IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

DAVID M. DRISCOLL,	)	
	)	
Plaintiff,	)	Case No. 1:12-cv-00690-ESH
	)	
v.	)	
	)	
THE GEORGE WASHINGTON UNIVERSITY,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S CROSS MOTION TO AMEND THE AMENDED COMPLAINT

George Washington University (the "University"), by and through undersigned counsel, submits this Opposition to Plaintiff's Cross Motion to Amend the Amended Complaint.

INTRODUCTION

Plaintiff's Cross Motion to Amend his Amended Complaint attempts to assert a class-action claim under the DCMWA and to assert a number of additional facts related to his alleged retaliation and unpaid overtime claims. Plaintiff's attempt to amend his complaint is an exercise in futility. In *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), the Supreme Court held that Rule 23 does not apply if application of the rule "abridges, enlarges, or modifies a state-created right or remedy" in violation of the Rules Enabling Act. The DCMWA unequivocally requires claims to be brought as individual or collective actions, and that opt-in requirement is substantively intertwined with the statute's rights and remedies. Accordingly, Rule 23 does not apply to DCMWA claims. Alternatively, Rule 23 does not apply because the DCMWA is a federal law, and, thus, under *Shady Grove*, the opt-in provision is a valid exception

to Rule 23. Similarly, Plaintiff's attempts to amend his individual claims are futile because the allegations in his proposed Second Amended Complaint fail to state a claim.

Moreover, Plaintiff's motion should be denied for undue delay, bad faith, and prejudice because he seeks to add facts and a class-action claim of which he was well aware at the time he filed his original Complaint and his Amended Complaint. Plaintiff does not (nor can he) offer any explanation or justification for his failure to plead these facts and claim when he filed his prior Complaints. Accordingly, the University requests that the Court deny Plaintiff's Cross Motion to Amend.

RELEVANT PROCEDURAL HISTORY

On April 27, 2012, Plaintiff David M. Driscoll filed a complaint (the "Original Complaint") in this Court, alleging an individual claim for retaliation under the FLSA (the "Retaliation Claim") and individual claims for unpaid overtime under the FLSA, the DCMWA, and the DCWPCL (the "Overtime Claims"). *See* Original Compl. ¶¶ 50-62. Plaintiff also alleged a collective-action claim under the FLSA and DCMWA for unpaid overtime and a class-action claim under the DCWPCL for unpaid overtime. *See id.* ¶¶ 2-3.

On June 29, 2012, four days before the University's responsive pleading or Rule 12 motion was due, Plaintiff filed an Amended Complaint. In his Amended Complaint, Plaintiff alleged additional facts describing the period for which the University paid "back overtime wages" and the method by which the University computed "back overtime wages" and adding "Executive Associates" as putative members of the collective and class actions. Amended Compl. ¶¶ 1, 3, 21-22, 38-47, 51. The Amended Complaint also deleted allegations that the putative collective and class members had "worked more than 40 [hours] in a week." *Compare* Original Compl. ¶¶ 51-52 *with* Amended Compl. ¶¶ 53-54. The Amended Complaint did not

allege any previously unknown facts. All facts alleged were within the Plaintiff's knowledge and possession at the time he filed his Original Complaint.

On July 3, 2012, the University filed its motion to dismiss the Amended Complaint with prejudice. On July 17, 2012, Plaintiff filed an Opposition to the University's Motion to Dismiss. In an attempt to address deficiencies in his Amended Complaint, Plaintiff also filed the instant motion to amend and attached a proposed Second Amended Complaint. Plaintiff improperly relied on his proposed Second Amended Complaint to oppose the University's Motion to Dismiss. *See* Pl.'s Opp. to Def.'s Mot. to Dismiss at 7-8.

In his Second Amended Complaint, Plaintiff alleges a class-action claim under the DCMWA for unpaid overtime despite the fact that the statute expressly provides only for a collective action as is available under the FLSA. Pl.'s Cross Mot. to Amend, Ex. A ¶ 3. On his Retaliation Claim, Plaintiff alleges additional facts describing how he claims to have expressed discontent about his alleged back wages paid to him after the University on its own initiative reclassified his position. *Id.*, Ex. A ¶¶ 57-63. On his Overtime Claims, Plaintiff also alleges additional facts describing his salary, "job hourly rate," and "back overtime" pay and the University's method of determining his "overtime wages." *Id.* ¶¶ 42, 48-49, 51-52.

Although the Amended Complaint had deleted allegations that putative class members had worked more than 40 hours per week, the proposed Second Amended Complaint restates and expands those allegations, alleging that the putative members "regularly worked more than 40 hours per week." *Id.* ¶ 44. Moreover, for the first time, Plaintiff seeks to allege that he personally "worked overtime." *Compare generally* Original Compl. (containing no allegation that Plaintiff Driscoll personally worked more than 40 hours per week) and Amended Compl. (same), *with* Cross Mot. to Amend, Ex. A ¶¶ 44, 52.

As with the Amended Complaint, the proposed Second Amended Complaint does not allege any previously unknown facts. All facts alleged were within the Plaintiff's knowledge and possession at the time he filed his Original Complaint.

