

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

**DANIEL SCHEVE, Individually and
On Behalf of All Others Similarly
Situated,**

Plaintiff,

v.

TEXAS PRIDE FUELS, LTD.,

Defendant.

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CIVIL ACTION NO. 7:19-CV-248-DC-RCG

**DEFENDANT’S ORIGINAL ANSWER
TO PLAINTIFF’S ORIGINAL COMPLAINT**

Defendant Texas Pride Fuels, Ltd. (“Defendant”), files its Original Answer (“Answer”) in response to Plaintiff’s Original Complaint (“Complaint”), denies each and every allegation set forth in the Complaint, except as hereinafter specifically admitted, and specifically answers as follows:

I. NATURE OF SUIT

1. Paragraph 1 of the Complaint states legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations and responds that the FLSA and the case law cited in paragraph 1 speak for themselves.

2. Paragraph 2 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Defendant denies these allegations and responds that the NMMWA speaks for itself.

3. Defendant admits that it has paid bonuses. Defendant denies the remaining allegations in paragraph 3 of the Complaint.

II. PARTIES

4. Defendant admits that it employs Plaintiff Scheve. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff's residency. Defendant admits that a consent form purportedly signed by Plaintiff has been filed previously in this action at ECF No. 1-1. Defendant denies the remaining allegations in paragraph 4 of the Complaint.

5. Defendant denies the allegations in paragraph 5 of the Complaint.

6. Defendant admits the allegations in paragraph 6 of the Complaint.

III. JURISDICTION AND VENU

7. Defendant admits the allegations in paragraph 7 of the Complaint.

8. Defendant admits that venue is proper in this District and Division as to Defendant. The remaining allegations in paragraph 8 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

IV. COVERAGE UNDER THE FLSA

9. The allegations in paragraph 9 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

10. The allegations in paragraph 10 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

11. The allegations in paragraph 11 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

12. Defendant admits it has an annual gross volume of sales made or business done of not less than \$500,000. The remaining allegations in paragraph 12 of the Complaint state legal

conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

13. The allegations in paragraph 13 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

V. COVERAGE UNDER THE NM WAGE ACT

14. The allegations in paragraph 14 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

15. The allegations in paragraph 15 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

VI. FACTUAL ALLEGATIONS

16. Defendant admits the allegations in paragraph 16 of the Complaint.

17. Defendant admits that Plaintiff Scheve has worked as an automated fuel systems operator and currently has the title “AFSO - Pad Driver II.” Defendant denies the remaining allegations in paragraph 17 of the Complaint.

18. Defendant admits that Plaintiff Scheve has used tools, equipment, and other materials manufactured outside of the State of Texas and outside the State of New Mexico. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 18 of the Complaint as to unnamed putative class members and therefore denies the same.

19. Defendant admits the allegations in the first and second sentences of paragraph 19 of the Complaint. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 19 of the Complaint as to unnamed putative class members and therefore denies the same.

20. Defendant admits that Plaintiff Scheve's primary job duty has been the performance of non-management work. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 20 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 20 of the Complaint.

21. Defendant admits that Plaintiff Scheve performed manual tasks outside at jobsites in the oilfield. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 21 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 21 of the Complaint.

22. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 22 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 22 of the Complaint.

23. Defendant admits that Plaintiff Scheve did not have the authority to hire or fire other employees. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 23 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 23 of the Complaint.

24. Defendant admits the allegations in paragraph 24 as to Plaintiff Scheve. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 24 of the Complaint as to unnamed putative class members and therefore denies the same.

25. Defendant admits the allegations in paragraph 25 as to Plaintiff Scheve. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 25 of the Complaint as to unnamed putative class members and therefore denies the same.

26. Defendant denies the allegations in paragraph 26 of the Complaint.

27. Defendant admits the third sentence in paragraph 27 of the Complaint. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 27 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 27 of the Complaint.

28. Defendant admits that Plaintiff Scheve sometimes worked more than 40 hours in a workweek. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 28 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 28 of the Complaint.

29. Defendant admits that Plaintiff Scheve sometimes lodged at company-provided facilities in Midland, Texas. Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 29 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 29 of the Complaint.

30. Defendant admits that Plaintiff Scheve sometimes worked 12-hour shifts that lasted from 5:00 (a.m. or p.m.) until 5:00 (p.m. or a.m.). Defendant admits that Plaintiff Scheve typically worked on four-person crews, with two members on each shift. Defendant lacks

knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 30 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 30 of the Complaint.

31. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 31 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 31 of the Complaint.

32. Defendant admits that Plaintiff Scheve sometimes drove back to company-provided facilities in Midland when his shift ended at the jobsite. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 32 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 32 of the Complaint.

33. Defendant admits that Plaintiff Scheve sometimes was required to participate in a conference call. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 33 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 33 of the Complaint.

34. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 34 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 34 of the Complaint.

