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 MV-GJF**
v.	§	
MEWBOURNE OIL COMPANY, INC. and D. DREW GREENE,	§	
Defendants.	§	

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

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1. **Mewbourne now admits it delayed "implement[ing]" its reclassification of Lease Operators as non-exempt.**

Although Mewbourne represented to the Court that it "[re]classified its Lease Operators as non-exempt in October 2016," it now admits that it delayed in "implement[ing] this [re]classification." *Cf.* Dkt. 9 p. 2 *with* Dkt. 47 pp. 2-3. This is consistent with the undisputed declaration testimony of both Nathaniel Echavarria and Joseph Rodriguez that Mewbourne waited until April or May 2017 to both (1) record the hours worked by its Lease Operators and (2) pay its Lease Operators overtime compensation for hours worked over forty. *See* Dkt. 44 pp. 2-3; Dkts. 44-1, 44-2.

2. **Mewbourne misled the Court and Plaintiff.**

Yet Mewbourne pleads innocence in its Response. It claims that it merely represented that it began classifying Lease Operators as nonexempt in October 2016 and never made any

representations about *when* it started paying overtime compensation to Lease Operators. Dkt. 47 pp. 2-3. Mewbourne continues by suggesting that it was Plaintiff's *"baseless and incorrect assumption"* that it corrected the FLSA violation by actually paying for overtime at the same time it made the administrative reclassification. Dkt. 47, p. 3 (emphasis added).

Plaintiff's assumption was obviously incorrect, but it was certainly not baseless. The first misleading representation that Mewbourne made to the Court was in the section of the Joint Status Report and Provisional Discovery Plan where Mewbourne stated for the Court "DEFENDANT'S CONTENTIONS." Dkt. 9 p. 2. There, it represented that it "classified its Lease Operators as non-exempt in October 2016 and obtained USDOL-approved releases from approximately 53 Lease Operators." *Id.* If, as we now know, Mewbourne did not start paying overtime compensation to Lease Operators at this same time, this reclassification *is entirely meaningless*—the FLSA and NMMSA violations *continued* unabated after October 2016. Rather, the most reasonable reading of this representation is that Mewbourne corrected its FLSA violations in October 2016 and obtained releases from 53 Lease Operators for those violations. This—the most reasonable reading—is false.

Mewbourne's obfuscation continued in its Answer to Plaintiff's First Amended Complaint, where it self-servingly admitted the following allegation:

> Sometime in October 2016, Mewbourne reclassified its Lease Operators as non-exempt from the overtime protections of the NM Wage Act and began paying them overtime for hours worked over 40 in a week.

Dkt. 36 ¶ 45. We know now that although the first part of this allegation is potentially true, the second part—that Mewbourne did not start paying overtime in October 2016—is, by Mewbourne's belated admission, not true. Therefore, Mewbourne should have admitted the first part of the sentence (regarding the timing of the reclassification) and denied the second part (regarding the timing of when Mewbourne first paid overtime). *See* Fed. R. Civ. P. 8(b)(4) ("A party that intends

in good faith to deny only part of an allegation must admit the part that is true and deny the rest."). Or Mewbourne could have clarified that although it administratively reclassified the Lease Operators, it did not start paying them overtime until a later date. Instead, it continued to by omitting the reference to October 2016 when admitting that it started paying overtime:

> Defendant admits that it began classifying Lease Operators as nonexempt from the overtime provisions of the FLSA and the NMMWA starting in approximately October 2016. Defendant further admits that it began paying Lease Operators 1.5 times their regular rate of pay for hours worked above 40 in a workweek.

Dkt. 42 ¶ 45.

By using the word "began" in the second sentence without any reference to a date, Mewbourne left the reader with the clear, yet entirely misleading, impression that the second sentence related back to the month stated the first sentence.[1]

3. The evidence submitted with the Amended Motion is proper.

Mewbourne asserts that the Court should not consider the declaration of Nathaniel Echavarria because it was not submitted with the Original Motion. Dkt. 47 p. 4. But Mewbourne does not dispute the evidence in Mr. Echavarria's declaration or explain how it is prejudiced by its inclusion in the record. In fact, Mewbourne does even oppose the expanded class definition supported in part by Mr. Echavarria's declaration.[2]

Further, Mewbourne's legal basis for excluding the evidence in inapplicable. Relying on this Court's opinion in *Davis v. USA NutraLabs*, Mewbourne argues that Plaintiff is not permitted to "supplement the evidentiary record" at this time. Dkt. 47, p. 4 (citing *Davis*, No. CV 15-01107, MV/SCY, 2016 WL 9774945, at *2 n.2 (D.N.M. Dec. 21, 2016)). But this case is nothing like

[1] Ironically, Mewbourne asserts that "Plaintiff never asked Defendant for the date on which Mewbourne first paid a Lease Operator overtime compensation." Dkt. 47 p. 3. He obviously did in his First Amended Complaint but was met with less than a forthright response. Dkt. 36 ¶ 45. Defendant's admission is, in short, not made in good faith as required by Rule 8(b)(4).

