

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
MIDLAND/ODESSA DIVISION**

<b>JASON GUAJARDO, Individually and</b>	§	
<b>On Behalf of All Others Similarly</b>	§	
<b>Situated,</b>	§	
	§	<b>Civil Action No.</b>
<b>Plaintiff,</b>	§	
	§	<b>7:18-CV-00025-DC</b>
<b>v.</b>	§	
	§	
<b>BIRD ELECTRIC ENTERPRISES, LLC</b>	§	
	§	
<b>Defendant.</b>	§	

**PLAINTIFF’S MOTION TO COMPEL COMPLIANCE WITH ORDER CERTIFYING  
CLASS OR, IN THE ALTERNATIVE,  
TO CONDITIONALLY CERTIFY A SECOND CLASS OF ELECTRICIANS**

Plaintiff Jason Guajardo (“Named Plaintiff” or “Plaintiff”) on behalf of himself and all others similarly situated (“Class Members”) files this Motion to Compel Compliance with Order Certifying Class or, in the Alternative, to Conditionally Certify a Second Class of Electricians.

**I. INTRODUCTION**

The Court previously conditionally certified—and ordered notice to—a class of plaintiffs who held the position of “Electrician” for Defendant in Department 16. Order of April 16, 2018, Dkt. No. 12. In response, Defendant disclosed information regarding only its general electricians in the department. Defendant did not disclose any information regarding its “underground lineman electricians.” However, the underground lineman electricians are in Department 16 and perform the same work as the general electricians; and, like the general electricians, the underground lineman electricians are compensated by the hour, work long hours, and are subject to the same FLSA violations in that they are required to work off-the-clock for no pay.

It is Plaintiff's position that Defendant violated the Court's Order of April 16, 2018 by not disclosing information regarding the underground lineman electricians. Plaintiff therefore requests an order tolling the statute of limitations for underground linemen electricians, compelling Defendant's compliance with the Court's order of conditional certification, requiring Defendant to disclose contact information for "underground linemen electricians," and authorizing Plaintiff's counsel to notify these previously undisclosed individuals.

## II. BACKGROUND

On February 15, 2018, Plaintiff filed a Motion for Conditional Class Certification (the "Motion"), requesting that the court certify a class defined as "all current and former electricians who were employed by Defendant and who were paid by the hour at any time in the last three years" and permit notice to the class in various forms. Dkt. 3 at 3-4, 8-10. On April 10, 2018, prior to Defendant's deadline to respond to the Motion, the parties filed a Stipulation of Conditional Certification (the "Stipulation"). Dkt. 10. The Stipulation provided a modified notice and fewer forms of notice. *Id.* at 2-3. The Stipulation also narrowed the class to electricians in Department 16, defining the class as "[a]ll current and former Electricians who worked for Defendant in Department 16 at any time since April 10, 2015 to the present." *Id.* at 1. Although "Electricians" was not defined in the stipulation, during negotiations on the Stipulation, Bird Electric did not mention the existence of—or its intent to split hairs and not disclose information regarding—the underground linemen electricians. In addition, the agreed Notice and Consent to Join defined those eligible to join the suit as anyone who was an "electrician for Bird Electric in Department 16; and . . . [was] paid by the hour at any time after April 10, 2015." Dkt. 10-1 p. 2.

On April 16, 2018, the Court entered an Order on the Motion (the "Order"), adopting this class description in the Stipulation, and approving the Notice and Consent Form. Dkt. 12. In

response to the Order, Defendant did not produce any information regarding its underground lineman electricians in Department 16.

