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,	§	**Civil Action No.**
v.	§	**MO:19-CV-248-DC-RCG**
TEXAS PRIDE FUELS, LTD.,	§	
Defendant.	§	

PLAINTIFF'S OPPOSED MOTION FOR CERTIFICATION OF COLLECTIVE ACTION AND JUDICIALLY SUPERVISED NOTICE UNDER FLSA SECTION 216(b)

Plaintiff Daniel Scheve ("Plaintiff") on behalf of himself and all others similarly situated ("Class Members") files this Motion for Conditional Certification and Judicially Supervised Notice Under FLSA Section 216(b).

I. INTRODUCTION

Plaintiff and Class Members worked as fuel technicians or automated fuel systems operators (referred to collectively as "operators") for Defendant in Texas, New Mexico, Louisiana, and Oklahoma. They were not exempt from the protections of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. ("FLSA"). Defendant paid them on an hourly basis, knew they were working in excess of forty hours per week, and knew that that they were working off the clock during overtime hours. Yet Defendant refused to pay Plaintiff and Class Members for off-the-clock time. In addition, Defendant pays its operators a bi-monthly safety and performance bonus and does not include that bonus amount in calculating its employees' regular rates of pay, resulting in underpaid overtime. Plaintiff requests that the Court conditionally certify a class of similarly situated operators, direct prompt disclosure by Defendant of contact information for potential class members, and authorize Plaintiff's counsel to notify putative class members of this lawsuit.

II. LEGAL BASIS OF CLAIMS

The FLSA requires an employer to pay compensation at one and one-half an employee's regular rate of pay for all hours worked over 40 in a workweek. 29 U.S.C. § 207(1). When an employer "suffers or permits" an employee to work more than 40 hours per week without proper overtime compensation, it violates the FLSA. 29 U.S.C. 203(g); *Falcon v. Starbucks Corp.*, 580 F. Supp. 2d 528, 533 (S.D. Tex. 2008) ("Management has a duty to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them." (internal quotes omitted)). Under 29 U.S.C. § 216(b), this Court is authorized and empowered to certify a class of workers who are "similarly situated" to the Plaintiff. Cases involving "off-the-clock" claims are routinely conditionally certified.[1]

III. FACTUAL BACKGROUND

Defendant is a fuel distribution company that provides on-site fueling services for hydraulic fracturing operations in Texas, New Mexico, Louisiana, and Oklahoma.[2] Plaintiff has held the position of fuel technician, and is currently an automated fuel system operator.[3] With the exception of a six-week span of time in the fall of 2016, Named Plaintiff Scheve has been

[1] *See, e.g. Repass v. TNT Crane and Rigging, Inc.*, MO:18-CV-107-DC, 2019 WL 856412, *1 (W.D. Tex., 2019) (Counts, J.) (adopting Magistrate Judge Griffin's recommendation to certify a class of oilfield workers deprived overtime pay for drive time and off-the-clock work); *Lopez v. Bird Electric Enterprises*, LLC, MO:18-CV-0231-DC-RCG, 2019 WL 4061700, at *3 (W.D. Tex. June 10, 2019) (Griffin, M.J.) (recommending the conditional certification of class of oilfield workers deprived off-the-clock overtime pay); *Hoppens v. K & G Men's Co., Inc.*, CIV.A. H-14-2393, 2015 WL 4508939, at *4 (S.D. Tex. July 24, 2015) (Miller, J.) (conditionally certifying class of assistant store managers claiming off-the-clock work); *Pacheco v. Aldeeb*, 5:14-CV-121-DAE, 2015 WL 1509570, at *7 (W.D. Tex. Mar. 31, 2015) (Ezra, S.J.) (conditionally certifying multi-facility class of off-the-clock claims); *Corcione v. Methodist Hosp.*, CIV.A. G-14-160, 2014 WL 6388039, at *8 (S.D. Tex. Nov. 14, 2014) (Rosenthal, J.) (conditionally certifying class of nurses who claimed off-the-clock meal period work); *Lee v. Metrocare Services*, 980 F. Supp. 2d 754, 766 (N.D. Tex. 2013) (O'Connor, J.) (conditionally certifying class of service coordinators claiming off-the-clock violations); *Lay v. Gold's Gym Intern., Inc.*, SA-12-CV-754-DAE, 2013 WL 5595956, at *7 (W.D. Tex. Oct. 4, 2013) (Ezra, S.J.) (conditionally certifying a regional class of Fitness Consultant and Sales Managers working off-the-clock despite the defendant's company policy prohibiting off-the-clock work); *Cantu v. Milberger Landscaping, Inc.*, SA-13-CA-731, 2013 WL 12101104 (W.D. Tex., Nov. 22, 2013).