LEGAL ARGUMENT

The decision as to whether to grant Plaintiff's request for leave to amend is within the sound discretion of this Court. *E.g.*, *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Leave to amend should only be "given when justice so requires." Fed. R. Civ. P. 15(a). The defendant has the burden of presenting "a colorable basis" for denying leave to amend. *Hajjar – Nejad v. George Wash. Univer.*, --- F. Supp. 2d ----, 2012 WL 89973, at *7 (D.D.C. 2012); *see also Foman v. Davis*, 371 U.S. 178, 179 (1962) (holding that motion should be granted only "[i]n the absence of any apparent or declared reason" such as undue delay, bad faith, dilatory motive, prejudice, or futility).

Moreover, it is "well-established" that the district court's discretion to deny leave to amend is "particularly broad" where a plaintiff has previously amended the complaint. *Hajjar – Nejad*, 2012 WL 89973, at *10. This is especially true where, as here, the amendment related to conduct of which the plaintiff "should have been aware at the inception of the action." *Id.*

A trial court should deny a motion to amend where there is undue delay, undue prejudice, bad faith, dilatory motive, or futility or where a party has had sufficient opportunity to state a claim and has failed to do so. *E.g.*, *PhRMA v. Thompson*, 259 F. Supp. 2d 39, 58 (D.D.C. 2003); *Wiggins v. Dist. Cablevision, Inc.*, 853 F. Supp. 484, 499 (D.D.C. 1994).

Plaintiff's class-action claim and additional facts alleged in the proposed Second Amended Complaint still do not (and could not) sufficiently state a claim and, thus, the amendments would be futile. Moreover, Plaintiff's undue delay in pleading claims of which his

was aware at the time of filing his original and amended complaints suggests bad faith, and Plaintiff should not be permitted to amend his deficient complaint for yet a third time.

I. Plaintiff's Amendment TO STATE A DCMWA CLASS-ACTION CLAIM IS FUTILE BECAUSE THE DCMWA LIMITS RECOVERY TO INDIVIDUAL OR COLLECTIVE ACTIONS.

Plaintiff's amendment to state a DCMWA class-action claim is futile because the DCMWA limits recovery to individual or collective actions. Contrary to Plaintiff's assertion, *Shady Grove* dictates that Rule 23 does not preempt the DCMWA's opt-in provisions because they are substantively intertwined with the rights and remedies granted by the DCMWA. Alternatively, *Shady Grove* does not control because, for purposes here, D.C. is not a state but a federal enclave.

A. Under *Shady Grove*, Rule 23 Is Invalid As Applied To The DCMWA.

The DCMWA creates a cause of action permitting an employee to sue an employer for overtime wages owed pursuant to the DCMWA but limits that cause of action to an individual or collective action by providing that:

> No employee shall be a party plaintiff to any action brought under [the DCMWA] unless the employee gives written consent to become a party and the written consent is filed in the court in which the action is brought.

D.C. Code § 32-1012(b). Plaintiff asserts that Rule 23 of the Federal Rules of Civil Procedure preempts the DCMWA's opt-in provision. *See* Cross Motion to Amend at 2-3. He asserts that the Supreme Court has "made clear" that a plaintiff in federal court may bring a class action under Rule 23 "regardless of state procedural laws to the contrary." *Id.* at 2. As support for his broad assertion, he simply cites—without discussion or explanation or even a parenthetical—*Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, --- U.S. ----, 130 S. Ct. 1431, 1437 (2010).

Plaintiff's assertion is patently wrong. The framework for deciding whether a Federal Rule of Civil Procedure applies in the face of a conflicting state law is a two-step process. *See Shady Grove*, 130 S. Ct. at 1437; *Burke v. Air Serv. Int'l, Inc.*, --- F.3d ----, 2012 WL 2866408, at *4 (D.C. Cir. 2012). The first step is to determine whether there is a federal rule that "answers the question in dispute." *Shady Grove*, 130 S. Ct. at 1437. If a federal rule does answer the question and thus conflicts with the state law, the second step is to determine whether the rule "exceeds statutory authorization or Congress's rule-making power." *Id.* As explained below, to determine whether a federal procedural rule is *ultra vires*, the Court must determine whether application of the rule to the state law claim affects substantive rights and remedies. *Id.* at 1449-51 (Stevens, J., concurring in part and concurring in the judgment). If the rule does, the rule does not apply. *See id.*

Here, application of Rule 23 would alter the substantive rights and remedies created under the DCMWA. Applying Rule 23 to DCMWA claims would drastically expand the scope of recovery for plaintiffs in federal court and thereby encourage forum shopping. Accordingly, under the second step, Rule 23 does not apply, and the DCMWA's opt-in provision controls.

1. Justice Stevens's opinion in *Shady Grove* controls for determining whether Rule 23 applies when it squarely conflicts with a state law.

