NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
Civil No. 20-1519-BLS1

MAURA HEALEY[1]
Plaintiff

Notice sent (4)
03/02/2022

vs. (sc)

UBER TECHNOLOGIES, INC., & another[2]
Defendants

MEMORANDUM AND ORDER ON DISCOVERY MOTIONS

The Attorney General seeks a declaration and injunctive relief regarding the proper classification under G.L. c. 149, § 148B of drivers who drive, at least in part, under the ride-hailing applications provided by defendants Uber Technologies, Inc. ("Uber") and Lyft, Inc. ("Lyft"). Plaintiff also alleges that by classifying drivers as independent contractors Uber and Lyft violate Massachusetts wage and hour laws.[3] Before me are a series of motions that raise overlapping discovery issues: Uber's motion to compel production of (i) information withheld under a claim of investigatory privilege, and (ii) further discovery in response to a number of Uber's interrogatories and document requests (Docket #59); plaintiff's cross-motion for a

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[1] In her official capacity as Attorney General for the Commonwealth of Massachusetts.

[2] Lyft, Inc.

[3] This is one of a number of cases challenging the classification of Uber and Lyft drivers as independent contractors. Plaintiff earlier represented that there are or were cases pending in the Superior Court in California and in the United States District Courts in the Northern District of California and in Massachusetts. See Affidavit of Erin K. Staab in Support of the Attorney General's Memorandum of Law in Opposition to Defendants' Rule 56(f) Motions (Oct. 28, 2021).

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protective order from, among other things, much of the discovery Uber seeks to compel (Docket #61); Lyft's motion to compel plaintiff to supplement or provide substantive responses to seven interrogatories (Docket #65); and Lyft's motion to compel production of documents plaintiff allegedly shared in common interest with a private law firm, or alternatively for in-camera review of those documents to assess plaintiff's common interest and work product claims (Docket #69).[4] I address each of these motions in turn insofar as is necessary to decide the discovery issues presented.

I. Uber's Motion to Compel and Plaintiff's Cross-Motion for Protective Order

A. Investigatory Privilege

Uber moves to compel production of the full documents withheld from production, or produced only in redacted form, under the Commonwealth's assertion of an investigatory privilege. See District Attorney for Norfolk Dist. v. Flatley, 419 Mass. 507, 510, 513 (1995); Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976). The withheld or redacted information largely amounts to the identities of Uber and Lyft drivers who shared information with plaintiff about their work with Uber and/or Lyft and about defendants' policies and practices. Plaintiff interviewed some of these individuals. Others supplied information solicited by plaintiff or in response to a posting on plaintiff's website designed to gather driver stories or insights in connection with the filing and/or preparation of this case.

Plaintiff did not tell the drivers that their identities would be kept confidential; to the contrary, plaintiff alerted the drivers that she may have to disclose to Uber and/or Lyft their identity and the information they supplied. No one speaking to plaintiff or her representatives could have harbored any reasonable illusion that their identities would remain secret.

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[4] Uber joins Lyft's motion to compel regarding the common interest doctrine.

Even plaintiff seems to concede that disclosure of the withheld information will not result in "premature disclosure of [plaintiff's] case prior to trial" or "disclosure of confidential investigative techniques, procedures, or sources of information;" nor will it create a disincentive for "police officers [to] be completely candid in recording their observations, hypotheses and interim conclusions." Bougas, 371 Mass. at 62. Rather, plaintiff argues that obliging her to identify the drivers will generally chill the willingness of "individual citizens to come forward and speak freely with police concerning matters under investigation." Id. I disagree in the specific context of this case.

First, the testimony of drivers is potentially relevant and admissible on the question of how defendants' drivers operate in practice. The drivers who have provided oral or written information to plaintiff, or are known to plaintiff, are more likely to testify in the case; defendants are entitled to know who they are in order to prepare for their testimony, or to consider calling them as defense witnesses.

Second, given the outreach plaintiff has done to drivers, the number of drivers – upwards of 600, according to plaintiff's counsel – who have provided information to plaintiff, and the tremendous pool of possible witnesses (i.e. all drivers in Massachusetts for either of the defendants), the drivers in question are not unreasonably being singled out, are unlikely to suffer any retaliation (and, in any event, have a considerable remedy if any retaliation were to follow), and could not reasonably have anticipated that their identity would remain confidential. In this context, there is little likelihood that disclosure of the drivers' identities will chill the willingness of witnesses to come forward in other situations in the future.