[2] Dkt. 1, ¶ 16; Dkt. 10, ¶ 16.

[3] Ex. A, Scheve Decl. ¶ 2.

continuously employed by Defendant from December 2014 until the present.[4] Named Plaintiff has performed work for Defendant in both Texas and New Mexico's Permian Basin.[5] This motion is supported by the declarations of Plaintiff Scheve and Opt-in Plaintiffs Ronald Ezell, Abram Terry, and Andrew Kirschbaum. Other opt-in plaintiffs and declarants performed work for Defendant in Texas, New Mexico, Oklahoma.[6]

A. Plaintiff and the Class Members had Similar Job Duties and Were Paid Using the Same Compensation Scheme.

Plaintiff, the opt-in plaintiffs, and the Class Member operators have the same job duties: they spent or spend most of their time performing manual tasks outside in the oilfields (1) monitoring and servicing equipment; (2) filling supplemental fuel tanks; (3) transporting fuel to Defendant's customers' equipment; and (4) fueling that equipment.[7]

Plaintiff, the opt-in plaintiffs, and the Class Member operators are all paid an hourly wage.[8] If they worked more than forty hours in a week, they were paid time and a half their regular hourly rate (excluding bonuses) for some, but not all, of those hours over forty.[9] Specifically, Defendant did not compensate Plaintiff, the opt-in plaintiffs, or the Class Member operators for any of their drive time to the job sites, or for any of their time spent performing work for Defendant prior to or after leaving the job site; it only compensated them for the time they were at the job site, without regard to actual hours worked.[10] In addition, Defendant paid the Plaintiff, the opt-in plaintiffs, and

[4] *Id.*; Dkt. 1, ¶ 4; Dkt. 10, ¶ 4.
[5] *Id.*; Dkt. 1, ¶ 19, Dkt. 10, ¶ 19.
[6] Ex. B, Ezell Decl. ¶ 2; Ex. C, Terry Decl. ¶ 2; Ex. D, Kirschbaum Decl. ¶ 2.
[7] Ex. A, Scheve Decl. ¶ 5; Ex. B, Ezell Decl. ¶ 5; Ex. C, Terry Decl. ¶ 5; Ex. D, Kirschbaum Decl. ¶ 5.
[8] Ex. A, Scheve Decl. ¶ 4; Ex. B, Ezell Decl. ¶ 4; Ex. C, Terry Decl. ¶ 4; Ex. D, Kirschbaum Decl. ¶ 4; *see also*, Dkt. 1, ¶ 25; Dkt. 10, ¶ 25.
[9] *Id.*
[10] Ex. A, Scheve Decl. ¶¶ 7-10; Ex. B, Ezell Decl. ¶¶ 7-10; Ex. C, Terry Decl. ¶¶ 7-10 Ex. D, Kirschbaum Decl. ¶¶ 7-10.

the Class Members a bonus twice per month.[11] However, Defendant did not include any of those bonuses when calculating their regular rates of pay.[12]

B. Class Members worked overtime hours off-the-clock.

Defendant divides the workday into two shifts, with operators arriving in a company vehicle at the jobsite at 5:00 (either AM or PM, depending on whether it was a night or day shift) and leaving the jobsite at around 5:00 (either AM or PM).[13] Defendant typically had four-person crews at a job site, with two crewmembers on each shift.[14] Named Plaintiff and Class Members often picked up the other crew member before continuing to drive to their jobsites.[15] However, Plaintiff and Class Members began working before they even arrived at the jobsite. On the way to their jobsites, Plaintiff and Class-Members often drove to a service station.[16] At the station, they inspected and performed routine maintenance on their vehicles and were required to fill the fuel tanks on their company-provided vehicle to be able to drive it to their jobsites. Plaintiff and Class-Members also obtained and loaded water and other items necessary to their work onto their vehicles before driving to their jobsites.[17] After performing this work, Plaintiff and Class Members then drove to the jobsite.[18] At times, they would also stop at the service station after the shift to do the same tasks.[19]

Some of the operators who work the night shifts also participated in conference calls the following morning after the shift.[20] For the operators who participated in those conference calls, Defendant paid them for their working time until 7:30 AM, regardless of when they performed the