During the notice period, despite not being disclosed as a class member and not receiving notice from Plaintiff’s counsel, Manuel Flores opted into this lawsuit. Dkt. 17-1. Mr. Flores was an underground lineman electrician for Defendant from approximately August 2016 until January 2018. Exhibit A at ¶¶ 3-4. He worked in Department 16 from March 2017 to January 2018. *Id.* ¶ 4. While he worked for Defendant, Mr. Flores was a licensed electrician. *Id.* ¶ 5. Mr. Flores did the same work as Defendant’s other electricians and underground lineman electricians—installing, maintaining, and inspecting electrical systems; monitoring and operating machinery; and collecting and relaying data to supervisors for analysis. *Id.* ¶¶ 6-7; Dkt. 3-1 ¶ 4; Dkt. 3-2 ¶ 4. The only difference between an “underground lineman electrician” and an “electrician” is that an “underground lineman electrician’s” work occurs along electrical transmission lines whereas the “electrician’s” work occurs on a specific jobsite like an oil rig. *Id.* ¶ 6.

Like the general electricians, Mr. Flores and the other underground lineman electricians are compensated by the hour and regularly worked more than forty hours per week. *Id.* ¶¶ 8-9; Dkt. 3-1 ¶¶ 5-6; Dkt. 3-2 ¶¶ 5-6. Also like the general electricians, Mr. Flores and the underground lineman electricians were required to be at Bird Electric’s shop—and perform work for Defendant—before driving to and after leaving the job site for the day. *Id.* ¶ 10; Dkt. 3-1 ¶ 7; Dkt. 3-2 ¶ 7. For example, while at the shop, Mr. Flores and the other underground lineman electricians chose the tools and materials necessary for the day’s work, picked up and loaded materials onto vehicles for transport to the jobsite, picked up and loaded equipment, completed job-related paperwork, and attended morning safety meetings. *Id.* After the day’s work at the job site, Mr. Flores and the other underground lineman electricians returned to the shop and continued to perform work, such as unloading materials, equipment, and tools; loading materials, equipment,

and tools for the next day; and filling out tickets, invoices, and forms. *Id.* ¶ 11; Dkt. 3-1 ¶ 10; Dkt. 3-2 ¶ 10. But like the general electricians, Mr. Flores and the other underground lineman electricians were not compensated for their time at the shop or driving to and from the job sites. *Id.* ¶¶ 10-11; Dkt. 3-1 ¶ 9; Dkt. 3-2 ¶ 9.

### III. REQUEST TO COMPEL COMPLIANCE

The Court certified a class of “Electricians who worked for Defendant in Department 16.” Dkt. 12 (incorporating class definition from Dkt. 10). Mr. Flores and the underground lineman electricians fit this description—Mr. Flores was a licensed electrician, performed the same work as Defendant’s general electricians, and worked for Defendant in Department 16. Ex. A ¶¶ 3-7. And there are a number of other underground lineman electricians who have worked and who work for Defendant in Department 16. *Id.* ¶ 3. These underground lineman electricians similarly work long hours, are paid by the hour, and are subject to the same off-the-clock FLSA violations. *Id.* ¶¶ 6-11 But Defendant did not disclose their identities or contact information in response to the Order. Therefore, Plaintiff requests that the Court order that Defendant disclose identifying information for its underground lineman electricians and permit Plaintiff to send notice to these individuals as described below in Section VI.<sup>1</sup>

### IV. ALTERNATIVELY, REQUEST FOR CONDITIONAL CERTIFICATION OF SECOND CLASS

Should the Court find that underground lineman electricians were not covered by the Court’s Order (Dkt. 12), Plaintiff requests the Court conditionally certify a class defined as:

**All current and former underground lineman electricians who were employed by Defendant and who were paid by the hour at any time in the last three years.**

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<sup>1</sup> In agreeing to the Stipulation, Plaintiff made concessions in the content and form of notice. Plaintiff requests that the Court permit his counsel to send notice in the forms requested in his Motion—not the forms conceded to in the Stipulation—for two reasons. First, Defendant violated the Stipulation and Order by not disclosing the underground lineman electricians. Second, only after Plaintiff agreed to the Stipulation and after the Court entered the Order did Defendant reveal to Plaintiffs that it did not have any e-mail addresses for the class members. *See* Ex. B.