In *Shady Grove*, the Court considered whether Rule 23 preempted a New York procedural law, N.Y. CPLR § 901(b). Section 901(b) is analogous to Rule 23, except that § 901(b) prohibited courts from entertaining class actions in claims seeking penalties or statutory minimum damages, regardless of whether those claims arose under federal, New York, or other state law. *See Shady Grove*, 130 S. Ct. at 1436 & n.1; *see also id.* at 1457 (Stevens, J., concurring in part and concurring in the judgment). The district court and the Second Circuit

had held that the New York rule applied and precluded class treatment of the plaintiff's claim. *Id.* at 1437. The Supreme Court reversed. *See id.*

In an opinion authored by Justice Scalia and joined by Chief Justice Roberts and Justices Stevens, Thomas, and Sotomayor, the Court held that Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," *id.* at 1437, and that § 901(b) "squarely conflicts with" and "flatly contradicts" Rule 23, *id.* at 1441. Because Rule 23 "answer[ed] the question in dispute," the Court held that Rule 23 applied unless it exceeds Congress's rule-making power under the Constitution or the Court's statutory authority under the Rules Enabling Act. *See id.* at 1437, 1442; *see also id.* at 1448 (Stevens, J., concurring) (joining Justice Scalia's opinion as to Parts I and II-A); *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 94-95 & n.7 (holding that Justice Scalia's opinion in Part II-A is the majority opinion for the "first step" of the *Shady Grove* analysis).

The majority fractured, however, in deciding how to determine whether a federal procedural rule exceeds the Court's authority under the Rules Enabling Act. In a plurality opinion, Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Sotomayor, concluded that a rule falls within the Rules Enabling Act if the federal rule "really regulat[es] procedure" by governing only "the manner and the means by which the litigants' rights are enforced." *Shady Grove*, 130 S. Ct. at 1442 (quotation marks omitted).[1] The plurality found that Rule 23 governs procedure. *See id.* at 1443. Consequently, the plurality concluded that Rule 23 applied regardless of whether § 901(b) was procedural or substantive. *See id.* at 1444.

In a narrower opinion concurring in the judgment, Justice Stevens concluded that a federal procedural rule falls within the Rules Enabling Act if "application" of the rule does not

[1] Chief Justice Roberts and Justice Thomas concurred in Justice Scalia's opinion in full. Justice Stevens concurred only in Parts I and II-A. Justice Sotomayor concurred in Parts I, II-A, II-B, and II-D; she did not concur in Part II-C.

"displace a State's definition of its own rights or remedies." *Shady Grove*, 130 S. Ct. at 1449, 1451 (Stevens, J., concurring in part and concurring in the judgment). Justice Stevens reasoned that the Rules Enabling Act provides that the federal rules "'shall not abridge, enlarge, or modify any substantive right.'" *Id.* at 1449 (quoting 28 U.S.C. § 2072(b)).

Justice Stevens concluded that whether a federal rule "abridge[s], enlarge[s], or modif[ies]" a substantive right "turns on whether the state law actually is part of a State's framework of substantive rights or remedies." *Id.* He reasoned that the Rules Enabling Act analysis does not turn "on whether the state law at issue takes the *form* of what is traditionally described as substantive or procedural." *Id.*; *see id.* at 1450 (noting that "[t]he line between procedural and substantive is hazy" and that the categories are not "mutually exclusive") (quotation marks omitted).

Justice Stevens wrote that a state law, although seemingly procedural, is part of the State's substantive rights or remedies if the law "exist[s] to influence substantive outcomes" or becomes "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." *Id.* As an example, Justice Stevens noted that statutes of limitations, "although in some sense procedural rules," are also "a temporal limitation on legally created rights." *Shady Grove*, 130 S. Ct. at 1453 n.9. He concluded that if a state uses a procedural rule "as a means of defining the scope of substantive rights or remedies," the federal courts "must recognize and respect that choice." *Id.* at 1450.

Applying that framework to § 901(b), Justice Stevens found that the law was not part of the state's substantive rights or remedies and thus, as applied, Rule 23 did not violate the Rules Enabling Act. *Shady Grove*, 130 S. Ct. at 1457-60. He reasoned that § 901(b) "expressly and unambiguously" applies to all claims and not merely claims arising under New York law. *Id.* at

1457. Therefore, he concluded, the law could not be understood as "defining New York's rights or remedies" but rather reflected a policy about which lawsuits should proceed as class actions. *Id.* at 1457-58. He further reasoned that § 901(b) was directed to New York courts and was a rule "about how its courts operate." *Id.* at 1458 n.16. He noted that § 901(b) was placed "in New York's procedural code" and not in a substantive law creating rights and remedies. *Id.* at 1459. Accordingly, Justice Stevens concluded that Rule 23 controlled. *See id.* at 1459-60.

For purposes of the second step – determining whether a federal procedural rule exceeds Congress's authority or the Rules Enabling Act – Justice Stevens's concurrence is the controlling opinion for the Court. Under *Marks v. United States*, when no opinion commands a majority of the Court, the holding is "that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977). Justice Stevens provided the crucial fifth vote in *Shady Grove*. In doing so, he rejected the plurality's broad conclusion that a federal procedural rule falls within Congress's authority and the Rules Enabling Act if the rule truly governs procedure regardless of whether the rule's application affects state substantive rights or remedies. *See Shady Grove*, 130 S. Ct. at 1452 (rejecting the plurality's conclusion). Instead, Justice Stevens more narrowly held a federal procedural rule is valid if the rule, as applied, does not affect substantive rights or remedies.