[2] Mewbourne does not challenge the Court's consideration of the declaration of Joseph Ramirez, which also supports the relief requested in the Amended Motion. Dkt. 44-2.

Davis. In *Davis*, the plaintiff filed supplemental evidence supporting a previously filed response. *Id.* By contrast, here Plaintiff filed an *Amended* Motion with the newly obtained evidence. He did so because the newly obtained evidence required that he alter the relief requested in the Original Motion—a broader class definition to include Lease Operators employed by Mewbourne up through June 21, 2017. And, because it was a new motion, Mewbourne had the opportunity to—and did—respond. *See* Dkt. 47. The rationale for excluding supplemental evidence in *Davis* does not apply here.

Further, the Local Rules relied upon in *Davis*—Local Rules 7.4(b) and 7.8—do not apply in this case. Local Rule 7.8 relates to the citation to supplemental *authorities* and makes the filing of a Notice of Supplemental Authorities either mandatory or permissive depending on whether the intervening authority is controlling or merely "pertinent and significant." Because this case does not involve any intervening change in authority—but only newly discovered evidence (which evidence Mewbourne actively concealed)—Local Rule 7.8 has no application. Similarly, Local Rule 7.4(b) governs the filing of sur-replies, again something not at issue here because Plaintiff filed an Amended Motion, altering the relief requested and restarting the briefing schedule.

The undisputed testimony of Nathaniel Echavarria is properly before the Court and the Court should consider it when ruling on the Amended Motion.

4. Provisional equitable tolling is proper.

A. Mewbourne's opposition to conditional class certification is a strategic delay tactic given its admissions of a nationwide FLSA violation.

Mewbourne claims that, despite admitting to the DOL that it misclassified Lease Operators nationwide, it filed a "reasoned response . . . with sound legal and factual support" on which it opposed conditional class certification. Dkt. 47 p. 5. Plaintiff disagrees and believes Mewbourne's opposition to the Original Motion and its continued opposition to this Amended

Motion is solely to occasion delay and therefore bar through limitations the class members' claims. *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)). Plaintiff leaves that determination to the Court.

B. Mewbourne's non-disclosure to the DOL of all Lease Operators harmed by its nationwide misclassification has "lulled" Plaintiff and class members into inaction.

Mewbourne's other actions support Plaintiff's suggestion that Mewbourne's actions merit equitable tolling. First, it is undisputed that Mewbourne did not disclose to the DOL all of its Lease Operators. Plaintiff has already presented sworn evidence from five Lease Operators who were undisclosed. Dkt. 12-1 ¶ 9 (Jonathan Felps); Dkt. 12-2 ¶ 9 (Keenan Senter); Dkt. 12-3 ¶ 11 (Jammie Hobbs); Dkt. 44-1 ¶ 15 (Nathaniel Echavarria); Dkt. 44-2 ¶ 11 (Joseph Rodriguez). Each of these five individuals testified that they worked overtime during the time covered by the DOL investigations and were not disclosed to the DOL as having done so. *Id.* Mewbourne also admits that it employed *far more* than the roughly 53 individuals it disclosed to the DOL as having worked uncompensated overtime.[3]

Mewbourne claims that its statements (really, its non-disclosure) to the DOL could not have lulled Plaintiff or the class members into inaction because the only parties to those communications were Mewbourne and the DOL. While this contention may have a surface-level appeal, it does not withstand scrutiny. Starting with the Plaintiff, it was he who initiated the investigation with DOL in the fall of 2016 while still employed by Mewbourne. That investigation continued for more than two years and, when it concluded, Plaintiff learned Mewbourne had not disclosed to the

[3] Defendant states that it has employed "thousands" of Lease Operators in New Mexico since August 2015. Dkt. 24-1 pp. 3, 22 (Response to Interrogatory No. 16). In later communications with the undersigned, Mewbourne dialed back that estimate to "hundreds" but it has not amended its response to Interrogatory No. 16.

