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

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

PLAINTIFFS' REPLY IN SUPPORT OF HIS MOTION TO COMPEL COMPLIANCE WITH ORDER CERTIFYING CLASS OR, IN THE ALTERNATIVE, TO CONDITIONALLY CERTIFY A SECOND CLASS OF ELECTRICIANS

1. Defendant's evidence shows that Manuel Flores was an Electrician in Department 16.

In his declaration, Jason Morgan, Defendant's Vice President with responsibility over Defendant's Midland and Hobbs facilities, testified that Department 16 "consists solely of hourly-paid electricians." Dkt. 32-1 ¶ 8. Mr. Morgan also testified that Mr. Flores worked in Department 16 from March 13, 2017 until October 18, 2017. *Id.* ¶ 5. Based on Defendant's own evidence, then, Mr. Flores is an electrician in Department 16. Defendant violated the April 16, 2018 Order (Dkt. 12) by not disclosing Mr. Flores—an hourly-paid electrician in Department 16.

It appears Defendant excluded Mr. Flores (and presumably others) from disclosure because it claims Mr. Flores was a "foreman" in Department 16 (*see* Dkt. 32-1 ¶ 5). But excluding Mr. Flores because he was ostensibly a "foremen" still violates the April 16 Order—Defendant concedes that Mr. Flores and all employees in Department 16 are "solely hourly-paid electricians." *Id.* ¶ 8. Second, Mr. Flores' March 3, 2017 Change of Status Form (the "COS Form")—Defendant's sole document referencing Mr. Flores as a foreman—describes Mr. Flores among a class of employees described as "Oilfield Electricians & Drivers" and confirms that Mr. Flores

was paid by the hour. Dkt. 32-2 p. 5.[1] Thus, Mr. Flores was an "hourly-paid electrician" like all other employees in Department 16.

Plaintiffs therefore requests that the Court order Bird Electric to comply fully with the April 16 Order by requiring Defendant to disclose contact information for *all workers* (since all of the workers are electricians) employed in Department 16—including, but not limited to, foremen[2]—and authorizing Plaintiffs' counsel to notify these previously undisclosed individuals.

2. Defendant's assertion that it has no underground lineman electricians is disingenuous.

Citing Mr. Morgan's testimony, Defendant claims that it "does not have a position called 'underground lineman electrician,' 'underground lineman,' or 'lineman electrician.'" Dkt. 32 p. 2 (citing Dkt. 32-1 ¶ 6).[3] Instead, Defendant claims that it simply has a category of "electricians" and a category of "linemen." Dkt. 32 p. 2-3 (citing Dkt. 32-1 ¶ 3). Defendant's disavowal of an underground lineman position is disingenuous at best.

Defendant has produced a job description for a "Class B Lineman – *Overhead*." *See* Exhibit A (emphasis added).[4] This job description states that these types of linemen work only on "*overhead* distribution systems." *Id.* (emphasis added). But Defendant advertises on its website that it does both overhead (described as "aerial") *and* underground electrical work. *See* Exhibit B, Bird Electric Website, pp. 2-3. Defendant also advertises that its CEO, Brian Bird, has both

[1] The COS Form left blank the box for "Supervisor/Superintendent." *Id.*

[2] That foremen, electricians, and underground linemen electricians have slightly different job duties is immaterial because it is the Defendant's *per se* illegal payment scheme binds them as a class. *See* Dkt. 30 p. 5-7. Job duties are only relevant in misclassification cases. *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.). Here, foremen, electricians, and underground lineman electricians are each paid by the hour and classified as FLSA non-exempt employees.

[3] Interestingly, Defendant does have a job classification for "groundman" which it completely ignores and fails to explain in its Response. *See* Dkt. 32-1 ¶ 13; Dkt. 32-2 p. 19. Defendant's decision to ignore it is puzzling since, according to Defendant's own records, Mr. Flores was a "New Hire . . . *groundman*" in an unlisted department on October 29, 2016. Dkt. 32-2 p. 9 (emphasis added).

