party,” and a fact is material if, when applied to the substantive law, it affects the outcome of litigation. [Anderson](#), 477 U.S. at 248, 106 S.Ct. 2505.

A party seeking summary judgment bears the initial responsibility of informing the court of the basis of its motion and identifying the portions of the opposing party's case which it believes demonstrate the absence of a genuine issue of material fact. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). When considering the motion, the court assumes that all of the non-moving party's evidence is worthy of belief and justifiable inferences are drawn in favor of the non-moving party. \*629 [Matsushita Elec. Indust. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). If the movant demonstrates that there is no genuine issue of material fact and that she is entitled to summary judgment as a matter of law, the non-moving party must, in order to withstand the motion for summary judgment, produce sufficient evidence in the form of depositions, affidavits or other documentation that demonstrates that a triable issue of fact exists for trial. [Celotex](#), 477 U.S. at 324, 106 S.Ct. 2548. The existence of only a “scintilla of evidence” is not enough to defeat a motion for summary judgment. Instead, the evidentiary materials must show facts from which the finder of fact could reasonably find for the non-moving party. [Anderson](#), 477 U.S. at 252, 106 S.Ct. 2505. At the summary judgment phase, it is not appropriate for the court to make credibility determinations, weigh the evidence, or draw inferences from the facts which are adverse to the nonmoving party; these are jury functions. [Anderson](#), 477 U.S. at 255, 106 S.Ct. 2505.

## III. DISCUSSION

### A. Fair Labor Standards Act Claims

[1]  Congress's goal in enacting the FLSA was “to protect all covered workers from substandard wages and oppressive working hours, ‘labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.’ ” [Barrentine v. Arkansas-Best Freight System, Inc.](#), 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) (quoting [29 U.S.C. § 202\(a\)](#)). [Section 206](#) provides that covered employees shall be paid not less than \$5.15 per hour. [29 U.S.C. § 206\(a\)\(1\)](#). [Section 207](#) provides that covered

employees who work more than 40 hours in a workweek shall be paid at least one and one-half times their regular pay rate for those hours worked above 40 hours. [29 U.S.C. § 207\(a\)\(1\)](#). In interpreting the FLSA, the Supreme Court has frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. “FLSA rights cannot be abridged by contract or otherwise waived because this would ‘nullify the purposes’ of the statute and thwart the legislative policies it was designed to effectuate.” *Id.* at 740, [101 S.Ct. 1437](#) (citing [Brooklyn Savings Bank v. O’Neil](#), 324 U.S. 697, 707, 65 S.Ct. 895, 89 L.Ed. 1296 (1945)).

### 1. Minimum Wage Claims

Twenty-nine Plaintiffs have moved for summary judgment on their minimum wage claims seeking entry of judgment in the aggregate amount of \$97,430.60. The two remaining Plaintiffs, Leslie Rogers and Andrea Mack, while acknowledging that a dispute as to the number of hours that they worked prevents entry of judgment on their minimum wage claims at this time, nonetheless seek a declaration that they were entitled to have been paid at the minimum wage. Plaintiffs concede that the amount of underpayment as to Rogers and Mack would need to be determined at trial.


The FLSA's minimum wage obligations extend to employers who employ workers in an “enterprise engaged in [interstate] commerce or in the production of goods for commerce ... whose annual gross volume of sales made or business done is not less than \$500,000.” [29 U.S.C. § 203\(s\)\(1\)\(A\)\(ii\)](#). The term “employer” includes “any person acting directly or indirectly in the interest of an employer in relation to an employee.” *Id.* at 203(d). SFM admits that it engages in interstate commerce and has a business volume exceeding \$500,000. For the purposes of this lawsuit, Defendants have stipulated that Korotki, as the sole owner of SFM and with operational control of the company\*630 as its sole corporate officer is an “employer” within the meaning of the FLSA. Furthermore, the parties have been able to agree by stipulation or admission as to the hours worked by all Plaintiffs except Rogers and Mack, and it is on these agreed-upon hours that Plaintiffs base their claim for the aggregate amount of \$97,430.60 in minimum wage claims. As to Plaintiffs' minimum wage claims, the dispute is not about whether Plaintiffs are entitled to have been paid pursuant to the minimum wage statute, but centers on how those minimum wage payments are to be calculated.

Defendants' method of calculation relies on two related propositions, both of which this Court finds untenable. First, Defendants argue that Plaintiffs fall under an “interstate transportation” or “motor carrier” exemption to the FLSA's overtime provisions and that Defendants should be permitted to selectively invoke that exemption as to any Plaintiff of their choosing. For the reasons stated in the next section of this opinion, the Court finds that the motor carrier exemption is inapplicable to Plaintiffs. Defendants' second proposition, which the Court also finds unsupportable, is that Defendants should be allowed, at least as to some Plaintiffs, to stretch the allocation of commissions over the average period of time that Defendants contend it takes to process a loan.

Defendants' first proposition relating to the entitlement to overtime pay is only raised in this discussion of minimum wage pay because it is Defendants' belief that the methodology of allocating commissions can vary depending upon whether the allocation is for minimum wage purposes only, for overtime purposes only, or for both overtime and minimum wage purposes. Defendants acknowledge, as they must, that if only minimum wage payments are at issue, the wages paid on a prescribed payday must be allocated to the workweeks within that pay period where the pay period is greater than a week. For overtime purposes, however, Defendants argue that commissions can be allocated to the period in which the commission is *earned*. In this instance, they would argue that this period is the average time from the date a loan is originated to the date that it is closed, which Defendants represent to be 51 days. Defendants further assert that when commissions must be allocated for purposes of both minimum wage and overtime, this can also be done over this 51 day period.<sup>FN5</sup>

[FN5](#). Defendants assert that while the motor carrier exemption is potentially available as to all loan officers, it should be applied only to those employees to which Defendants choose to apply it. Thus, they posit a methodology under which they could allocate commissions paid to each individual Plaintiff either to semi-monthly pay periods or to 51-day pay periods. Presumably, Defendants would make this election based upon which calculation would be to Defendants' economic advantage. Because the Court finds that the exemption is not applicable to any Plaintiff, it need not decide whether Defendants would be empowered with such unfettered discretion were the exemption available.

Plaintiffs, in contrast, contend that a commission payment can only be allocated over the semi-monthly pay period in which it is received. In their view, the commission must be pro-rated to each day within that pay period, and then the compensation allocated to each day is attributed to the workweek in which it falls. Plaintiffs protest that, contrary to Defendants' mischaracterization of their position, they are not advocating that commissions be allocated only to the single workweek in which there are paid. Because the semi-monthly pay period (of 15 or 16 days) will typically span three workweeks, under Plaintiffs' methodology a single commission might \*631 satisfy the minimum wage obligation for three separate work weeks.



[\[2\]](#)  The Court finds Plaintiffs' methodology to be more consistent with the principles of the FLSA. The FLSA “takes as its standard a single workweek consisting of seven consecutive days.” [Roland Electric Co. v. Black, 163 F.2d 417, 421 \(4th Cir.1947\), cert. denied, 333 U.S. 854, 68 S.Ct. 729, 92 L.Ed. 1135 \(1948\)](#). “While there is no requirement that compensation be paid weekly, the minimum wage provisions of the [FLSA] apply on a workweek basis. Thus, in order to meet the requirements of [the FLSA's minimum wage provisions], an employee compensated wholly or in part on a commission basis must be paid an amount not less than the statutory minimum wage for all hours worked in each workweek without regard to his sales productivity.” [Marshall](#)

[v. Allen-Russell Ford, Inc., 488 F.Supp. 615, 617 \(E.D.Tenn.1980\)](#). Furthermore, “this amount must be paid to him free and clear (i.e. finally and unconditionally) *on the payday for that week.*” *Id.* at 617-18 (emphasis added); see also [Roland Electric, 163 F.2d at 421](#) (holding a claim for unpaid wages under the FLSA arises immediately upon the employer’s failure to pay, on the regular pay day, all wages which are due).

This last requirement reflects Congressional awareness that the timely payment of compensation can be critical for lower wage workers. In the context of explaining the inclusion of a liquidated damages provision in the FLSA, the Supreme Court observed,

the liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman’s pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living “necessary for health, efficiency, and general well-being of workers” and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to the minimum standard of well-being. Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date.

[Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707-08, 65 S.Ct. 895, 89 L.Ed. 1296 \(1945\)](#). See also [Marshall v. Sam Dell’s Dodge Corp., 451 F.Supp. 294, 302 \(N.D.N.Y.1978\)](#) (noting “even the better paid salesman with a family would be hard pressed if he was obliged to suffer a few weeks at less than minimum wages”).

 [\[3\]](#)  [\[4\]](#) Here, it is undisputed that Defendants established a semi-monthly pay period. While Defendants are correct “that the FLSA does not require that an employer utilize a pay period of any specific duration,” Defs.’ Reply at 15, the cases are clear that, once a pay period is established, it cannot be retroactively modified to escape FLSA liability. For example, in *Sam Dell’s Dodge*, the defendant, a car dealership, paid its salespersons a minimal base salary on a weekly basis. This base salary was augmented by commissions and often substantial weekly, monthly, and annual bonuses. Because the employees received less than the minimum wage for the weeks where they were paid only the base pay, but substantially more for weeks involving commissions and bonus, the defendants contended that “some period other than the week should be used in assessing compliance with the minimum wage requirements of the [FLSA].” [451 F.Supp. at 301](#). Specifically, they argued for what \*632 would be in effect a yearly, or in the alternative, a monthly pay period. See *id.* The court rejected that suggestion, observing that as salespersons were paid each week for earning which accrued during that week, there is no problem fixing the work period as one week. “Having established the week as the applicable pay period, defendants cannot now argue that any other time period measures compliance with the [FLSA].” *Id.*

The sole authority cited in Defendants' pleading for their position that the minimum wage can be calculated differently where overtime is also at issue is the deposition and report of their expert witness, Travis Campbell. Campbell, in turn cites portions of the Department of Labor's Field Operations Handbook (FOH) and the Code of Federal Regulations. Campbell admits, however, that he is not aware of any court that has ever applied this alternative methodology to calculate minimum wage payments simply because the plaintiffs were also pursuing overtime claims. Campbell Dep. at 21. Defendants have not directed the Court to any such decision and the Court's exhaustive research has uncovered none. Furthermore, Campbell admits that he has no idea why the presence or absence of an overtime exemption should impact the way in which minimum wages are calculated under the FLSA. *Id.*

Defendants are somewhat vague as to which regulations or portions of the FOH they are advocating the Court should apply. In their pleadings, Defendants opine what "DOL policy" prescribes or permits without ever citing to any particular portion of the Code or FOH. See Defs.' Reply at 16. Defendants' pleadings actually quote "DOL policy," but again without specific citation. *Id.* (stating without citation that their "approach is consistent with DOL policy as it is 'reasonable and equitable' ").

Subchapter 30b of the FOH discusses the methods to be used to determine compliance with the minimum wage requirements of the FLSA. Section 30b05 within that subchapter addresses "Employee[s] compensated on a commission basis." Because methods of computation and payment involving commissions vary widely, the FOH instructs that "the determination of [minimum wage/overtime] compliance must be made on the facts of each case." FOH § 30b05(a). The Handbook does allow that some general principles may be applicable. *Id.*

"If an employee paid wholly or in part on a commission basis is subject to [overtime]," the FOH states that "the principles set out in [29 C.F.R.] 778.117-778.122 shall be followed." FOH § 30b05(b).<sup>FN6</sup> These sections of the Code give guidance as to the calculation of the "regular rate" for overtime purposes where the employee is paid by commission. The only regulations in this portion of the Code that could arguably apply here are §§ 778.119 ("Deferred commission payments-general rules") and 778.120 ("Deferred commission \*633 payments not identifiable as earned in particular workweeks"). The thrust of § 778.119 is that, in situations where the calculation and payment of the commission cannot be completed until after the regular pay day, the employer can disregard the commission in determining the regular pay rate until the amount of the commission can be ascertained. Once the amount can be ascertained, it must be "apportioned back over the workweeks of the period during which it was earned." [Section 778.120](#) addresses the situation where "it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned or reasonably presumed to be earned each week." In that instance, "some other reasonable and equitable method must be adopted." [29 C.F.R. § 778.120](#).

[FN6](#). As mentioned above, Defendants' expert does cite some provisions of the FOH and Code of Regulations in his report and deposition, but his reasons for citing these particular provisions are not clear. When he looks for guidance as to the method for calculating minimum wages for employees who are exempt from overtime, he properly goes to Subsection 30b05(c). See Campbell Report at unnumbered page 3. This subsection explicitly states that it is to be used in determining whether an employee is paid in compliance with minimum wage requirements “[i]f an employee paid on a commission basis is exempt from [overtime].” But for reasons he does not explain, when addressing employees paid commission but not exempt from overtime, he directs the Court's attention to provisions related to “bonus [es] and other payments,” FOH § 30b07(b), and ignores § 30b05(b). See *id.* at unnumbered page 4.

Plaintiffs' proposed method of calculation essentially follows the method suggested in § 778.119; commissions are apportioned over the workweeks encompassed in the semi-monthly pay period in which the commissions were “earned,” at least as that term is defined by Defendants. As discussed below in the context of Defendants' request for judgment on Plaintiffs' terminal commission claims, it is Defendants' position that commissions are only earned when a loan closes and funds and a loan officer has earned nothing prior to that date. See Defs.' Mot. at 6. In light of Defendants' position, the Court cannot conclude that it is not “possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned.” Thus, whatever principles might be inferred from [§ 778.120](#) are not implicated here. Of additional note, regardless of any allocation principles that might be implicated, nothing in any of these regulations can be read to relieve Defendants of the obligation to pay no less than the minimum wage for each workweek within a pay period on that regular payday for that workweek.

For these reasons, the Court concludes that Plaintiffs are entitled to minimum wage payments as calculated and set out in their exhibits.

## *2. Overtime Claims-Applicability of the “Motor Carrier” Exemption*

While neither Defendants nor Plaintiffs have moved for summary judgment on Plaintiffs' overtime claims, Defendants have asked that the Court hold that an overtime compensation exemption that applies to employees engaged in the interstate transportation of personal property is applicable to Plaintiffs' claims.

Three years before passing the FLSA, Congress enacted the Motor Carrier Act of 1935(MCA). The purpose of the MCA was to promote efficiency, economy, and safety in the rapidly growing motor transportation industry and, in line with that purpose, the MCA gave the Interstate Commerce Commission (ICC) the authority to regulate the maximum hours of work for employees of “common carriers” and “contract carriers” by motor vehicle. The MCA also gave the ICC similar regulatory powers over employees of “private carriers” by motor vehicle if the ICC concluded that such regulation was needed

to promote safety on the nation's roadways. See [Friedrich v. U.S. Computer Services, 974 F.2d 409, 412 \(3rd Cir.1992\)](#). These regulatory powers have since been transferred by Congress from the ICC to the Department of Transportation (DOT). See *id.*

When it enacted the FLSA, Congress wanted to ensure that the FLSA's overtime provisions not overlap or interfere with those of the MCA. Accordingly, Congress included a provision in the FLSA \*634 that exempted employees whose hours the ICC had the power to regulate from the FLSA's overtime regulations. This exemption, as amended, is codified at [29 U.S.C. § 213\(b\)\(1\)](#) and states, “[t]he provisions of [section 207](#) of this title (the overtime provisions) shall not apply with respect to-(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of [section 31502 of Title 49](#) ....”

[Section 31502](#) of the MCA provides that “[t]he Secretary of Transportation may prescribe requirements for-(1) qualifications and maximum hours of service of employees of ... a motor carrier; and (2) qualifications and maximum hours of service of employees of ... a motor private carrier, when needed to promote safety of operation.” [49 U.S.C. § 31502\(b\)](#). A “motor private carrier” is defined under the MCA as

a person, other than a motor carrier, transporting property by motor vehicle when-

(A) the transportation is as provided in section 13501 of this title; [FN7](#)

[FN7](#). Section 13501 is a general jurisdiction provision and imposes the condition that the transportation at issue must involve interstate or foreign commerce.


(B) the person is the owner, lessee, or bailee of the property being transported; and


(C) the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise.

[49 U.S.C. § 13102\(13\)](#). Furthermore, for the exemption to be applicable, not only must the employer be a “common carrier,” “contract carrier,” or “private motor carrier,” but the employee must also be one “whose work activities affect the ‘safety of operation’ of that motor carrier.” [Troutt v. Stavola Bros. Inc., 107 F.3d 1104, 1107 \(4th Cir.1997\)](#).