For this reason, Justice Stevens's opinion is the controlling authority for the Court. *See, e.g.*, *McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733, 744-47 (N.D. Ohio 2010) (holding that Justice Stevens's concurrence is controlling for determining how to apply the second step of *Shady Grove*); *In re Wellbutrin XL Antitrust Litig.*, 756 F. Supp. 2d 670, 673-75 (E.D. Pa. 2010) (same); *Estate of C.A. v. Grier*, 752 F. Supp. 2d 763, 767 (S.D. Tex. 2010) (same); *Bearden v. Honeywell Int'l Inc.*, 2010 WL 3239285, at *9-*10 (M.D. Tenn. 2010) (same); *see also Garman*

v. Campbell Cnty. Sch. Dist. No. 1, 630 F.3d 977, 983-84 (10th Cir. 2010) (holding that Justice Stevens's concurrence is the controlling opinion for both steps under *Shady Grove*); *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 660-61 (E.D. Mich. 2011) (holding that Justice Stevens's concurrence controls whether Rule 23 applies to a conflicting state law).

2. As applied to the DCMWA, application of Rule 23 would violate the Rules Enabling Act because the DCMWA's opt-in provision is substantively intertwined with the rights and remedies of the DCMWA.

Applying Justice Stevens's opinion, this Court should conclude that the opt-in requirement contained in the DCMWA is substantively intertwined with the DCMWA's rights and remedies. Consequently, the Court should rule that Rule 23 is *ultra vires* as applied to DCMWA claims and thus does not preempt the opt-in requirement.

a. The DCMWA's opt-in provision is contained in a substantive statute and not in a separate procedural rule.

Unlike the New York law at issue in *Shady Grove*, the DCMWA's opt-in provision "is contained in the substantive statute itself, not in a separate procedural rule." *Bearden*, 2010 WL 3239285, at *10 (interpreting *Shady Grove* and applying class-action restriction contained in the Tennessee Consumer Protection Act ("TCPA")); *see also* D.C. Code § 32-1012(b). Numerous courts have held that a class-action limitation is a substantive limitation when it is contained in a substantive statute. *See, e.g.*, *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 416 (S.D.N.Y. 2011) (applying Illinois class-action limitation contained in Illinois Antitrust Act ("IAA") and holding that Rule 23 was *ultra vires* under *Shady Grove*); *Wellbutrin*, 756 F. Supp. 2d at 677 (same); *Bearden*, 2010 WL 3239285, at *10 (applying class-action limitation contained in TCPA and holding that Rule 23 was *ultra vires* under *Shady Grove*), *followed by Tait v. BSH Home Appliances Corp.*, 2011 WL 1832941, at *8-*9 (C.D. Cal. 2011); *see also Packaged Ice*, 779 F. Supp. 2d at 661 n.4 (stating that class-action limitations would apply in federal court

because the limitations "appear in the substantive statutes" under which plaintiffs sought relief and thus are "sufficiently 'intertwined' with the substantive rights defined in those statutes").

b. The opt-in provision applies only to causes of action arising under the DCMWA.

Unlike the New York law, the DCMWA's opt-in provision applies only to causes of action arising under the DCMWA. *See* D.C. Code § 32-1012(b). The opt-in provision does not apply to federal claims or claims arising under other states' laws or even claims arising under other D.C. laws. *See id.* The provision is limited to claims arising under the DCMWA. Courts applying Justice Stevens's concurrence have held that a class-action limitation is substantive when the limitation applies only to a specific substantive act. *See, e.g.*, *Wellbutrin*, 756 F. Supp. 2d at 677 (upholding Illinois class-action limitation because it applied only to the IAA); *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 2010 WL 2756947, at *2 (N.D. Ohio 2010) (upholding Ohio class action limitation as substantive because it applied only to a violation of the Ohio Consumer Protection Act); *see also McKinney*, 744 F. Supp. 2d at 748-49 (following *Whirlpool*); *Leonard v. Abbott Labs., Inc.*, 2012 WL 764199, at *13 (E.D.N.Y. 2012) (same); *Kline v. Mortgage Elec. Sec. Sys.*, 2010 WL 6298271, at *4 (S.D. Ohio 2010) (same).

c. The opt-in provision provides substantive rights to employers and employees.

The DCMWA's opt-in provision provides substantive rights to employers and employees. *See* D.C. Code § 32-1012(b). By providing that an employee is not a "party plaintiff" to an action unless the employee affirmatively gives written consent, the DCMWA reserves to an employee the right to control his claim. The DCMWA protects an employee's right of control by precluding the employee from falling within a class action by default. Because he must opt-in, an employee cannot inadvertently lose his right of control or be bound to a judgment without his knowledge. Rather, an employee must make an affirmative decision to

pursue his claim and to be bound to the final judgment. The opt-in provision also protects employers by giving them the right not to be sued except where an employee affirmatively chooses to pursue his claim by joining the lawsuit as "a party plaintiff." D.C. Code § 32-1012(b); *compare* 29 U.S.C. § 216(b). Thus, the opt-in provision is part of the DCMWA's "framework of substantive rights or remedies." *Shady Grove*, 130 S. Ct. at 1449. As a result, although the DCMWA's opt-in provision may be "traditionally described as … procedural," the provision is substantive for purposes of the Rules Enabling Act under Justice Stevens's controlling opinion in *Shady Grove*. *Id.* at 1449 (holding that the inquiry does not turn on whether a rule is "traditionally described as … procedural"); *see also id.* at 1455 n.13 (holding that "what is procedural in one context may be substantive in another").

