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

TIMOTHY W. REPASS and WILLIAM SCOTT McCANDLESS, Individually and On Behalf of All Others Similarly Situated,	§	**Civil Action No.**
Plaintiffs,	§	**MO:18-CV-00107-DC-RCG**
v.	§	
TNT CRANE AND RIGGING, INC.	§	
Defendant.	§	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR OPPOSED MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

I. Plaintiffs Have Shown Good Cause to Modify the Scheduling Order

As Defendant correctly notes, the Fifth Circuit requires a showing of "good cause" under Rule 16(b)(4) when seeking leave to amend after the passage of the deadline for amendments under a scheduling order. *See S&W Enters., LLC v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 535-36 (5th Cir. 2003). Applying those standards here, Plaintiffs have shown good cause to amend their complaint after the October 4 amendment deadline; and, upon a showing of good cause, "the more liberal standard of Rule 15(a) appl[ies] to the district court's decision to grant or deny leave." *Id.* at 536. When determining whether a party has demonstrated good cause, courts consider: "(1) the explanation for the failure to [timely move for leave to amend]; (2) the importance of the [amendment]; (3) potential prejudice in allowing the [amendment]; and (4) the availability of a continuance to cure such prejudice." *Id.* Defendant argues that the first three elements weigh against allowing the amendment here; all of its arguments fail.

A. Plaintiffs' Explanation for Moving to Amend After the Deadline

Defendant incorrectly asserts that the first element requires proof that "the deadlines cannot reasonably be met despite the [Plaintiffs'] diligence[.]" Dkt. 58, p. 6. That is not the standard for proof of the first element, but instead the entire "good cause" standard, which all four of the *S&W* elements elucidate. *See S&W Enters.*, 315 F.3d at 535 ("*The good cause standard* requires the 'party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension.'" (emphasis added)) (*quoting* 6A Wright, Federal Practice and Procedure § 1522.1 (2d ed. 1990)). Regardless, Plaintiffs have been diligent in prosecuting this case, and they did not know until November 6 the basis for Defendant's argument to limit the actionable period.

Defendant asserts that the fact that Plaintiffs did not know, until November 6, the basis for the Defendant's position that the relevant time period stopped at three years is "incorrect" and "not credible." Dkt. 58, pp. 5, n.1 and 7. However, what Plaintiffs learned for the first time on November 6 was not that Defendant objected to anything beyond the three-year FLSA period (Plaintiffs learned that for the first time during the October 25 telephone conference between counsel, some three weeks after the deadline to amend had expired), but that it did so because, it now claims, Plaintiffs have not adequately pleaded facts supporting that contention. During the October 25 telephone conference, Defendant's counsel did not cite any reason for limiting the time period to the three years, but simply asked that the undersigned limit his questioning during the Rule 30(b)(6) deposition to the last three years because that is the FLSA limitations period. The undersigned refused, noting that the Plaintiffs had pleaded claims under the New Mexico Minimum Wage Act ("NM Wage Act"), which, in light of the "continuing course of conduct" which the Plaintiffs had also pleaded, arguably has no statute of limitation at all. In short, prior to November 6, Defendant stated a position with no legal basis, and it was only on November 6 that

Plaintiffs learned the reason underlying Defendant's objection to questioning beyond the three-year period.

It was this email of November 6, where Defendant's counsel wrote to confer about a motion for protective order, that Defendant's counsel first stated that it contends that a three-year period should apply to the NM Wage Act claims *because* "the purported NM class in the complaint is limited to the last 3 years and no facts have been alleged in support of any purported continuing course of conduct." (Exh. A).[1] Consequently, Plaintiffs learned for the first time on November 6 that the dispute about the limitations period was based on Defendant's claim that Plaintiffs had not pleaded adequate facts in support of their continuing course of conduct allegations.[2]

Moreover, and prior to that time, Plaintiffs have been diligent in pursuing this case. Although Defendant contends that Plaintiffs' explanation for the delay in filing their motion is deficient, Defendant has omitted from its discussion the important series of events from June 3 through October 1, and then through the filing of Plaintiffs' Motion. Dkt. 58, pp. 3-4. However, the entire sequence of events between May 2019 (when the parties agreed to an amendment deadline of October 4) and November 15 (when Plaintiffs filed their Motion for Leave to Amend) are important to explain why Plaintiffs were unable to comply with the October 4 deadline.