It is Defendants' contention that SFM is a “motor private carrier.” Defendants reason as follows. SFM markets its loans in four states: Maryland, Virginia, Pennsylvania, and Delaware. Historically, 50% of its customers are located outside of the state of Maryland. Defendants contend that because the percentage of loans that go to closing is significantly higher when loan officers make an appointment and present the loan package to the borrowers in person instead of simply mailing the package, loan officers regularly travel out of state to meet with potential borrowers. The typical loan package consists of approximately twenty documents that are approximately one-half inch thick.

Aff. of David Barrash at ¶ 4. Because loan officers carry this one-half inch thick folder of paper with them when they go to present the loan, Defendants argue that they are “engaged in the transportation of property,” Defs.’ Mot. at 15, and therefore, SFM is a “motor private carrier” whose employees are exempt from the FLSA’s overtime provisions.

 [5] The Supreme Court has cautioned that exemptions to the FLSA 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 \(1960\)](#); see also [Pugh v. Lindsay, 206 F.2d 43, 46 \(4th Cir.1953\)](#) (“Since the Act is remedial in nature, the exemptions contained therein must be strictly construed, and it is incumbent upon one asserting an exemption to bring himself clearly and unmistakably within the spirit and the letter of its terms.”). The burden of invoking these exemptions rests upon the employer. \*635 [Arnold, 361 U.S. at 394 n. 11, 80 S.Ct. 453](#); [Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 614 \(2nd Cir.1991\)](#), cert. denied, [506 U.S. 905, 113 S.Ct. 298, 121 L.Ed.2d 222 \(1992\)](#). Thus, in order to hold that SFM can rely upon the motor carrier exemption to avoid its obligations to pay overtime wages, this Court must conclude that SFM can meet the burden of establishing that it is plainly and unmistakably a private motor carrier.

 [6] While Defendants cite close to two dozen cases in their discussion of this exemption, none of those cases find the exemption applicable under circumstances remotely resembling those presented here. Most of the cases address issues not in dispute here. For example, in *Troutt*, the Fourth Circuit specifically noted that, in the case before it, “[i]t is undisputed that (the plaintiff’s employer) is a ‘private motor carrier’ that provides transportation on public highways between two states.” [107 F.3d at 1109 n. 2](#). The issue in *Troutt* was whether the particular employee’s activities “affect safety of operations.” *Id.* at 1108; see also [Blankenship v. Thurston Motor Lines, Inc., 415 F.2d 1193 \(4th Cir.1969\)](#) (addressing whether loading dock workers who loaded freight into trucks for interstate carrier had sufficient discretion in the exercise of their duties to affect safety). In several of the cases cited by Defendants, there was an issue as to whether the employer’s enterprise had sufficient interstate connections to fall within the exception, but it was undisputed that the employer was otherwise a common or private motor carrier. See, e.g., [Griffin v. Consolidated Foods Corp., 771 F.2d 826 \(4th Cir.1985\)](#) (stating “the sole question on appeal is whether [defendant] was engaged in such interstate commerce as to qualify for the motor carrier exemption” in case involving route salesperson who delivered party hose from employer’s warehouse to retail stores in company owned van); [Garcia v. Pace Suburban Bus Serv., 955 F.Supp. 75 \(N.D.Ill.1996\)](#) (holding that bus driver for common carrier was exempted from FLSA where he “reasonably could be expected to make one of the carrier’s interstate runs”).

Here, there is no dispute that Plaintiffs are called upon to make frequent trips to other

states. It is also undisputed that, were SFM a private motor carrier, Plaintiffs' employment activities, which include more than a *de minimis* amount of driving, could be found to affect safety. The sole issue then is whether SFM is a private motor carrier. That determination, in turn, depends on whether carrying a half inch file of paper constitutes the "transportation of property" under the MCA. As the Supreme Court has observed, once a court concludes that the employer is not a carrier, "it is not necessary to determine which of the employees ... do work which affects the safety of operation of motor vehicles." [Boutell v. Walling, 327 U.S. 463, 471-72, 66 S.Ct. 631, 90 L.Ed. 786 \(1946\)](#). If the employer is not a carrier, the inquiry is over and the exemption does not apply.

The only decision cited by Defendants directly addressing the question of whether the employer was a private motor carrier under facts arguably close to those presented here is [Friedrich v. U.S. Computer Serv., 974 F.2d 409 \(3rd Cir.1992\)](#). The plaintiffs in *Friedrich* were field engineers employed by a company that provided computer hardware and software installation, maintenance, and repair service. Although plaintiffs were based in Pennsylvania, they routinely serviced customers in several surrounding states. When a customer was located within a six-hour drive, the field engineers would drive their personal vehicles to the customer's place of business, carrying with them a tool kit, \*636 replacement parts, and other equipment. These field engineers filed an action seeking overtime compensation under the FLSA and the defendant moved for summary judgment, arguing that the plaintiffs were exempted from FLSA's overtime provisions under the interstate transportation exemption.


The district court agreed with the defendant. On appeal, the Third Circuit affirmed the lower court's decision, reasoning that because the plaintiffs carried tools and spare parts, they were transporting property. The Third Circuit reached this conclusion acknowledging that the MCA does not define "property" and that "it is arguable that the tools, parts, and equipment the plaintiffs transported were so trivial or insubstantial that they did not constitute property within the meaning of the MCA." [974 F.2d at 417](#).

Taking what this Court views as a more reasoned approach, Chief Judge Sloviter authored a dissenting opinion in *Friedrich* in which he concluded that "incidental carriage by plaintiffs" of the tool kit and parts was insufficient to render their employer a private motor carrier. "The absence of enhanced safety concerns due to plaintiffs' transportation of the tool kits and minimal replacement parts makes the MCA inapplicable in that the policy considerations supporting exemption of motor private carriers from the requirement to pay overtime compensation to their drivers is not implicated." *Id.* at 421 (Sloviter, C.J., dissenting).

There is no precedent that is binding on this Court that would compel it to conclude that Plaintiffs were engaged in the transportation of property in interstate commerce. Even *Friedrich* can be readily distinguished on its facts. In *Friedrich*, the plaintiffs were carrying tool kits consisting of approximately 75 tools and weighing 35 pounds, spare parts, and on occasion, a personal computer board or tandem board. As Chief Justice

Sloviter opined in his dissent, even under the majority's expansive view of the exemption, had the plaintiff “carried a few diagnostic computer discs with them in order to service customer software instead of a tool kit and a few replacement parts, such ‘transportation of property’ presumably would not preclude their claim for overtime.” *Id.* at 422. A half inch folder of paper is certainly more akin to a few computer disks than to a 35 pound toolkit.

It is possible that under some hyper-technical interpretation of the word “property” one could argue that, contrary to Chief Judge Sloviter's presumption, carrying a onehalf inch file of paper or a few computer disks could be deemed the “transportation of property.” Accepting that interpretation, however, would broaden the interstate transportation exemption to include any individuals whose business requires them to routinely drive across state lines, as almost every such employee would invariably be carrying some “property” of his or her employer, be it an invoice, an order form, a business card, a cell phone or a pager. If Congress's intent was to exclude so broad a class of individuals from the FLSA (which it certainly could have done) there is no reasonable basis for it to have drafted the exemption in terms of the “transportation of property.”

 [7] The general rule of statutory construction is that there is no occasion for construction where the language is clear and unambiguous and does not lead to absurd or impracticable results. [\*Caminetti v. United States\*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 \(1917\)](#). There are limits to literalism, however. As the Supreme Court long ago instructed, “[a]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.” [\*United States v. Kirby\*, 74 U.S. \(7 Wall.\) 482, 486-87, 19 L.Ed. 278 \(1868\)](#).

A noted commentator has similarly observed,


[t]he literal interpretation of words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are sufficiently flexible to admit of a construction which will effectuate the legislative intention. The intention prevails over the letter, and the letter must if possible be read so as to conform to the spirit of the act... Thus words or clauses may be enlarged or restricted to harmonize with other provisions of an act. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense were they intended to be understood or what understanding they convey when used in the particular act.


*Sutherland Statutes & Statutory Construction* § 46:7 (6th ed.); see also [\*In re Sunterra Corp.\*, 361 F.3d 257, 265 \(4th Cir.2004\)](#) (noting that exception to the Plain Meaning Rule exists “when literal application of the statutory language at issue results in an

outcome that can truly be characterized as absurd, i.e., that is so gross as to shock the general moral or common sense”).

So that the Court is clear, the absurd aspect of Defendants' interpretation of the statute is not that Congress could have intended the exemption to apply to all employees who use their private vehicles to travel over state lines. Congress could have determined that the ICC, and later the DOT, regulate that group of employees. The absurdity is that Congress would have resorted to language related to the transportation of property as the means to define a group that inclusive.


### 3. Liquidated damages claims under the FLSA


 [8] The FLSA provides that the employer who violates its minimum wage or overtime provisions “shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, *and in an additional equal amount as liquidated damages.*” [29 U.S.C. § 216\(b\)](#) (emphasis added). As noted above, liquidated damages are not seen as punitive, but as compensation for damages otherwise “too obscure and difficult of proof.” [Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707-08, 65 S.Ct. 895, 89 L.Ed. 1296 \(1945\)](#). Under the FLSA, there is a presumption in favor of the award of liquidated double damages against employers who violate the statute. [Lanza v. Sugarland Run Homeowners Assoc., Inc., 97 F.Supp.2d 737, 739 n. 9 \(E.D.Va.2000\)](#).

 [9] Congress has granted the district courts discretion, however, to withhold liquidated damages under certain limited situations:

[I]f the employer shows 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] the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in [\[29 U.S.C. § 216\(b\)\]](#).

\*638 [29 U.S.C. § 260](#) (emphasis added). To avoid liquidated damages an employer found liable under [section 206](#) or [207](#) has the “plain and substantial burden of persuading the court by proof that his failure to obey the statute was *both* in good faith *and* predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict.” [Wright v. Carrigg, 275 F.2d 448, 449 \(4th Cir.1960\)](#). This burden “is a difficult one to meet … and ‘[d]ouble damages are the norm, single damages the exception.’ ” [Reich v. Southern New England Telecomm. Corp. 121 F.3d 58, 71 \(2nd Cir.1997\)](#).

 [10] In moving for judgment on Plaintiffs' claim for liquidated damages, Defendants raise four main arguments. First, they assert general ignorance of the applicability of the FLSA: “[t]here is no evidence that Defendants knew that Loan Officers had to be paid minimum wage and/or overtime.” Defs.’ Mot. at 27. Second, they rely on what they represent to be the common practice of other mortgage lenders: “[i]n the personal experience of SFM management, it is customary for employers in the mortgage industry to pay Loan Officers on a straight commission basis.” *Id.* Third, Defendants appear to be making a half-hearted “advice of counsel” argument. Korotki testified that when a company he previously owned was acquired by another mortgage company which had its own general counsel, he did not think or could not remember the acquiring company expressing any concerns about the straight commission compensation structure used by the acquired company. Korotki Dep. at 109-10. Fourth, Defendants raise a waiver argument: “Defendants also justifiably believed that Loan Officers were not due overtime and minimum wage because the Loan Officers had voluntarily agreed to be paid on a straight commission basis.” Mot. at 28. Recognizing, as they must, that there can be no waiver of rights under the FLSA, Defendants augment their waiver argument with an “ignorance-of-the-law” argument: “Defendants were unaware that an employee’s entitlement to minimum wage and overtime cannot be waived as a matter of law.” *Id.*

 [11] None of these arguments meet Defendants’ substantial burden. With the exception of the advice-of-counsel argument, Defendants’ arguments carry no legal validity. Courts have consistently held that ignorance of the FLSA’s requirements is not a defense to liquidated damages:

[T]he presumption of willfulness stands, absent positive and compelling proof of good faith. It is not enough, for instance, to plead and prove ignorance of the wage requirements. Knowledge will generally be imputed to the offending employer . . . . Nor does the complete ignorance of the possible applicability of the [FLSA] shield the employer from liability for liquidated damages . . . . Good faith requires some duty to investigate potential liability under the [FLSA].

[Reeves v. Int’l Tel. & Tel., Corp.](#), 616 F.2d 1342 (5th Cir.1980), cert. denied, 449 U.S. 1077, 101 S.Ct. 857, 66 L.Ed.2d 800 (1981). “Nor is good faith demonstrated by the absence of complaints on the part of employees, or simple conformity with industry-wide practice.” [Reich](#), 121 F.3d at 71 (citations omitted).

If factually supported, a defense based on advice of counsel might be sufficient to avoid liability for liquidated damages. See [Van Dyke v. Bluefield Gas Co.](#), 210 F.2d 620, 621 (4th Cir.) (finding it within district court’s discretion to deny liquidated damages where an attorney advised employer that plaintiff was not employee covered \*639 under the FLSA), cert. denied, [347 U.S. 1014, 74 S.Ct. 870, 98 L.Ed. 1137 \(1954\)](#). Here, there is no such factual support. When asked about Korotki’s testimony concerning the general counsel for that acquiring company, Defendants clarify that they are not representing

that Korotki had “any specific conversations relative to wage and hour matters/subjects.” Pls.' Exh. G, Email from Defs.' counsel to Pls.' counsel dated Sept. 24, 2004. Korotki does not even remember the attorney's name. *Id.*

Defendants explicitly acknowledge that none of these arguments, standing alone, can satisfy their burden of showing that they acted in good faith with a reasonable belief that they were in compliance with the FLSA. Defs.' Reply at 18. Instead, urging a “totality of circumstances” approach, they hope that four arguments with little or no weight can somehow tip the scale when all are piled on top of one another. *Id.*; *see also* Defs.' Mot. at 26. The Court finds that the cases cited by Defendants in support of this approach are readily distinguishable. In some of the cases cited, the plaintiffs entitlement to recovery under the FLSA turned on the interpretation of some unsettled or confusing point of law. *See, e.g., Colunga v. Young, 722 F.Supp. 1479 (W.D.Mich.1989)* (declining to award liquidated damages “[i]n light of the complex and conflicting case law defining who is an ‘employee’ under the FLSA”); <sup>FN8</sup> *Bowman v. Harford County, Maryland, 684 F.Supp. 416 (D.Md.1988)* (limiting liquidated damage award where defendants reasonably relied on language in county legislation creating the compensation at issue that expressly stated that this compensation would not increase the “established rates of pay”). Other courts denied liquidated damages based on the uncertainty of the factual predicate for the plaintiffs' claim. *Foster v. Irwin, 258 F.Supp. 709, 712 (D.La.1966)* (liquidated damages denied where court was “of the opinion that if proper time records had been kept, the defendant might well have been able to prove that the plaintiffs were not, in fact, underpaid at all.”)

[FN8](#). Another decision from this same district deemed the *Colunga* decision “especially unreliable precedent” because of the circumstances under which it was litigated. [Salazar v. Brown, 940 F.Supp. 160, 165 \(W.D.Mich.1996\)](#).

Here, Defendants offer no legal argument that they were not required to pay Plaintiffs minimum wage. As for the Motor Carrier Exemption argument advanced in this litigation to avoid the payment of overtime, Defendants make no representation that they were even aware of the potential applicability of this exemption at the time they denied overtime payments. The Court also notes that as of the date of Korotki's deposition, almost one year after this action was filed, Defendants had still not changed their payroll practices to bring them into compliance with the FLSA's minimum wage requirements. *See* Korotki Dep. at 80-82.

The Court finds that under the undisputed facts presented here, Plaintiffs are entitled to liquidated damages in an amount equal to the awards for minimum wage and overtime payments.

### *B. Maryland Wage Payment and Collection Law Claims*

Under [§ 3-505](#) of the Wage Payment Law, employers are required to pay employees “all

wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated.” [Md.Code Ann., Lab. & Empl. § 3-505](#). “Wages” are defined\*640 under the Wage Payment Law as “all compensation that is due to an employee for employment” and are defined so as to include “a bonus” or “a commission.” *Id.* § 3-501(c)(1) & (2). [Section 3-507.1\(a\)](#) provides the employee a civil cause of action to recover wages withheld in violation of [§ 3-505](#). In addition, [§ 3-507.1\(b\)](#) provides that “[i]f, in an action under subsection (a) of this section, a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs.”

There are three categories of wages, along with treble damages, that Plaintiffs seek under the Wage Payment Law: (1) “year-end” bonuses, (2) terminal commissions, and, (3) a referral bonus for Plaintiff Robert Greveris.

### *1. Year-End Bonuses*

Twenty-seven Plaintiffs seek summary judgment in the aggregate amount of \$74,427.87 for unpaid year-end bonuses for calendar years 2002 and 2003. Plaintiffs contend that these Plaintiffs had done everything necessary to earn the bonuses at issue, that the loans upon which the bonuses were based all went to closing, and that Defendants have received the loan profits, a portion of which was promised to these Plaintiffs under SFM's bonus plan. It is undisputed that the only reason these bonuses were not paid is because the Plaintiffs were not employed on June 30th of the year following the calendar year in which these loans were closed. Plaintiffs assert that denying the bonuses on this ground, while perhaps permissible under the terms of SFM's Bonus Plan, is inconsistent with the public policy manifested in [§ 3-505](#). Plaintiffs find support for this position in a relatively recent decision of the Maryland Court of Appeals, [Medex v. McCabe, 372 Md. 28, 811 A.2d 297 \(2002\)](#).