Plaintiff's assertion that a class action will not deny employees the right to control their claim because they can choose to opt out ignores that the DCMWA gives employees an unconditional right to control their claims. Plaintiff's assertion makes an employee's rights conditional -- an employee has the right to control his claim only if he realizes he must opt-out and if he understands the ramifications of choosing not to opt-out. Under Plaintiff's theory, an employee loses his right to control his claim if, as is common, he mistakes a class notice for junk mail. *See, e.g., Kuncl v. IBM Corp.*, 660 F. Supp. 2d 1246, 1250 (N.D. Okla. 2009) (noting that opt-out rates are extremely low because class members view the notice received in the mail as "just another piece of junk that the recipient has neither the time nor the interest to read, let alone act on") (quotation marks omitted). A conditional right is not as broad as an unconditional one. Application of Rule 23 thus violates the Rules Enabling Act by "abridg[ing]" the employee's unconditional right of control.

Moreover, Plaintiff's assertion fails to address an employer's right not to be sued unless the employee affirmatively chooses to pursue his claim by filing his "written consent" to become "a party plaintiff." D.C. Code § 32-1012(b). Applying Rule 23 to DCMWA claims would destroy the employer's right by permitting him to be sued by employees who never affirmatively filed individual claims by becoming "party plaintiff[s]," but instead became class members by default. *Id.* Therefore, Rule 23 cannot apply under the Rules Enabling Act.

d. The opt-in provision is inextricably linked to the DCMWA's statute of limitations.

The DCMWA's opt-in provision is inextricably linked to the DCMWA's statute of limitations. *See* D.C. Code §§ 32-1012(b), 32-1013. The DCMWA is modeled after the FLSA, and, like an FLSA action, a DCMWA action is not commenced for purposes of the statute of limitations until the plaintiff's written consent to sue is filed with the court. *See Thompson v. Linda And A., Inc.*, 779 F. Supp. 2d 139, 143, 146 (D.D.C. 2011) (holding that the DCMWA is to be "construed consistently with the FLSA"); D.C. Code §§ 32-1012(b), 32-1013. Applying Rule 23 in this context would effectively nullify the DCMWA's statute of limitations by permitting employees to recover even though they had not tolled the statute of limitations by opting in.

Under Justice Stevens's controlling opinion, Rule 23 violates the Rules Enabling Act if the rule's application alters a state's statute of limitations. *See id.* at 1453 n.8. Justice Stevens reasoned that if a federal rule displaced a state statute of limitations, "the federal rule would have altered the State's 'substantive rights.'" *Id.* Were Rule 23 to apply and were employees not required to opt-in, the rule would "displace" D.C.'s definition of its "rights and remedies" under the DCMWA and would "enlarge" an employee's "rights and remedies" by permitting him to recover after the DCMWA's statute of limitations had run. *Shady Grove,* 130 S. Ct. at 1449. Justice Stevens's holding is consistent with Supreme Court precedent, which holds that statutes

of limitations are substantive not procedural. *See, e.g.*, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 743 (1980); *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949); *Guar. Trust Co. v. York*, 326 U.S. 99, 109-12 (1945).

For the reasons stated above, the DCMWA's opt-in provision, although perhaps "seemingly procedural," is a substantive limitation on a plaintiff's rights and remedies under the DCMWA. *Shady Grove*, 130 S. Ct. at 1450, 1453 nn.8-9. This Court cannot apply Rule 23 to Plaintiff's DCMWA claim without abridging, enlarging, or modifying the rights and remedies granted under that statute. As a result, Rule 23 violates the Rules Enabling Act as applied to Plaintiff's claim. Consequently, his motion to amend to state a class-action claim under the DCMWA is futile under Justice Stevens's concurrence in *Shady Grove* and relevant precedent governing the applicability of state statutes of limitations.

3. The cases that Plaintiff cites (but does not discuss) are inapposite.

The cases Plaintiff cites do not hold otherwise. In *Landsman*, the Third Circuit merely applied *Shady Grove*'s exact holding that N.Y. CPLR § 901(b) does not apply in federal court. *See Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 91-92 (3d Cir. 2011). The court did not consider whether § 901(b) was substantively intertwined with "state rights and remedies" because *Shady Grove* held that it was not. *See generally Landsman*, 640 F.3d 72. Thus, *Landsman* does not speak to whether the DCMWA's opt-in provision is substantive under Justice Stevens's concurrence.