[11] Ex. A, Scheve Decl. ¶ 4; Ex. B, Ezell Decl. ¶ 4; Ex. C, Terry Decl. ¶ 4; Ex. D, Kirschbaum Decl. ¶ 4.
[12] *Id.*
[13] Ex. A, Scheve Decl. ¶ 8; Ex. B, Ezell Decl. ¶ 8; Ex. C, Terry Decl. ¶ 8; Ex. D, Kirschbaum Decl. ¶ 8.
[14] Ex. A, Scheve Decl. ¶ 9; Ex. B, Ezell Decl. ¶ 9; Ex. C, Terry Decl. ¶ 9; Ex. D, Kirschbaum Decl. ¶ 9.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Ex. A, Scheve Decl. ¶ 10; Ex. B, Ezell Decl. ¶ 10; Ex. C, Terry Decl. ¶ 10; Ex. D, Kirschbaum Decl. ¶ 10.
[20] Ex. A, Scheve Decl. ¶ 11; Ex. B, Ezell Decl. ¶ 11; Ex. C, Terry Decl. ¶ 11; Ex. D, Kirschbaum Decl. ¶ 11.

last work of the day.[21] If, for example, an operator was not able to leave the jobsite until 7:00 AM—which happened frequently[22]—they would not have time to drive back to their place of lodging before participating in the conference call.[23] That operator would have to participate in the conference call on the way back to their place of lodging; and, as discussed above, the operators would sometimes perform work after that conference call on the way back to their places of lodging.[24] But even when the conference call occurred or lasted past 7:30 AM—or if the visit to the service station occurred after 7:30AM—the operator was not paid for the time past 7:30 AM.[25]

In short, Plaintiff and the Class Members were not paid for any of the time that they spent working at the service stations, for any of the drive time between the service station and the job sites, at their places of lodging, or for all of their time participating in the conference calls.[26] In addition, Plaintiff and Class Members worked over 40 hours in a week for most if not all weeks in which they performed work.[27]

III. REQUEST FOR CONDITIONAL CERTIFICATION AND NOTICE

Plaintiff requests the Court conditionally certify a class defined as:

> **All hourly paid fuel technicians and automated fuel system operators employed by Defendant in the last three years.**[28]

A. Collective actions are favored, and the District Court is authorized to issue notice.

A FLSA plaintiff may bring an action on behalf of all "other similarly situated employees."[29] Such collective actions are favored under the law because they enable the "efficient

---

[21] *Id.*
[22] Ex. A, Scheve Decl., ¶11.
[23] Ex. A, Scheve Decl. ¶ 11; Ex. B, Ezell Decl. ¶ 11; Ex. C, Terry Decl. ¶ 11; Ex. D, Kirschbaum Decl. ¶ 11.
[24] Ex. A, Scheve Decl. ¶¶ 10-11; Ex. B, Ezell Decl. ¶¶ 10-11; Ex. C, Terry Decl. ¶¶ 10-11; Ex. D, Kirschbaum Decl. ¶¶ 10-11.
[25] Ex. A, Scheve Decl. ¶¶ 11-12; Ex. B, Ezell Decl. ¶¶ 11-12; Ex. C, Terry Decl. ¶¶ 11-12; Ex. D, Kirschbaum Decl. ¶¶ 11-12
[26] *Id.*
[27] Ex. A, Scheve Decl. ¶ 6; Ex. B, Ezell Decl. ¶ 6; Ex. C, Terry Decl. ¶ 6; Ex. D, Kirschbaum Decl. ¶ 6.
[28] Fuel technicians and automated fuel systems operators performed the same basic job duties. Ex. A, Scheve Decl. ¶ 2; Ex. B, Ezell Decl. ¶ 2; Ex. C, Terry Decl. ¶ 2; Ex. D, Kirschbaum Decl. ¶ 2.
[29] 29 U.S.C. § 216(b).

resolution in one proceeding of common issues of law and fact" and provide plaintiffs with the opportunity to "lower individual costs to vindicate rights by the pooling of resources."[30] "The broad remedial goal of the statute should be enforced to the full extent of its terms."[31]

Because the substantial benefits of FLSA collective actions "depend on employees receiving accurate and timely notice concerning the pendency of the collective action," the FLSA authorizes the Court to manage the collective action, including the power to authorize notice and monitor preparation and distribution of the notice.[32] In short, the FLSA empowers and encourages this Court to issue notice to all potential plaintiffs in this case.