Defendants raise two defenses to Plaintiffs' claim for unpaid year-end bonuses. First, they contend that many of the claims are barred by the Statute of Frauds. Second, they argue that the requirement that loan officers be still employed on June 30th of the following year is a legitimate and enforceable durational requirement. They cast this provision as simply a means to combat the high turnover rate in the industry. They postulate that if a loan officer continues to render service for the first six months of the year in order to receive the bonus from the previous year, she might have a sufficient number of loans closed or in progress to induce her to remain in SFM's employ. Defendants find support for their position in [Whiting-Turner Contracting v. Fitzpatrick, 366 Md. 295, 783 A.2d 667 \(2001\)](#), a Maryland Court of Appeals decision issued one year before *Medex*.

Like their attempted reliance on a motor carrier exemption, Defendants' invocation of a

Statute of Frauds defense, while creative, is ultimately meritless. Defendants base their Statute of Frauds defense on the fact that SFM's bonus plan is only presented to loan officers for signature when they first begin employment. For example, if a loan officer begins work in calendar year 2002, he would be presented with a document entitled "2002 Loan Officer Bonus Program," which states that it covers "loans that fund between the January 1 and December 2, 2002, funding periods." Defs.' Exh. 10. Although SFM would prepare and present a document entitled "2003 Loan Officer Bonus Program" to each new loan officer hired in 2003, loan officers employed in previous years would not be asked to sign this new document. Noting this practice, Defendants contend that after the first year of \*641 employment, "any alleged annual bonus entitlement is based upon an implied in fact or oral contract." Defs.' Mot. at 19. It is undisputed, however, that the terms of the bonus program have been identical for each year since SFM initiated the program.


Maryland's Statute of Frauds provides that:

[u]nless a contract or agreement upon which an action is brought, or some memorandum or note of it, is in writing and signed by the party to be charged or another person lawfully authorized by that party, an action may not be brought:

...

(3) On any agreement that is not to be performed within 1 year from the making of the agreement.

[Md.Code Ann., Cts. & Jud. Proc. § 5-901](#). Because they contend that the bonus is paid not only for the loan production for a given year but also for the services rendered for the first six months of the following year, Defendants claim that the contract cannot be fully performed in a year and thus falls under the statute. Thus, the "implied in fact" contracts under which loan officers worked after the initial year of employ are, in Defendants' view, unenforceable.

[12]  Accepting for the purpose of this discussion Defendants' construction of the bonus agreements, the Court still finds no bar under the Statute of Frauds. Maryland courts have long held that admissions in the form of sworn testimony in court or in deposition can satisfy the statute. [Lewis v. Hughes, 276 Md. 247, 346 A.2d 231 \(1975\)](#); see also [Labrecque v. Sunbird Boat Co., Inc., 873 F.Supp. 946, 951 \(D.Md.1994\)](#) ("A contract otherwise falling under the Statute of Frauds may nevertheless be enforceable when there is an admission by the opposing party that the contract was indeed formed."). Such admissions may also be made by a current agent of the party. [Labrecque, 873 F.Supp. at 951](#).

In his October 8, 2004, deposition, Brian Oates, SFM's sales manager and a member of SFM's senior management team, testified that the bonus program was unchanged over

the time relevant to this litigation. Oates Dep. at 31. When asked specifically about the “2001 Loan Officer Bonus Program,” he testified that he believed “this is the one that’s still in effect.” *Id.* He further testified:

Q. Now, the loan officer bonus program applies to every loan officer employed by the company, right?

A. Yes.

Q. So, if somebody comes in and signs the loan officer bonus program in 2001, as long as they meet the requirements of that program, they’re eligible for a bonus. Right?

A. A[s] long as you meet the criteria that it states here, you’re eligible for the bonus.

Q. And if they’re still employed in 2002, as long as they meet the criteria of the bonus program, they’re eligible for the bonus program for 2002. Correct?

A. I don’t think they sign another one. I believe it to be an ongoing thing.

...

Q. But the fact that you have signed one every year is irrelevant. If you worked there and you generated loans, and you meet the criteria set forth in the plan, you earn and are paid a bonus…… Correct?

A. Yes.


Oates Dep. at 33-35. [FN9](#)

[FN9](#). The Court further notes that Defendants in their pleadings readily acknowledge the existence of the contract. Defs.’ Reply at 4 (“There is no dispute that there is an implied contract between SFM and its loan officers providing for payment of a bonus following a loan officer’s hire.”)

In addressing whether compelled testimony such as that given in a deposition \*642 can be utilized to satisfy the Statute of Frauds, the Maryland Court of Appeals made the following observation which the Court finds particularly apropos here:

it may be urged, on the one hand, that the defendant should not be required to make the admission, because any waiver of the Statute of Frauds should be exercised voluntarily and not under the threat of perjury. On the other hand, it may be contended that the Statute of Frauds is not designed to protect the welsher. If the defendant made the contract, why should it not be enforceable? If he did not make it, he can deny it and set up the Statute of Frauds. It is only the welsher, therefore, who faces the problem of the “compelled admission” and the law should have little solicitude for him.

[Lewis, 276 Md. at 256, 346 A.2d 231](#). In adopting the latter position, the court held, “if a party admits an oral contract, he should be held bound to his bargain. The statute of frauds was not designed to protect a party who made an oral contract, but rather to aid a party who did not make a contract, though one is claimed to have been made orally with him.” *Id.* (citation omitted).

 [13] Turning to the merits of Plaintiffs' claim for year-end bonuses, this Court must determine if this case is controlled by the Maryland Court of Appeals decision in *Medex* (as urged by Plaintiffs) or *Whiting-Turner* (as urged by Defendants). This Court finds the facts presented here to be virtually indistinguishable from the facts in *Medex*. In *Medex*, the plaintiff was a sales representative for a medical supply manufacturer. Part of his compensation package was incentive fees based on sales made during defined fiscal years. His employment agreement, however, provided that “[p]ayment from all Company incentive compensation plans is conditional upon meeting targets and the participant being an employee at the end of the incentive plan (generally the fiscal year) *and being employed at the time of actual payment.*” [372 Md. at 33, 811 A.2d 297](#) (emphasis added by Court of Appeals). The plaintiff resigned from his position four days after the end of the 2000 fiscal year, which occurred on January 31, 2000. Incentive payments for that year were not made until March 31, 2000. Because the plaintiff was not employed on that date, his employer refused to pay plaintiff's fees under the plan. Plaintiff brought suit under the Wage Payment Act to recover those payments.

Reversing the decision of the trial court, the Court of Appeals held that the plaintiff was entitled to the incentive fees. While acknowledging that under common law contract principles, the contract provision would have provided a sufficient basis to deny payment, the Court of Appeals noted that “[c]ontractual language between the parties cannot be used to eliminate the requirement and public policy [of [§ 3-505](#)] that employees have a right to be compensated for their efforts.” *Id.* at 39, [811 A.2d 297](#). The court found the contract language in question to be invalid and unenforceable. *Id.*

The defendant in *Medex* raised similar arguments to those raised here. *Medex* asserted that “the ‘incentive fees’ were not simply commissions, but more akin to a bonus for continued employment,” *id.* at 36, [811 A.2d 297](#), and that “no wage ha[d] been earned without the continuous employment required by the employment policy.”\*643 *Id.* at 41, [811 A.2d 297](#). Rejecting this position, the Court of Appeals held that “the employee's right to the payment of wages vests without satisfaction of the provision of continued employment. To hold otherwise would place the rights of employees to these wages at the whim of their employer, who could simply terminate any at-will employee whose incentive fees it didn't wish to pay.” *Id.* at 42, [811 A.2d 297](#).

In reaching its conclusion, the court relied on one of the earliest decisions in the nation to interpret a wage payment statute, [Burdette v. Broadview Dairy Co., 123 Wash. 158, 212 P. 181 \(1923\)](#). In *Burdette*, the employer sought to justify its failure to timely pay its

employees their wages due by relying on a provision in the employment contract that required the employees to give two weeks notice. The employer, a dairy, cited the unique demands for particularly skilled labor in the dairy processing industry as justification for the two week notice provision. As summarized by the Court of Appeals in *Medex*, the *Burdette* court held, “[d]espite the employer's assertions that the provision was an important measure to protect its business ... ‘it is clear that the [wage payment] statute establishes a rule of public policy, and that the natural right of the employer and the employee to contract between themselves must yield to what the legislature has established as the law.’ ” [Medex, 372 Md. at 40, 811 A.2d 297](#) (quoting [Burdette, 212 P. at 182-83](#)).

In deciding *Medex*, the Court of Appeals concluded that its earlier decision in *Whiting-Turner* stood in “marked contrast” to the case before it. [372 Md. at 36, 811 A.2d 297](#). In *Whiting-Turner*, the plaintiff's employment agreement provided for a weekly salary and, after two years of employment and depending on the profitability of the company, profit sharing. Before the two year mark, the plaintiff told his supervisor that he was considering resigning. As an inducement to keep him from doing so, his supervisor responded, “I have a profit sharing check for you in my pocket. All you have to do is tell me you are staying.” [Id. at 299-300, 783 A.2d 667](#). The plaintiff resigned anyway and then sued for the bonus check. Under those facts, the court found that the bonus check “was not compensation for the employee's services, but merely a gratuity, revocable at any time before delivery.” [Medex, 372 Md. at 36-37, 811 A.2d 297](#) (citing [Whiting-Turner, 366 Md. at 306, 783 A.2d 667](#)). As such, the bonus was not “ ‘promised for service,’ and hence could not be wages.” *Id.*

This Court concludes that under *Medex*, Plaintiffs are clearly entitled to the claimed year-end bonuses.

## 2. Terminal Commissions

The resolution of Plaintiffs' terminal commission claims is somewhat less clear. Plaintiffs have not moved for judgment on these claims, asserting that there are issues of fact regarding them that must be resolved by a jury. Defendants have moved for judgment, relying heavily on an unpublished decision issued by this Court last year, *McLaughlin v. Murphy*, Civ. No. CCB-04-767, [2004 WL 1634980 \(D.Md. July 20, 2004\)](#). They also rely heavily on the argument that it would be too difficult to apportion a commission between the terminated loan officer and the individual taking over the loan and seeing it through the closing. See Defs.' Mot. at 16, Defs.' Reply at 10-11. Because of this alleged difficulty, they justify the adoption of their “bright line rule,” *i.e.*, that loan officers receive nothing at all unless they are employed at the time of closing, regardless of whether any work had to been \*644 done on the loan after their termination. Defs.' Mot. at 16.

*McLaughlin* provides limited support for Defendants' position. *McLaughlin* involved the claims of a single loan officer. Like Plaintiffs here, *McLaughlin* was paid on a straight

commission basis with no regular salary. Also like Plaintiffs here, his employment agreement provided that, should his employment be terminated, he would not receive a commission on loans that had not settled and funded prior to that termination. After he was terminated for lying about his dealings with a client, McLaughlin brought claims against his former employer under the Wage Payment Act for commissions on three loans that he had originated but had yet to close at the time of his termination.

In rendering her decision, Judge Blake noted that, for two of the pending loans, McLaughlin had signed up the customers for loan programs for which they did not qualify. As a result, these loans had to be completely redone by another loan officer. Significantly, the replacement loan officer was paid the commission once the loans closed. The third loan had yet to close when Judge Blake rendered her decision. [2004 WL 1634980 at \\*5](#).

Under these facts, Judge Blake held that McLaughlin was not entitled to commissions on these three loans. In so ruling, she did use language that would appear to bolster Defendants' position. She observed,

[i]t is not contrary to public policy for [the plaintiff's employer] to decide that commissions will only be paid for those loans that are fully settled. Closing a loan is set forth in the contract as a key element of the broker's job, and the brokerage fees from settled loans are likely crucial to [the employer's] income. Unlike *Medex*, in this case compensation is not linked to an arbitrary factor such as employment on a particular date, but to a reasonable job requirement... [T]he contract makes clear that his job was to prospect, develop, and settle loans completely, and then he would be paid when those duties were performed. Under the [Wage Payment Law], only when McLaughlin completed *all* those tasks would his right to any payment vest. Because McLaughlin did not do everything required of him under the contract with respect to the three loans at issue, he is not entitled by law to any compensation for them.

*Id.* at \*6 (emphasis in original).


In addition to distinguishing the case before her from *Medex*, Judge Blake also contrasted McLaughlin's claims from those brought by a loan officer in another recent Maryland Court of Appeals decision, [Admiral Mortgage, Inc. v. Cooper, 357 Md. 533, 745 A.2d 1026 \(2000\)](#). *McLaughlin* at \*6 (summarizing the holding of *Admiral Mortgage* as "employee whose sole job was to generate and develop loans was entitled to commissions for loans he completely developed that closed after his resignation"). Looking at the facts in *Admiral Mortgage*, they appear closer to those presented in the instant action, at least as to some Plaintiffs, than those presented in *McLaughlin*.

As with Plaintiffs here, "[Cooper's] job was to generate and pursue leads on potential mortgage loans." [357 Md. at 537, 745 A.2d 1026](#). Once he obtained a completed application and other necessary documents, he would turn the file over to another employee for processing and closing. *Id.*<sup>FN10</sup> Also like Plaintiffs here, it appears\*645 that

the loan officer in *Admiral Mortgage* was not relieved of all responsibilities once the loan was turned over to the loan processor. He testified that after he quit his employment, “he offered to continue to assist Admiral in processing th[e pending] loan applications.” *Id.* His employer also testified that, “when a loan officer left, any of his or her pending applications would be worked on by someone else, and that person would be paid the commission when the loan closed.” [Id. at 544, 745 A.2d 1026](#).<sup>FN11</sup> Rejecting the employer's assertion that no commission was due on any loan that had not closed by the time the plaintiff left his employment, the jury awarded the plaintiff the unpaid commissions and the Maryland Court of Special Appeals affirmed the judgment based upon the jury award. At the next appellate level, the main issue regarding these commissions was whether there was sufficient evidence of a lack of a bona fide dispute as to plaintiff's entitlement to those commissions to support the trial court's submission of the issue of treble damages to the jury. Cooper's entitlement to the actual unpaid commissions was not contested. [Id. at 536, 745 A.2d 1026](#).

[FN10](#). Similarly, Defendants here admit that “a loan officer's main function is to originate loans and that SFM has a separate processing department and uses outside title companies to handle the actual closing.” Defs.' Reply at 7.

[FN11](#). The employer also admitted that “although one or more other employees worked on [the plaintiff's] pending applications, no commissions were paid to anyone when those loans closed.” *Id.*

[\[14\]](#)  In this action, the Court finds that there are disputes of facts rendering summary judgment on all of the terminal commissions inappropriate. Although Plaintiffs admit that some additional work is often required on pending loans right up until the time of closing, it is unclear how substantial that work truly is for each of the different loans at issue here. Certainly, it is unlikely if much or any additional work had to be done by others on loans that closed immediately after a Plaintiff was terminated. For example, the Hawkins loan originated by Plaintiff John Bohlander closed the very next day after his termination. See Defs.' Responses to Request for Admissions Nos. 1-5. For those loans where no additional work was done, the relevant considerations are the same as those in *Medex*: compensation (\$3,677.67 in the case of the Hawkins loan) is being linked to the arbitrary factor of employment on a particular date. This result is particularly disturbing when the person doing the firing also receives a windfall in the form of an increased commission. Bohlander testified that his team manager, Travis Koballa, received a 43% commission on the Hawkins loan, instead of the 16% commission he would have received had he not fired Bohlander on the day before the closing.

Plaintiffs point to other untoward practices on the part of SFM managers that create further doubt as to whether Defendants are entitled to judgment on any of Plaintiff's terminal commission claims. In addition to the example of Bohlander's Hawkins loan, Plaintiffs cite the example of Plaintiff David Moray who had six pending loans close

shortly after he was terminated. As a result of Moray's team manager's decision to terminate Moray, the manager received a 43% commission on each of these loans, instead of the 16% commission he would have otherwise received. Moray Aff. ¶¶ 6, 7.

