IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
LAS CRUCES DIVISION

JONATHAN FELPS, Individually and On Behalf of All Others Similarly Situated,	§	
	§	**Civil Action No.**
Plaintiffs,	§	
	§	**2:18-CV-811 RB-GJF**
v.	§	
MEWBOURNE OIL COMPANY, INC. and D. DREW GREENE,	§	
Defendants.	§	

PLAINTIFF'S AMENDED MOTION FOR EXPEDITED CONDITIONAL CERTIFICATION OF COLLECTIVE ACTION AND JUDICIALLY-SUPERVISED NOTICE UNDER SECTION 216(b) AND BRIEF IN SUPPORT

Plaintiff Jonathan Felps ("Plaintiff" or "Named Plaintiff") on behalf of himself and all others similarly situated ("Class Members" herein) files this Amended Motion for Expedited Conditional Certification and Judicially-Supervised Notice Under Section 216(b).

I. INTRODUCTION

Defendant Mewbourne Oil Company's ("Mewbourne") has claimed in this case that it reclassified the class member Lease Operators as overtime eligible in October 2016. Plaintiff files this Amended Motion for Expedited Conditional Certification because his investigation has revealed that, contrary to Mewbourne's representations to the Court, the violations alleged in this case continued until at least June 2017. In light of this new evidence, Plaintiff requests an expanded class definition to include Lease Operators who worked for Mewbourne from October 31, 2015 through June 21, 2017. Defendants are unopposed to the requested expanded definition

of the class but are opposed to to conditional certification and equitable tolling.

II. ADOPTION OF ORIGINAL MOTION AND REPLY BY REFERENCE

Pursuant to Local Rule 7.1(a), Plaintiff adopts by reference his Original Motion for Expedited Conditional Certification and Judicially-Supervised Notice Under Section 216(b) (Dkt. 12, filed October 31, 2018, 2018) (the "Original Motion") and his Reply in Support of the Original Motion (Dkt. 24, filed December 14, 2018) (the "Reply").

III. ARGUMENT

A. Newly obtained declaration testimony from putative class members indicate that, contrary to Mewbourne's representations, the FLSA violations alleged in this case continued until at least June 2017.

In the parties' Joint Status Report and Provisional Discovery Plan (the "JSR"), Defendant Mewbourne stated that it reclassified its Lease Operators as non-exempt in October 2016. Dkt. 9 pp. 2-3. Mewbourne repeated this assertion in its Answer to Plaintiff's Amended Complaint. Dkt. 42 ¶ 45; Dkt. 43 ¶ 45. This representation appears to be misleading at best. Mewbourne also asserted that it began paying overtime for hours worked over forty in a week at the same time. *Id.* This representation appears to be false. However, because Plaintiff Felps left his employment with Defendants prior to the alleged reclassification in October 2016 (*see id.)*, until now, he was unable to dispute this version of events in his Original Motion.

Since filing the Original Motion, however, Plaintiff has continued his investigation into the claims asserted in this case and has obtained declarations from Nathaniel Echavarria (**Exhibit A**) and Joseph Rodriguez (**Exhibit B**). Mr. Echavarria worked as a Lease Operator for Mewbourne from approximately July 2015 until August 2017. Ex. A ¶ 3. Mr. Rodriguez worked as a Lease Operator for Mewbourne from approximately October 2016 until March 18, 2017. Ex. B ¶ 3.

Mr. Echavarria and Mr. Rodriguez testify that during their employment with Mewbourne as Lease Operators, they frequently worked 60 or more hours per week and almost always worked

more than forty hours per week. Ex. A ¶ 8; Ex. B ¶ 8. Mr. Rodriguez testified that during the entirety of his employment—which ended on approximately March 18, 2017—he was paid a salary, Mewbourne did not record his hours worked, and he was never paid overtime. Ex. B ¶¶ 3, 7-9.

Per Mr. Echevarria—whose employment ended even later, in August 2017—Mewbourne did not (1) inform its Lease Operators that they were eligible for overtime or (2) start recording the hours worked by its Lease Operators until after a company meeting that occurred in April or May of 2017. Ex. A ¶ 9-10. Even after this meeting, Mr. Echavarria and other Lease Operators reported working more than forty hours per week but Mewbourne did not pay any overtime for these overtime hours. *Id.* ¶¶ 11, 13. It was not until a later meeting in June 2017 that Mewbourne foremen offered its Lease Operators the help they needed to complete their tasks within a forty-hour workweek. *Id.* ¶ 12. During that meeting, Mr. Echavarria's foreman informed him and the other Lease Operators under the foreman's supervision that they were not to work or record more than forty hours per week. *Id.* If it looked as though they were not going to be able to finish their work within the 40 hours, they were told to call the foreman or lead pumper for help. *Id.*

B. Plaintiff requests a modified class definition to extend the class of Lease Operators to those who worked for Mewbourne through June 21, 2017.

Based on Mewbourne's claims that the Lease Operators were reclassified in October 2016, in the Original Motion, Plaintiff requested that the Court certify a class defined as, "[a]ll persons who worked as a Lease Operators or Pumper for Defendant at any time between October 31, 2015 and November 1, 2016." Dkt. 12 at 6, n. 3. However, Mr. Echavarria and Mr. Rodriguez's declaration clarify that the unpaid overtime violations continued until at least June 2017. Ex. A, Ex. B. Therefore, Plaintiff requests a modified class definition of:

> All persons who worked as a Lease Operators or Pumper for Defendant at any time between October 31, 2015 and June 21, 2017.

Although it continues to oppose conditional certification, in the event the Court does conditionally certify a class, Mewbourne does not oppose this request to expand the definition of the class to cover Lease Operators from October 31, 2015 to June 21, 2017. Defendants do not oppose this expanded definition of the class.