Third, the parties agree that the unredacted documents that reveal the identity of drivers would be produced subject to a protective order and will be treated as confidential. Thus, there

will be no general disclosure of the identities of the drivers who provided information to plaintiff, and the risk to those drivers is minimal. The disclosure of the drivers' identities in the unique circumstances of this case is unlikely to adversely impact the willingness of witnesses to come forward in other future investigations.[5] Accordingly, I overrule plaintiff's objection to discovery based on the investigatory privilege.

B. Uber's Interrogatory Nos. 2, 10, and 12-18

Uber moves to compel answers to one interrogatory that seeks disclosure of people with knowledge of the facts supporting plaintiff's allegations (Int. No. 2), and eight interrogatories that ask plaintiff to "[s]tate the basis" of certain allegations in plaintiff's complaint (Int. Nos. 10, 12-18).

Int. No. 2 is awkwardly phrased, asking plaintiff to "[i]dentify all persons who have," who "claim to have," or who "[p]laintiff believes may have," relevant information. To the extent this phrasing seeks impressions or beliefs by plaintiff or her counsel, they are not discoverable. However, the core information sought – the identification of people with relevant knowledge – is discoverable regardless of whether plaintiff intends to rely on the witnesses. See Superior Court Rule 30A(1)(c)(3) (defining what it means to "identify" a person in response to written discovery).

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[5] Plaintiff also appears to have asserted a work product privilege as to certain records related to drivers to the extent the disclosure would identify who plaintiff spoke to in the course of her investigation. The mere fact that plaintiff spoke to a witness does not make the identity of that witness work product, nor does it insulate the information provided by that witness from disclosure under the work product doctrine. With that said, in any particular document or debriefing memorandum regarding a driver, there may be individual statements or mental impressions of an investigator or attorney that may properly constitute work product – e.g., "I don't find this witness to be particularly credible," "we should definitely use this witness at trial," or "this witness' testimony contradicts information we learned from the following three other witnesses. . . ." The papers before me do not allow me to assess whether and to what extent the work product invocation is proper.

Plaintiff objects to Int. No. 2 because, in addition to the standard information that must be disclosed when identifying a person under Rule 30A, the request also asks for "the specific nature and substance of the knowledge Plaintiff believes each person may have." While this phrasing improperly calls for disclosure of plaintiff's mental impressions, nothing in Superior Court Rule 30A bars a party from expressly requesting information in addition to the standard information which must be disclosed when identifying a person under Rule 30A's definition of "identify." Plaintiff will therefore be required to answer Int. No. 2 as modified to read as follows: "Identify all persons who have knowledge, facts or information pertaining to any allegation in Plaintiff's complaint, including for each such person the general topics of information the person has." To the extent plaintiff objects to answering this interrogatory based on the investigatory privilege, the objection is overruled for the reasons already stated, see, supra, at 2-4; or based on work product, the objection is overruled in part. See, supra, at 4 n.5.

Int. Nos. 10 and 12-18 ask plaintiff to "[s]tate the basis" for certain factual allegations in her complaint. This type of interrogatory is standard stuff. Superior Court Rule 30A even describes the information that must be provided when an interrogatory asks a party to "state the basis" of a "claim, allegation, or defense." As to each of these interrogatories, plaintiff has provided a partial answer, largely by reference to documents disclosed, see Mass. R. Civ. P. 33(c), but objects to providing further answers on various grounds. Uber moves to compel further answers to the extent information has been withheld under the investigatory privilege. For the reasons stated above, Uber's motion is allowed in this respect and the Commonwealth's objection based on investigatory privilege is overruled. See, supra, at 2-4. Plaintiff shall supplement its answers to Int. Nos. 10 and 12-18 with information otherwise withheld based on the investigatory privilege.

C. Uber's Requests for Production

Uber seeks to compel plaintiff to produce documents responsive to Uber's RFP Nos. 25, 93-95, 100-104, 106-111, and 117-118, while plaintiff seeks a protective order from having to produce documents in response to Uber's RFP Nos. 18-19, 25, 71-72, 78-98, 100, 104, 106-115, and 117-118. Uber's requests are quite overbroad. For the following reasons, I largely grant plaintiff's motion for a protective order.