Defendants' efforts to dispel concerns about these practices do more to highlight them. Without denying that Plaintiff Bohlander's team manager terminated him on May 28, 2003, one day before one of his loans was scheduled to close, Defendants \*646 complain, “[w]hat Plaintiffs neglect to say is that at the time of his termination Bohlander was employed one day a week in order to accommodate his working a full time job elsewhere and that, as of the date of his termination, he had not originated a loan *in over ten weeks*, i.e., since March 10, 2003.” Defs.’ Reply at 14 (emphasis in original). A review of the three documents that Defendants submit in support of that justification, however, reveals that Koballa approved Bohlander's transition from full time to part time just a few weeks earlier, on April 17, 2003. Defs.’ Exh. 14-B. Furthermore, Exhibit 15 reveals that the loan that closed on May 29, 2003, had attached to it the largest commission, by far, of those shown on this exhibit. [FN12](#) Exhibit 15 also appears to indicate that Bohlander obtained signatures on loan applications on March 27, 2003, and May 27, 2003, contrary to Defendants' representation that he had not originated a loan since March 10, 2003. [FN13](#)

[FN12.](#) As stated above, this commission was for \$5,875.03. The average amount of the commissions on the other loans shown on this document was only \$1,862.00.

[FN13.](#) Exhibit 15 is a printout listing details about 9 different loans, including the Hawkins loan. Defendants give no explanation as to what Exhibit 15 might be, but from the context in which Defendants present it, the Court can only assume it is a list of Bohlander's loans.

Defendants' explanation for the termination of Plaintiff Moray raises similar concerns. Defendants assert Moray “was terminated on November 10, 2003, for lack of production, *i.e.*, his failure to have generated any loans since October 8, 2003.” The supporting exhibit shows that Moray originated a loan on October 1, 2003, another loan on October 2, 2003, another loan on October 7, 2003, and two loans on October 8, 2003. See Defs.’ Exh. 13. Then, on October 20, 2003, less than two weeks after Moray had originated two new loans on a single day and five loans within a week, and while Moray had pending loan applications showing total commissions of close to \$25,000, his team manager issued an “official Production Warning” concerning Moray, and fired him a few weeks later, on November 10, 2003. Six of Moray's loans closed between November 14, 2003, and December 9, 2003, and, as a result of that firing, all of the commissions went entirely to Moray's team manager. See *id.* Furthermore, it is noteworthy that of the seven loan officers listed on this exhibit, Moray had the highest production by far. [FN14](#)

[FN14.](#) As with Exhibit 15, Defendants give no explanation as to what Exhibit 13 might be. It is also unclear if any of these other loan officers listed on the exhibit were

terminated for low production. The Court notes, however, that each of the other loan officers are Plaintiffs in this action and Defendants would have the Court infer that, with the exception of Moray, Bohlander, and LaRicci, all the remaining Plaintiffs ended their employment with SFM voluntarily. See Defs.' Reply at 14.

In light of the evidence in the record, the Court cannot conclude that Defendants' bright line rule denying all Plaintiffs their terminal commissions is reasonable. It may well be that there were some loans, like the loans in *McLaughlin*, where another loan officer had to take over after a Plaintiff left SFM, had to do substantial work, and was paid the commission for that work. Defendants have not provided any examples, however, of such a situation.

Defendants' request for summary judgment on Plaintiffs' terminal commission claims will be denied.


### 3. Greveris's Referral Bonus

It is undisputed that SFM offers a bonus to all employees who refer someone to the company to work as a loan officer. \*647 The bonus is equal to 5% of the gross profits for fundings that occur in the second, third, and fourth months of the new loan officer's employ. In support of the motion for summary judgment on his claim for a referral bonus, Plaintiff Greveris states:

After learning about the referral bonus plan, I referred one of my oldest friends, Joseph A. LaRicci, to SFM. In completing his employment application, Mr. LaRicci wrote that I referred him to the company. Mr. LaRicci was hired as a loan officer on May 28, 2002 and was continuously employed by SFM until July 7, 2003. Both Mr. LaRicci and I had numerous conversations with Chad Tracy, our manager, and members of senior management in which they acknowledged that I would receive a referral bonus with respect to Mr. LaRicci.

Greveris Aff. ¶ 3. Mr. LaRicci had a very successful first few months at SFM and generated 9 loans in the relevant period. See Pls.' Exh. B. Under the referral bonus plan, Greveris claims he is entitled to a bonus of \$4,220.57 based upon LaRicci's loans.

Defendants offer nothing to directly refute this evidence. Instead, they complain that Greveris's referral bonus claim was not properly pled and ask that the Court so find. In the alternative, Defendants ask that the Court allow them to reopen discovery "to confirm that Plaintiff Greveris satisfied the conditions for payment of such a bonus." Defs.' Reply at 3.

[15]  In the Second Amended Complaint, Plaintiffs alleged that Defendants "failed and refused to pay bonuses earned by at least some of the plaintiffs under the 2002

loan officer bonus program, the 2003 loan officer bonus program, *and/or other bonus programs* maintained by Defendants.” Second Am. Compl. ¶ 18 (emphasis added). In his answers to interrogatories, which Plaintiffs served on Defendants on June 14, 2004, Greveris stated that he “was never paid the \$4,000 Finders Fee which I was owed for referring Joe LaRicci.” Greveris’s Answer to Interr. No. 19. Defendants inquired about this referral bonus when Defendants deposed Greveris on September 30, 2004, and Greveris testified much as he did in his affidavit. See Greveris Dep. at 31-32. Greveris’s referral bonus was also the subject of several questions in the deposition of Samuel Skidmore, a member of SFM’s management team. Skidmore Dep. at 114-20.

Defendants did complain about the lack of notice concerning this claim when Plaintiffs attempted to question Defendant Korotki about it in his deposition. The following exchange occurred:

[Defendants’ Counsel]: I’m going to object to this continued line of questioning regarding the referral bonus because there is no claim in the lawsuit as to the nonpayment of a referral bonus, but go ahead and answer.

[Plaintiffs’ Counsel]: I think there is.

[Defendants’ Counsel]: I mean, if you want to point me to it, but we don’t need to do that now, you can go ahead and answer.

Korotki Dep. at 90.<sup>FN15</sup> Aside from this exchange, there is no record of Defendants taking issue with Plaintiffs’ pursuit of this claim prior to the filing of their opposition to Plaintiffs’ motion.

[FN15](#). In their Reply, Defendants cite to and supply page 19 of Korotki’s Deposition. Defs.’ Reply at 3. The exchange in question, of which Defendants quoted only a portion, is actually found on page 90 of Korotki’s deposition.

The Court finds that the claim was adequately pled and that Defendants are not entitled to reopen discovery. Under the \*648 Federal Rules, the complaint is to give a short and plain statement of the claim, with the understanding that discovery is available to fill in the details. See [Wright & Miller, Federal Practice and Procedure: Civil § 1376, at 737-738](#) (observing that “the theoretical overall scheme of the federal rules calls for relatively skeletal pleadings and places the burden of unearthing the underlying factual details on the discovery process”). Here, Defendants were readily able to frame discovery to elicit the information regarding Plaintiffs’ claims for unpaid bonuses, and were, in fact, supplied with that information last June, well before the end of discovery and, it appears, well before depositions were taken. Choosing not to fully explore this issue in discovery, for whatever reason, does not provide grounds for them to be given another opportunity.


Because Plaintiffs have provided evidence establishing that Greveris is entitled to the


referral bonus, and Defendants have failed, after adequate time for discovery, to produce sufficient evidence to demonstrate that a triable issue of fact exists for trial,<sup>FN16</sup> the Court concludes that summary judgment should be entered on Greveris's referral bonus claim.

[FN16](#). Defendants did present a copy of LaRicci's employment application, Defs.' Exh. 20, and argue that this application shows "there *may* be a genuine issue of material fact" regarding who referred LaRicci. Defs.' Reply at 3 (emphasis added). On the application, in answer to the question, "How were you referred to this company?," a name is written that is crossed out and above it is written the name Rob Greveris.

The fact remains that Rob Greveris is identified on the application as the referring party. If this application, which presumably was in the possession of Defendants, created questions in Defendants' minds that needed to be explored in discovery, they should have done so. For the reasons stated above, it is too late to do so now.

#### *4. Treble Damages Under the Wage Payment Law*

 [16] Where an employee brings an action against an employer to recover unpaid wages and it is established that the employer's withholding of the wages was not the result of a bona fide dispute, the employee may be awarded an amount up to three times the unpaid wage. [Md.Code. Ann., Lab. & Empl. § 3-507.1\(b\)](#). Defendants have moved for summary judgment on Plaintiffs' treble damages claim arguing that Plaintiffs have failed to introduce facts that would allow an inference that Defendants had no bona fide reason for failing to pay wages upon their terminations. Plaintiffs contend that their entitlement to treble damages is an issue properly left to the jury.

 [17] As is evident from the above discussion, the Court finds sufficient evidence to raise questions as to Defendants' credibility in withholding wages. Accordingly, Defendants' motion will be denied as to these claims as well, and the issue of treble damages will be left for the jury. See [Medex, 372 Md. at 44, 811 A.2d 297](#) (reversing lower court's finding of bona fide dispute and observing " 'the determination of discretionary damages is quintessentially a matter for the trier of fact,' and therefore, the determination of a bona fide dispute and award of treble damages was for the jury," quoting [Admiral Mortgage, 357 Md. at 550, 745 A.2d 1026](#)).

#### **IV. CONCLUSION**

For the reasons stated above, the Court reaches the following conclusions:

(1) Count III of the Second Amended Complaint will be dismissed;

\*649 (2) Plaintiffs are entitled to summary judgment on their minimum wage claims in the aggregate amount of \$97,430.60, as set forth in the exhibits accompanying Plaintiffs' motion;

(3) Plaintiffs' overtime claims are not subject to the motor carrier exemption;

(4) Plaintiffs are entitled to liquidated damages under [29 U.S.C. § 216\(b\)](#), in an amount equal to their awards for unpaid minimum wage and overtime payments;

(5) Plaintiffs are entitled to summary judgment on their claims for year-end bonuses in the aggregate amount of \$74,427.87, as set forth in the exhibits accompanying their motion;

(6) Defendants are not entitled to summary judgment on Plaintiffs' claims for unpaid terminal commissions;

(7) Plaintiff Robert Greveris is entitled to summary judgment on his claim for a referral bonus in the amount of \$4,220.57; and

(8) Defendants are not entitled to summary judgment on Plaintiffs' claims for treble damages under Maryland's Wage Payment Law.

In light of these rulings, the following issues remain in need of resolution:

(1) a determination of the amount of Plaintiffs' overtime claims;

(2) a determination of the amount of the award to which each Plaintiff is entitled for terminal commissions, if any; and

(3) a determination of the amount of the award to which each Plaintiff is entitled under [Md.Code Ann., Lab & Empl. § 3-507.1\(b\)](#), if any. A telephone conference will be held on Thursday, March 24, 2005, at 10:00 a.m. to schedule the remaining proceedings in this action.

Copr. (C) West 2007 No Claim to Orig. U.S. Govt. Works D.Md.,2005.  
Rogers v. Savings First Mortgage, LLC  
362 F.Supp.2d 624, 150 Lab.Cas. P 34,982

(C) 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

436 F.Supp.2d 732, 10 Wage & Hour Cas.2d (BNA) 1467

United States District Court,  
D. Maryland.  
Michael MCLAUGHLIN,  
v.  
Kevin MURPHY, et al.,  
No. Civ.A. CCB-04-767.  
July 26, 2005.

**Background:** Loan officer for mortgage company brought action against the company and its president, asserting minimum wage and overtime claims under the Fair Labor Standards Act (FLSA) and claims under Maryland state law. Defendants' motion to dismiss or, in the alternative, for summary judgment was granted with regard to the state-law claims, [372 F.Supp.2d 465](#). Loan officer filed motion for summary judgment as to defendants' claim that he was an outside salesman, and defendants filed cross-motion for summary judgment.

**Holding:** The District Court, [Blake](#), J., held that even assuming loan officer was not an "outside salesman" exempt from FLSA's minimum wage and overtime provisions, he could not satisfy his burden of establishing the number of uncompensated hours he worked, or the number of uncompensated hours that mortgage company suffered or permitted him to work.

Plaintiff's motion denied; defendants' motion granted.

### **MEMORANDUM**

[BLAKE](#), District Judge.

Michael McLaughlin ("McLaughlin") filed this suit against Kevin Murphy and Freedmont Mortgage Corporation ("Freedmont") asserting claims under the Fair Labor Standards Act of 1938 ("FLSA"), [29 U.S.C. §§ 201](#) *et seq.* and Maryland state law. On December 15, 2004, he filed a motion for summary judgment as to the defendants' claim that McLaughlin was an outside salesman, exempt from the minimum wage and overtime provisions of the FLSA. See [29 U.S.C. § 206](#); [29 U.S.C. § 207](#); [29 U.S.C. § 213](#). The defendants filed their cross-motion for summary judgment on December 27, 2004. Oral argument was heard on April 26, 2005. For the reasons that follow, McLaughlin's motion

will be denied and Freedmont's will be granted.

## **BACKGROUND**

McLaughlin was employed as a loan officer for Freedmont from August 2001 through November 2003. His job entailed contacting clients and suggesting appropriate loan and interest rate products for them. McLaughlin was paid straight commissions on the loans he sold in accordance with his employment contract.<sup>FN1</sup> (Pl.'s Mot. for Summ. J., Murphy Dep. at 115; *id.*, Delmont Dep. at 27; *id.*, Ex. 1, Employee Handbook.) He never received or demanded hourly wages.

FN1. Prior and subsequent to his employment at Freedmont, McLaughlin has worked as a loan officer and has been paid only commissions.

Though McLaughlin solicited his own clients, he was also given leads that were generated by Freedmont's advertising. (Def.'s Mot. for Summ. J. at 15 (citing McLaughlin Dep. at 18.)) For that reason, McLaughlin was obligated to spend one day each week in Freedmont's offices to field phone calls from customers seeking to learn more about Freedmont's loans. (*Id.* at 14-15.) Otherwise, McLaughlin was free to work from home or elsewhere. (*Id.* at 16 (citing McLaughlin Dep. at 20-21.)) McLaughlin also determined the number of hours he worked each day.<sup>FN2</sup> Carl Delmont, the Chief Operating Officer of Freedmont, testified that Freedmont was open for operation between 9 a.m. and 7 p.m. but that loan officers would frequently work as late as 9 p.m. (Pl.'s Mot. for Summ. J., Delmont Dep. at 71.)

FN2. There is some evidence in the record that Murphy, Freedmont's president, required officers to work at least "two night[s] per week until 8" (Pl.'s Mot. for Summ. J., Murphy Dep. at 135-136; *id.*, Ex. 2, Manner e-mail), and that he warned loan officers they would lose their job if they were not working a sufficient number of hours. (*Id.* at 113.)

In order to make a sale, McLaughlin could either approach a potential client in person with the loan documents and ask them to complete the loan application, or he could mail documents to the client and wait for a response. (*Id.* at 74-75; 109). If he so chose, McLaughlin could meet potential clients in the conference room at Freedmont's offices. (Pl.'s Mot. for Summ. J., Murphy Dep. at 123-124.) Freedmont alleges and McLaughlin acknowledges that Freedmont recommends its new hires go out to meet potential new clients (Def.'s Mot. for Summ. J. at 16 (citing McLaughlin Dep. at 20.)) In the same manner, Freedmont maintains that it discourages mailing documents, even though it provides the mailing supplies and brochures, because it believes the mail is an ineffective sales tool. (Pl.'s Mot. for Summ. J., Delmont Dep. at 117.)

\*735 Freedmont did not maintain records of the people McLaughlin met or sent loan applications to if they did not close a loan. (Pl.'s Mot. for Summ. J., Murphy Dep. at 118-119.) McLaughlin also did not keep any records of the time he worked. Murphy, relying

on his memory, asserts that McLaughlin did not work more than 40 hours a week in the office. ( *Id.* at 169.) However, Delmont wrote on McLaughlin's health insurance form that he worked "40+" hours per week. (Pl.'s Mot. for Summ. J., Delmont Dep. at 139; Ex. 4, Election Form.) Delmont explains that he wrote this only because McLaughlin would not be eligible for health insurance unless the insurance company understood that McLaughlin was a full-time employee. (Defs.' Mot. for Summ. J., Delmont Aff. at ¶ 7.) Delmont states that he had no other way to demonstrate that to the insurance company on the form.<sup>FN3</sup> ( *Id.*)

[FN3](#). In any event, this form was completed in 2001 and is at best an estimate of future hours of work rather than a record of actual hours.

McLaughlin received no pay during 8 different biweekly pay periods in 2001, 2002, and 2003 because he did not have any commissions for those pay periods. (Pl.'s Mot. for Summ. J., Murphy Dep. at 155-156; 160-163.) Murphy explained that McLaughlin's failure to make sales at those times could have been attributable to difficult business conditions. ( *Id.* at 161-162.) Overall, McLaughlin earned \$10,697.15 from August 2001 to December 2001; \$67,649.41 for calendar year 2002; and \$82,994.97 from January to November 2003. (Defs.' Reply in Supp. of Mot. to Dismiss, Delmont Aff. at ¶ 3.)