**A. Plaintiff and Class Members are similarly situated with respect to job duties and Defendants’ pay policies and practices.**

The evidence discussed above in Part II shows that Defendant’s electricians and underground lineman electricians had similar job duties, regularly worked more than forty hours per week, and Defendant required that they work off-the-clock both pre- and post-shift. *See* Part II. Therefore, Plaintiff has put forward evidence that a group of electricians (including at least general and underground lineman electricians) had similar job duties, were paid in the same manner, and were together subjected to an illegal payment scheme under the FLSA. Plaintiff has met his lenient burden.<sup>2</sup>

**B. Plaintiff’s different job classifications does not render class certification inappropriate.**

To the extent that Defendant argues that class certification for both electricians and underground lineman electricians is inappropriate on the ground that the two job classifications had dissimilar job duties, such an argument has been considered and rejected by courts in this District and Division.<sup>3</sup> In any event, both sets of electricians performed the same work. They just did so in different locations.

In *Minyard*, the plaintiffs—two “Field Hands” and one “Crew Pusher” of an oilfield casing company—moved for conditional certification of a group of “all workers” who were all subject to

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<sup>2</sup> *See Steiner v. Mitchell*, 350 U.S. 247 (1956); *see also Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 Fed. Appx. 448, 455 (5th Cir. 2009) (determining that the time plaintiffs spent checking specialized tools in and out, setting up the tool display and putting away tools, and cleaning up workstations at the end of the shift was compensable under the FLSA); *Cantu v. Milberger Landscaping, Inc.*, 12 F. Supp. 3d 918, 921-22 (W.D. Tex. 2014) (Hudspeth, J.) (holding time spent working at a yard and traveling to and from jobsites is compensable when the employees were required to meet at a yard prior to traveling to the jobsite and required to work upon arriving back at the job site).

<sup>3</sup> *See Minyard v. Double D Tong, Inc.*, No. MO:16-CV-00313-RAJ, 2017 WL 5640818, at \*3 (W.D. Tex. Mar. 22, 2017) (Junell, J.) (on reconsideration) (“While the Court acknowledges that Defendants’ casing employees have dissimilar job positions, these dissimilarities are not legally relevant because the alleged FLSA violations in this case do not turn on the nature of the work performed.”); *see also, Tamez v. BHP Billiton*, No. 5:15-CV-330-RP, 2015 WL 7075971 (W.D. Tex. Oct. 5, 2015) (Pitman, J.).

the same allegedly illegal pay scheme.<sup>4</sup> Initially, the court refused to certify a class of *all workers*, noting that plaintiffs had failed to describe how their job duties were similar to all workers and finding that the proposed class included workers whose job duties “varied widely.”<sup>5</sup> The court instead certified only a group of Field Hands and Crew Pushers, positions held by the plaintiffs.<sup>6</sup>

The plaintiffs moved for reconsideration, requesting the court expand the group of conditionally certified individuals to include all non-exempt casing workers subject to the same payment scheme irrespective of job duties.<sup>7</sup> The plaintiffs argued—and the court agreed and reconsidered its prior order—that an inquiry into the job duties of the proposed class is necessary only in misclassification cases.<sup>8</sup> The court stated, “[a] class that encompasses a wide range of job positions may be conditionally certified as long as the differences between class members are not material to the allegations of the case.”<sup>9</sup> Because the class the *Minyard* court certified was comprised of non-exempt employees who were all subject to the same purportedly illegal pay scheme, “the dissimilar job responsibilities among the class have not been shown to be relevant to Plaintiffs’ FLSA allegations [and] are not a barrier to conditional certification.”<sup>10</sup> The court therefore expanded its prior definition of the conditionally certified class to also include all non-exempt casing employees paid in the same purportedly illegal manner.<sup>11</sup>

Similarly, in *Tamez*, each of the plaintiffs was a “health and safety environmental specialist[.]” whom the employer paid only a day rate, regardless of the number of hours worked in a week.<sup>12</sup> The *Tamez* plaintiffs nevertheless brought a FLSA collective action on behalf of *all*

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4 *Minyard*, 237 F. Supp. 3d 480, 483 (W.D. Tex. 2017).

5 *Id.* at 485.

6 *Id.* at 485-86.