Similarly, contrary to Plaintiff's assertion, *Fields* does not hold that "Rule 23 applies to state law claims in a wage-and-hour case even where state law provides a different rule." Cross Motion to Amend at 2. *Fields* did not involve a class-action restriction. *See generally Fields v. QSP, Inc.*, 2012 WL 2049528 (C.D. Cal. 2012). In *Fields*, a plaintiff filed a claim for civil penalties under California's Private Attorney General's Act ("PAGA"), which permits a plaintiff

to bring an action on behalf of other employees. *Fields v. QSP, Inc.*, 2012 WL 2049528, at *1, *4 (C.D. Cal. 2012). The plaintiff argued that she could bring a PAGA claim without complying with Rule 23. *Id.* at *4. The court rejected this argument, holding that class actions in federal court must satisfy Rule 23. *Id.* at *5. The court also reasoned that PAGA could not control in federal court because the California Supreme Court has held that the statute is "'simply a procedural statute'" that "'does not create property rights or any other substantive rights'" and does not "'impose any legal obligations.'" *Id.* at *4 (citation omitted; emphasis removed).

Fields is inapposite because the parties do not dispute that a class action brought in federal court must satisfy Rule 23. Rather, the parties dispute whether Plaintiff's DCMWA may be brought as a class action in the first instance. In addition, *Fields* did not consider whether PAGA was substantive because the California Supreme Court had held that PAGA is a purely procedural act that does not create any substantive rights or obligations. In contrast, the DCMWA is not "simply a procedural statute" because it creates substantive rights and obligations for employees and employers. *Id.* at *4.

Similarly, *Bates* is irrelevant because the plaintiff did not attempt to bring her state law claim as a federal class action. *See Bates v. Smuggler's Enters., Inc.*, 2010 WL 3293347, at *4 (M.D. Fla. 2010). For that reason, the court declined to decide whether a Florida Rule of Civil Procedure limiting class actions would apply in federal court. *See id.* Thus, the court's statement that it was "inclined to agree" that Florida Rule of Civil Procedure 1.220 could not preclude a federal class action under Rule 23 is pure dictum. *Bates*, 2010 WL 3293347, at *4. Moreover, the dictum is not persuasive because the court did not analyze the issue or provide any reasoning for the court's "inclination." *See id.* In any event, unlike the DCMWA, Rule 1.220

appears to be a purely procedural rule contained in Florida's Rules of Civil Procedure and applying to all claims regardless of whether they arise under federal, Florida, or other state law.

Because the DCMWA's opt-in provision is substantively intertwined with the Act's rights and remedies, Rule 23 is *ultra vires* as applied to Plaintiff's DCMWA claim. Accordingly, Plaintiff's proposed amendment to state a DCMWA class-action claim is futile.

B. Alternatively, *Shady Grove* Does Not Apply Because D.C. Has A Unique Status As A Federal Enclave.

Shady Grove considered whether a federal procedural rule controls when it conflicts with a state law. D.C. is not a state for purposes of this analysis, and the DCMWA is not a state law. Rather, D.C. is a federal enclave, and the DCMWA is a federal law.

Article I, section 8, clause 17 of the United States Constitution grants Congress the authority "[t]o exercise exclusive legislation in all cases whatsoever" over the District of Columbia. The purpose of the District Clause was "to create a Federal District free from any control by an individual state." Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 Georgetown L.J. 207, 211 (1957) (citing authorities). The Supreme Court has held that the District is not one of the several states and is not to be treated as one unless federal law provides otherwise. *See, e.g.*, *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (holding that, under the District Clause, Congress could enact legislation treating the District as a state for purposes of diversity jurisdiction); *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 452 (1804) ("[T]he members of the American confederacy are the only states contemplated in the Constitution.").

Because the Constitution vests Congress with the authority to legislate for the District, the "sovereign power" of the District "is not lodged in the corporation of the District of Columbia, but in the government of the United States." *Metro. R.R. v. Dist. of Columbia*, 132

U.S. 1, 9 (1889). The District's "supreme legislative body" is Congress. *Id.*; *see also id.* ("Crimes committed in the District are not crimes against the District, but against the United States.").

Congress may, however, delegate its authority. *Dist. of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 110 (1953). That is what Congress did in enacting the D.C. Home Rule Act and creating a local D.C. government. *See* Pub. L. No. 93-198, 87 Stat. 774 (1973). Under the Home Rule Act, Congress reserved its authority to review and approve all laws enacted by the D.C. Council. *See* D.C. Code 1-206.02(c)(1) (requiring that acts passed by the Council be submitted to Congress for a 30-day review before becoming law). Because the D.C. Council acts pursuant to a delegation of congressional authority, laws enacted by the Council "ha[ve] the force of a federal statute." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941) (holding that actions taken pursuant to a delegation of congressional authority have the force of federal law).

The DCMWA was enacted by Congress in 1918 and amended by Congress several times thereafter. *See* District of Columbia Minimum Wage Law Amendments, c. 438, 55 Stat. 738, District of Columbia Revenue Act of 1970 §702-703, Pub. L. No. 91-650, 84 Stat. 1938, District of Columbia Revenue Act of 1971 §708, Pub. L. No. 92-196, 85 Stat. 658. In 1992, the D.C. Council amended the DCMWA to provide, among other things, for collective actions. Minimum Wage Amendments Act of 1992, D.C. Law 9-248, §2, 40 DCR 761. The D.C. Council submitted the amended DCMWA for Congress to "examine [the act] and veto [it] going into effect if contrary to the policy of the legislature." *Sibbach*, 312 U.S. at 15. That Congress did not veto the act indicates that Congress approved the act and that it did not conflict with federal law. *See id.* at 15-16 (holding that review without veto shows that the action "squares with the

Congressional purpose," falls "within the ambit" of the delegated authority, and does not "transgress[]" congressional policy).