On **May 16, 2019**, counsel for the parties held their Rule 26(f) conference during which they discussed possible early resolution. (*See* Exh. B). On **May 17**, Plaintiffs' counsel delivered

[1] While suggesting that Plaintiffs have misled the Court, Defendant omits from its Exhibit H (Dkt. 58-8) its counsel's November 6 email in which Defendant first made clear the reason for Defendant's position. The entire November 6 email exchange is submitted with this pleading as Exhibit A.

[2] Defendant also contends that it should be so limited because the NM Wage Act class is defined as anyone who performed work in New Mexico "in the last three years." Dkt. 58, p. 2. However, that allegation in Plaintiffs' complaint does not limit the applicable time period to three years, so long as each plaintiff and putative class member has a claim for at least one violation in the three-year period prior to July 11, 2018 and the Plaintiffs have pleaded continuing course of conduct. N.M. Stat., § 50-4-32. For this reason, Defendant's standing argument at page 9 of its Response is also legally incorrect.

a draft of the Scheduling Proposals to Defendant's counsel and the parties agreed on October 4 as the amendment deadline. (*Id.*).[3] In the meantime, discussions of an early mediation continued until **June 25**, when counsel for Defendant indicated that it "is amenable to working toward a mediation in this case." (Exh. C).[4] At Defendant's request, the parties engaged in limited discovery: Defendant would deliver pay and time data, and Plaintiffs would produce Mr. Repass for a deposition. (*Id.*). Plaintiffs' counsel responded to that June 25 email on the same day asking when Defendant would like to depose Mr. Repass and proposing two mediators. (*Id.*).

Because Defendant's counsel had not responded to his June 25 email, on **July 10**, Plaintiffs' counsel sent a follow-up email repeating his questions. (*Id.*). Defendant's counsel responded on **July 15** with an email (1) indicating that one of the proposed mediators was fine, (2) asking to depose Plaintiff Repass in August 2019, and (3) proposing mediation in August. (*Id.*). In that email, Defendant's counsel also indicated that Defendant would produce the time and pay data by the following week (*Id.*); but Defendant did not produce it until September 23 and 24, 2019 (Exh. D). On the same day, **July 15**, Plaintiffs' counsel left a voice mail for Defendant's counsel proposing August 29 or 30 for Mr. Repass's deposition. (Exh. C). On **July 17**, Plaintiffs' counsel followed up that voice mail with an email confirming the offer of August 29 or 30 for the deposition, and asking Defendant's counsel to contact the mediator about his availability in September. (*Id.*). On the same day, Defendant's counsel confirmed both August 29 for the deposition and that Defendant's counsel would contact the mediator about potential dates. (*Id.*).

[3] Obviously, if Plaintiffs had understood on May 17 that a mediation in the case would not occur until October 1, they would not have agreed to that deadline at that time. As a result of the possibility of reaching an early resolution of this case, as the undersigned indicated to Defendant's counsel they would, Plaintiffs refrained from serving discovery. But for these discussions, Plaintiffs would have immediately engaged in written discovery, as they eventually did immediately after mediation on October 1.

[4] An important aspect underlying this series of events is the fact that one of Defendant's counsel suffered a death in his immediate family in May 2019. The undersigned was attempting throughout these months to be respectful of counsel's loss and to provide counsel necessary space.

On **July 25**, Plaintiffs' counsel sent a follow-up email regarding available dates for mediation; and, on **July 26**, Defendant's counsel responded with nine available dates between September 4 and September 26. (*Id.*). The undersigned immediately confirmed his availability for all but three of those dates and inquired about the production of the pay data. (*Id.*). At the request of Plaintiffs' counsel (because he had not heard back regarding mediation dates or pay data), on **August 2**, counsel for the parties held a telephone conference regarding those matters. (*See Id.*). During that call, the parties agreed on either September 10 or 26 for the mediation.

Since he had not heard back from Defendant's counsel following the August 2 conference, on **August 14**, the undersigned sent an email asking about the pay and time data and whether Defendant's counsel was able to schedule the mediation for either September 10 or 26. (Exh. E). In that same email, the undersigned indicated that he would file a motion to extend the deadline for Plaintiffs to make a settlement offer. (*Id.*). Plaintiffs' counsel prepared and filed that motion on **August 16**, in which he also sought an extension for Defendant to respond to Plaintiffs' settlement offer, and which the Court granted. Dkt. 50 and Text Order of August 19, 2019.

