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

DANIEL SCHEVE, Indivially and On Behalf of All Others Similarly Situated,	§	
	§	
Plaintiff,	§	
v.	§	
	§	**Civil Action No. 18-cv-248-DC-RCG**
TEXAS PRIDE FUELS, LTD.,	§	
	§	
Defendant.	§	
	§	

DEFENDANT'S RESPONSE TO PLAINTIFF'S OPPOSED MOTION FOR CERTIFICATION OF COLLECTIVE ACTION

Defendant Texas Pride Fuels, Ltd. ("Defendant" or "Texas Pride") hereby responds to Plaintiff's Opposed Motion for Certification of Collective Action and Judicially Supervised Notice Under FLSA Section 216(b) (Doc. 17) (the "Motion").

I. INTRODUCTION

This case is about whether Texas Pride owes plaintiff Daniel Scheve ("Plaintiff" or "Scheve") overtime pay beyond what he has already received. He alleges that the company violated the Fair Labor Standards Act ("FLSA") by not paying him for his commute time and failing to include bonuses in his overtime calculation. The Motion concerns whether the Court should expand this case to encompass many more plaintiffs. It should not. First, Plaintiff's claims are simply without merit, and there is no reason for the Court to certify a class of similarly flawed claims. Under the Portal-to-Portal, driving to and from work is not work. And the bonuses paid by Texas Pride did not need to be included in the overtime rate because they were discretionary. Second, the proposed class members are not similarly situated to one another. Plaintiff asks the Court to conditionally certify a class of plaintiffs who worked at a multitude of locations and on different shifts, who had different duties, and who were paid differently. Just

like with Plaintiff, deciding liability and damages as to any putative class member would require a specific analysis of evidence relevant to *that class member only*. In other words, the putative class members are not similarly situated, and, correspondingly, collective certification provides no meaningful advantages or efficiencies. Though the standard for conditional certification has historically been a low one, the Court is not a rubber stamp: it has discretion to grant or deny conditional certification. *See Steffen v. Contract Sweepers & Equip. Co.*, No. 2:17-CV-579, 2018 WL 1755332, at *4 (S.D. Ohio Apr. 12, 2018) ("The Court may not merely 'rubber-stamp' any proposed collective action, even at the conditional certification stage."). In this case, conditional certification is not warranted.

II. RELEVANT FACTUAL BACKGROUND

Texas Pride offers fuel services for oil field operations. Ex. A, Quiet Decl. ¶ 2. The company delivers fuel to a work site and then maintains a steady supply of fuel to various equipment at the site, including fracking pumps, light towers, and generators. *Id.*

Automated Fuel Systems Operator ("Operator") is a general term for an employee assigned to a frac site and responsible for fueling equipment from a storage device maintained at the frac site. *Id.* ¶ 3. Operators provide on-site service. *Id*.

Texas Pride has employees known as Transport Drivers who are paid to deliver fuel to frac sites. *Id.* ¶ 4. Operators do not deliver fuel to the frac sites, but an Operator who has a commercial driver's license (a "CDL") may move a bob-tail truck holding fuel on start-up days, where equipment is being moved to a new job. *Id.* ¶ 5. In that situation, the Operator would be paid for the time driving the bob-tail truck. Operators are not responsible for delivering water to the frac sites. *Id.*

Operators are paid by the hour and receive overtime pay when they work more than 40 hours in a workweek. Id. ¶ 6. Operators are required to submit timesheets on a bi-weekly basis.

Operators are expected to provide a start time and end time for each day, and no time is deducted for meal breaks. *Id.* Texas Pride calculates pay using the timesheets submitted by Operators. *Id.*

Because of the schedule set by the fracking companies, Texas Pride assigns a crew to cover a 24-hour period. *Id.* ¶ 7. Each crew usually has four Operators, with two crew members assigned to a day shift and two crew members assigned to a night shift. *Id.* Operators typically work a shift beginning at 5:00 a.m. or 5:00 p.m. at the frac site. *Id.* Operators are given a company pickup truck to commute to the frac site. *Id.* at 8. Operators are free to decide who will drive the truck. *Id.* Operators are provided housing in a bunkhouse or at a hotel. *Id.* ¶ 9.