[4] Despite an April 23, 2018 request for production for any "documents relating to the job duties of each Plaintiff," Defendant has not produced any other lineman job descriptions in this case.

"overhead" and "underground line work" experience. *See* Exhibit B, p. 5. Morgan's declaration is also cagey on this point, stating that Defendant's "linemen . . . work on high-voltage power lines, *typically overhead* lines." Dkt. 32-1 ¶ 10 (emphasis added).[5]

By contrast, Mr. Flores unequivocally testified that he and others performed underground lineman electrician work while in Department 16 and were subject to the same pay violations as the other electricians.[6] Plaintiffs have not been afforded the discovery necessary to make sense of the inconsistencies of Defendant's job titles.[7] But that is in part why courts do not undertake merits-based inquiries at the conditional certification stage and instead rely on substantial allegations in pleadings and declarations. *See, e.g., Gronefeld v. Integrated Prod. Services, Inc.*, 5:16-CV-55, 2016 WL 8673851, *4 (W.D. Tex., Apr. 26, 2016) (conditionally certifying a class to include a position that the employer claimed did not even exist and observing that "[c]ourts do not resolve factual disputes or decide merits issues at the conditional certification stage.").[8] Mr. Flores hade made those substantial allegations here. In addition, while the April 16 Order clearly required Defendant to identify "all current and former Electricians who worked for Defendant in Department 16," and while Morgan has clearly testified that Defendant employs *only* electricians in that Department, Defendant has not offered any satisfying explanation as to why it did not, pursuant to the April 16 Order, disclose Mr. Flores and other underground lineman electricians.

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[5] Even Defendant's change of status forms for Mr. Flores indicate that it views "underground experience" as relevant to Mr. Flores' job with Defendant, noting it on a February 2, 2015 Change in Status Form. Dkt. 32-2 p. 18.

[6] There also appears to be a distinction—not previously disclosed by Defendant—between the "Class" of linemen. Defendant's "Class B" job description suggests there is, at a minimum, a "Class A" job as well.

[7] Plaintiffs served discovery requests on Defendant—including for the complete personnel file for each Plaintiff–on April 23, 2018. Mr. Flores opted into this case and became a Plaintiff on May 10, 2018. Dkt. 17-1. Nevertheless, Defendant first produced Mr. Flores' personnel documents—including the personnel documents in Exhibit 1 to Morgan's declaration on October 3, 2018, the same day it filed its Response to the Motion.

8 *See also Harris v. Pel-State Bulk Plant, LLC*, MO:17–CV–00096–RAJ, 2018 WL 2432963, *3 (W.D. Tex., January 5, 2018) ("[I]n a motion for conditional certification, it is not appropriate to require the plaintiffs to produce evidence sufficient to survive summary judgment or to otherwise test the merits beyond the light burden of production to show potential class members are similarly situated." (internal quotations omitted)) (*citing McKnight*, 756 F. Supp. 2d at 803).

Because Defendant admits it has no way to determine which of its linemen performed underground versus overhead electrical work, and because irrespective of titles, Department 16 has only electricians, the Court should err on the side of inclusion and order notice to all linemen electricians. The text of the proposed notice informs the putative class members that it relates only to "underground lineman electricians" and to "off-the-clock overtime hours, including for drive time." Dkt. 30-3. If, as Defendant alleges, its overhead linemen were paid for their shop and drive time, they will not be inclined to join the case.[9]

3. Defendant's tactics and violation of the Order justify modified forms of notice.

Defendant argues that "Plaintiff has offered no reason why it [*sic*] seeks to deviate from" the notice agreed in the parties' previous Stipulation. Quite the opposite—and as previously described (Dkt. 30 p. 4, n.1)—in the Stipulation, Plaintiffs made concessions on the content and form of notice to avoid the lengthy process of an opposed motion. *Cf* Dkt. 3 pp. 8-10 with Dkt. 10, p. 2. Because Defendant has clearly violated the parties' Stipulation and this Court's Order of April 16, a modified notice is appropriate.