Uber argues that most of its requests at issue are designed to discover information relevant to its "constitutional defenses;"[6] in essence, that plaintiff has been inconsistent or selective in her decision to pursue this case, influenced by outside actors, or has singled out Uber and Lyft unconstitutionally. Such defenses, among other things, focus on plaintiff's motive for bringing this case. But the Attorney General enjoys considerable discretion in deciding what cases to file, when to file them, and how to allocate her prosecutorial resources. See generally United States v. Armstrong, 517 U.S. 456, 464-465 (1996) (describing principles of selective prosecution in criminal context). Courts are "reluctan[t]" to estop a government agency from enforcing legislative policies designed to "protect the public interest." Sullivan v. Chief Justice for Admin. and Management of Trial Court, 448 Mass. 15, 30-31 (2006) (and cases cited). Moreover, the Attorney General is free to receive input from any sector she chooses to learn more about an issue and execute the duties of her office.

To obtain discovery about plaintiff's motive for bringing this enforcement action, it is not sufficient for Uber simply to assert an affirmative defense. Prosecutors' decisions are shielded by

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[6] Uber cites to its affirmative defenses that allege generally that this prosecution does not treat them fairly. See Affirmative Defense Nos. 36 (due process), 37 (Mass. Const. Art. X), 38 (equal protection – U.S. Const.), 39 (equal protection – Mass. Const.) and 41 (impairment of contract).

a "presumption of regularity" and a presumption that they have "properly discharged their official duties." Armstrong, 517 U.S. at 464, quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926). If the law were otherwise, in every civil enforcement action a defendant could delve into and litigate the Attorney General's motivation for bringing the action simply by asserting an affirmative defense.

To support a selective prosecution claim, a defendant must present "clear evidence" that the prosecutor has violated the equal protection clause, id. at 465 or singled out the defendant(s) for discriminatory treatment, i.e. treatment different from comparable entities; and did so for a discriminatory purpose. Armstrong, 517 U.S. at 465-466. In the civil context, when it comes to the Attorney General's enforcement of a legislative mandate designed to protect the public interest, a defendant must establish at least a threshold showing with some evidence that it was singled out for discriminatory treatment, and that plaintiff did so for a discriminatory purpose. Uber has failed to make such a showing.

Uber argues that plaintiff did not sue it for a number of years after it started doing business in the Commonwealth, chose to bring this suit because of its (and Lyft's) economic success, and admits she has not brought claims against "all entities that may qualify as a 'gig-economy' company."[7] Uber also points to the fact that various interested labor groups were invited to plaintiff's press conference announcing the filing of the case. This showing falls well short of evidence for each element of a selective prosecution claim and does not justify a

[7] See Affidavit of Perlette M. Jura, Ex. P, Response to Request No. 22 (plaintiff's responses to first request for admissions). Plaintiff further responded to Uber's request for admission that "over the past five years, the Attorney General has brought more than 100 enforcement actions against companies for misclassification of workers . . . including Delta-T Group Massachusetts, Inc., a gig-economy company with an app-based platform" and that plaintiff maintains a web-based list of her enforcement actions on her website. Id.

searching inquiry into plaintiff's motive for bringing this case. Uber neither demonstrates that it has been treated differently from other similarly situated entities,[8] nor suggests that plaintiff filed this case for a discriminatory purpose.

Moreover, many of Uber's requests for production are considerably far afield. A few examples suffice:

> RFP No. 25 seeks all agreements for any services the Office of the Attorney General has entered into with any individual or law firm in the last 4½ years. In effect, this request seeks documents related to the internal operations of plaintiff's office without regard to subject or relevance.[9]
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> RFP Nos. 78-89 seek all documents related to plaintiff's election, reelection, potential run for Governor, as well as communications with campaign donors or potential future campaign donors, that relate to Uber, Lyft or misclassification of independent contractors.[10]
>
> RFP Nos. 90-93 seek "[a]ll documents and communications with any journalists or entities engaged in journalism" related to Uber, Lyft or misclassification of independent contractors. These requests are not limited to communications by any party to this case, but would require disclosure of every news account of anything related to Uber, Lyft, or the misclassification of independent contractors, regardless of relevance.

Daringly overbroad requests like these undermine counsel's credibility when they argue they are only seeking discovery "reasonably calculated to lead to the discovery of admissible evidence." Mass. R. Civ. P. 26(b)(1).