B. Class Members are entitled to notice based on Plaintiff's allegations and sworn declarations submitted with this Motion.

This Court uses a two-stage analysis—the so-called *Lusardi* analysis—to decide the certification issue.[33] At this stage of the *Lusardi* analysis—the notice stage—Plaintiff must show that: "(1) there is a reasonable basis for crediting the assertion that aggrieved individuals exist; (2) those aggrieved individuals are similarly situated to the plaintiff in relevant respects given the claims and defenses asserted; and (3) those individuals want to opt in to the lawsuit."[34] "[B]ecause the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in conditional certification of a representative class."[35] "Courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination."[36] Finally, courts use a relaxed evidentiary standard when deciding the issue of conditional certification.[37]

---

[30] *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 170 (1989).
[31] *Id.* at 173.
[32] *Id.* at 169-73.
[33] *See, e.g., Bernstein v. Buckeye, Inc.*, MO:18-CV-097-DC, 2019 WL 2563841, *2 (W.D. Tex. 2019).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Snively v. Peak Pressure Control, LLC*, 174 F.Supp.3d 953, 958-59 (W.D. Tex. 2016) (Counts, J.) ("Most courts agree that affidavits submitted at the notice stage of class certification need not be in a form admissible at trial.").

1. Plaintiff and Class Members are similarly situated with respect to job duties and Defendants' pay policies and practices.

In this case, Plaintiff has submitted his own declaration, and the declarations of three opt-in plaintiffs, in addition to the allegations of Plaintiff's Complaint. The evidence discussed above in Part II shows that Defendant's automated fuel system operators had similar job duties, regularly worked more than forty hours per week, and Defendant required that they work off-the-clock before and after the time they spent working at their jobsites. *See* Part II, *supra*. During this preparatory and concluding work, Plaintiff and Class Members performed tasks that were compensable under the FLSA because they were an "integral and indispensable" part of their principal activities.[38] Therefore, Plaintiff has put forward evidence that a group of operators had similar job duties, were paid in the same manner, and were together subjected to an illegal payment scheme under the FLSA. Plaintiff has met his lenient burden.

2. Similarly situated individuals exist.

Plaintiff and the declarant opt-in plaintiffs have identified additional operators who performed similar duties for Defendant, were paid all paid by the hour and eligible for overtime, and who worked off-the-clock for Defendant.[39] To the extent that there are any differences among them, these operators differ only in the *amount* of off-the-clock work that they perform, which is not a reason to deny conditional class certification.[40] Plaintiff has met his burden on this element.[41]

---

[38] *See Steiner v. Mitchell*, 350 U.S. 247 (1956); *see also Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 Fed. Appx. 448, 455 (5th Cir. 2009) (determining that the time plaintiffs spent checking specialized tools in and out, setting up the tool display and putting away tools, and cleaning up workstations at the end of the shift was compensable under the FLSA); *Cantu*, 12 F. Supp. 3d at 921-22 (holding time spent working at a yard and traveling to and from jobsites is compensable when the employees were required to meet at a yard prior to traveling to the jobsite and required to work upon arriving back at the job site).

[39] Ex. A, Ex. A, Scheve Decl. ¶¶ 3-4; Ex. B, Ezell Decl. ¶¶ 3-4; Ex. C, Terry Decl. ¶¶ 3-4; Ex. D, Kirschbaum Decl. ¶¶ 3-4.

[40] *See, e.g.*, *Maynor v. Dow Chem. Co.*, CIV. A. G-07-0504, 2008 WL 2220394, at *9 (S.D. Tex. May 28, 2008) (collecting autorities and stating, "[m]ost courts have held that in unpaid overtime 'off-the-clock' cases, the need to determine class members' damages on an individualized basis should not bar conditional certification if the proposed class is otherwise similarly situated.").