Texas Pride does not require Operators to start their commute at any particular time, and Operators are not required to perform any task prior to arriving at the frac site to begin their shift. *Id.* ¶ 10. Operators are free to stop during their commute to eat or purchase personal items, such as food and drinks. *Id.* At the end of the shift, when Operators leave the frac site, they are free to stop during their commute to eat or purchase personal items, such as food and drinks. *Id.* ¶ 11.

When Operators on the day shift leave the frac site at the end of their shift, they generally have no responsibilities until they return to the frac site the next day. *Id.* ¶ 12. If an Operator is given a special assignment between shifts, such as picking up a part, then the Operator is expected to report that time on his timesheet so that he can be paid for the special assignment. *Id.*

When Operators on the night shift leave the frac site at the end of their shift, one of the Operators must participate in a daily conference call that starts at 7:00 a.m. and usually ends well before 7:30 a.m. *Id.* 13. The Operator on the night shift who participates in the call is paid from the beginning of his shift until the end of the call, which means that this Operator is usually paid for his commute from the frac site to the location where he sleeps. *Id.* The Operator on the night shift who is not responsible for the call generally has no responsibilities until he returns to the

frac site at the beginning of his next shift. *Id.* If an Operator on the night shift is given a special assignment between shifts, such as picking up a part, then the Operator is expected to report that time on his timesheet so that he can be paid for the special assignment. *Id.*

Texas Pride has a maintenance department. *Id.* at14. The maintenance department uses a software program to schedule and record maintenance on company equipment, including pickup trucks driven by Operators. *Id.* If an Operator notices a maintenance display reminder on a pickup truck, then he is expected to notify the maintenance department. *Id.* Operators assigned to 12-hour shifts at a frac site are not expected to perform maintenance on a truck or to take a truck for maintenance. *Id.* If Texas Pride assigns an employee to take a company truck to a vendor for maintenance, such as an oil change, the company pays the employee for the time involved. *Id.*

Texas Pride has paid bonuses to Operators. *Id.* ¶ 15. But the company does not have a formal bonus plan. *Id.* There is no document setting requirements or metrics for a bonus. *Id.* The company exercises its discretion as to whether to pay a bonus. *Id.*

III. ARGUMENTS AND AUTHORITIES

A. The Court Should Not Conditionally Certify the Proposed Class.

The FLSA itself does not provide for conditional collective-action certification or distribution of judicially approved notice of a lawsuit to prospective plaintiffs. *See* 29 U.S.C. § 216(b); *see also Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 176 (1989) (Scalia, J., dissenting). However, the Supreme Court has recognized that district courts "have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) . . . by facilitating notice to potential plaintiffs." *Hoffman-La Roche*, 493 U.S. at 167. Courts should carefully exercise this discretion so as to avoid "stirring up unwarranted litigation." *Lentz v. Sparky's Rest. II, Inc.*, 491 F. Supp. 2d 663, 669 (N.D. Tex. 2007). "Further, employers should not be unduly burdened by a frivolous fishing expedition conducted by plaintiff[s] at the employer's expense." *Id.* at 666.

Most courts use the two-stage process established in *Lusardi v. Xerox Corp.* to determine whether certification is appropriate. 118 F.R.D. 351 (D.N.J. 1987); *see Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995). The Fifth Circuit has never adopted the *Lusardi* method, however, so a court in this Circuit may, in its discretion, employ a different test. *In re JPMorgan Chase & Co.*, 916 F.3d 494, 500 (5th Cir. 2019). At the first stage of the *Lusardi* process, a plaintiff must provide the court with evidence showing that the defendant subjected a group of similarly situated potential class members to a "single decision, policy or plan" that violated the provisions of the FLSA. *Mooney*, 54 F.3d at 1214, n.8. If a plaintiff meets this burden, the court "conditionally certifies" a class and authorizes notice of the lawsuit to be sent to potential members of that class, who may then opt into the action. "A court may deny plaintiffs' right to proceed collectively if the action arises from circumstances purely personal to the plaintiff, and not from any generally applicable rule, policy, or practice." *Simmons v. T-Mobile USA, Inc.*, 2007 WL 210008, at *4 (S.D. Tex. Jan. 24, 2007).