McLaughlin instituted a five-count action against Kevin Murphy and Freedmont on March 17, 2004. On July 20, 2004, this court granted the defendants' motion for summary judgment on Counts Three and Four and their motion to dismiss as to Count Five. [McLaughlin v. Murphy, 372 F.Supp.2d 465 \(D.Md.2004\)](#)(opinion incorporated herein by reference). Pending discovery, the court denied without prejudice the defendants' motion for summary judgment as to Counts I and II, which alleged violations of the FLSA, [29 U.S.C. § 201](#) *et seq.* McLaughlin now claims that at various times during his employment, he worked more than forty hours per week without receiving overtime pay in violation of [29 U.S.C. § 207](#). He also maintains that for approximately sixteen weeks of his employment, he was not compensated at all, let alone the statutory minimum wage provided in [29 U.S.C. § 206](#).

## **ANALYSIS**



### *I.*

Freedmont contends that it is not bound by the requirements of [§ 206](#) and [§ 207](#) because the FLSA exempts McLaughlin, an "outside salesman," from those provisions. See [29 U.S.C. § 213](#). An outside salesman is defined as an employee: (1) who is employed for the purpose of and who is customarily engaged away from the employer's place of business in making sales or obtaining orders or contracts for services; and (2) whose hours of work of a nature other than that just described do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer.<sup>FN4</sup> See

\*736 [29 C.F.R. § 541.500\(a\)-\(b\)](#); [26 A.L.R. Fed. 941](#). Work performed incidental to and in conjunction with the employee's own sales or solicitations, however, is not considered nonexempt work that counts towards the 20 percent limit. [29 C.F.R. § 541.500\(b\)](#).

[FN4](#). The regulation that defines “outside salesman” was changed effective August 23, 2004. See [69 FR 22122, 22267-22268](#). The new rule removes the restriction that outside sales employees cannot do inside sales work for more than 20% of the hours worked in a week by nonexempt employees. This revision was made for consistency with the other exemptions under section 13(a)(1) of the FLSA and because “the current outside sales 20-percent restriction is particularly complicated and confusing since it relies on the work hours of nonexempt employees and requires tracking the time of employees who, by definition, spend much of their time away from the employer's place of business.” [69 FR 22122, 22160](#). However, because this case was filed prior to the modification, the 20% restriction applies.

The regulations further provide that an outside sales employee makes sales at the customer's place of business or home. 29 C.F.R. § 502(b). If a salesperson uses his/her home to conduct business, it is considered the employer's place of business for these purposes. [Id.](#) In addition, sales made via mail, telephone, or the internet are not outside sales. [Id.](#)

 [\[1\]](#)  [\[2\]](#) Because the employee's exempt status is an affirmative defense, the employer bears the burden of proving the exemption by clear and convincing evidence. [Stricker v. Eastern Off Road Equip., Inc., 935 F.Supp. 650, 653-54 \(D.Md.1996\)](#). The FLSA exemption must be narrowly construed against the employer who asserts it. [U.S. Dept. of Labor v. North Carolina Growers Ass'n, 377 F.3d 345, 350 \(4th Cir.2004\)](#); [Stricker, 935 F.Supp. at 654](#).

Freedmont must show that McLaughlin was primarily engaged in outside sales and that any inside sales he conducted were less than 20% of the hours worked in a week by nonexempt employees at Freedmont. However, neither Freedmont nor McLaughlin kept records of McLaughlin's time. There is no independent evidence that would demonstrate what percentage of his time McLaughlin spent doing sales outside the office as compared to sales he did by phone, mail, or in the office. Though Freedmont does supply a list of all the loans McLaughlin closed in 2003, it has no way of accounting for McLaughlin's time on any of those loans or on any sales pitches that did not succeed. [FN5](#) Thus, McLaughlin contends that Freedmont fails to satisfy its burden of proof for its affirmative defense.

[FN5](#). McLaughlin argues that even the list produced by Freedmont does not indicate he spent the bulk of his time on exempt work. There is no information as to how much time was spent at the loan closing appointments or where they took place. Presumably, each client solicited by mail took less of McLaughlin's time than each client he met in person.

On the other hand, Freedmont insists that a case-by-case analysis must be done to determine whether an employee falls within the exemption. [Nielsen v. Devry, Inc., 302 F.Supp.2d 747 \(W.D.Mich.2003\)](#). Freedmont lists various indicia, used in [Nielsen, Hodgson v. Krispy Kreme Doughnut Co., 346 F.Supp. 1102 \(M.D.N.C.1972\)](#), [Fields v. AOL Time Warner, Inc., 261 F.Supp.2d 971 \(W.D.Tenn.2003\)](#), and [Jewel Tea Co. v. Williams, 118 F.2d 202 \(10th Cir.1941\)](#) that are considered in the decision as to whether an individual is an outside salesman. These include: first, the employee not only sells to existing customers but solicits new business. McLaughlin did accomplish this by generating his own leads and fielding calls that were generated by advertisements. (Def.'s Mot. for Summ. J. at 15 (citing McLaughlin Dep. 18-19.)) Second, the employee was hired as a salesperson and has that title. McLaughlin states that he was hired as a salesperson, and so does his employment contract. ( *Id.* at 7-8 (citing McLaughlin Dep. at 16, 12.)) Third, the employee is paid entirely or primarily from commissions on sales he makes. ( *Id.* at 8 (citing McLaughlin Dep. at 12.)) Fourth, the employee decides his own work schedule and the number of hours to be devoted \*737 to serving his sales territory. McLaughlin testified that he set his own schedule and indeed he changed his routine in May/June 2003 to spend more time away from the office when his relationship with another employee in the office ended. ( *Id.* at 16 (citing McLaughlin Dep. at 20-21.)) Fifth, the employer does not direct, monitor, or supervise the employee.<sup>FN6</sup> (Pl.'s Mot. for Summ. J., Murphy Dep. at 124; *id.*, Delmont Dep. at 101.) Quoting [Nielsen](#), Freedmont argues that the indicia should be considered together to determine if the employee is an outside salesman.<sup>FN7</sup> [302 F.Supp.2d 747, 756](#).

[FN6](#). Freedmont stresses this factor: it hired McLaughlin with the understanding that he was in charge of his own time. See [Jewel Tea, 118 F.2d at 208](#).

[FN7](#). McLaughlin contends that he was not engaged in sales at all when he met clients in person because, he claims, he had already worked the details out over the phone and was only going to deliver the documents. This argument is unpersuasive, because execution of the documents is an integral and essential part of the sale. Similarly, McLaughlin's argument that he was not a salesman when he received no pay is unconvincing. As Freedmont responded, McLaughlin is still a salesman when he closes no loans, although he may be an unsuccessful salesman.

While it is clear that McLaughlin was engaged in sales activity, it is less clear whether that sales activity was regularly engaged in away from the employer's place of business. Moreover, under the regulation as it existed when this case was filed, Freedmont must show that McLaughlin only worked on inside sales work for less than 20% of the hours worked in a week by nonexempt employees. There is not sufficient evidence in the record to support that assertion.<sup>FN8</sup> Accordingly, I will assume for purposes of this opinion that Freedmont has failed to show that McLaughlin met the definition of an "outside salesman."

[FN8](#). Some cases avoid this requirement by deciding whether an individual employee worked on inside sales work for less than 20% of his working time. The regulation,

however, requires an evaluation of the individual employee's time based on the time of his nonexempt colleagues. See [29 C.F.R. 541.500\(b\)](#). If Freedmont had established that all employees, exempt and non-exempt, worked the same number of hours, the standard could be equated. Freedmont did not do so. ( See Pl.'s Mot. for Summ. J., Murphy Dep. at 124.) The hours listed in the employee handbook ( *Id.*, Ex. 1) are not relevant for these purposes, as Delmont explained that the handbook had never been updated since the company had grown and compensation had been changed from salaried employees to those paid based on commissions. ( *Id.*, Delmont Dep. at 71.)

II.

[3] [4] [5] [6] McLaughlin has the burden of establishing the hours he claims to have worked and the work he claims to have performed for which he was not paid. See [Anderson v. Mt. Clemens Pottery Co.](#), 328 U.S. 680, 686-687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946); [Turner v. Human Genome Science, Inc.](#), 292 F.Supp.2d 738, 748 (D.Md.2003). In a situation, such as this, where the employer does not have records of the employee's hours, "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](#), 328 U.S. at 687, 66 S.Ct. 1187. McLaughlin does not need to give exact evidence of the hours he worked. See [Pforr v. Food Lion, Inc.](#) 851 F.2d 106, 108 (4th Cir.1988); [Turner](#), 292 F.Supp.2d at 747, [Donovan v. Kentwood Dev. Co., Inc.](#), 549 F.Supp. 480, 485 (D.Md.1982). After McLaughlin produces his evidence, the burden shifts to Freedmont to negate the \*738 inference drawn from McLaughlin's proffer. "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 688, 66 S.Ct. 1187.

Neither Freedmont nor McLaughlin kept records of McLaughlin's hours. Likewise, McLaughlin has offered no proof that he actually worked during the 16 weeks in which he closed no loans and did not receive a paycheck. The two parties dispute McLaughlin's deposition testimony in which McLaughlin was asked if he remembered how many hours he worked for which he was not paid. (Def.'s Mot. for Summ. J. at 6-7 (citing McLaughlin Dep. at 23-24.)) McLaughlin responded that he did not know how many hours he had worked. Thus, Freedmont argues that McLaughlin has not satisfied his burden of showing the amount and extent of work he performed for which he was not paid.

McLaughlin contends, however, that he attempted to give an estimate but was cut off by opposing counsel. (Pl.'s Consolidated Reply at 7; *Id.*, McLaughlin Aff. at ¶ 2.) He argues that he believed Freedmont's counsel was asking if he recalled his hours from specific weeks, which he did not. However, McLaughlin maintains that he had testified earlier in his deposition that his typical workday was 11:00 a.m. to 7:00 p.m. or 12:00 p.m. to 8:00

p.m. (Pl's Consolidated Reply, McLaughlin Dep. at 22.) I will assume that McLaughlin's interpretation of his deposition testimony as stating that his work hours were "something like" 11 to 7, or 12 to 8 is correct. This is nonetheless an imprecise estimate that amounts to a 40-hour work-week.

McLaughlin's interrogatory response to Freedmont stated that his work week hours ranged from 40 to 55 hours a week. (*Id.*, McLaughlin Aff. at ¶ 4.) That estimate, averaged out to 47 hours a week, appears to be the principal, if not the only, basis on which McLaughlin would calculate his "uncompensated" hours. McLaughlin argues that his estimates are sufficient for a "just and reasonable inference" of time worked without proper compensation, see [Donovan, 549 F.Supp. at 485-486](#); Freedmont responds that estimates may be sufficient but speculation is not. See [Jax Beer Co. v. Redfern, 124 F.2d 172, 175 \(5th Cir.1941\)](#)(refusing to base an award upon the "guess, speculation, and averages made up from the uncertain recollections of these appellees.") Moreover, the Fourth Circuit has held in [Pforr](#) that the employee must show that the employer knew about the overtime hours and permitted the employee to work those extra hours. [851 F.2d at 109-110](#). McLaughlin has admitted that he never reported his hours to Freedmont and Freedmont did not supervise his work. He has not shown any awareness on Freedmont's part of any specific amount of uncompensated hours that he worked.

Based on the record, McLaughlin cannot meet his burden of showing as a matter of "just and reasonable inference," either the uncompensated hours he worked, or the number of uncompensated hours Freedmont "suffered" or "permitted" him to work. Accordingly, his motion for summary judgment will be denied, and Freedmont's will be granted.

A separate Order follows.

Not Reported in F.Supp.2d, 2006 WL 561489 (W.D.Mo.), 11 Wage & Hour Cas.2d (BNA) 503

[Motions, Pleadings and Filings](#)

United States District Court,  
W.D. Missouri, Western Division.  
Mark BELTON, et al., Plaintiffs,

v.

PREMIUM MORTGAGE, INC., et al., Defendants.

No. 03-0964-CV-W-HFS.

March 6, 2006.

[Ronald E. Sandhaus](#), Leawood, MO, for Plaintiffs.

[Christopher A. Brackman](#), [R. Scott Smith](#), Furry and Smith, PC, Independence, MO, for Defendants.

MEMORANDUM AND ORDER

[SACHS](#), J.

\*1 Before the court is the motion of defendants Premium Mortgage, Inc., and William Mohn for summary judgment. Plaintiffs, Mark Belton, and Terence Cooper, as former employees of defendants, commenced this action pursuant to section 16(b) of the Fair Labor Standards Act ("FLSA") of 1938, [29 U.S.C. § 216\(b\)](#). In their complaint, plaintiffs seek recovery of unpaid overtime compensation, unpaid minimum wage compensation, liquidated damages, attorney fees, and costs.

In their motion for summary judgment, defendants claim that because plaintiffs qualify as exempt employees under the "outside salesmen" exemption of [29 U.S.C. § 213\(a\)\(1\)](#), they are not entitled to overtime wages under [29 U.S.C. §§ 206\(a\)](#) and [207\(a\)](#).

Also, before the court is defendants' fourth motion for sanctions. Defendants seek the imposition of sanctions and claim that counsel for plaintiffs failed to respond to discovery requests, file witness and exhibit lists, or to participate in preparing a joint proposed pre-trial order.

*Background Facts*

The parties essentially agree on most of the facts surrounding this dispute, and where controverted, will be duly noted. Plaintiffs began their employment with defendants in June of 2002, and were trained as loan originators during the first 2 weeks of employment. According to defendants, as loan originators, plaintiffs were trained as salespeople in order to learn the mortgage business and to increase their individual sales efforts. Plaintiffs agree that, as salespeople, they would solicit or generate business for the company by selling their services to customers interested in refinancing mortgages. Plaintiffs claim, however, that in addition to receiving instruction and orientation, they were also required to answer phones, set up files, assemble office furniture, and perform work related to defendant Mohn's rental property.

Plaintiff Cooper claims that for the period of June 2, 2002, through September 30, 2002, he worked approximately 634 hours of regular time, and 82.5 hours of overtime, but received no compensation. (Complaint: ¶¶ 15-16). He resigned employment with defendants on August 15, 2003, and claims that he is due commissions of not less than \$5,600. (Id: ¶¶ 17-18).

Plaintiff Belton claims that during the period of June 2, 2002, through August 1, 2002, he worked approximately 354 hours of regular time, and 28 hours of overtime. (Id: ¶¶ 19-20). He also resigned his employment on August 15, 2003, and claims that he is due commissions not less than \$3,00.00. [FN1] (Id: ¶¶ 22-23). Belton further states that on August 2, 2003, defendants issued a check no. 6113 in the net amount of \$2,650.04 for the period of June 16, 2003, through July 15, 2003, but then stopped payment on the check after August 18, 2003. (Id: ¶¶ 24-25).

[FN1]. Presumably this is a typographical error, and Belton estimates his unpaid compensation to be not less than \$3,000.

#### *Standard of Review for Summary Judgment*

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. [Nelson v. Ellerbe Beckert Const. Services, 283 F.Supp.2d 1068 \(D.Minn.2003\)](#); citing, [Fed.R.Civ.P. 56](#)©; see also, [Celotex Corp. v. Catrett, 477 U.S. 317, 322- 23, 106 S.Ct. 2548, 91 L.Ed.2d 265 \(1986\)](#). The nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *Nelson*, at 1076. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific showing that there is a genuine issue for trial. *Id.*; citing, [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 \(1986\)](#). The Court must view the evidence, and the inferences that may reasonably be drawn from the evidence, in the light most favorable to the nonmoving party. [Nelson, 283 F.Supp.2d at 1076](#). However, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designated to secure the just, speedy, and inexpensive determination of every action." *Nelson*, at 1076-77.

#### *Analysis*

##### *Fair Labor Standards Act*

\*2 The FLSA requires covered employers to compensate non-exempt employees at overtime rates for time worked in excess of statutorily-defined maximum hours. [Casas v. Conseco Finance Corp., 2002 WL 507059, at \\*2 \(D.Minn.2002\)](#); citing, [29 U.S.C. 207\(a\)](#). [FN2] Defendants argue that plaintiffs are exempt from collecting overtime wages under FLSA [29 U.S.C. §§ 206\(a\)](#) and [207\(a\)](#), because they qualify as exempt employees under the "outside salesmen" exception under [29 U.S.C. 213\(a\)\(1\)](#).

[FN2]. [29 U.S.C. § 207\(a\)](#) provides, in pertinent part:

Except as otherwise provided in this section, no employer shall employ any of his employees, who in any workweek is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. *Casas*, \*2 n. 3.