After careful review of the requests at issue, Uber's motion to compel is denied, and/or plaintiff's motion for a protective order is allowed, as to Uber's RFP Nos. 18-19, 25, 78-98, 100-

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[8] To the contrary, Uber's argument presupposes that Uber and Lyft have grown to the point that they are unique in the app-based ride-sharing market.

[9] RFP Nos. 18 and 19 also seek internal policies of the Office of the Attorney General, which are not reasonably calculated to lead to the discovery of admissible evidence.

[10] Notably, Uber does not move to compel production of documents responsive to these requests.

104, 106-115, and 117-118.[11] Plaintiff also moves for a protective order related to RFP Nos. 71 and 72. The motion is denied as to these two requests because they relate to statements by a potential witness with relevant knowledge who plaintiff held out to the public. See also, supra, at 2-4.

II. Lyft's Motion to Compel Supplemental Interrogatory Answers

Lyft moves to compel plaintiff to respond substantively to its Interrogatory Nos. 1 and 3-8. I address these in turn.

Int. No. 1 seeks the identity of each person who has knowledge of facts related to this case, but is awkwardly phrased as seeking the identity of the people who have knowledge of facts "that the Attorney General has relied on or has considered relying on in bringing this Action." Lyft is not entitled to plaintiff's mental impressions, but is generally entitled to information about the identity of people with relevant knowledge. As with Uber's Int. No. 2, and for the same reasons, see, supra, at 4-5, plaintiff will be required to answer Int. No. 1 as modified to read as follows: "Identify each and every person who has knowledge, facts or information pertaining to any allegation in Plaintiff's complaint, including for each such person the general topics of information the person has."

Int. Nos. 3 and 4 relate to plaintiff's trial preparation and efforts to contact others related to this case. To the extent it seeks relevant information, it is duplicative of the information that plaintiff will have to produce in response to Int. No. 1, as modified by the court. The information otherwise responsive to these interrogatories relates to plaintiff's trial preparation and

[11] Uber does not move to compel production of documents responsive to all of the requests from which plaintiff seeks a protective order.

investigative efforts, which, as these interrogatories are phrased, trespasses on plaintiff's work product.

Int. No. 5 asks plaintiff to "[i]dentify any documents, data, analyses, or assessments drafted or created by any employee or agency of the Commonwealth . . . related to Lyft's operations in Massachusetts, relied upon or considered in bringing this Action." To the extent this interrogatory seeks plaintiff's mental impressions (i.e. what plaintiff considered before bringing this action), it is not discoverable. Almost surely, many responsive documents created by investigators or attorneys before this case was filed are properly shielded from discovery by the work product doctrine or the attorney-client privilege. There may, however, be a class of "documents, data, analyses, or assessments" that was drafted by an "employee or agency of the Commonwealth" that relates to Lyft's Massachusetts operations, which plaintiff possessed prior to filing this action, but which is not so protected. Such "documents, data, analyses, or assessments," if any, should be identified. Accordingly, plaintiff will be required to answer Int. No. 5 as modified to read as follows: "Identify any documents, data, analyses, or assessments drafted or created by any employee or agency of the Commonwealth of Massachusetts related to Lyft's operations in Massachusetts, which was in plaintiff's possession prior to filing the complaint in this case and which is not subject to the attorney-client privilege or work product doctrine."

Int Nos. 6-8 are contention interrogatories, asking plaintiff about the consequences of treating Lyft drivers as Lyft employees during the time they are waiting to be offered or to accept a ride, or while the drivers are simultaneously logged in to another rideshare or delivery platform application. Contention interrogatories are proper. See Mass. R. Civ. P. 33(b) ("An interrogatory . . . is not necessarily objectionable merely because an answer . . . involves an opinion or

contention that relates to fact or the application of law to fact"). Plaintiff objects to these interrogatories because they claim that the answers are "not relevant to, or necessary for, a determination of" the question of whether the drivers have been misclassified as independent contractors under G.L. c. 149, § 148B. I disagree. These interrogatories ask for the factual consequence of treating drivers as employees in the messy, overlapping world of gig-employment. Far from irrelevant, these contention interrogatories seek illuminating information on the question of whether and when an individual driver is subject to the direction and control of Lyft and whether they are engaged in their own independent business. Plaintiff must supplement its answers to Int. Nos. 6-8.