[41] *See, e.g.*, *Lopez* 2019 WL 4061700, at *3 (W.D. Tex. June 10, 2019) (Griffin, M.J.) (recommending conditional

3. Others are interested in joining this suit

Here, Plaintiff and three opt-in plaintiffs have all testified that they believe other operators would be interested in joining this suit if they were made aware of it.[42] This alone is sufficient to meet this prong of the first stage *Lusardi* analysis.[43] Additionally, five individuals have taken an interest in this lawsuit by joining the case after it was filed.[44] Thus, there can be no dispute that other class members are interested in joining this suit.[45]

C. The Magistrate Judge has authority to decide this Motion without a Report and Recommendation.

The District Court referred this case to Magistrate Judge Ronald G. Griffin with the authority to "issue any preliminary orders and conduct any necessary evidentiary hearings or other appropriate proceedings." Dkt. 7. Because this motion is not dispositive, the Magistrate Judge has authority to rule on the motion without a report and recommendation.[46] Because the statute of

---

certification based on declaration of named plaintiff and one opt-in plaintiff); *Nabarrette v. Propetro Services, Inc.*, MO:15-CV-00211-RAJ, 2016 WL 7616717, at *3 (W.D. Tex. Apr. 4, 2016) (Junell, S.J.) (finding plaintiff's declaration sufficient to support conditional certification); *Dyson v. Stuart Petroleum Testers, Inc.*, 308 F.R.D. 510, 513 (W.D. Tex. 2015) (Pitman, J.) (declarations of the single named plaintiff and one co-worker sufficient); *Pacheco*, 2015 WL 1509570 at *8 (two declarations attesting "many" current and former employees would join lawsuit sufficient basis for conditional certification); *Reid v. Timeless Restaurants, Inc.*, 2010 WL 4627873, at *3 (N.D. Tex. Nov. 5, 2010) (finding "evidence from two individuals who experienced similar employment pay practices . . . and [who] stated that they are aware of others who also experienced them" sufficient to support motion for conditional certification).

[42] Ex. A, Ex. A, Scheve Decl. ¶¶ 3, 14; Ex. B, Ezell Decl. ¶¶ 3, 14; Ex. C, Terry Decl. ¶¶ 3, 14; Ex. D, Kirschbaum Decl. ¶¶ 3, 14.

[43] *Bernstein*, 2019 WL 2563841 at *3 ("This Court has previously held that a named plaintiff's testimony that other, similarly-situated individuals would be 'interested to learn about their rights and opportunity to join [the] lawsuit,' combined with a consistent declaration of a non-party individual, constitutes a sufficient showing that others want to opt in to the suit.")

[44] Dkts. 4-1, 6-1, 8-1, 11-1, 12-1, 15-1.

[45] *DeBord v. Texas CES, Inc.*, NO. MO:17-CV-215-DC, 2018 WL 6177948, at *4 (W.D. Tex., 2018) (Counts, J.) ("A plaintiff may satisfy the third factor by providing evidence that individuals, other than those who filed the initial complaint, have taken an interest in the lawsuit. This can be accomplished through affidavits from potential class members affirming their intentions to join or by showing that new plaintiffs opted in to the lawsuit after it was filed." (citation omitted)).

[46] *See, e.g., Mendoza v. AFO Boss, et al.*, Cause No. 402 F.Supp.3d 355, 357-58 (W.D. Tex., 2019) (Griffin, M.J.) ("This Court has authority to enter this order [conditionally certifying a collective action under 29 U.S.C. § 216(b)] pursuant to 28 U.S.C. § 636(b)(1)(A)"); *Wade v. Furmanite Am., Inc.*, 3:17-CV-00169, 2018 WL 2088011, at *1 (S.D. Tex. May 4, 2018) (Edison, M.J.) (granting, without a report and recommendation, the plaintiff's motion for conditional class certification); *Freeman v. Progress Residential Prop. Manager, LLC*, 3:16-CV-00356, 2018 WL 1609577, at *1 (S.D. Tex. Apr. 3, 2018) (same); *Esparza v. C&J Energy Servs., Inc.*, No. 5:15–CV–850-DAE, 2016 WL 1737147, at *1 (W.D. Tex. May 2, 2016) (noting conditional certification involves non-dispositive issues); *Wedel*

limitations is running on all remaining potential opt-in plaintiffs—and to conserve the Court's and the party's resources—Plaintiff requests that the Magistrate Judge decide this motion rather than issue a report and recommendation.

IV. REQUEST FOR NOTICE TO CLASS MEMBERS

Plaintiff's proposed Notice (*see* **Exhibit E**) to potential opt-ins is "timely, accurate, and informative," as the law requires.[47] It contains accurate notice of the pendency of this action and the ways in which potential plaintiffs may opt-in; and they are informed that they are not required to opt-in.