35. Defendant admits that it provided a Ford F150 to Plaintiff Scheve. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in

paragraph 35 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 35 of the Complaint.

36. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 36 of the Complaint and therefore denies the same.

37. Defendant admits that Plaintiff Scheve sometimes drove himself and other crew members. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 37 of the Complaint as to unnamed putative class members and therefore denies the same. Defendant denies the remaining allegations in paragraph 37 of the Complaint.

38. Defendant denies the allegations in paragraph 38 of the Complaint.

39. Defendant denies the allegations in paragraph 39 of the Complaint.

40. Defendant denies the allegations in paragraph 40 of the Complaint.

41. Defendant admits that it has paid bonuses. Defendant denies the remaining allegations in paragraph 41 of the Complaint.

42. Defendant admits that \$100 bonuses have been paid. Defendant denies the remaining allegations in paragraph 42 of the Complaint.

43. Defendant admits that bonuses have not been included in regular rate calculations. Defendant denies the remaining allegations in paragraph 43 of the Complaint.

44. Defendant denies the allegations in paragraph 44 of the Complaint.

45. Defendant denies the allegations in paragraph 45 of the Complaint.

46. Defendant denies the allegations in paragraph 46 of the Complaint.

47. Defendant denies the allegations in paragraph 47 of the Complaint.

48. Defendant denies the allegations in paragraph 48 of the Complaint.

49. The allegations in paragraph 49 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations and responds that the NMMWA speaks for itself.

50. Defendant denies the allegations in paragraph 50 of the Complaint.

51. Defendant denies the allegations in paragraph 51 of the Complaint.

VII. FLSA COLLECTIVE ACTION ALLEGATIONS

52. Defendant admits that Plaintiff Scheve seeks conditional certification as requested in paragraph 52 of the Complaint, but Defendant denies that he is entitled to such certification. Defendant denies any and all further allegations in paragraph 52 of the Complaint.

53. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 53 of the Complaint and therefore denies the same.

54. Defendant denies the allegations in paragraph 54 of the Complaint.

VII. NM WAGE ACT RULE 23 CLASS ALLEGATIONS

55. Defendant admits that Plaintiff Scheve purports to pursue claims under the NMMWA against Defendant, both individually and on behalf of others similarly situated. Defendant denies that he is entitled to such or any relief. Defendant denies any and all further allegations in paragraph 55 of the Complaint.

56. Defendant admits that Plaintiff Scheve seeks certification as requested in paragraph 56 of the Complaint, but Defendant denies that he is entitled to such certification. Defendant denies any and all further allegations in paragraph 56 of the Complaint.

57. Defendant admits that Plaintiff Scheve purports to pursue claims against Defendant, both individually and on behalf of others similarly situated, as stated in paragraph 57

of the Complaint. Defendant denies that he is entitled to such or any relief. Defendant denies any and all further allegations in paragraph 57 of the Complaint.

58. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in the first sentence of paragraph 58 of the Complaint, which relate to unnamed putative class members, and therefore denies the same. Defendant denies the allegations in paragraph 58 of the Complaint.

59. Defendant denies the allegations in paragraph 59 of the Complaint.

60. Defendant denies the allegations in paragraph 60 of the Complaint.

61. Defendant denies the allegations in paragraph 61 of the Complaint.

62. The allegations in paragraph 62 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

63. **Numerosity.** Defendant admits that the data required to calculate the size of the putative class is within its control. The remaining allegations in paragraph 63 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

64. **Commonality.** The allegations in paragraph 64 of the Complaint, including the allegations in subparagraphs (a), (b), (c), (d), and (e) thereof, state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

65. **Typicality.** Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 65 of the Complaint relating to unnamed putative class members and therefore denies the same. The allegations in paragraph 65 of the Complaint relating to the purported satisfaction of Rule 23's typicality requirement state legal conclusions

to which no response is required. To the extent a response is required, Defendant denies these allegations. Defendant denies the remaining allegations in paragraph 65 of the Complaint.

66. **Adequacy.** The allegations in paragraph 66 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

67. **Superiority.** The allegations in paragraph 67 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendant denies these allegations.

IX. CAUSE OF ACTION ONE: FAILURE TO PAY WAGES IN ACCORDANCE WITH THE FAIR LABOR STANDARDS ACT

68. Defendant denies the allegations in paragraph 68 of the Complaint.

X. CAUSE OF ACTION TWO: FAILURE TO PAY WAGES IN ACCORDANCE WITH NEW MEXICO MINIMUM WAGE ACT

69. Defendant denies the allegations in paragraph 69 of the Complaint.

XI. PRAYER FOR RELIEF

Defendant admits that Plaintiff seeks the relief requested in the in the Prayer for Relief section of the Complaint but denies that Plaintiff is entitled to such or any relief. Defendant denies any and all further allegations in the “Prayer for Relief” section of the Complaint.

a. Defendant specifically denies that Plaintiff is entitled to the relief requested in subparagraph a of the “Prayer for Relief” section of the Complaint.