7 *Minyard*, 2017 WL 5640818, at \*2.

8 *Id.*

9 *Id.*

10 *Id.* at 3.

11 *Id.*

12 *Id.* at \*1.

*employees* whom the employer paid in the same way.<sup>13</sup> The court acknowledged that the proposed class in *Tamez* consisted of “numerous dissimilar job positions with distinct responsibilities.”<sup>14</sup> Yet the court conditionally certified the class, reasoning that because the focus of the case was on the employer’s illegal pay scheme, “[t]he alleged FLSA violations . . . do not depend on the job title or responsibilities of each particular plaintiff.”<sup>15</sup>

Just as in *Minyard* and *Tamez*, the focus in this case is Defendant’s illegal payment scheme—refusing to pay for work performed at the shop before and after shifts and the driving between the shop and the job sites. Because Plaintiff’s request for certification is premised on Defendant’s *per se* violation of the FLSA of non-exempt employees, Plaintiff’s and Class Members’ duties are not relevant. Indeed, the proposed class definition includes only individuals whom Defendant treated as non-exempt from the protections of the FLSA, including only hourly-paid individuals eligible for overtime pay.

### **C. Similarly situated potential opt-in plaintiffs exist.**

Although it is required by neither the statute nor the great weight of relevant caselaw,<sup>16</sup> Mr. Flores has identified additional underground lineman electricians who performed similar duties for Defendant, were paid in the same manner, and who worked off-the-clock for Defendant.

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<sup>13</sup> *Id.* at \*2-\*3.

<sup>14</sup> *Id.* at \*2.

<sup>15</sup> *Id.* at \*3; *see also Behnken v. Luminant Min. Co., LLC*, 997 F.Supp.2d 511, 522 (N.D.Tex.2014) (“Because it appears from the record developed thus far that the employees’ job classifications, descriptions, or duties do not affect any of the facts that are material to plaintiffs’ claim, these differences are not sufficient to defeat conditional certification”); *Aguilar v. Complete Landsculpture, Inc.*, No. 3:04–CV–0776 D, 2004 WL 2293842, at \*4 (N.D. Tex. Oct.7, 2004) (“The . . . class members . . . were compensated under the same regimen. Thus under plaintiffs’ theory of the case, the fact that [they] had somewhat different duties and rates of pay is immaterial.”).

<sup>16</sup> *See, e.g., Wade v. Furmanite Am., Inc.*, 3:17-CV-00169, 2018 WL 2088011, at \*3 (S.D. Tex. May 4, 2018) (collecting sources and agreeing that finding that the plaintiff need not meet this element); *Vega v. Point Security, LLC*, A-17-CV-049-LY, 2017 WL 4023289, at \*4 (W.D. Tex. Sept. 13, 2017) (Austin, M.J.) (same); *Contreras*, 2017 WL 663560, at \*7 (W.D. Tex. Feb. 17, 2017) (“This court agrees with the above and finds that Plaintiffs need not specifically show that other aggrieved individuals desire to opt in. Requiring Plaintiffs to identify and obtain preliminary support from potential class members is “putting the cart before the horse.”).

Ex. A ¶¶ 3, 6-12. Mr. Flores also believes that many other underground lineman electricians—at least six identified by name—would join this action if they were given notice of their rights to do so. *Id.* ¶ 14. Indeed, besides Plaintiff and Mr. Flores, sixteen other individuals have opted to join the suit. Thus, even if the Court were to require evidence on this point, Plaintiff has met the lenient standard.<sup>17</sup>

### V. REQUEST FOR EQUITABLE TOLLING

An opt-in plaintiff's statute of limitation continues to run until he or she files a consent to join the lawsuit.<sup>18</sup> However, the FLSA's statute of limitation, like all such federal limitations periods, is subject to equitable tolling.<sup>19</sup> The decision whether or not to toll a statute of limitation rests within the court's discretion.<sup>20</sup> District courts have tolled the limitations periods for putative class members during the time that a motion for conditional certification was pending court approval when the plaintiff had diligently pursued their claims and/or the delay in the court's ruling was beyond the plaintiff's control.<sup>21</sup>