Given the remedial nature of the FLSA, exemptions under the Act 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." *Casas*, at \*3; quoting, [Arnold v. Ben Kanowsky, Inc.](#), 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960). Consistent with this principle, it is the employer's burden to establish that it is entitled to the benefit of an exemption and excused from the general overtime payment provision. *Id.*, citing, [Mitchell v. Kentucky Finance Co.](#), 359 U.S. 290, 291, 79 S.Ct. 756, 3 L.Ed.2d 815 (1959).

Exempt from the minimum wage and maximum hour requirements is any employee employed in the capacity of outside salesman, as defined by the regulations of the Secretary. [29 U.S.C. 213\(a\)\(1\)](#). The regulations define an outside salesperson as a person (1) "who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business" in making sales; and (2) who does not devote more than 20% of time to activities other than outside sales. *Casas*, at 10; citing, [29 C.F.R. § 541.500](#). Work performed that is incidental to and in conjunction with the employee's own outside sales or solicitation is also considered exempt work. *Id.*; [29 C.F.R. § 541.500\(b\)](#); [541.503](#). Inside sales, however, is nonexempt work. *Id.* [292 C.F.R. § 502\(A\)](#); [29 U.S.C. § 506](#).

Defendants correctly argue that there is a dearth of precedents in this circuit pertaining to application of the outside salesman exemption, and rely on sister jurisdictions for guidance. According to defendants, factors to be considered include whether new business was solicited by the employee; whether sales training was provided; whether the employee was hired and designated as a salesperson; the freedom in determining work hours; and the type of compensation paid. [Fields v. AOL Time Warner, Inc.](#), 261 F.Supp.2d 971, 974 (W.D.Tenn.2003); [Nunneley v. Farmers Insurance Exchange](#), 564 P.2d 231, 234 (Okla.1977); [Hodgson v. Krispy Kreme Doughnut Co.](#), 346 F.Supp. 1102, 1104- 07 (M.D.N.C.1972).

Plaintiffs agree that they were initially trained as loan originators in order to learn the mortgage business and increase their individual sales efforts, but state that they also performed other tasks during this period including assembling office furniture, and receiving calls pertaining to Mohn's rental property. Plaintiffs also agree that as loan originators they were "salespeople" soliciting and generating business for defendants by selling services involved in the refinancing of mortgages. Also undisputed, is the fact that plaintiffs were required to create their own sales reports and file the necessary paperwork after closing mortgage deals. Further, plaintiffs do not dispute that they signed a Loan Officer Pay Plan which confirmed that their earnings were derived in

whole from sales commissions, and that less than 20% of their time was spent on work not related to their sales efforts. [\[FN3\]](#)

[FN3](#). These are additional factors that are probative of an employee's status as an outside salesman. [Fields v. AOL Time Warner, Inc., 261 F.Supp.2d at 974](#) (a court may consider whether the employee must solicit new business; receives sales training; and was hired and denominated as a salesman).

\*3 However, plaintiffs argue that, only occasionally, did their work involve sales calls outside the office on potential referral sources such as banks or real estate agencies. [\[FN4\]](#) Moreover, plaintiffs state that they rarely spent more than 3 to 4 hours per week on outside sales calls. Contrary to defendants' contentions, plaintiffs argue that they were directed by Mohn to be in the office during regular business hours where they made sales calls from a designated work area.

[FN4](#). According to plaintiffs, the banks and real estate agencies were not actual customers, but merely a resource that referred customers to Premium Mortgage.

Defendants, by way of Mohn's affidavit, attempt to counter this argument by stating that while plaintiffs may have chosen to spend the majority of their time in the office, rather than traveling door-to-door, this was not the typical practice of other "loan originator" employees at Premium Mortgage.

Defendants' cited cases fail to clinch their argument. They must establish every aspect of the definition for an exempt employee, and the requirement that the work be performed *away* from the business is the cornerstone of an outside salesperson. [Fields v. AOL Time Warner, 261 F.Supp.2d at 974](#). "[H]ow an employee spends his time is a question of fact, while the question of whether his activities fall within an exemption is a question of law." *Id.*

A fair number of recent unpublished cases involve the "outside salesman" category. I will rely on what may be the most recent pertinent case. [McLaughlin v. Murphy, 2005 WL 1787883 \(D.Md.\)](#). Summary judgment was there granted to plaintiff on the classification issue, noting that under the regulations "sales made via mail, telephone, or the internet are not outside sales" and even "if a salesperson uses his/her home to conduct business, it is considered the employer's place of business." Clearly, therefore, time in the employer's office cannot be treated as "outside" sales work, on a theory, as claimed here, that it is merely "incidental" to solicitation and closing of sales outside the office. Thus, summary judgment will be denied to defendants, and if the case goes to trial, or plaintiffs seek summary judgment on classification, they will have a good chance of getting a ruling or instruction favorable to them.

The plaintiff in *McLaughlin* ultimately lost, however, in his claim for excessive hours and lost compensation, because the district judge rejected what he considered to be " 'guess, speculation, and averages made up from the uncertain recollection" ' of the parties. That is not a matter presented to the court at this time, but the parties may find

it useful to examine that point.

#### *Admissions*

Defendants also argue that on January 14, 2005, [\[FN5\]](#) they delivered to plaintiffs their First Request for Admissions. In this request, plaintiffs were asked to admit or deny that: (1) defendant is not a covered employer under FLSA; (2) defendant is exempt as an employer under FLSA; (3) plaintiffs' employment was exempt from the overtime requirements of FLSA; and (4) plaintiffs were outside salesmen within the meaning of FLSA. Defendants contend that since plaintiffs failed to answer these questions within thirty (30) days pursuant to [Fed.R.Civ.P. 36](#), they are deemed admitted. Plaintiffs admit that they responded to outstanding discovery late, i.e. on March 11, 2005, but claim that they did not receive discovery requests for admissions.

[FN5.](#) Defendants state, and the court's record indicates that on March 24, 2005 (docs. 26 and 27), defendants filed a certificate of service certifying that on January 14, 2005, *inter alia*, a First Request for Admissions was served on plaintiffs.

\*4 While defendants correctly point to [Rule 36](#) in support of their argument, such an approach is not always appropriate. [American Petro, Inc. v. Shurtleff, 159 F.R.D. 35 \(D.Minn.1994\)](#). For, as a general proposition, "[i]t does not further the interests of justice to automatically determine all the issues in a lawsuit and enter summary judgment against a party because a deadline is missed." *American Petro*, at 37; *see also, Manatt v. Union Pacific R. Co., 122 F.3d 514, 517* (8th Cir.1997) (because under the circumstances of this case, the prospect of deeming the controverted fact as having been admitted seems to be anathema to the ascertainment of the truth). Here, defendants claim that plaintiffs failure to respond to certain discovery requests placed a burden upon them in maintaining their defense, and they were unable to file discovery and dispositive motions by the deadline. Defendants do not allege prejudice, and in and of itself, plaintiffs' untimeliness fails to establish any significant prejudice. *Manatt*, at 517 (where the party seeking admission has not established prejudice, which in this context means "the difficulty a party may face in proving its case because of the sudden need to obtain evidence.") As such, defendants fails to demonstrate entitlement to summary judgment on this ground as well.

#### *Unpaid Wages*

Defendants also argue that because plaintiffs are not covered "employees" pursuant to [R.S.Mo. § 290.527](#), they are prevented from collecting overtime wages. This rule permits an employee to bring legal action necessary to collecting wages which the employer failed to pay. However, defendants argue that, pursuant to the definition of employee under [R.S.Mo. § 290.500\(1\)](#), plaintiffs are individuals whose earnings were derived in whole or in part from sales commissions; thus, they fail to come within the purview of [§ 290.527](#).

Plaintiffs counter that they do not seek to collect unpaid commissions for the period of June 2, 2003, through September 30, 2003, because they performed non-sales duties for which they did not receive compensation. Rather, plaintiffs contend that although Count III of their complaint seeks recovery of commissions, it is for the period after

September 30, 2003.

Neither party presents a very persuasive argument. For, although defendants correctly note that a fair reading of Count III of the complaint permits an understanding that plaintiffs seek recovery of unpaid commissions for the entire period of employment, defendants fail to acknowledge that two criteria are necessary to a determination of whether an employee is covered under [§ 290.500](#). Not only must the individual have received earnings which derived from sales commissions, he or she must have also worked hours in places of employment not substantially controlled by the employer. As previously noted, there is a genuine issue of material fact as to whether defendants substantially controlled plaintiffs hours of work, as well as their place of work.

#### *Sanctions*

\*5 Nonetheless, a review of these proceedings, and the conduct of plaintiffs' counsel throughout strongly favors the imposition of sanctions. Shortly after the commencement of this action the parties were directed to file a proposed scheduling order. This was not accomplished in a timely fashion, and counsel states that this was due to the relocation of his office and inoperable phone service. On February 15, 2005, defendants filed motions to compel discovery and for sanctions due to counsel's failure to respond to certain discovery requests; counsel did not see fit to respond to the motions or offer an explanation. Thus, on March 4, 2005, counsel was directed to show cause why the action should not be dismissed for failure to prosecute. In response, counsel simply stated that he "has now completed responses to defendants' discovery."

On March 16, 2005, defendants renewed their motion for sanctions, and stated that, notwithstanding counsel's claim of participating in discovery, he continued to ignore their discovery requests. Counsel claimed communication errors. By an order dated June 2, 2005, counsel was admonished that further communication errors would result in the imposition of sanctions or dismissal of the action. Due to the failure to complete discovery, the case was removed from the fall docket, and continued to the spring docket.

On October 3, 2005, defendants filed a third motion for sanctions due to counsel's failure to respond to their second requests for certain discovery. Once again, counsel did not bother to respond. However, inasmuch as defendants were able to file their dispositive motion, the motion for sanctions was rendered moot. [\[FN6\]](#) Counsel has also not seen fit to comply with the court's order to file exhibit and witness lists in preparation for trial, and has failed to participate in the preparation of the joint proposed pre-trial order. [\[FN7\]](#)

[FN6.](#) In prior motions, defendants argued that counsel's failure to respond to discovery requests prevented them from filing dispositive motions.

[FN7.](#) The latter was to be filed on or before January 25, 2006. In their fourth motion for sanctions, defendants state that their calls to counsel have failed to compel a response. Yet, nearly one month after the deadline, counsel called chambers to state that, once again, due to hectic schedules and misunderstandings, the parties have been unable to file the pre-trial order.

It is clear that counsel has been given every opportunity to cooperate and participate in the discovery process, but has chosen to forego the opportunity. Admonitions, as well as warnings of dismissal have gone unheeded. Therefore, sanctions will be imposed. A restricted amount will be used because this is a somewhat "small claims" case.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment (ECF doc. 31) is DENIED. It is further

ORDERED that defendants' fourth motion for sanctions (ECF doc. 45) is GRANTED. Sanctions in the amount of \$300 will be imposed. Responsibility between plaintiff and counsel is a matter left to them. [\[FN8\]](#)

[FN8.](#) Defendants are free to seek additional sanctions at the conclusion of litigation, depending on future compliance with rules and procedural orders.

W.D.Mo.,2006.

Belton v. Premium Mortg., Inc.

Not Reported in F.Supp.2d, 2006 WL 561489 (W.D.Mo.), 11 Wage & Hour Cas.2d (BNA) 503

442 F.Supp.2d 529

United States District Court,

N.D. Illinois,

Eastern Division.

Paula GATTO, Plaintiff,

v.

MORTGAGE SPECIALISTS OF ILLINOIS, INC. and Walter J. Krajewski, Defendants.

No. 04 C 5216.

March 13, 2006.

**Background:** Former employee sued former employer and employer's president, claiming that they violated the Fair Labor Standards Act (FLSA) and the Illinois Minimum Wage Act by failing to compensate her at a rate of one and a half times her regular rate for alleged overtime hours worked.

**Holdings:** On a defense motion for summary judgment, the District Court, [Brown](#), United States Magistrate Judge, held that:

(1) employee's handwritten documents containing the hours she allegedly worked did not fall within the business records exception to the hearsay rule;

(2) employee's declaration asserting without specificity that she worked more than 40 hours per week “nearly every week,” by itself, was not sufficient to create a genuine issue of fact; and  
(3) in any event, employer was a “retail or service establishment,” within the meaning of an exemption from the FLSA's overtime pay requirements.

Ordered accordingly.

### **MEMORANDUM OPINION AND ORDER**

BROWN, United States Magistrate Judge.

Plaintiff Paula Gatto brought this action alleging that defendants Mortgage Specialists of Illinois, Inc. (“MSI”) and Walter J. Krajewski, the President of MSI (collectively, “Defendants”), violated the Fair Labor Standards Act (“FLSA”) and the Illinois Minimum Wage Act by failing to compensate Gatto at a rate of one and a half times her regular rate for alleged overtime hours worked. (First Am. Compl. ¶¶ 12, 15.) [Dkt 18.] This court has subject matter jurisdiction pursuant to [28 U.S.C. §§ 1331](#) and [1337](#) for Count I, the FLSA claim, and pursuant to [28 U.S.C. § 1367](#) for the supplemental state law claims. Defendants move for summary judgment on Counts I and II of the First Amended Complaint. [Dkt 21.] The parties have consented to the jurisdiction of a Magistrate Judge. [Dkt 5, 6.] For the reasons set out below, Defendants' motion for summary judgment on Counts I and II is granted. Count I is the sole claim arising under federal law, and the court declines to exercise supplemental jurisdiction over the remaining state law claims. [28 U.S.C. § 1367\(c\)\(3\)](#). Accordingly, Counts III through VIII are dismissed without prejudice.

### **FACTUAL BACKGROUND [FN1](#)**

[FN1](#). The following facts are taken from Gatto's responses to Defendants' statement of facts filed pursuant to Local Rule 56.1, cited herein as: “Pl.'s LR Resp. ¶ \_\_\_” [dkt 29], and from the exhibits submitted with those statements or responses to those statements, cited herein as: “Pl.'s LR Ex. \_\_\_” [dkt 30], “Gatto Decl. ¶ \_\_\_” [dkt 28], “Gatto Suppl. Decl. ¶ \_\_\_” [dkt 32], “Defs.' LR Ex. \_\_\_” [dkt 23], “Krajewski Decl. ¶ \_\_\_” [dkt 23], and “Defs.' Reply, Krajewski Suppl. Decl. ¶ \_\_\_” [dkt 31].

#### **A. MSI's Business and Employees**

MSI, an Illinois corporation, is a licensee in good standing under the Illinois \*532 Residential Mortgage License Act of 1987, 205 Ill. Comp. Stat. § 635/1, et seq. (Pl.'s LR Resp. ¶ 2.) MSI operates as a “loan broker” and provides retail “brokerage services” pursuant to the Illinois Residential Mortgage License Act. ( *Id.* at ¶ 6.) MSI's services are available to the general public and include assisting local consumers to obtain loans

secured by residential real estate in Illinois from approved lenders. (*Id.*) MSI's primary business is finding and closing residential mortgage loans for Illinois consumers. (*Id.* at ¶ 5.) This service included finding and closing loans for purchases of new and existing residences, as well as finding and closing second mortgages and home equity loans, and the refinancing of existing loans. (*Id.*) Specifically, MSI's services include soliciting, processing, and placing consumers' residential mortgage loans with qualified lenders who have entered into agreements with MSI. (*Id.* at ¶ 6.) MSI does not make, buy or sell loans, extend credit, or hold mortgages. (*Id.* at ¶ 9.) MSI is not a bank, a savings and loan, or any other kind of financial institution. (*Id.*) It is also not a finance, credit, or loan company, and does not accept consumer deposits or hold funds. (*Id.*)

In return for its services, MSI is paid a predetermined fee by the lender based on the terms and nature of the loan. (*Id.* at ¶ 6.) None of MSI's services are subcontracted, assigned or for resale. (*Id.*) MSI works as an independent contractor, and does not represent either the consumer-borrower or the lender. (*Id.* at ¶ 7.) MSI's entire annual dollar volume of sales comes from its brokerage services as an Illinois Residential Mortgage Act licensee. (*Id.* at ¶ 8.)

MSI employs two types of employees: Loan Processors and Loan Officers. [FN2](#) (*Id.* at ¶ 10, Gatto Decl. ¶ 3; Defs.' Reply, Krajewski Suppl. Decl. ¶ 3(a).) Loan Processors are clerical employees who work solely on a salary basis, handling the bulk of the paperwork and details for the office and the loans. (Pl.'s LR Resp. ¶ 10.) Loan Processors generally work no more than 40 hours per week, although they have been paid overtime compensation during periods when they worked more than 40 hours in a week. (*Id.* at ¶ 10; Gatto Decl. ¶ 3; Defs.' Reply, Krajewski Suppl. Decl. ¶ 3(a).)