Because the DCMWA was approved by Congress and has the force of federal law, it does not fall within the *Shady Grove* framework. As the majority recognized in *Shady Grove*, Congress "can create exceptions" to Rule 23. 130 S. Ct. at 1438 (Part II.A.). That is exactly what Congress did in approving the DCMWA's opt-in provisions. Thus, in this context, the DCMWA's opt-in provisions are a valid exception to Rule 23, and the Plaintiff's motion to amend to state a DCMWA class-action claim must be denied for futility.

II. Plaintiff's Proposed Amendments to His retaliation and overtime claims are also futile and SUBJECT TO DISMISSAL

Plaintiff's proposed amendments to his Retaliation Claim and Overtime Claims are also futile because Plaintiff's "new" allegations in his Second Amended Complaint are still insufficient to state a claim under the FLSA.

A. Plaintiff's Proposed Amendments To His Retaliation Claim Are Futile Because He Failed To Put The University On Notice That He Was Filing A Complaint Under the FLSA.

Plaintiff's proposed amendments to his Retaliation Claim are futile because he fails to allege that he engaged in protected conduct, such as filing a complaint "in the context of a formal legal action," that caused his termination. *Mansfield v. Billington*, 432 F. Supp. 2d 64, 74 (D.D.C. 2006). Although the D.C. Circuit has not yet determined whether mere informal complaints can trigger protection from retaliation under the FLSA,[2] the U.S. Supreme Court has made clear that "some degree of formality" is required for an employee complaint to constitute protected activity. *Kasten v. Saint Gobain Performance Plastics Corp.*, --- U.S. ----, 131 S.Ct. 1325, 1334 (2011); *see also Saint-Jean v. District of Columbia*, 2012 WL 723715, *7. ("[E]ven

[2] *Saint-Jean v. Dist. of Columbia*, 2012 WL 723715, *7 (D.D.C. 2012).

assuming that retaliation for making an informal complaint is cognizable under § 215(a)(3), an employee must still step outside his or her role of representing the company and ... threaten to file an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights.")

Plaintiff's proposed amendments do not provide the requisite level of formality so as to put the University on notice that he was asserting rights under the FLSA.. Plaintiff's only mention of the FLSA comes in a vague allegation that he "question[ed] GWU's use of the FLSA's half-time method of calculating overtime and the initial FLSA exempt classification of his position." Pl.'s Cross Mot. to Amend, Ex. A ¶ 57 (emphasis added). Although Plaintiff characterizes the University's conduct as falling under the FLSA, he does not allege that he complained to the University that its conduct violated the FLSA. Asking questions about the University's method and classification does not constitute "a serious occasion" with the "requisite degree of formality" to give the University "fair notice that a grievance has been lodged" by Plaintiff. *Kasten*, 131 S. Ct. at 1334. Accordingly, because Plaintiff's proposed amendments fail to allege that he registered a complaint invoking the protections of the FLSA, his claim is futile.

B. Plaintiff's Proposed Amendments To His Overtime Claims Are Futile For Multiple Reasons, Each Of Which Provides Independent Grounds For Dismissal.

Likewise, his proposed amendments to his Overtime Claims are futile because he does not approximate how many overtime hours he allegedly worked. *See generally* Pl.'s Cross Mot. to Amend, Ex. A; *see, e.g.*, *Jones v. Carsey's Gen. Stores*, 538 F. Supp. 2d 1094, 1102 (S.D. Iowa 2008) (dismissing complaint that failed to approximate hours worked); *Zhong v. August August Corp.*, 498 F. Supp. 2d 625, 628-31 (S.D.N.Y. 2007) (holding that claim must

approximate the number of hours worked and the wages owed). In addition, as to his DCWPCL Overtime Claim, Plaintiff's proposed amendments are futile because the DCMWA provides the exclusive remedy for overtime claims under D.C. law and because the DCWPCL does not apply to claims for wages disputed in good faith. *See, e.g.*, *Fudali v. Pivotal Corp.*, 310 F. Supp. 2d 22, 27-29 (D.D.C. 2004) (holding that the DCWPCL does not apply to disputed wages); Motion to Dismiss at 4-14 (explaining that the DCMWA is the exclusive local remedy and the DCWPCL does not apply to disputed wages). Plaintiff's allegation of bad faith is conclusory and fails to satisfy federal pleading standards. *See, e.g.*, *Artuso v. Vertex Pharm., Inc.*, 637 F.3d 1, 9 (1st Cir. 2011) (holding that mere allegation of bad faith is conclusory and fails to satisfy federal pleading standards); *see also* Def.'s Reply to Pl.'s Opp. to Mot. to Dismiss at 6-7 (citing cases).

For these reasons, this Court should deny Plaintiff's proposed amendments to his Retaliation Claim and Overtime Claims as futile.