Although the first stage of the *Lusardi* process involves a lenient test, "certification is not automatic." *Novick v. Shipcom Wireless, Inc.*, 2017 WL 1344961, at *5 (S.D. Tex. Apr. 12, 2017). Indeed, "notice is by no means mandatory," and "the relevant inquiry in each particular case is whether it would be appropriate to exercise [the court's] discretion" and conditionally certify a class. *Harris v. Fee Transp. Servs., Inc.*, 2006 WL 1994586, at *2 (N.D. Tex. May 15, 2006). Before granting conditional certification, courts typically require "substantial allegations that the putative class members were together victims of a single decision, policy, or plan." *Mooney*, 54 F.3d at 1214 n.8.; *Laney v. Redback Energy Servs., LLC*, 285 F. Supp. 3d 980, 985 (W.D. Tex. 2018). To make this determination, many courts consider whether (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. *E.g.*, *Parker v. Silverleaf Resorts, Inc.*, 2017 WL 1550522, at *8 (N.D. Tex. May 1, 2017).

Plaintiff has failed to meet the standard for conditional certification. He has not shown (1) the existence of a reasonable basis to conclude that aggrieved individuals exist, or (2) that, even if such individual existed, they would be similarly situated to him. Accordingly, Plaintiff has not met the first or second factors of the *Lusardi* test for conditional certification.

1. There is no reasonable basis to conclude that aggrieved individuals exist because Plaintiff's "off-the-clock" claim is not actionable as a matter of law.

The violations necessary to support an FLSA collective action must be tied to a single decision, policy, or plan that binds the putative class. *See Hickson v. U.S. Postal Serv.*, 2010 WL 3835887, at *6 (E.D. Tex. July 22, 2010), *recommendation adopted*, 2010 WL 3835885 (E.D. Tex. Sept. 28, 2010) (denying conditional certification). Here, there is no credible evidence of such an unlawful decision, policy, or plan.

Texas Pride at all relevant times had—and continues to have—a policy requiring employees to report their time. And Scheve admits that he regularly received overtime pay. Scheve essentially argues that in addition to all the overtime he received that he should be paid for commuting to work. But his argument has been rejected by Congress and the courts.

Under the Portal-to-Portal Act, travel time to and from work is not compensable. *See* 29 U.S.C. § 254. Employers are not required to pay for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform," and it makes no difference if the employee is traveling in "an employer's vehicle." *Id.* Furthermore, employers are not required to pay for "activities which are preliminary to or postliminary to . . . the principal activity or activities." *Id.* Congress passed the Portal-to-

Portal Act so that employers would not face "unexpected liabilities" related to travel and other preliminary and postliminary activities and so that employees would not receive "windfall payments." 29 U.S.C. § 251(a). Immediately after the passage of the FLSA in 1938, the Supreme Court held that "time spent traveling between mine portals and underground work areas" and "time spent walking from timeclocks to work benches" was compensable work. *Integrity Staffing Solutions, Inc. v. Busk*, 134 S.Ct. 513, 516 (2014). "These decisions provoked a flood of litigation," and Congress responded with the Portal-to-Portal Act to prevent similar lawsuits. *Id.* at 516-17.

In *Chambers v. Sears Roebuck & Co.*, the Fifth Circuit noted that "it is well settled that ordinary home-to-work travel is not compensable under the Portal–to–Portal Act in the absence of a contract or custom of compensation that exists between the employer and the employees." 428 F. App'x 400, 410 (5th Cir. 2011). Department of Labor regulations are equally clear that "[n]ormal travel from home to work is not worktime." 29 C.F.R. § 785.35. And the length of the commute is irrelevant. The Fifth Circuit has held that daily commutes up to four hours are not compensable. *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994). Similarly, traveling with co-workers does not convert the commute to compensable work. *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1288 (10th Cir. 2006).

Even if the employer mandates a particular procedure for how employee travel to work, the Portal-to-Portal Act exempts employee compensation for the commute. In *Griffin v. S & B Engineers & Constructors, Ltd.*, 507 F. App'x 377 (5th Cir. 2013), the plaintiffs sought compensation for a mandatory park and ride scheme that involved a daily round-trip that lasted up to an hour. After parking their vehicles at a remote lot, the plaintiffs were required to walk through turnstiles, scan their identification badges, and board buses to drive to a plant. *Id.* at 378-

79. Rejecting the claims, the Fifth Circuit held "the travel time is not compensable under the FLSA, as it constitutes ordinary home-to-work-and-back travel." *Id.* at 382.

Conditionally certifying a class of nonactionable claims would be a waste of the Court's and the parties' resources. Accordingly, the Court should, in its discretion, decline to conditionally certify the class.