Plaintiff requests that Defendant be ordered to produce within ten (10) days of the granting of this Motion an Excel file containing the names, all known addresses, all email addresses, and all telephone numbers (home, mobile, etc.) of all the potential opt-in plaintiffs. Telephone numbers will be used only for text message notice and to verify addresses or email addresses for potential opt-in plaintiffs.[48]

Plaintiff requests a 60-day opt-in period from the date of initial mailing and emailing. Plaintiff requests to send the Notice and Consent forms by mail and email,[49] the proposed Social

---

v. Vaughn Energy Servs., LLC, No. 2:15–CV–93, 2015 WL 5920034, at *1 (S.D. Tex. Oct. 6, 2015) (same). Although the United States Code prohibits magistrate judges from determining, without a report and recommendation, "a motion . . . to dismiss or to permit maintenance of a class action [under Federal Rule of Civil Procedure 23]" (28 U.S.C. § 636(b)(1)(A)), "a magistrate judge has jurisdiction over a motion seeking conditional class certification because it is only a 'preliminary determination and is not dispositive." *Spack v. Trans World Ent. Corp.*, 117CV1335TJMCFH, 2019 WL 192344, at *18 (N.D.N.Y. Jan. 15, 2019) (citations omitted) (collecting and summarizing sources); *see also Haas v. Verizon New York, Inc*., No. 13-CV-813, 2015 WL 5785023, at *2 S.D.N.Y. 2015 ("Unlike class certification actions brought under Rule 23, motions for conditional certification of FLSA collection actions qualify as 'pretrial matter' subject to clear error review.").

[47] *Hoffmann-La Roche*, 493 U.S. at 172.

[48] *See Sandoval*, 2016 WL 8674067 (ordering disclosure of phone numbers for use in verifying physical and e-mail addresses). For the verification of addresses or email addresses, Plaintiff will agree on a reasonable script to be used for that purpose. *See Parrish v. Premier Directional Drilling, L.P.*, SA-16-CA-00417-DAE, 2016 WL 8673862, *6 (W.D. Tex., October 14, 2016) (Primomo, M.J.).

[49] Courts in this district and division have held that "email is a traditional and commonly used method to provide notice of class actions." *Lemmers v. Gary Pools, Inc.*, SA–15–CA–00828–OLG, 2016 WL 7508075 (W.D. Tex., May 24 2016) (Garcia, J.); *see also Snively*, 174 F. Supp. 3d at 962 ("The Court agrees with Plaintiffs and the other courts in the cases cited by Plaintiffs that sending of notice in FLSA proceedings via email is an appropriate method of distribution."); *Wade*, 2018 WL 2088011 at *7 ("The distribution of notice via traditional mail and email is particularly appropriate, where, as here, employees are known to work away from home for long periods of time.").

Media Notice of Collective Action (attached as **Exhibit F** to this motion) via Facebook and/or LinkedIn,[50] and the proposed Text Message Notice of Collective Action (attached as **Exhibit G** to this motion) via text message[51] to all identified class members. Plaintiff also requests that the Court order Defendant to post the Notice of Collective Action in a conspicuous and accessible location at each of its places of work at which it currently employs one or more potential Class Members.[52]

Plaintiff also requests leave for their counsel to be permitted to maintain a website dedicated to posting the Notice and Consent Form. On that website, Plaintiff's counsel will post only the Notice and Consent Form (**Exhibit E**) that he is requesting the Court to approve for

[50] Courts in the Western District of Texas have previously authorized Facebook notice after conditionally certifying a class. *Yair Granados v. Hinojosa*, 219 F. Supp. 3d 582, 587 (W.D. Tex. 2016) (Yeakel, J.); *see also Pacheco*, 2015 WL 1509570 at *8-9; *Gonzalez v. CNL Wings VII, Inc.*, SA-14-CA-886-OLG, 2015 WL 10818674, at *2 (W.D. Tex. Mar. 24, 2015) (Primomo, M.J.) (recommending same).