DOL that he had worked more than forty hours in any workweek. Dkt. 12-1 ¶ 9. By the time Plaintiff realized that he was not receiving any unpaid wages from the DOL investigation, some of his claims had already become time-barred under the FLSA. The ongoing DOL investigation combined with Defendant's ostensible—but not actual cooperation—"lulled" Plaintiff into inaction. At a minimum, there is sufficient indication that Mewbourne's actions lulled the Plaintiff to inaction such as to permit provisional equitable tolling while Plaintiff pursues discovery on the issue.

As it relates to the many—potentially "hundreds" of—class members undisclosed to the DOL, had those individuals been disclosed, the DOL would have almost assuredly requested that Mewbourne make back wage payments to them. Mewbourne's non-disclosure prevented those class members from receiving notice of their overtime claim against Mewbourne and having the option to accept a back wages payment in exchange for a release of their FLSA claims. Mewbourne claims the nondisclosure was reasonable because it calculated the hours worked "analyzing GPS data created from the Lease Operators' use of company vehicles." Dkt. 47 p. 6. Plaintiff believes Mewbourne's methodology in utilizing the GPS was so flawed (and willfully so) that the hours worked were undercalculated and the vast majority of Lease Operators were wrongfully undisclosed. This is at least a reasonable conclusion based on the *consistent* testimony of the six declarant Lease Operators in this case that all Lease Operators almost always worked more than forty hours per week. Dkt. 12-1 ¶ 6; Dkt. 12-2 ¶ 5; Dkt. 12-3 ¶ 8; Dkt. 12-4 ¶ 8; Dkt. 44-1 ¶ 8; Dkt. 44-2 ¶ 8. Provisional equitable tolling will permit the Lease Operators to finally receive notice of their claims, permit discovery on this issue, and allow the parties to present to evidence to the Court at a later time for a final ruling on equitable tolling.

C. Mewbourne's misleading statements in litigation caused a delay in notice to class members.

Mewbourne argues that any misrepresentation it might have made could not have "affect[ed] potential class members' knowledge of 'the facts and circumstances of their employment,' which 'form the basis of the putative plaintiff's FLSA claims.'" Dkt. 47 p. 7 (citing *Aguilar v. Mgmt. & Training Corp.*, No. CV 16-050 WJ/GJF, 2017 WL 4277139, at *11 (D.N.M. Jan. 27, 2017), report and recommendation adopted, 2017 WL 4534874 (D.N.M. Feb. 15, 2017)). This is transparently false. In these sorts of cases, class members rarely opt-in *prior to* receiving notice of their right to do so. All the while, the statute of limitations is running on their claims. In this regard, Defendant's contention runs directly counter to the one of the primary reasons for permitting plaintiffs to pursue their claims as collective actions under 29 U.S.C. § 216(b). *See Hoffman-La Roche v. Sperling*, 493 U.S. 165, 171 (1989) (noting that the benefits of the collective action mechanism "depend on employees receiving accurate *and timely* notice concerning the pendency of the collective action, *so that they can make informed decisions about whether to participate*." (emphasis added)).

Had Mewbourne been forthcoming about the date when it first started recording and paying for overtime, Plaintiff would have sought in his Original Motion the broader class definition he seeks here, eliminating the need for this Amended Motion and the delay associated with having to reopen the briefing. Stated simply, Mewbourne's misleading statements delayed notice to the class members and, without provisional equitable tolling, will prevent some from ever receiving notice of their right to join this suit. Plaintiff simply requests provisional tolling so these individuals may receive notice of their claims, have the opportunity to join the case, and, if appropriate, present evidence supporting equitable tolling at a later time.

D. The reassignment of this case to District Judge Vázquez was beyond Plaintiff's control.

Plaintiff understands the exigencies in running a busy docket and that reassigning this case from District Judge Brack to District Judge Vázquez was necessary. However, Plaintiff requests that the Court consider Plaintiff's lack of fault in the reassignment and any resulting delays from the reassignment in considering Plaintiff's request for provisional equitable tolling.

CONCLUSION AND PRAYER

Named Plaintiff respectfully requests that the Court conditionally certify the class and authorize counsel for the Plaintiffs to send the Notice and Consent Form and Text Message Notice of Collective Action 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 and any other relief he is entitled.

Respectfully Submitted,

MORELAND VERRETT, P.C.

By: */s/ Daniel A. Verrett*

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that I filed this document using the Court's CM-ECF electronic filing service on April 4, 2019, which will notice all parties to this case.

/s/ *Daniel A. Verrett*
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