2. Plaintiff's bonus claim is not actionable as a matter of law.

Plaintiff also claims that he received bonuses that were not included in his overtime calculations. The only evidence offered by Scheve and his declarants is the statement that they received "performance and safety bonuses as part of our compensation." He has not, and cannot, point to a document describing a bonus program or setting forth criteria for earning a bonus.

The FLSA expressly provides that discretionary bonuses are not required to be included in overtime calculations. 29 U.S.C. § 207(e)(3)(a). Texas Pride has not paid any bonuses pursuant to a formal plan and has not promised any bonuses. The bonuses paid by Texas Pride were discretionary.

3. The potential class members are not similarly situated to one another in relevant respects.

Plaintiff has also not demonstrated that the proposed class members are similarly situated. To meet this requirement, he must show that the proposed class members are not just similarly situated, but that they are similarly situated "in relevant respects *given the claims and defenses asserted*." *Parker*, 2017 WL 1550522, at *8 (emphasis added). He has not done so.

Resolution of the proposed class members' claims would require individualized inquiries into essential factual issues that would defeat the purpose of the collective action procedure. *See Caballero v. Kelly Servs., Inc.*, 2015 WL 12732863 (S.D. Tex. Oct. 5, 2015) (denying motion for

conditional certification); *Dudley v. Tex. Waste Sys., Inc.*, 2005 WL 1140605 (W.D. Tex. May 16, 2005).

Plaintiff's proposed off-the-clock class claim related to the commute would require several individualized inquiries. Each plaintiff would need to show how much he actually worked in order to demonstrate that Texas Pride violated the FLSA and to prove damages. Plaintiff's own evidence shows that this would be an individual inquiry. In fact, the two crew members on the same shift had a different experience. First, the evidence is undisputed that only one of the two crew members on a shift would drive the pickup truck. Second, the evidence is undisputed that only one of the two crew members on the night shift participated in the daily conference call. The crew member who participated in the call was paid from the beginning of his shift at the frac site until 7:30 a.m.—meaning that he was paid for his commute at the end of the shift and paid more than required under the FLSA. *See* Ex. A, ¶ 12; *see also* Decl. of Daniel Scheve, Doc. 17-1 at ¶ 11. The bottom line is that the two crew members on the same shift were not similarly situated.

There is no common evidence that would allow the Court to collectively determine liability to an entire class of opt-in plaintiffs. Rather, each plaintiff would have to introduce separate, unique evidence to demonstrate how much he worked in order to prove his case. *See Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379 (5th Cir. 2019) ("Plaintiffs must prove four elements to make their *prima facie* case: '(1) that there existed an employer-employee relationship during the unpaid overtime periods claimed; (2) that the employee engaged in activities within the coverage of the FLSA; (3) that the employer violated the FLSA's overtime wage requirements; and (4) the amount of overtime compensation due.'"). This sort of individualized inquiry is not appropriate for class treatment. Courts have denied conditional

certification where, as here, the overtime claims of proposed class members require individualized proof, holding that the putative opt-in plaintiffs are not similarly situated in relevant respects. Because the alleged wrongdoing in this case is a collection of "discrete FLSA violations," collective treatment of the claims will not promote judicial efficiency. *See Franklin v. HCA Mgmt. Services, L.P.*, 2016 WL 7744407, at *4 (N.D. Tex. Dec. 19, 2016), *recommendation adopted*, 2017 WL 149984 (N.D. Tex. Jan. 13, 2017) (denying motion for conditional certification where plaintiffs "only demonstrated claims that are predicated on discrete FLSA violations, i.e. 'purely personal' circumstances"). This sort of individualized inquiry does not warrant class treatment.

B. Equitable Tolling Is Not Appropriate.

In an FLSA collective action, the limitations period for an opt-in plaintiffs runs from the date on which that plaintiff files a written consent to join the suit. 29 U.S.C. § 256; *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 916–17 (5th Cir. 2008). The FLSA does not provide for tolling while a court considers whether or not to certify a case as a collective action. "Rather, Congress 'expressed concern that an opt-in plaintiff should not be able to escape the statute of limitations bearing on his cause of action by claiming that the limitations period was tolled by the filing of the original complaint.'" *McKnight v. D. Houston, Inc.*, 756 F. Supp. 2d 794, 808 (S.D. Tex. 2010).