Because he had not heard back from Defendant's counsel regarding a confirmed date for the mediation, on **August 21** Plaintiffs' counsel contacted the mediator's office. (Exh. E). By then, the mediator was unavailable on September 10, but September 26 was still a possibility. (*See Id.*). However, as it turned out, September 26 was also unavailable, and the Parties eventually scheduled the mediation for the next earliest available date, October 1, 2019. (*See* Exh. F).

The deposition of Plaintiff Repass occurred in Midland, as scheduled, on **August 29**. On **August 30**, the undersigned sent a follow-up email asking that Defendant's counsel confirm October 1 with Defendant for mediation. Defendant's counsel did so on that day. (Exh. G). Pursuant to the Court's Scheduling Order, on **September 3, 2019**, the undersigned prepared and filed a Joint ADR Report indicating they were proceeding to mediation on October 1. Dkt. 51.

Because he still had not received the pay and time data, on **September 9**, the undersigned sent an email to Defendant's counsel inquiring about it. (Exh. G). Defendant's counsel responded three days later, on **September 12**, indicating that he would be producing that data either on September 12 or 13. (*Id.*). Counsel for the parties again held a telephone conference on **September 13** regarding the pay data production. (*See Id.*).

Defendant finally produced the pay and time data on **September 23 and 24**, but the data for several plaintiffs was missing (including that for Named Plaintiff McCandless which still has not been produced). (Exh. H). In spite of the late production, Plaintiffs created their damage model, and made their settlement offer in anticipation of mediation, as per the amended Scheduling Order, on **September 26**. (Exh. I). On **September 28**, counsel for the Parties held a telephone conference regarding the settlement offer and the Plaintiffs' damage model. (*Id.*).

After months of discussion, and during which the parties agreed to engage in only limited discovery in view of the mediation, the parties proceeded to mediation on **October 1**. However, after Plaintiffs agreed to engage only in limited informal discovery for more than three months pending mediation, and although the parties attended mediation in Houston, to date, Defendant has still not made any offer to settle Plaintiffs' claims in this case. (*See* Exh. J).

On the day of, and immediately after the failed mediation, on October 1, Plaintiffs served their first set of written discovery. They did so because they were then no longer obligated to abide by any agreement to limit discovery. As explained in their motion to extend the expert designation deadline (Dkt. 52, p. 2), Plaintiffs have very diligently pursued discovery in this case since October 1. As a direct result of pursuing this discovery, on **October 25**, Plaintiffs' counsel learned for the first time that Defendant would contest any discovery beyond the three-year FLSA statutory period (although Defendant at that time provided no legal basis for that position). On **November 1**, Plaintiffs filed a motion to extend the expert designation deadline. On **November**

6, Plaintiffs learned the basis for Defendant's position regarding the actionable period in this case (Exh. A), and Defendant filed its Motion for Protective Order (Dkt. 53). On **November 12**, Plaintiffs' counsel delivered a letter regarding Defendant's deficient discovery responses to which Defendant has, to date, provided no substantive response. (Exh. K). On **November 13**, Plaintiffs' counsel delivered to Defendant's counsel a draft of the Second Amended Complaint which Plaintiffs moved for leave to file on **November 15**. (Exh. L).

What this sequence of events demonstrates is that (1) Plaintiffs' counsel has been diligent in pursuing this case, (2) Plaintiffs' counsel in good faith abided by an agreement to limit discovery for three months pending a mediation (in which Plaintiffs' counsel also erroneously believed Defendant would participate in good faith), and (3) Plaintiffs' counsel had never in the course of this case allowed a deadline to expire without complying with it, or a motion to extend it if he believed there was even a chance that he needed to take some action before its expiration. Against this background, Plaintiffs immediately began the process to amend their complaint when they understood for the first time on November 6 the basis for Defendant's position on the actionable period in this case. As Defendant notes, "[t]he 'good cause' standard primarily focuses on the diligence of the party seeking the modification[,]" and Plaintiffs have surely been diligent in this case. Dkt. 58, pp. 6-7 (*citing Bakner v. Xerox Corp. ESOP*, No. SA-98-CA-0230-OG, 2000 WL 33348191, *14 (W.D. Tex., Aug. 28, 2000)*; see also Mailing and Shipping Sys., Inc. v. Neopost USA, Inc.*, 292 F.R.D. 369, 373 (W.D. Tex. 2013) (granting a motion for leave to amend even though "Plaintiff does not provide a persuasive explanation for its failure to bring [a] new claim . . . prior to the Court's deadline for amendments to the pleadings.")