III. The Common Interest Doctrine

Under the common interest doctrine, plaintiff has withheld from discovery communications between plaintiff's lawyers and attorney Shannon Liss-Riordan or others at the law firm of Lichten & Liss-Riordan, P.C. (together, "Liss-Riordan"). Liss-Riordan is separately bringing claims on behalf of Uber and Lyft drivers alleging misclassification. As such, plaintiff contends that she has a common interest with Liss-Riordan. Plaintiff contends that these communications are also protected under the work product doctrine. By separate motion, which Uber joins, Lyft moves to compel production of these documents.[12]

In Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc., 449 Mass. 609, 617 (2007), the SJC adopted as Massachusetts law the principle in Section 76(1) of the Restatement (Third) of the Law Governing Lawyers. Section 76(1) states:

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[12] It is not clear to me how many documents plaintiff has withheld on this basis. Plaintiff refers to 31 documents, identified on her February 3, 2022, privilege log, but also indicates that plaintiff's "document review is still underway." Of the 31 documents identified on the privilege log, many apparently are made up of multiple documents embedded in email chains of some length.

> If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

The common interest doctrine extends beyond attorney-client privileged communications, and includes attorney work product. See, e.g., Rhodes v. AIG Domestic Claims, Inc., 20 Mass. L. Rptr. 491, 2006 WL 307911 **9-10 (Mass. Super. Jan. 27, 2006) (Gants, J.). No written joint interest agreement is necessary, nor need the interests of the respective clients be identical. Hanover Ins., 449 Mass. at 618-619. To seek refuge under the common interest doctrine, a party must "only prove that '(1) the communications were made in the course of [the parties' common interest] effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived.'" Id. at 619, quoting United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989). To decide whether to make the required findings in this instance, see Hanover Ins., 449 Mass. at 619, and to assess plaintiff's claim of work product, I must review the documents in question in-camera.

ORDER

Uber Technologies, Inc.'s Motion to Compel Discovery (Docket #59) is **ALLOWED** insofar as (i) the Court overrules plaintiff's objection to producing information withheld under the investigatory privilege, (ii) plaintiff shall provide further answers to Interrogatory Nos. 2 (as revised herein), 10, and 12-18, as set forth herein, and (iii) plaintiff shall produce its documents responsive to Request for Production Nos. 71 and 72; but is otherwise **DENIED**.

The Attorney General's Cross-Motion for a Protective Order (Docket #61) is **ALLOWED** as to Uber's Request for Production Nos. 18-19, 25, 78-98, 100, 104, 106-115, and 117-118, but is otherwise **DENIED**.

The Motion to Compel Plaintiff to Supplement its Responses to Lyft's Interrogatories (Docket #65) is **ALLOWED** as to Interrogatory Nos. 1 (as revised herein), 5 (as revised herein), and 6-8 as set forth herein, but is otherwise **DENIED**.

Lyft's Motion to Compel Discovery (Docket #69) is **ALLOWED** insofar as the court shall conduct an in-camera review of the documents plaintiff contends are protected under the common interest doctrine for the purposes of assessing the claim that the communications are subject to the common interest doctrine, and that they are work product. Any further action on this motion is deferred until after the court's in-camera review of the documents in question.

By March 10, 2022, plaintiff shall deliver the 31 documents in question, and the relevant portion of the February 3, 2022, privilege log, to Assistant Clerk-Magistrate Gloria Brooks for the court's in-camera review.[13] To the extent that any of the 31 documents were authored or received, in whole or in part, by any person whose involvement, representation, or role is not self-evident from the documents, plaintiff shall provide in her cover letter to the court a listing of the names of each person who authored or received one of the documents, in whole or in part, and shall identify their relevant role (e.g. employee of the Attorney General's Office, employee of Lichten & Liss-Riordan, P.C., etc.). Plaintiff shall provide a copy of her cover letter to

[13] I expect that a ruling based on the 31 documents identified through February 3, 2022, see, supra, at 11 n.12, will be sufficient to give the parties guidance as to other documents plaintiff has identified, or will identify in the future, which she believes are similarly covered by the common interest doctrine. If not, the parties may bring the matter to the court's attention by motion.

Notice sent
03/02/2022

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defendants' counsel. The documents submitted to the court pursuant to this Order shall be impounded subject to the court's review.

Dated: February 28, 2022

Peter B. Krupp
Justice of the Superior Court