C. Mr. Echavarria testifies that Lease Operators, including himself, are interested in joining this suit.

Although Plaintiff is not required to show similarly situated individuals are interested in joining the suit (*see* Dkt. 24-1 pp. 1-4), Mr. Echavarria presents additional testimony that many Lease Operators, including himself and thirteen other Lease Operators listed by name, would be interested in joining the case if they were informed of their right to do so. Ex. A at ¶¶ 3, 16.

D. Provisional equitable tolling is further bolstered by Mewbourne's potential misrepresentations to the Court.

Since filing of the Original Motion, four and one-half months has elapsed. Without equitable tolling, some or all of a potential class member's claims will have become time-barred under the FLSA's statute of limitation. However, had Defendant not opposed conditional certification of a class of employees they admit to misclassifying uniformly and company-wide, the putative class members would have received notice of their right to join this suit and stop the running of the statute months ago. *See, e.g., Kenney v. Helix TCS, Inc.*, 17-CV-01755-CMA-KMT, 2018 WL 722458, at *3 (D. Colo. Feb. 5, 2018) (equitably tolling statute of limitations to "protect the interests of absent potential class members who have been, and continue to be, affected by Defendant's unreasonable delay tactics.") (internal citation omitted)).

Also, neither Mr. Echavarria nor Mr. Rodriguez were disclosed to the DOL as having worked more than forty hours in a week (when in fact they did), bringing the total known class members who should have been—but were not—disclosed to the DOL to five. Ex. A ¶ 15; Ex B ¶ 11; Dkt. 12-1 ¶ 9 (Jonathan Felps); Dkt. 12-2 ¶ 9 (Keenan Senter); Dkt. 12-3 ¶ 11 (Jammie

Hobbs). This non-disclosure further supports the possibility that Mewbourne "lulled" Plaintiff and putative class members into inaction through "active deception" in its dealings with the DOL. *U.S. v. Clymore*, 245 F.3d 1195, 1199 (10th Cir. 2001).

Finally, the declarations of Mr. Echevarria and Mr. Rodriguez call into question Mewbourne's assertions to the Court that it reclassified its Lease Operators as non-exempt in October 2016. Dkt. 9 pp. 2-3. Mr. Rodriguez repeatedly worked more than 40 hours per week, was never required to records his hours worked, and was paid only a salary with no overtime through the time he left in March 2017. Ex. B ¶¶ 3, 7-9. Mr. Echevarria testifies that was always paid a salary, repeatedly worked more than forty hours per week, was never paid any overtime, and that Mewbourne first informed Lease Operators of their eligibility for overtime and first started recording hours worked in April or May 2017. Ex. A ¶¶ 8-11, 13. And, according to Mr. Echevarria, even after this meeting, the unpaid overtime continued through at least June 2017. Ex. A ¶ 12.

It is possible that Mewbourne in fact began classifying its Lease Operators as overtime eligible in October 2016. But such a change, assuming it in fact happened, was meaningless because Mewbourne did not actually pay overtime compensation for overtime hours and, in any event, the Lease Operators themselves were unaware of it until April or May 2017. Ex. B ¶¶ 3, 7-9; Ex. A ¶¶ 8-11, 13. And from April or May 2017 until June 2017, class members reported, but Defendants still did not pay them any overtime compensation for hours worked over forty in a week. Ex. A ¶ 12. Therefore, Plaintiff requests provisional equitable tolling for all class members dating back to the filing of his Original Motion on October 31, 2018 so he can conduct the necessary discovery to determine if Mewbourne's representations to the Court or the DOL "rises to the level of active deception" sufficient to warrant equitable tolling of the class members' statute of limitations. *Clymore*, 245 F.3d at 1199. Plaintiff will move for equitable tolling after

developing the record through discovery.

IV. CONCLUSION AND PRAYER

For the foregoing reasons, Named Plaintiff respectfully requests that the Court conditionally certify the class, authorize counsel for the Plaintiffs to send the Notice and Consent forms submitted with this motion as Exhibit C and the Text Message Notice of Collective Action submitted with this motion as Exhibit D[1] to the following group of individuals:

> All persons who worked as a Lease Operators or Pumper for Defendant at any time between October 31, 2015 and June 21, 2017.

Plaintiffs additionally respectfully request that the Court award the relief outlined in the amended proposed Order submitted with this Motion.

Respectfully Submitted,

MORELAND VERRETT, P.C.

By: */s/ Daniel A. Verrett*

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1The Notice and Consent Form (Exhibit C) and Text Message Notice of Collective Action (Exhibit D) have been revised only to reflect the broader class definition to include Lease Operators employed by Mewbourne from October 31, 2015 to June 21, 2017.

CERTIFICATE OF CONFERENCE

I certify that conferred with counsel for Defendants regarding the relief requested in this Motion. Mewbourne remains opposed to the request to conditionally certify the class and for provisional equitable tolling but is not opposed to Plaintiff's requested amendment of the class definition to cover Lease Operators employed by Mewbourne from October 2016 through June 21, 2017. Defendant Drew Greene is also unopposed to Plaintiff's requested amendment of the class definition to cover Lease Operators employed by Mewbourne from October 2016 through June 21, 2017 but is opposed to conditional certification and provisional equitable tolling.

/s/ *Daniel A. Verrett*
Daniel A. Verrett

CERTIFICATE OF SERVICE

I certify that I filed this document using the Court's CM-ECF electronic filing service on March 14, 2019, which will notice all parties to this case.

/s/ *Daniel A. Verrett*
Daniel A. Verrett