Defendant finally argues that the information with which Plaintiffs wish to amend their complaint "was within Plaintiffs' knowledge well before the Court's deadline." Dkt. 58, p. 8. This is true, but Plaintiffs had already pleaded a continuing course of conduct in their First Amended

Complaint. Dkt. 12, ¶¶ 63(c) and 68. However, it was only when Plaintiffs learned on November 6 that Defendant felt those allegations were deficient did they feel it necessary to amend the complaint to avoid this dispute later in the case. Moreover, Defendant complains (while citing inapposite discrimination cases from the D.C. district), that Plaintiffs' allegations in their First Amended Complaint are "conclusory." However, Defendant understood them well enough to deny the allegations, without qualification. Dkt. 16, ¶¶ 63 and 68. Defendant did not, for example, claim that it does not have sufficient information to admit or deny (as it did in paragraphs 4 and 5 of its Answer), nor did it file a Motion for More Definite Statement. That is because Defendant knew what Plaintiffs meant with their allegations of continuing course of conduct.

B. The Importance of the Amendment

Defendant argues that "Plaintiffs make no argument about [the importance] factor." Dkt. 58, p. 8. That is incorrect. Plaintiffs emphasized the importance of the amendment in their Motion. First, while discussing continuing course of conduct, Plaintiffs cite and quote *Olivo v. Crawford Chevrolet, Inc.*, No. CIV 10-782 BB/LFG, 2011 WL 13137328, *3 (D.N.M. Sept. 20, 2011), which emphasizes that "[t]his issue is important[.]" Dkt. 55, p. 2. Second, Plaintiffs explain that if Defendant is able to limit the actionable period based on a technical argument over the state of the Plaintiffs' pleadings, "then Defendant will be able to avoid liability for its illegal pay practices from at least September 2013 until June 18, 2015." Dkt. 55, p. 6 (internal footnote omitted). The importance of the amendment is compounded by the fact that, under the NM Wage Act, successful plaintiffs recover treble damages for an employer's violations. N.M. Stat. §50-4-26(C). For the three-year period to which Plaintiffs currently have access, and only for the two named Plaintiffs and the 37 opt-ins, Plaintiffs' damage calculations under the FLSA and the NM Wage Act currently exceed $3 million. An additional 21 months of liability for all putative class members (in the event this Court certifies a Rule 23 class for Plaintiffs' NM Wage Act claims) with mandatory treble

damages are obviously important in this case.

C. Prejudice to Defendant

Defendant next argues that it would be prejudiced by the amendment because it will have to re-depose Plaintiff Repass. However, Defendant knew that Plaintiffs intended to pursue their NM Wage Act claims for the time period beyond June 18, 2015 when it deposed him. It knew this because Plaintiffs have already specifically pleaded a continuing course of conduct in connection with those claims. Dkt. 12, ¶¶ 64(c) and 68. Thus, Defendant's bald contention that "the parties had operated with the understanding the relevant period began after June 2015[]" is nonsense. Moreover, Plaintiff Repass worked at TNT from 2002 to 2004, and again from November 2017 until June 2018. (Exh. M, Repass Depo., 11:6-8, 92:6-12). Plaintiffs seek to amend their complaint to allege continuing course of conduct back to 2007. Thus, the only period of Mr. Repass's employment that is relevant to the allegations in the proposed amended complaint is November 2017 until June 2018; and Defendant has already deposed him about that time period.

Defendant also contends that "[e]xpanding the temporal scope . . . would render this case unmanageable." However, Defendant does not explain how that might happen.[5] Finally, Defendant asserts that "[t]he amendment would be an unfair surprise and prejudicial to TNT[,]" but again does not explain how that could be the case. In fact, Defendant has been well aware since July 2018 that Plaintiffs reached back earlier than three years with their NM Wage Act claims. That is the significance of the continuing course of conduct allegation. The Plaintiffs here