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<sup>17</sup> See, e.g., *Nabarrette v. Propetro Services, Inc.*, MO:15-CV-00211-RAJ, 2016 WL 7616717, at \*3 (W.D. Tex. Apr. 4, 2016) (Junell, S.J.) (finding plaintiff's declaration sufficient to support conditional certification); *Dyson v. Stuart Petroleum Testers, Inc.*, 308 F.R.D. 510, 513 (W.D. Tex. 2015) (Pitman, J.) (declarations of the single named plaintiff and one co-worker sufficient); *Alford*, 2016 WL 8673858 at \*3 (two declarations); *Toentino v. C & J Spec-Rent Services Inc.*, 716 F. Supp. 2d 642, 652 (S.D. Tex. 2010) (finding two declarations of similarly situated individuals and the complaint sufficient to demonstrate the existence of employees who would opt in); See, e.g., *Burns*, 2017 WL 1842937 at \*4-5 (two declarations from two named plaintiffs sufficient).

<sup>18</sup> 29 U.S.C. § 256.

<sup>19</sup> See *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946) (“This equitable doctrine is read into every federal statute of limitation.”); see also *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir.1998).

<sup>20</sup> *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999).

<sup>21</sup> See, e.g., *Shidler v. Alarm Security Group, LLC*, 919 F.Supp.2nd 827, 829-30 (S.D. Tex. 2012) (granting equitable tolling in a FLSA case from the date of the filing of the notice of agreement on conditional certification where “the parties [were] agreed to the terms of conditional certification, as well as the attendant notice” and where the reason for the length of time between the filing of the notice of agreement and entry of the order of conditional certification “was entirely beyond the control of [the plaintiff.]”); *Ferguson v. Texas Farm Bureau*, ---F. Supp. 3d---, 2018 WL 2212979 (W.D. Tex., April 6, 2018) (Magistrate Judge Manske's Report and Recommendation that the district court grant in part the plaintiff's motion to equitably toll the limitations period until the time the court granted the plaintiff's motion for conditional certification; objections to the Report and Recommendation are pending before the district court (Dkt. No. 157)); *Hernandez v. Caviness Packing Co., Inc.*, 2008 WL 11183755, \*2 (N.D. Tex., June 2, 2008) (Robinson, J.) (“The Court finds that there is no evidence that the Defendants threatened or intimidated Plaintiffs to stop their participation in the lawsuit. However, the Court exercises its power to equitably toll the statute of limitations due to the delay [10 months from the time of filing] in ruling on the Plaintiff's motion for class certification.”); *Davis*

Plaintiff filed his Motion without delay—on the same day of filing his Original Complaint. The delay in delivering notice to the underground lineman electricians is solely the result of Defendant not disclosing their existence at any time during this suit, even after the Court ordered it to disclose the identities of all “Electricians.” Considering the forthcoming briefing on this motion, the necessary time for the Court to consider and rule, and—if the motion is granted—the time for the underground lineman electricians to receive notice and opt-into the suit, six months or more could elapse. This passage of time might result in some or all of their claims being time-barred should they decide to opt-in. Therefore, Plaintiff requests the Court toll the limitations period for any opt-in class member from the date of the parties’ Stipulation—April 10, 2015—until the notice and opt-in period is concluded.

#### **VI. REQUEST FOR NOTICE TO CLASS MEMBERS**

Plaintiff’s proposed Notice (*see Exhibit C*) to potential opt-ins is “timely, accurate, and informative,” as the law requires. *Hoffmann-La Roche*, 493 U.S. at 172. It contains accurate notice of the pendency of this action and the ways in which potential plaintiffs can opt-in; and they are informed that they are not required to opt-in.

Plaintiff requests that Defendant be ordered to produce within ten (10) days of the granting of this Motion an Excel file containing the names, all known addresses, and all telephone numbers (home, mobile, etc.) of all underground lineman electricians in Department 16. Telephone numbers will be used only for text message notice and to verify addresses only.