[FN2](#). Gatto asserts that there are two types of Loan Officers: "inside" Loan Officers (like Gatto) who receive a receive a 50% commission, and "outside" Loan Officers who receive a commission of 80% or higher. (Pl.'s LR Resp. ¶ 15; Gatto Decl. ¶ 5.) Gatto also claims that there are other relatively minor differences between inside Loan Officers and outside Loan Officers, such as a \$100 processing fee paid by inside Loan Officers for each loan, compared with a fee of \$350 to \$500 paid by outside Loan Officers. (*Id.*) Defendants assert that there is only one type of Loan Officer, and do not make a distinction between inside Loan Officers and outside Loan Officers. (Defs.' Reply, Krajewski Suppl. Decl. ¶ 3(a).) That distinction, if it exists, is not material to the outcome of this motion.

Loan Officers are salespersons who work solely on a commission basis. (Pl.'s LR Resp. ¶¶ 10, 15.) Loan Officers receive no draw, no salary, no base pay, no hourly wages, and no overtime compensation. (*Id.* at ¶ 15.) They are paid commissions twice a month, and are paid only on loans that are closed with approved lenders. (*Id.*) Loan Officers are responsible for: (a) finding qualified consumers who desire loans by generating their own leads and prospects; (b) matching consumers' needs with offerings from MSI's approved lenders; (c) signing and delivering new loans; (d) explaining to the consumers all facets of the loans; (e) locking in acceptable\*533 terms for the consumers; (f)

monitoring the processing of the loans by the lenders and MSI's clerical staff; (g) contacting consumers as necessary regarding appraisals and closing figures; and (h) timely closing the loans. ( *Id.* at ¶ 11.) Loan Officers can maintain other employment so long as it is not with a lender or another Illinois Residential Mortgage licensee. (Pl.'s LR Resp. ¶ 14.)

### **B. Gatto's Employment with MSI**

Gatto worked as a Loan Officer from approximately July 2002 until August 13, 2003. (Pl.'s LR Resp. ¶ 16; Gatto Decl. ¶ 3.) She was hired and fired by defendant Krajewski, who served as her supervisor during her employment. (Pl.'s LR Resp. ¶ 16.) Gatto was told that her work should be performed at the MSI office, and a desk, computer system, fax, and telephone were made available to her there. (Gatto Decl. ¶ 6; Pl.'s LR Resp. ¶ 17.) Gatto admits that Loan Officers do not have to account for or keep their time or punch a time clock. (Pl.'s LR Resp. ¶ 14.) However, she claims that she was expected to work a minimum of eight hours per day on the premises of MSI. ( *Id.*; Gatto Decl. ¶ 4.) According to Gatto, she could either start at 8:00 a.m. and leave at 4:00 p.m. or start at 9:00 a.m. and leave at 5:00 p.m. (Pl.'s LR Resp. ¶ 14; Gatto Decl. ¶ 4.) Gatto states that she was told that if she did not abide by that procedure, her employment would be terminated. (Pl.'s LR Resp. ¶ 21; Gatto Decl. ¶ 7.) <sup>FN3</sup>

FN3. Defendants dispute that MSI ever imposed mandatory hours on Gatto or even suggested a minimum number of hours to her. (Defs.' Reply, Krajewski Suppl. Decl. ¶¶ 3(c), 4.) This dispute is not material to the outcome of this motion.

### **C. Gatto's Pay and Time Records**



Gatto's commissions totaled \$183,464.90 during the approximately 13.5 months that she worked for MSI. (Pls.' LR Resp. ¶ 20; Krajewski Decl., Ex. B.) Gatto was paid commissions of not less than \$2,645.39 per pay period at all times during her employment as a Loan Officer. (Pl.'s LR Resp. ¶ 20.) Gatto never submitted any list, log, or record of the hours she worked to Krajewski during her employment with MSI, or prior to the filing of this lawsuit. ( *Id.* at ¶ 18.) Nor did Gatto ever request payment for overtime during her employment with MSI. ( *Id.* at ¶ 19.) Prior to the filing of this lawsuit, MSI had no records indicating that Gatto worked in excess of 40 hours in any particular week. ( *Id.* at ¶ 21.)

## **LEGAL STANDARD**

The court may properly grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law.” [Fed.R.Civ.P. 56\(c\)](#). A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 \(1986\)](#). In determining whether a genuine issue of material fact exists, the court must construe all facts and draw all reasonable and justifiable inferences in favor of the non-moving party. [Id. at 255, 106 S.Ct. 2505](#). The moving party bears the initial burden to demonstrate the absence of a genuine issue of material fact and that judgment as a matter of law should be granted in the moving party's favor. [Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 \(1986\)](#). Once the moving party has met the initial burden, the non-moving party must designate specific facts showing that there is a genuine\*534 issue for trial. [Id. at 324, 106 S.Ct. 2548](#). The non-moving party must support its contentions with admissible evidence and may not rest upon the mere allegations in the pleadings or conclusory statements in affidavits. [Id.](#); see also [Winskunas v. Birnbaum, 23 F.3d 1264, 1267 \(7th Cir.1994\)](#) (non-moving party is required to present evidence of “evidentiary quality” ( *i.e.*, admissible documents or attested testimony, such as that found in depositions or in affidavits) demonstrating the existence of a genuine issue of material fact). “[N]either ‘the mere existence of some alleged factual dispute between the parties’ … nor the existence of ‘some metaphysical doubt as to the material facts,’ is sufficient to defeat a motion for summary judgment.” [Chiaromonte v. Fashion Bed Group, Inc., 129 F.3d 391, 395 \(7th Cir.1997\)](#) (quoting [Anderson, 477 U.S. at 247, 106 S.Ct. 2505](#) and [Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 \(1986\)](#)). Thus, “[t]he mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].” [Anderson, 477 U.S. at 252, 106 S.Ct. 2505](#).



## DISCUSSION

[1]  [2]  The FLSA states that “no employer shall employ any of his employees … for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed.” [29 U.S.C. § 207\(a\)\(1\)](#). Certain employees, however, are not covered by the overtime provisions. An employer has the burden of demonstrating that a particular employee is not within the ambit of the overtime provisions. [Klein v. Rush-Presbyterian-Saint Luke's Med. Ctr., 990 F.2d 279, 283 \(7th Cir.1993\)](#) (citing [Corning Glass Works v. Brennan, 417 U.S. 188, 196-97, 94 S.Ct. 2223, 41 L.Ed.2d 1 \(1974\)](#)); [Gieg v. DRR, Inc., 407 F.3d 1038, 1045 \(9th Cir.2005\)](#). Exemptions from the Act are to be narrowly construed, although such generalizations are “at best tie-breakers.” [Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1177 \(7th Cir.1987\)](#); see also [Bankston v. State of Ill., 60 F.3d 1249, 1252 \(7th Cir.1995\)](#). The FLSA exempts from coverage employees of “a retail or service establishment” whose regular rate of pay is more than one and one-half times the minimum wage and if more than half their compensation for a representative period (not

less than one month) represents commissions on goods or services. [29 U.S.C. § 207\(i\)](#). If Defendants can establish that there is no genuine issue of material fact as to whether Gatto is exempt under that standard, they are entitled to summary judgment. However, before that issue is even reached, Gatto must produce admissible evidence demonstrating, as a matter of just and reasonable inference, that she has performed work for which she would be entitled to overtime compensation. [Anderson v. Mount Clemens Pottery Co., 328 U.S. 680, 686-88, 66 S.Ct. 1187, 90 L.Ed. 1515 \(1946\)](#), *superseded by statute on other grounds*.


The court finds that Defendants are entitled to summary judgment on the FLSA claim for both reasons. First, Gatto has not provided admissible evidence that she has performed work for which she would be entitled to overtime compensation. Alternatively, Defendants have demonstrated that Gatto is exempt from the overtime requirements of the FLSA.

### A. Gatto's Eligibility for Overtime Compensation

[3]  [4]  The first issue is whether Gatto worked a sufficient number of hours to be \*535 eligible for overtime compensation from Defendants. Although MSI has the duty to “make, keep, and preserve … records of the persons employed by [it] and of the wages, hours, and other conditions and practices of employment maintained by [it],” ([29 U.S.C. § 211\(c\)](#)), an employee who brings suit for unpaid overtime compensation has the burden of proving that she performed work for which she was not properly compensated ([Mount Clemens Pottery, 328 U.S. at 686-87, 66 S.Ct. 1187](#)).

[A]n 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. 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.

[Id. at 687-88, 66 S.Ct. 1187](#). The Court held that employee timecards showing workweeks longer than forty hours created a just and reasonable inference that the employees may be eligible for overtime compensation. [Id. at 684, 688, 693, 66 S.Ct. 1187](#).

[5]  In this case, there is a threshold matter of what evidence is before the court on this issue. In their initial memorandum, Defendants argued that Gatto had produced no admissible evidence that she had worked more than 40 hours in a week. (Defs.' Mem. at 3.) [Dkt 23.] In her opposition to Defendants' motion for summary judgment (Pl.'s Resp. [dkt 30] ), Gatto failed to include any evidence that she ever worked more than

forty hours a week, but subsequently moved to supplement the record with a supplemental declaration stating that she worked more than 40 hours during nearly every week between August 2002 and July 2003, and handwritten documents containing the hours she allegedly worked (Pl.'s Mot. Suppl., Gatto Suppl. Decl., Ex. A [Dkt 32] ). [FN4](#) Gatto does not directly address the issue of whether those documents are admissible evidence, although her declaration suggests a belief that the records fall under the “business records” exception to the hearsay rule. ( See Gatto Suppl. Decl. ¶¶ 7, 8.)

[FN4](#). Contrary to Defendants' argument, Gatto's initial declaration does not admit that she was not authorized to work any overtime. (Defs.' Reply at 2-3.) Gatto stated that she was “expected to work a *minimum* of an eight hour day…” (Gatto Decl. ¶ 4.)

Gatto's motion to supplement the record was granted, and the record was supplemented by her declaration and Exhibits A and B thereto. [Dkt 40.] However, the court agrees with Defendants that Gatto's handwritten documents are inadmissible hearsay and not subject to any exception to the hearsay rule. The documents do not fall under the “business records” exception to the hearsay rule. That exception requires the business records to be “kept in the course of a regularly conducted business activity,” and the making of the records to be “the regular practice of that business activity.” [Fed.R.Evid. 803\(6\)](#). Gatto' s maintenance of her own notes about the time she worked was not in the course of MSI' s regularly conducted business activity. ( See Pl.'s LR Resp. ¶ 14 (admitting that Loan Officers were not required to account for their time); Defs.' Reply, Krajewski Suppl. Decl. ¶ 3(c) (stating that Loan Officers were not required to keep time records or submit reports of their activities).) Moreover, Gatto's supplemental declaration does not provide adequate assurance of the trustworthiness of the handwritten documents. \*536 See [Mount Clemens Pottery, 328 U.S. at 687, 66 S.Ct. 1187](#) (observing that an employee's own records “may be and frequently are untrustworthy”). She says only that while employed she kept a written record of the overtime hours she worked, and that the entries were made “at or near” the time she worked the overtime. (Gatto Suppl. Decl. ¶¶ 4-6.)




[6] Because the notes are not admissible evidence, the only remaining support is Gatto's declaration asserting without specificity that she worked more than 40 hours per week “nearly every week.” (Gatto Suppl. Decl. ¶ 3.) That statement, by itself, is not sufficient to create a genuine issue of fact on this element of Gatto's claim. See e.g., [Haywood v. North Am. Van Lines, Inc., 121 F.3d 1066, 1071 \(7th Cir.1997\)](#) (stating that conclusory allegations and self-serving affidavits, if not supported by evidence in the record, will not preclude summary judgment); [Cardenas v. Benter Farms, No. IP 98-1067-C T/G, 2000 WL 1372848 at \\*2 n. 3 \(S.D.Ind. Sept. 19, 2000\)](#) (Tinder, J.) (stating that plaintiffs' statements in their affidavits that they worked more hours than their employer credited them with were conclusory and insufficient to create a genuine issue of material fact as to actual hours worked, although supplemental affidavits providing specific facts underlying the conclusory assertions were sufficient to allow plaintiffs to

advance beyond the summary judgment phase); compare [Mount Clemens Pottery, 328 U.S. at 684, 688, 693, 66 S.Ct. 1187](#) (time clock records demonstrated that the employees had worked more than 40 hours per week).

Because Gatto has not produced sufficient evidence demonstrating a genuine issue of fact as to her eligibility for overtime compensation, Defendants are entitled to summary judgment on Count I.

## B. The Retail or Service Establishment Exemption

 [7] Even if Gatto had satisfied her burden of establishing eligibility for overtime compensation, Defendants would still be entitled to summary judgment based on the “retail or service establishment” exemption to the overtime requirements of the FLSA:

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services……

[29 U.S.C. § 207\(i\)](#).

There is no dispute regarding two of the requirements for the exemption. Defendants maintain, and Gatto does not dispute, that Gatto's regular rate of pay was in excess of one and one-half times the minimum hourly rate applicable to her under [29 U.S.C. § 206](#).<sup>FN5</sup> (Defs.' Mem. at 6-\*537 7.) Nor does Gatto dispute that more than half of her pay represented commissions on goods or services.<sup>FN6</sup> The parties do, however, dispute whether Gatto was employed by a “retail or service establishment.” Citing [Mitchell v. Kentucky Finance Co., 359 U.S. 290, 79 S.Ct. 756, 3 L.Ed.2d 815 \(1959\)](#), Gatto contends that MSI cannot be a “retail or service establishment” because it is in the “financial industry.” (Pl.'s Resp. at 3.) For the following reasons, the court concludes that MSI is a “retail or service establishment” under [§ 207\(i\)](#), and that the exemption defeats Gatto's claim for overtime compensation.

[FN5. Section 206\(a\)\(1\)](#) states that “[e]very employer shall pay to each of his employees … not less than \$5.15 an hour.” Therefore, Gatto's regular rate of pay must exceed \$7.73 per hour ( $\$5.15 \times 1.5$ ) to meet that element. (The minimum wage in Illinois during the relevant time period was not more than \$5.15 per hour.) See [820 Ill. Comp. Stat. § 105/4](#). Gatto admitted receiving total commissions of \$183,464.90 between July 2002 and August 13, 2003, a 58-week period, and at least \$2,645.39 per pay period. (Pl.'s LR Resp. ¶ 20.) In her complaint, Gatto stated that she “frequently” worked 15 hours per

day and “worked weekends when it was necessary.” (First Am. Compl. ¶ 18.) Even if it were assumed that Gatto regularly worked 15 hours per day seven days a week, equaling a work week of 105 hours for every week during that 58-week period, Gatto would have earned an average of \$30.13 per hour (\$183,464.90 / (58 weeks x 105 hours per week))-well above the \$7.73 hourly rate required. See [Schwind v. EW & Assocs., Inc.](#), 371 F.Supp.2d 560, 568 n. 8 (S.D.N.Y.2005) (calculating plaintiff’s regular rate of pay by averaging the commissions received by plaintiff in a year and allocating the average to each week, and then dividing that figure by a maximum number of hours that could have been worked).

[FN6](#). Gatto admitted that 100% of her compensation represented commissions earned by her as a Loan Officer at MSI. (Pl.’s LR Resp. ¶ 15.)

### 1. The Term “Retail or Service Establishment”

Gatto’s argument relies on the Supreme Court’s interpretation of the FLSA in [Mitchell](#). However, the FLSA as it currently exists is different from that considered by the Court in [Mitchell](#) in 1959. The FLSA then contained a definition of “retail or service establishment,” but the current version of the FLSA does not. In 1949, the FLSA had been amended to include a definition of “retail or service establishment” in [29 U.S.C. § 213\(a\)\(2\)](#): “an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry…” [Mitchell](#), 359 U.S. at 291, 79 S.Ct. 756. The issue in [Mitchell](#) was whether a business that made personal loans to individuals and purchased conditional sales contracts from furniture and appliance dealers met that definition. [Id.](#) at 290, 292, 79 S.Ct. 756. The Court looked to regulations that had been promulgated under an even earlier version of the term “retail or service establishment”: “[t]he Administrator early ruled [under the prior version] that personal loan companies and other business entities in what may broadly be called the ‘financial industry’ were not within the scope of that exemption.” [Id.](#) at 292, 79 S.Ct. 756. The Court quoted legislative history to the effect that the definition “does not exempt banks, insurance companies, building and loan associations, credit companies, [and] newspapers, … because there is no concept of retail selling or servicing in these industries,” and concluded that the 1949 amendment was not intended to include the “financial industry” in the exemption. [Id.](#) at 295, 79 S.Ct. 756 (citation omitted).