As a related matter, Plaintiffs' counsel believed—and Defendant did not disabuse Plaintiffs' counsel of the belief—that Defendant possessed e-mail addresses for the putative class members. Defendant did not reveal that it had *no e-mail addresses* for the class members until after the Stipulation was finalized and filed, after the Court entered its Order adopting the Stipulation, and after Defendant disclosed the contact information for putative class members. Dkt 30-2. In short, from Plaintiffs' perspective, Defendant lacked good faith in the negotiations surrounding the parties' Stipulation. Although Defendant has clearly violated the parties'

9 *See Sims v. Housing Auth. of El Paso*, EP–10–CV–109–KC, 2010 WL 2900429, *2 (W.D. Tex., July 19, 2010) ("A potential plaintiff in a section 216(b) collective action who takes no steps to be part of the class effectively screens himself or herself out . . . As a result, an affected individual who is in the best position to decide whether he or she is similarly situated to the named plaintiffs has the opportunity to make this decision affirmatively, yet the Court retains the option to decertify the class later, if it disagrees." internal citations omitted).

Stipulation and the Court's Order and Plaintiffs are forced to return to the Court for intervention related to the Order, Defendant now seeks the forms of notice it initially sought in its Motion for Conditional Class Certification. *See* Dkt. 3. This Court should not condone such gamesmanship.

4. Notice through text message and social media is appropriate.

Defendant notes concern that a text message notice might be confusing to class members. Dkt. 32 p. 7. Defendant cites two cases for support; one, *Aguirre v. Tastee Kreme*, was discussed and distinguished in Plaintiffs' Motion for Conditional Certification. Dkt. 3, n.9. In short, unlike the text notice in *Aguirre* which attempted to summarize the notice in a text message, the text message in this case merely refers the recipients to a webpage where only the full Court-approved notice is posted. This was the approach approved by Magistrate Judge Austin in *Vega v. Point Security, LLC*, A-17-CV-049-LY, 2017 WL 4023289, at *4 (W.D. Tex. Sept. 13, 2017). The second case Defendant cites is *Bewley v. Accel Logistics*. Dkt. 32 p. 7 (citing 2018 WL 2422043, at *5 (N.D. Tex. May 7, 2018). The magistrate judge in *Bewley* permitted only mailed notice, disallowing both e-mail notice and text notice because the plaintiffs had not demonstrated why mailing alone would be insufficient. *Id.* at *4-5. As this Court has recognized[10]—and Defendant implicitly agreed in the Stipulation—notice solely through mail is insufficient. *Bewley* is not in line with other cases out of this Court and others in this District, and it is not persuasive.

Addressing Defendant's concerns regarding social media notice, Plaintiffs will not post the social media notice on social media platforms. Rather, after identifying putative class members' social media pages, Plaintiffs' counsel proposes to send the individual the proposed Social Media Notice in a private message through either Facebook or LinkedIn. Notice in these additional forms are necessary because Defendant does not possess e-mail addresses for the class members and

[10] *See, e.g., Bradbury v. Transglobal Services, LLC*, MO:18-CV-00036-DC, 2018 WL 3603078, at *5 (W.D. Tex. June 16, 2018) ("In the modern era, the notion that avoiding the use of email will protect a Court's integrity is archaic.").

"courts across the country are adapting with the times, taking steps to maximize the effectiveness of class notice through the use of social media." *Wade v. Furmanite Am., Inc.*, 3:17-CV-00169, 2018 WL 2088011, at *8 (S.D. Tex. May 4, 2018).

VI. CONCLUSION AND PRAYER

For the foregoing reasons, Plaintiffs respectfully request that the Court order Defendant to produce the names and requested information for all foreman in Department 16 and lineman electricians in Departments 16, 18, and 30 dating back to April 10, 2015. Plaintiffs further request that the Court authorize counsel for the Plaintiffs to send the previously filed Notice and Consent Form, Social Media Notice of Collective Action, and Text Message Notice of Collective Action to the individuals to be identified by Defendant. And given Defendant's noncompliance with the Court's Order, Plaintiffs reiterate their request that the Court equitably toll the statutes of limitation as previously requested.

Respectfully submitted,

MORELAND VERRETT, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 9th day of October, 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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