Although federal statutes of limitations are generally presumed to be subject to equitable tolling, "the Fifth Circuit takes a strict view of the FLSA's provision that statute of limitations run from the opt-in date, and courts cannot change the terms of the statute unless warranted by extraordinary circumstances." *Mejia, v. Bros. Petroleum, LLC*, 2014 WL 3853580, at *1 (E.D. La. Aug. 4, 2014). "Equitable tolling is a narrow exception that should be applied sparingly." *Sandoz v. Cingular Wireless, LLC*, 700 F. App'x 317, 320 (5th Cir. 2017). Indeed, the doctrine

"applies only in rare and exceptional circumstances." *Teemac v. Henderson*, 298 F.3d 452, 457 (5th Cir. 2002). For the equitable tolling to apply, the party invoking the doctrine must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Sandoz*, 700 F. App'x at 320. Courts most often grant equitable tolling where, unlike here, "the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Teemac,* 298 F.3d at 457. The doctrine may also apply when, again unlike here, "despite all due diligence, a plaintiff is unable to discover essential information bearing on the existence of his claim." *Pacheco v. Rice*, 966 F.2d 904, 906–07 (5th Cir. 1992). The party seeking equitable tolling bears the burden of proof. *Teemac*, 298 F.3d at 457.

The time between the filing of a motion for conditional certification and a court's ruling on that motion does not constitute a rare or exceptional circumstance, and it is not sufficient grounds for application of equitable tolling. Indeed, "inevitable court delays are part of routine litigation which, by definition, do not equate with extraordinary circumstances." *Robinson v. RWLS, LLC*, 2017 WL 1535072, at *2 (W.D. Tex. Mar. 14, 2017) (denying request for equitable tolling in FLSA case); *see also Sandoz*, 700 F. App'x at 321 (holding in FLSA case that "protracted litigation" did not justify equitable tolling). As explained by one court, "Congress did not provide for tolling while a court considers whether to certify a case as a collective action." *Lee v. Metrocare Services*, 980 F. Supp. 2d 754, 770 (N.D. Tex. 2013). Accordingly, "[c]ourts in the Fifth Circuit regularly deny motions for equitable tolling when the only justification provided is the delay in deciding a motion for conditional class certification." *Espinosa v. Stevens Tanker Div., LLC*, 2016 WL 4180027, at *4 (W.D. Tex. Aug. 5, 2016) (denying request for equitable tolling).

C. Plaintiff's Proposed Notice and Procedure Are Improper.

As explained above, conditional certification is not warranted in this case. If, however, the Court grants conditional certification, the Court should revise Plaintiff's proposed notice and reasonably limit his proposed opt-in procedure. Limitations on the content and extent of communications with putative plaintiffs are encouraged. In *Hoffman-La Roche*, the Supreme Court recognized that judicial oversight can prevent potential misuse of collective actions. *Id.* at 171–72. The Supreme Court also cautioned that notice procedures "must be scrupulous to respect judicial neutrality." *Id.* at 174. Here, Plaintiff's proposed notice and opt-in procedure are improper for several reasons. Plaintiff essentially asks the Court's permission to engage in a well-funded, multi-stage strategy to promote the lawsuit—more like a political campaign than simple notice.

1. Dissemination of the notice should be limited to mail, email, and a website.

Plaintiff asks that the proposed notice and consent forms be sent to potential plaintiffs by (1) mail, (2) email, (3) text message, and (4) Facebook and/or LinkedIn, and ask for court approval to maintain a website dedicated to the case. This request is unreasonable. Texas Pride is not opposed to notice being distributed by first-class mail and email or posting on a dedicated website. But Plaintiff has not articulated any reason why these three methods are not sufficient to inform the potential plaintiffs of their right to join this suit. For instance, he has not shown that potential plaintiffs cannot receive notice by mail or email. Accordingly, the Court should order distribution by only first-class mail and email. *See Furlow v. Bullzeye Oilfield Service, LLC*, 2016 WL 7616704, at *3 (W.D. Tex. May 4, 2016) (denying email and texting); *Alverson v. BL Restaurant Operations LLC*, 2018 WL 1324952, at *2 (W.D. Tex. Mar. 12, 2018) (finding delivery of notice by text message "unwarranted at this juncture"); *Aquirre v. Tastee Kreme #2*,

Inc., 2017 WL 2999271, at *9-11 (S.D. Tex. April 13, 2017) (denying request to send notice via text message).