In 1961, two years after the [Mitchell](#) decision, [§ 207\(i\)](#) was added to the FLSA (then as subsection (h), later renumbered). [29 U.S.C. § 207\(l\)](#), Hist. & Stat. Notes, 1961 Amendments. Congress stated that the term “retail or service establishment” should be defined as set out in [§ 213\(a\)\(2\)](#). [29 C.F.R. § 779.24](#); [Reich v. Delcorp](#), 3 F.3d 1181, 1183 (8th Cir.1993) (citing [29 C.F.R. § 779.411 \(1992\)](#)). The Department of Labor (“DOL”) promulgated regulations interpreting the term “retail or service establishment” expressly based on the \*538 definition in [§ 213\(a\)\(2\)](#). [29 C.F.R. § 779.24](#). The DOL also promulgated a partial list of establishments “to which the retail concept does not apply,”

including “[b]anks (both commercial and savings),” “[c]redit companies, including small loan and personal loan companies” and “[f]inance companies.” [29 C.F.R. § 779.317](#) (citing [Mitchell](#) ).

However, Congress repealed [§ 213\(a\)\(2\)](#) in 1989. See [Pub.L. No. 101-157, § 3\(c\)\(1\)](#), 103 Stat. 938, 939 (Nov. 17, 1989). In its place, Congress substituted a provision that exempts all small enterprises with a total annual sales volume of less than \$500,000 from the FLSA's requirements. [29 U.S.C. § 203\(s\)\(1\)\(A\)\(ii\)](#); see [Reich v. Delcorp](#), 3 F.3d at 1183. The House Report on the legislation states that the amendment replaces “several confusing standards.” H.R. Rpt. 101-260 at 39 (Sept 26, 1989). [Section 207\(i\)](#) was retained, but the FLSA no longer contains a definition of “retail and service establishment.” Notably, the DOL has not adopted revised regulations; its regulations relating to “retail and service establishment” continue to refer to the now-repealed [§ 213\(a\)\(2\)](#). See [29 C.F.R. § 779.24](#).

The Seventh Circuit has not addressed the issue of whether the definition formerly found in [§ 213\(a\)\(2\)](#), and the regulations and case law built upon it, should continue to be applied in determining what qualifies as a “retail or service establishment” under [§ 207\(i\)](#)'s exemption. A number of courts of appeals have continued to apply former [§ 213\(a\)\(2\)](#)'s definition, concluding (notwithstanding the repeal of [§ 213\(a\)\(2\)](#)) that no congressional intent has been shown to modify the definition. For example, in [Reich v. Delcorp](#), 3 F.3d at 1183, the Eighth Circuit stated, “[a]bsent specific congressional intent, we will not conclude that Congress retained the term ‘retail or service establishment’ in [§ 207\(i\)](#) yet at the same time discarded thirty years of established meaning.” *Accord* [Gieg](#), 407 F.3d at 1047 (citing [Reich v. Delcorp](#), and stating that “[a]lthough [§ 213\(a\)\(2\)](#) was later repealed, courts have continued to apply its definition of ‘retail or service establishment’ to [Section 207\(i\)](#)”).<sup>FN7</sup> Some district courts have followed that approach.<sup>FN8</sup>

<sup>FN7</sup>. In an earlier decision, the Ninth Circuit had applied [§ 213\(a\)\(2\)](#)'s definition of “retail or service establishment” without discussing the 1989 legislation. [Martin v. Refrigeration Sch., Inc.](#), 968 F.2d 3, 5 n. 1 (9th Cir.1992).

<sup>FN8</sup>. [Schwind](#), 371 F.Supp.2d at 564 (“Although [the] definition of ‘retail and service establishment’ is found in [29 U.S.C. § 213\(a\)\(2\)](#), which has been repealed, this definition still remains in effect for purposes of [29 U.S.C. § 207\(i\)](#).”); [Barnett v. Washington Mutual Bank, F.A.](#), No. C 03-00753 CRB, 2004 WL 1753400 at \*2 (N.D.Cal. Aug. 5, 2004) (Breyer, J.); [Collins v. Horizon Training Ctrs., L.P.](#), o. Civ.A. 3:02CV1310-L, 2003 WL 22388448 at \*3 n. 1 (N.D.Tex. Sept. 30, 2003) (Lindsay, J.); [Bennett v. SLT/TAG Inc.](#), No. Civ. CV02-65-HU, 2003 WL 23531402 at \*5 (D.Or. May 8, 2003) (Jones, J.); [Casas v. Conseco Fin. Corp.](#), No. Civ.00-1512 (JRT/SRN), 2002 WL 507059 at \*3-5 (D.Minn. March 31, 2002) (Tunheim, J.); [Reich v. Cruises Only, Inc.](#), No. 95-660-CIV-ORL-19, 1997 WL 1507504 at \*2 (M.D.Fla. June 5, 1997) (Fawsett, J.).

Because the Seventh Circuit has not spoken on this issue, this Court will follow the precedent in the Eighth and Ninth Circuits and apply the definition set forth in [§ 213\(a\)\(2\)](#) and the regulations built upon it.

## 2. Application to MSI

### a. *The “Financial Industry”*

Gatto contends that MSI cannot qualify for the exemption because it is part of the financial industry, and, she argues, under [Mitchell](#), an employer in the financial industry can never be a “retail or service \*539 establishment.” (Pl.’s Resp. at 3.) Assuming, *arguendo*, that the Court’s conclusion in [Mitchell](#) that the “financial industry” is not exempted from the FLSA remains viable after the repeal of [§ 213\(a\)\(2\)](#), MSI is not precluded from invoking the exemption, because MSI is not part of the “financial industry” as that term was used in [Mitchell](#).

The employer in [Mitchell](#) made loans to individuals and purchased conditional sales contracts. [359 U.S. at 290, 79 S.Ct. 756](#). In contrast, it is undisputed that MSI does not make, buy or sell loans; extend credit; or hold mortgages. (Pl.’s LR Resp. ¶ 9.) It is also undisputed that MSI is not a bank, a savings and loan, a finance, credit, or loan company, or any other kind of financial institution, and does not accept consumer deposits or hold funds (*id.*), unlike the banks, credit companies, and finance companies listed as financial industry establishments in [29 C.F.R. § 779.317](#).<sup>FN9</sup> Gatto admits that MSI operates as a loan broker under the Illinois Residential Mortgage License Act. (Pl.’s LR Resp. ¶ 6.) MSI is licensed under that Act. (*id.* at ¶ 2.) “Loan brokering” or “brokerage service” is defined in that Act to mean:

[FN9](#). Gatto’s supplemental submission includes a print-out from MSI’s website, including the statement, “Mortgage Specialists Of Illinois, Inc. is your mortgage lender.” (Pl.’s LR Ex. B at 1.) According to Gatto’s supplemental declaration, she obtained that printout from MSI’s website on June 29, 2005. (Gatto Suppl. Decl. ¶ 10.) She further states that by going to an internet archive, she was able to find a substantially similar statement for MSI’s website of May 4, 2000. (*id.* at ¶ 11.) Notably, neither of those dates was during the time that Gatto worked for MSI, which was between July 2002 and August 2003. (Pl.’s LR Resp ¶ 16; Gatto Decl ¶ 3.) More importantly, Gatto previously admitted that MSI does not make loans. (Pl.’s LR Resp. ¶ 9.) The text of the website print-out does not constitute, as Gatto suggests, an admission by MSI that it is a lender contrary to Gatto’s admission in her Local Rule statement. The website printout does not say that MSI would provide any loans. The content is consistent with MSI’s role as a mortgage loan broker, not a lender. Exhibit B is not evidence that would allow a reasonable finder of fact to conclude that MSI lends money.


the act of helping to obtain from another entity, for a borrower, a loan secured by residential real estate situated in Illinois or assisting a borrower in obtaining a loan secured by residential real estate situated in Illinois in return for consideration to be paid by either the borrower or the lender including, but not limited to, contracting for the delivery of residential mortgage loans to a third party lender and soliciting, processing, placing, or negotiating residential mortgage loans.

[205 Ill. Comp. Stat. 635/1-4](#). As a broker, MSI assists in obtaining the loan, but does not provide the loan. ( See Pl.'s LR Resp. ¶ 9.)

Those facts also distinguish MSI from the employer in [Casas, 2002 WL 507059 at \\*5](#) (employer was engaged in the same business as the employer in [Mitchell](#): “lending money to individual consumers”). The fact that MSI's brokerage services relate to loans does not necessarily preclude it from qualifying for the exemption as a “retail or service establishment.” See [Gieg, 407 F.3d 1038, 1052-53](#) (holding that employees whose commissions derive from financing and insurance aspects of retail automobile sales are exempt from overtime).

Further support for this conclusion is supplied by another section of the Illinois Residential Mortgage License Act. That Act's statement of purpose describes the “significant changes” that have taken place in residential mortgage lending in recent years, including the fact that “[r]esidential mortgage lenders of every type have increasingly\*540 relied on *nonfinancial intermediaries, such as mortgage brokers, to find customers.*” [205 Ill. Comp. Stat. 635/1-2](#) (emphasis added). MSI is not part of the “financial industry” as that term was used in [Mitchell](#).

#### *b. Application of “Retail or Service Establishment”*

 [8] As the Ninth Circuit observed, “[t]he meaning of the term ‘retail establishment’ is not obvious without further definition, and the statutory definition [in [§ 213\(a\)\(2\)](#)] is of little assistance.” [Refrigeration School, 968 F.2d at 5](#); see also [id. at 5 n. 1](#) (the definition “provides little guidance in determining the nature of the ‘retail’ concept as an initial matter”). The court must defer to the DOL's regulations, as long as they represent a reasonable construction of the statute. [id. at 5](#) (citing [Chevron USA, Inc. v. NRDC, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 \(1984\)](#)).

As discussed above, the DOL has created categories of businesses that lack a “retail concept.” [FN10](#) The DOL's regulations list “custom house [brokers]; freight brokers; insurance brokers, stock or commodity brokers” as lacking a retail concept. [29 C.F.R. § 779.317](#). However, they do not contain a listing for “mortgage brokers” like MSI. Defendants invoke the statutory construction canon *expressio unius est exclusio alterius* (see Defs.' Reply at 5), which has force “when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were

excluded by deliberate choice, not inadvertence,” ([Barnhart v. Peabody Coal Co.](#), 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003)). The DOL's list in [§ 779.317](#) does not preclude MSI from claiming the exemption.

[FN10](#). Those categories haven't been uniformly accepted by courts. See e.g., [Refrigeration School](#), 968 F.2d at 7 (finding no rational basis for the DOL's categorizing all schools as non-retail except those serving handicapped or gifted students); [Cruises Only, Inc.](#), 1997 WL 1507504 at \*2 (finding arbitrary and irrational DOL's listing of travel agencies as lacking a retail concept).

In addition to the lists, the DOL has promulgated a description of the “characteristics ... of retail or service establishments”:

Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process.

#### [29 C.F.R. § 779.318\(a\)](#).

As applied to a particular employer, courts have viewed this regulation as having three components: (1) the employer sells to the general public; (2) it serves the everyday needs of the community; and (3) it is at the end of the stream of distribution and does not take part in the manufacturing process. [Collins](#), 2003 WL 22388448 at \*6; [Cruises Only, Inc.](#), 1997 WL 1507504 at \*3.

It is undisputed that MSI sells its services to the general public, satisfying the first component. (Pl.'s LR Resp. ¶ 6.) In addition, MSI meets the second component because it serves the everyday needs of the community, as demonstrated by the fact that the Residential Mortgage License Act was enacted because of the impact of such services on “the neighborhoods and communities of [Illinois], its homeowners and potential homeowners.” [205 Ill. Comp. Stat. § 635/1-2\(b\)](#) (“The purpose of \*541 this Act is to regulate residential mortgage lending to benefit our citizens.”). Although Gatto argues that obtaining a mortgage loan is not an everyday occurrence ( see Pl.'s Resp. at 7), the regulation cannot be interpreted to mean that a consumer must use the establishment every day. That would be inconsistent with the DOL's listing of automobile dealerships, among others, as retail or service establishments. See [29 C.F.R. § 779.320](#); accord [Cruises Only, Inc.](#), 1997 WL 1507504 at \*4 (stating that the regulation “should not be interpreted to mean that a retail or service establishment must be used by everyone in the community on a daily basis,” noting that the regulation lists funeral homes, cemeteries, and taxidermists as having a retail concept although none of these could be used every day by anyone); [Collins](#), 2003 WL 22388448 at \*7 (holding that computer training serves the “everyday needs” of more than half of all households).

The third component is that the goods or services at issue are at the very end of the stream of distribution. In the case of a service establishment, the “end of the distribution stream” has been described as “providing a service with a distinct beginning and end.” See [Cruises Only, Inc., 1997 WL 1507504 at \\*5](#). MSI satisfies that standard because it is hired by purchasers of new and existing residences to perform the discreet tasks of finding and closing loans, second mortgages, and home equity loans and the refinancing of existing loans. (Pl.'s LR Resp. ¶ 5.) Once the loan has been closed or refinanced, MSI's job is done. Additionally, Gatto admits that MSI's services are not for resale (Pl.'s LR Resp. ¶ 6.), a factor which has been found by courts to indicate that the services are at the end of the distribution stream. See e.g., [Cruises Only, Inc., 1997 WL 1507504 at \\*4](#); [Schwind, 371 F.Supp.2d at 566](#). Thus, MSI qualifies as a retail or service establishment under C.F.R. § 779.318.

*c. Whether MSI's Sales Are Recognized as Retail in its Particular Industry*

The definition of “retail or service establishment” in [§ 213\(a\)\(2\)](#) requires that the business' goods or services be “recognized as retail sales or services in [its] particular industry.” See [Mitchell, 359 U.S. at 291, 79 S.Ct. 756](#). Regarding this requirement of § 213(a)(2), the DOL regulation observes that:

The express terms of the statutory provision requires the “recognition” to be “in” the industry and not “by” the industry. Thus, the basis for the determination as to what is recognized as retail “in the particular industry” is wider and greater than the views of an employer in a trade or business, or an association of such employers…… Such a determination must take into consideration the well-settled habits of business, traditional understanding and common knowledge. These involve the understanding and knowledge of the purchaser as well as the seller, the wholesaler as well as the retailer, the employee as well as the employer, and private and governmental research and statistical organizations. The understanding of all these and others who have knowledge of recognized classifications in an industry, would all be relevant in the determination of the question.

[29 C.F.R. § 779.324](#).

Here, the status of a mortgage broker as “retail” in the industry is supported by the policy statement of the Illinois Residential Mortgage License Act, quoted above. The services that MSI provides as a residential mortgage broker are regulated because they deal directly with consumers,\*542 the “retail” aspect of the industry. See [205 Ill. Comp. Stat. § 635/1-2\(a, b\)](#).

*d. The Legislative Purpose and Policy Considerations of the FLSA*

Finally, the legislative purpose and policy considerations of the FLSA also support a conclusion that Gatto is not entitled to overtime compensation. In [Mechmet, 825 F.2d at 1177](#), the Seventh Circuit observed that overtime statutes were designed to protect “marginal, non-unionized workers,” and that [§ 207\(i\)](#) was designed to exempt commissioned employees of a “big-ticket department.” The court's observations about the difficulties of requiring overtime pay for such “big-ticket” commissioned employees apply directly to Gatto's situation at MSI:

It would not be easy for the employer to cope with the irregular conditions of the salesman's job by placing a 40-hour ceiling on each salesman's weekly work and then hiring additional salesmen to take up the slack. If instead the employer paid the salesman time and a half for overtime during the busy weeks, this would just amplify the weekly fluctuations in the salesman's earnings, especially since, in the long run, either the base pay (if above the minimum wage), or the commission rate, or both, would decline, to offset the overtime premium.

[Id. at 1176-77](#); see also [Walton v. United Consumers Club, Inc., 786 F.2d 303, 307 \(7th Cir.1986\)](#) (stating that “[c]ommission salesm[e]n have fluctuating hours and income, and it is unlikely that Congress meant to require employers to pay overtime in the lean weeks when the fat weeks more than make up.”).

Consistent with that observation, Gatto's earnings fluctuated considerably from pay period to pay period. For example, Gatto received \$10,400.79 during the pay period ending February 15, 2003, but only \$4,983.57 during the pay period ending February 28, 2003. (Krajewski Decl., Ex. B.) But even assuming that she worked 15 hours of overtime a week, Gatto was paid an average of at least \$30.13 per hour, for a total of \$183,464.90 in just over one year of work. ( See n. 5, above.) She was an employee involved in the “big-ticket” sales which [§ 207\(i\)](#) was intended to exempt.

## CONCLUSION