[51] "[I]n the world of 2017, email and cell phone numbers are a stable, if not primary, point of contact for the majority of the U.S. population, and thus that [sic] using email and texts to notify potential class members is entirely appropriate." *Vega*, 2017 WL 4023289, at *4. Based on this observation, Judge Austin recommended that the district court order plaintiff's counsel to "send a text message to the Class Members with a link to the Notice of Rights and Consent Form." *Id.* at *5. The district court adopted that recommendation. Other courts in this district have also permitted text message notice. *See Peery v. Nixon Engineering, LLC*, 6:18-CV-00358-ADA-JCM, 2019 WL 5027126, at *6 (W.D. Tex., 2019) (Manske, M.J.) (recommending that text message notice be permitted where, like here, the class members worked away from home for long periods of time; to date, no objections have been entered); *Hines v. Ironclad Energy, LLC*, 5:19-CV-00155-OLG, 2019 WL 5027021, at *3 (W.D. Tex., 2019) (Garcia, C.J.) (approving text notice where "the nature of the[class members'] jobs requires them to be away from their homes for weeks and even months at a time"); *but see Aguirre v. Tastee Kreme #2, Inc.*, No. H-16-2611, 2017 WL 2999271, at *9-10 (S.D. Tex. April 13, 2017) (Johnson, M.J.) (denying requested text notice because it did not provide a full picture of the nature of the lawsuit, the class members' rights, and the seriousness of the communication; and it might therefore be misleading). Plaintiff's proposed text notice addresses Judge Johnson's concerns by directing class members to a website (www.TexasPrideOvertimeLawsuit.com) where the sole content is the Notice and Consent Form that Plaintiff proposes mailing and e-mailing to the class. As a result, although *Aguirre* suggests that text message notice may be potentially misleading, Plaintiff's proposed text message and the hyperlink contained in that message addresses the *Aguirre* court's concerns. In addition, Plaintiff's proposal is the approach that Magistrate Judge Austin recommended, and the district court approved, in *Vega v. Point Security*.

[52] *See Nabarette*, 2016 WL 7616717 at *7 (permitting workplace posting of the notice); *Snively*, 174 F. Supp. 3d at 963 (same); *Yair Granados*, 219 F. Supp. 3d at 587 (authorizing workplace posting of the notice); *Alford*, 2016 WL 8673858 at *7 (recommendation adopted) ("Posting notice in a workplace has been approved as an appropriate form of notice in FLSA cases.").

dissemination.[53] In addition, Plaintiff requests that potential opt-in plaintiffs be afforded the opportunity to electronically sign their consent forms from that website.[54]

V. REQUEST FOR EQUITABLE TOLLING

Finally, Plaintiff moves for equitable tolling. An opt-in plaintiff's statute of limitation continues to run until he or she files a consent to join the lawsuit.[55] However, the FLSA's statute of limitation, like all such federal limitations periods, is subject to equitable tolling.[56] The decision whether or not to toll a statute of limitation rests within the court's discretion.[57] District courts have tolled the limitations periods for putative class members during the time that a motion for conditional certification was pending court approval when the plaintiff had diligently pursued their claims and/or the delay in the court's ruling was beyond the plaintiff's control.[58]

---

[53] *See, e.g., Black*, 2011 WL 609884, at *6 (N.D. Tex. Feb. 14, 2011) (Kinkeade, J.) ("Ms. Black's counsel is authorized to maintain an internet website for the purpose of informing similarly situated persons of their right to opt into this litigation."); *Knox v. Jones Group*, 208 F. Supp. 3d 954, 964 (S.D. Ind. 2016) (permitting the posting of notice on a public website because "[o]pening a public website improves access to consent forms" and noting that "[a]s with email, communication through websites is common."). *See also, White v. Integrated Electronic Technologies, Inc.*, Civil Action Nos. 11–2186, 12–359, 2013 WL 2903070, *8 (W.D. La. June 13, 2013), *8 (permitting electronic signatures on consent forms from a dedicated website); *Beall v. Tyler Techs., Inc.*, Civil Action No. 2:08–CV–422, 2009 WL 1766141, *3-*4 (E.D. Tex. June 23, 2009) (conditionally certifying a class, and ordering the parties to confer regarding, among other things, "the content and operation of a website, to be maintained by the plaintiffs' counsel" in a FLSA collective action); *Harris v. Chipotle Mexican Grill, Inc.*, 49 F. Supp. 3d 564, 582 (D. Minn. 2014) (approving of a third-party notice administrator to disseminate notice by, among other methods, "website design and maintenance").

[54] *See, e.g.*, 15 U.S.C. § 7001(a)(1) ("[W]ith respect to any transaction in or affecting interstate or foreign commerce," a "signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form."); TEX. BUS. & COM. CODE § 322.007(a), (d) ("signature may not be denied legal effect or enforceability solely because it is in electronic form" and "[i]f a law requires a signature, an electronic signature satisfies the law."); *Yair Granados*, 219 F. Supp. 3d at 587 (authorizing electronic signatures); *Dyson*, 308 F.R.D. at 517 (collecting sources and permitting electronic signatures on consent forms); *Landry v. Swire Oilfield Services, L.L.C.*, 252 F. Supp. 3d 1079 (D.N.M. 2017), 252 F. Supp. 3d at 1095, 1130 (permitting identical use of a Right Signature (Adobe Sign competitor) website that posts a document and permits the viewer to electronically sign it).