III. Plaintiff's request for leave should be denied based on plaintiff's unexplained delay and REsulting prejudice to the university

A court may deny a motion for leave to amend "if the amendment would result in delay or undue prejudice to the opposing party, or if a party had sufficient opportunity to state the amended claims and failed to do so." *Onyewuchi v. Gonzalez*, 267 F.R.D. 417, 420 (D.D.C. 2010) (compiling cases).

Here, the Court should deny Plaintiff leave to amend his Complaint given his delay in seeking to amend his Amended Complaint to include facts and theories he knew (or should have known) at the time he filed his Original Complaint. *Id.* at 420 (holding that leave to amend is properly denied when plaintiff was aware of the information underlying the proposed amendment before moving for leave to amend the complaint). First, Plaintiff seeks to amend his Complaint to add facts related to the University's alleged reclassification, overtime payments,

and retaliation. *See* Cross Motion to Amend, Ex. A ¶¶ 41-42, 44-45, 48, 52, 57-63. These allegations, which speak to, among other things, his salary and hourly rate,[3] are facts that Plaintiff had personal knowledge of prior to filing his original complaint, and yet Plaintiff offers no explanation for his delay in pleading them. The complete absence of any explanation as to why he did not include these allegations earlier and lack of justification for his delay suggests that Plaintiff acted with bad faith and dilatory motive in seeking to amend his complaint for a second time. *See, e.g.*, *Chennareddy v. Dodaro*, 698 F. Supp. 2d 1, 18 (D.D.C. 2009) (affirming magistrate's denial of plaintiff's request to amend his complaint because plaintiff "failed to provide any justification" for why he should be permitted to amend his complaint); *Williams v. Savage*, 569 F. Supp. 2d 99, 108 (D.D.C. 2008) (denying Plaintiff's leave to amend complaint to include racial discrimination claim because plaintiffs had "not justified their delay" in civil rights action); *see also Kates v. Crocker Nat'l Bank*, 776 F.2d 1396, 1398 (9th Cir. 1985) (affirming denial of motion to amend where plaintiff "gave no reason for his delay" in amending). As such, Plaintiff's Cross-Motion for Leave to Amend his Complaint should be denied.

Similarly, even if Plaintiff's DCMWA class-action claims are not dismissed for the reasons set forth in Part I, *supra*, dismissal is still warranted given that Plaintiff has provided no justification for pleading these DCMWA claims as a class action for the first time in his Second Amended Complaint. Plaintiff knew or should have known prior to filing his Original Complaint about the argument that he apparently seeks to make in attempting to state a class action claim under the DCMWA. This is evident from his reliance on the Supreme Court's 2010 *Shady Grove* opinion as the basis for his claim. On this basis alone, Plaintiff's Cross-

[3] *See generally* Pl.'s Cross Mot. to Amend, Ex. A.

Motion for Leave to Amend his Complaint to include his class-action claim should also be denied. *See, e.g., Equity Group, Ltd. v. Painewebber Inc.*, 839 F.Supp. 930, 932 (D.D.C. 1993) (denying plaintiff leave to amend where plaintiff had sufficient opportunity to state the amended claims and unduly delayed in bringing them) (citing *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987)); *Conroy Datsun Ltd. v. Nissan Motor Corp.*, 506 F. Supp. 1051, 1054 (N.D. Ill. 1980) ("It is incumbent upon the movant to show that the information upon which the new claim is based was unknown or unavailable prior to the filing of the motion.").

Given the procedural history of this case, the Plaintiff's instant request unduly prejudices the University and would improperly delay the Court's ruling on the University's pending Motion to Dismiss. Plaintiff waited until after the University filed its Motion to Dismiss to move to amend his complaint for a second time. In doing so, he acknowledges that he filed his amended complaint specifically in an attempt to address deficiencies in his Amended Complaint and avoid dismissal. Pl.'s Cross Mot. to Amend at 1-2. Plaintiff's strategy thus far has been to let the University spend substantial resources responding to his deficient pleadings, only later to attempt to correct his deficiencies through amendment. Such gamesmanship is prejudicial to the University and should not be allowed. The University should not be required to respond to such a moving target, especially given that Plaintiff's claims cannot survive dismissal. *See* Part I-II, *supra*. Therefore, Plaintiff's request for leave to amend must be denied on the grounds of undue delay, bad faith, and prejudice to the University.

CONCLUSION

For all of the above reasons, the Court should deny Plaintiff's Cross Motion to Amend the Amended Complaint. In the event the Court allows the Second Amended Complaint, despite

the University's arguments to the contrary, the Court should use its discretion and award the University fees and costs.[4]

Dated: August 3, 2012

Respectfully submitted,

THE GEORGE WASHINGTON UNIVERSITY

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[4] It is well-settled that courts have discretion to impose conditions in granting leave to amend pursuant to Rule 15(a), including the payment of costs and fees incurred by the opponent in responding to pleadings associated with the party's proposed amendment. *See Wright and Miller, Federal Practice and Procedure* § 1486 (3d ed.); *see also Hayden v. Feldman*, 159 F.R.D. 452, 454-55 (S.D.N.Y. 1995) (conditioning leave to amend on payment of attorney's fees).