Plaintiff’s counsel requests leave to send notice to all current and former employees of Defendant who worked as an underground electrician for Defendants since April 10, 2015.

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*v. Flare Ignitors & Rentals, Inc.*, 2012 WL 12539328, \*2 (W.D. Tex., March 19, 2012) (Garcia, J.) (“Due to the length of time in which this motion remained pending with this Court [eight months], the Court finds it equitable—and therefore orders—that the statute of limitations as it applies to any additional opt-in plaintiffs is tolled from the date on which this motion was filed[.]”)

Plaintiff requests a 60-day opt-in period from the date of initial mailing. For the reasons cited in its Motion (*see* Dkt. 3 pp. 8-10, nn. 6-12), Plaintiff requests to send the Notice and Consent forms by mail, the proposed Social Media Notice of Collective Action (attached as **Exhibit D** to this motion) via Facebook and/or LinkedIn, and the proposed Text Message Notice of Collective Action (attached as **Exhibit E** to this motion) via text message to all identified class members. Plaintiff also requests that the Court order Defendant to post the Notice of Collective Action in a conspicuous and accessible location at each of its places of work at which it currently employs one or more potential Class Members.

As stated above, Plaintiff no longer requests the disclosure of—or notice via—e-mail because Defendant does not possess e-mail addresses. *See* Ex. B. Because Defendant lacks e-mail addresses, notice in the other ways requested is more likely to provide timely notice to the class members.<sup>22</sup>

Finally, Plaintiff requests leave for his counsel to be permitted to maintain a website dedicated to posting the Notice and Consent Form. On that website, Plaintiff’s counsel will post only the Notice and Consent Form (**Exhibit C**) that he is requesting the Court to approve for dissemination. In addition, Plaintiff requests that potential opt-in plaintiffs be afforded the opportunity to electronically sign their consent forms from that website.

## VI. CONCLUSION AND PRAYER

For the foregoing reasons, Plaintiff respectfully requests that the Court order that Defendant comply with the Order by producing the names and requested information for all

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<sup>22</sup> Magistrate Judge Edison’s opinion in *Wade v. Furmanite*, *supra*, is illuminative of the growing endorsement of forms of notice beyond U.S. mail. *Supra*, 2018 WL 2088011. There, the court approved the only two forms of notice requested – U.S. Mail and e-mail—but also noted the strong growing support for notice through social media. *Id.* at \*7 (“As expected, courts across the country are adapting with the times, taking steps to maximize the effectiveness of class notice through the use of social media.”). The *Wade* court also noted the efficacy of multiple forms of notice— “[w]hen playing darts, one has a much better chance of hitting a bull’s-eye if he uses more than one dart. The same reasoning applies here.” *Id.*

underground lineman electricians in Department 16 dating back to April 10, 2015. Alternatively, Plaintiff respectfully requests that the Court conditionally certify a second class of underground lineman electricians. Plaintiffs further request that the court authorize counsel for the Plaintiff to send the Notice and Consent forms submitted with this Motion as Exhibit C, the Social Media Notice of Collective Action submitted with this Motion as Exhibit D, and the Text Message Notice of Collective Action submitted with this motion as Exhibit E to the following group of individuals:

**All current and former underground lineman electricians of Defendant who were paid by the hour in the last three years.**

Plaintiff further requests that the Court equitably toll the statutes of limitation as requested above. Finally, Plaintiff respectfully requests that the Court award the relief outlined in the proposed Order submitted with this Motion.

Respectfully submitted,

MORELAND VERRETT, P.C.

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**ATTORNEYS FOR PLAINTIFF**

**CERTIFICATE OF CONFERENCE**

I certify that I communicated with counsel for Defendant regarding the relief requested in this motion. Defendant is opposed to this motion.

/s/ Daniel A. Verrett

Daniel A. Verrett

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 19<sup>th</sup> day of September, 2018, I electronically submitted the foregoing document for filing using the Court's CM/ECF system. The following counsel of record shall be served with a true and correct copy of the foregoing document by operation of the Court's CM/ECF system:

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