[55] 29 U.S.C. § 256.

[56] *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) ("This equitable doctrine is read into every federal statute of limitation."); *see also Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir.1998).

[57] *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999).

[58] *See, e.g., Sehr v. Val Verde Hosp. Corp.*, 368 F. Supp. 3d 1106, 1109 (W.D. Tex. 2019) (collecting authority and granting equitable tolling when a plaintiff had been diligent in pursuing certification and the delay was beyond his control) (*citing Shidler v. Alarm Security Group, LLC*, 919 F.Supp.2nd 827, 829-30 (S.D. Tex. 2012) (granting equitable tolling in a FLSA case from the date of the filing of the notice of agreement on conditional certification where "the parties [were] agreed to the terms of conditional certification, as well as the attendant notice" and where the reason for the length of time between the filing of the notice of agreement and entry of the order of conditional

Plaintiff is filing this Motion without delay—just over three months after filing his Original Complaint, even with the intervening holidays. Counsel for Defendant asked that Defendant be given a 14-day extension to their deadline to respond to this motion; and Plaintiff was not opposed that request. Dkt. 13, pp. 1-2. Considering the forthcoming briefing on this Motion, the necessary time for the Court to consider and rule, and—if the Motion is granted—the time for the Class Members to receive notice and opt-into the suit, six months or more could elapse. This passage of time might result in some or all of Class Members' claims being time-barred should they decide to opt-in. Therefore, Plaintiff requests the Court toll the limitations period for any opt-in class member from the date of this motion until the notice and opt-in period is concluded.

VI. CONCLUSION AND PRAYER

For the foregoing reasons, Plaintiff respectfully requests that the Court conditionally certify the class, equitably toll the statute of limitations, authorize counsel for the Plaintiff to send the Notice and Consent forms submitted with this Motion as Exhibit E, the Social Media Notice of Collective Action submitted with this Motion as Exhibit F, and the Text Message Notice of Collective Action submitted with this motion as Exhibit G to the following group of individuals:

> **All hourly paid fuel technicians and automated fuel system operators employed by Defendant in the last three years.**

Plaintiff additionally respectfully requests that the Court award the relief outlined in the proposed Order submitted with this Motion.

---

certification "was entirely beyond the control of [the plaintiff].")); *Ferguson v. Texas Farm Bureau*, 307 F. Supp. 3d577, 580-81(W.D. Tex. , 2018) (granting in part the plaintiff's motion to equitably toll the limitations period until the time the court granted the plaintiff's motion for conditional certification); *Hernandez v. Caviness Packing Co., Inc.*, 2008 WL 11183755, *2 (N.D. Tex., June 2, 2008) (Robinson, J.) ("The Court finds that there is no evidence that the Defendants threatened or intimidated Plaintiffs to stop their participation in the lawsuit. However, the Court exercises its power to equitably toll the statute of limitations due to the delay [10 months from the time of filing] in ruling on the Plaintiff's motion for class certification."); *Davis v. Flare Ignitors & Rentals, Inc.*, 2012 WL 12539328, *2 (W.D. Tex., March 19, 2012) (Garcia, J.) ("Due to the length of time in which this motion remained pending with this Court [eight months], the Court finds it equitable—and therefore orders—that the statute of limitations as it applies to any additional opt-in plaintiffs is tolled from the date on which this motion was filed[.]")

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
daniel@morelandlaw.com
The Commissioners House at Heritage Square
2901 Bee Cave Road, Box L
Austin, Texas 78746
Tel: (512) 782-0567
Fax: (512) 782-0605

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he conferred with counsel for Defendant regarding this motion during a telephone call and via email. Defendant's counsel advises that Defendant opposes the relief requested in this motion.

/s/ Edmond S. Moreland, Jr.
Edmond S. Moreland, Jr.

CERTIFICATE OF SERVICE

I certify that on this the 28th day of January 2020, I electronically submitted this document for filing using the Court's CM/ECF system, which will serve a true and correct copy of this document on counsel of record.

/s/ Edmond S. Moreland, Jr.
Edmond S. Moreland, Jr.