[5] For support, Defendant cites *Alligood v. Taurus Intern. Mfg., Inc.*, 2009 WL 8387645 (S.D. Ga., March 4, 2009). That case is inapplicable to this one because (1) the discussion on which Defendant relies occurs in the context of a denial of a motion to certify a nationwide class of individuals against a firearm manufacturer and (2) the certification of that class "would require application of the [various consumer protection] laws of many if not all of the 50 states and the District of Columbia." *Id.*, *4. Here, the Plaintiffs have sued only under the federal FLSA and the NM Wage Act. Such "hybrid" wage and hour class actions are often certified, *e.g., Bouaphakeo v. Tyson Foods, Inc.*, 564 F.Supp.2d 870 (N.D. Iowa 2008), and this case would suffer none of the types of variations among differing state laws that the court faced in *Alligood*.

are simply attempting to correct a technical pleading issue that Defendant did not reveal until November 6. Noting, as Plaintiffs did in their Motion, that the amendment rules are designed "to prevent litigation from becoming a technical exercise in the fine points of pleading," the Fifth Circuit has permitted amendments under similar circumstances, even after an amendment deadline. *Texas Indigenous Council v. Simpkins*, 544 Fed.Appx. 418, 421 (5th Cir. 2013) (reversing a district court's denial of leave to amend on the ground that the plaintiff's "failure to specifically cite § 1983 was at best an unintentional, technical pleading mistake . . . Once made aware of the error, Diaz sought leave to amend, confirming what the parties had known all along—that Diaz intended to assert a constitutional violation via § 1983.") (*citing Jones v. Louisiana,* 764 F.2d 1183, 1185 (5th Cir.1985) *and Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir.1981)).

D. Continuance to Cure Prejudice

Defendant does not directly address the fourth element, but suggests that "three months to complete discovery after an amended pleading enlarging the temporal scope is insufficient[.]" Again, the amendment would not "englarg[e] the temporal scope" since Plaintiffs have already pleaded continuing course of conduct. In addition, Defendant does not explain why it is "insufficient." Regardless, assuming *arguendo* that Defendant would suffer any prejudice (it has not demonstrated any), both an extension of the discovery deadline and a continuance are available. In fact, as of now, it is almost a certainty given Defendant's deficient discovery responses to date, that the parties will have to extend the current discovery deadline of February 28, 2020. Plaintiffs postponed the corporate representative deposition previously scheduled for November 13, 2019 in order to address those deficiencies. Although Plaintiffs sent Defendant a letter regarding those discovery responses on November 12, asking for Defendant to respond by November 20, and although Defendant's counsel indicated it would respond by the following week, Defendant still has not provided any supplements in response to that letter. (Exh. K). Consequently, Plaintiffs

will almost certainly file a motion to compel in the near future, and a ruling on that motion will further delay these proceedings. Therefore, not only is an extension of the discovery deadline available, it is almost certainly inevitable at this point. *See Mailing and Shipping Sys., Inc.*, 292 F.R.D. at 375-76 ("Although Plaintiff's Motion poses some potential for prejudice to Defendant, this prejudice is minimal and can be cured by postponing trial and providing additional opportunities for limited discovery, dispositive motions, and ADR in this case.")

II. Conclusion and Prayer

Plaintiffs have demonstrated good cause in support of their Motion for Leave to Amend. As a result, this Court should exercise its sound discretion and grant Plaintiffs' Motion pursuant to Rule 15(a) of the Federal Rules because, as Plaintiffs explained in their Motion, none of the "substantial reasons" for denying such a motion under Rule 15(a) are present here. Dkt. 55, pp. 7-9.

Respectfully Submitted,

MORELAND VERRETT, P.C.
700 West Summit Drive
Wimberley, Texas 78676
(512) 782-0567
(512) 782-0605 - telecopier

By: */s/ Edmond S. Moreland, Jr.*
Edmond S. Moreland, Jr.
State Bar No. 24002644
edmond@morelandlaw.com

Daniel A. Verrett
Texas State Bar No. 24075220
The Commissioners House at Heritage Square
2901 Bee Cave Road, Box L
Austin, Texas 78746
Tel: (512) 782-0567
Fax: (512) 782-0605
daniel@morelandlaw.com

ATTORNEYS FOR PLAINTIFFS

Certificate of Service

I hereby certify that on this the 4th day of December, 2019, I electronically submitted the foregoing document for filing using the Court's CM/ECF system. All 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.

/s/ *Edmond S. Moreland, Jr.*
EDMOND S. MORELAND, JR.