b. Defendant specifically denies that Plaintiff is entitled to the relief requested in subparagraph b of the “Prayer for Relief” section of the Complaint.

c. Defendant specifically denies that Plaintiff is entitled to the relief requested in subparagraph c of the “Prayer for Relief” section of the Complaint.

d. Defendant specifically denies that Plaintiff is entitled to the relief requested in subparagraph d of the “Prayer for Relief” section of the Complaint.

e. Defendant specifically denies that Plaintiff is entitled to the relief requested in subparagraph e of the “Prayer for Relief” section of the Complaint.

f. Defendant specifically denies that Plaintiff is entitled to the relief requested in subparagraph f of the “Prayer for Relief” section of the Complaint.

g. Defendant specifically denies that Plaintiff is entitled to the relief requested in subparagraph g of the “Prayer for Relief” section of the Complaint.

h. Defendant specifically denies that Plaintiff is entitled to the relief requested in subparagraph h of the “Prayer for Relief” section of the Complaint.

i. Defendant specifically denies that Plaintiff is entitled to the relief requested in subparagraph i of the “Prayer for Relief” section of the Complaint.

j. Defendant specifically denies that Plaintiff is entitled to the relief requested in subparagraph j of the “Prayer for Relief” section of the Complaint.

Defendant denies all allegations not specifically admitted herein.

DEFENSES, INCLUDING AFFIRMATIVE DEFENSES

Defendant asserts the following affirmative and other defenses without assuming any burdens of production, persuasion, or proof that, pursuant to law, are not legally assigned to Defendant and are Plaintiff’s burden to prove:

1. Plaintiff failed to state a claim upon which relief may be granted.
2. Plaintiff was properly compensated in accordance with the FLSA, the NMMWA, and all applicable law.

3. Without assuming the burden of proof or admitting to violating any statute, any alleged violation of the FLSA by Defendant was not willful, and therefore Plaintiff's claims are limited to a two-year limitations period calculated from the date Plaintiff filed suit, or from the date any future plaintiff files his or her written consent to join this action.

5. Plaintiff's claims are barred in whole or in part by the applicable statute of limitations, including, but not limited to, 29 U.S.C. § 255 and N.M. Stat. § 37-1-5.

6. Plaintiff's claims for time allegedly worked by him without Defendant's actual or constructive knowledge are barred.

7. Plaintiff is not entitled to recover for non-compensable time.

8. Plaintiff may not recover for time that is de minimis.

9. Plaintiff may not obtain relief for preliminary and postliminary acts under the Portal-to-Portal Act.

10. Defendant is entitled to an offset against any amounts due equal to the amount Defendant overpaid Plaintiff and for other amounts paid to Plaintiff.

11. Plaintiff may not obtain relief due to the affirmative defense of waiver.

12. Plaintiff may not maintain this action as a collective action under 29 U.S.C. § 216 because he is not similarly situated to any other employee for purposes of the allegations and claims made in this lawsuit.

13. Plaintiff is an inadequate class representative because of the highly fact-specific and individualized nature of the claims in the Complaint.

14. Plaintiff cannot meet the prerequisites for class certification under Rule 23 of the Federal Rules of Civil Procedure.

15. Plaintiff cannot meet the requirements of Rule 23(a)(1) because he cannot show that he represents a class sufficiently numerous to warrant class treatment, or that joinder is impracticable.

16. Plaintiff cannot meet the basic criteria of Rule 23(a)(2) and (3) because he cannot show that there are questions of law or fact common to the members of the class or that his claims are typical of the claims of the putative class.

17. Plaintiff cannot satisfy the requirements of Rule 23(a)(4) for class representation because he cannot show he will adequately represent and protect the interest of the putative class.

18. To the extent Plaintiff seeks to certify a class pursuant to Rule 23(b)(3), Defendant contends that questions of law or fact which are common to class members do not predominate over questions effecting individual members and that class action treatment is not superior to the available methods for the fair and efficient adjudication of the controversy.

19. Defendant asserts the above defenses to the claims of all opt-in plaintiffs.

20. Defendant presently has insufficient knowledge or information from which to form a belief as to whether it may have additional affirmative or other defenses available. Defendant reserves the right to amend and add additional defenses as deemed necessary and as permitted by the Court.

PRAYER

For the foregoing reasons, Defendant requests that Plaintiff's Original Complaint be dismissed with prejudice and that Defendant be awarded its costs, attorneys' fees, and such other and further relief, at law or in equity, to which they are justly entitled.

Respectfully submitted,

/s/ John B. Brown

John B. Brown

Texas State Bar No. 00793412

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2019, I electronically filed the foregoing document with the Clerk of Court for the United States District Court, Western District of Texas, using the Electronic Case Filing (“ECF”) system of the Court, which will provide service copies to all counsel of record by electronic means.

/s/ John B. Brown

John B. Brown

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