Defendant also objects to distribution of notice by Facebook and/or LinkedIn. Plaintiff has not shown that distribution by first-class mail and email (and texting, if approved by the Court) is insufficient to accomplish a reasonable notice under *Hoffmann-La Roche.* The Supreme Court recognized the district courts' discretion in providing notice is not "unbridled," and cautioned that notice "is distinguishable in form and function from the solicitation of claims." 493 U.S. at 174. Moreover, Plaintiff has not explained how it would direct the communication to only potential plaintiffs on Facebook and/or LinkedIn.

In determining what court-approved notice is appropriate, the Court should also know that Plaintiff's counsel has been advertising this case on its website for months. The website https://morelandlaw.com/cases/texas-pride-fuels-ltd/ provides a description of the case, includes a link to Plaintiff's Complaint and other pleadings, and provides "status updates."

2. Defendant should not be required to post a notice.

Plaintiff seeks an order requiring Texas Pride to "post the [notice] . . . at each of its places of work." Not only that, Plaintiff's proposed order would require Texas Pride to file an advisory with the court indicating the location of the posting and even take photographs of each posting. Numerous courts have rejected invitations to force a defendant to post a notice of an FLSA lawsuit at its place of business. As a threshold matter, "notice to the potential class members, rather than also posting them at Defendants' offices, is sufficient to provide the potential opt-in plaintiffs with notice of the suit." *Barnett v. Countrywide Credit Indus., Inc.*, 2002 WL 1023161, at *2 (N.D. Tex. May 21, 2002); *Roche v. S-3 Pump Service, Inc.*, 2015 WL 4164802, *3 (W.D. Tex. July 9, 2015) (denying posting); *Villarreal v. St. Luke's Episcopal Hosp.*, 751 F. Supp. 2d 902, 920 (S.D. Tex. 2010) (denying posting); *Martinez v. Cargill Meat Solutions*, 265 F.R.D.

490, 500-501 (D. Neb. 2009) (denying posting because "[t]here is not evidence personal mailing will be an unreliable means of delivering notice to the putative plaintiffs").

Courts also generally refuse to require defendants to post a notice at a worksite because doing so appears punitive. *See, e.g., Mark v. Gawker Media LLC*, 2014 WL 5557489, at *4 (S.D.N.Y. Nov. 3, 2014) (refusing to require defendants to post notice materials on their websites because it had "the potential to appear punitive" and noting that "the incremental chance that potential plaintiffs who do not otherwise receive notice would see it and become aware of their rights was small").

3. Defendant should not be required to disclose telephone numbers.

Plaintiff requests that the Court order Defendant to disclose "all known addresses, all email addresses, and all telephone numbers (home, mobile, etc.)" for potential plaintiffs. Names and last-known addresses are sufficient to ensure the potential plaintiffs receive notice of this case. Courts have repeatedly held that producing individuals' phone numbers unnecessarily invades those individuals' privacy. *See, e.g., Garcia v. TWC Admin., LLC*, 2015 WL 1737932, at *4 (W.D. Tex. Apr. 16, 2015) (noting that request to produce phone numbers was "inappropriate at this stage of the case"); *Leyva v. 35 Bar & Grill, LLC*, 2015 WL 5751638, at *5 (W.D. Tex. Sept. 22, 2015) (denying request for telephone numbers at the notice stage but ordering production of names and last known physical addresses); *Rousseau v. Frederick's Bistro, Ltd.*, 2010 WL 1425599, at *3 (W.D. Tex., April 7, 2010 (requiring production of names and addresses, but not telephone numbers); *Nguyen v. Versacom, LLC*, 2015 WL 1400564, at *13 (N.D. Tex. Mar. 27, 2015) (concluding disclosure of prospective class members' telephone numbers is outweighed by their privacy interests). Plaintiff has not offered any reason why names and last-known addresses would be insufficient, so the Court should not require Defendant to produce telephone numbers.

4. Defendant's position should be adequately represented in the notice.

Plaintiff's proposed notice also fails to fully describe Defendant's position in this matter. To ensure that the notice is fair and accurate, Texas Pride requests that the notice include the following language: "Defendant denies the allegations in the lawsuit and contends that it has not failed to pay its employees any wages they are due." *See Gerlach v. Wells Fargo & Co.*, 2006 WL 824652, at *4 (N.D. Cal. March 28, 2006) (rejecting plaintiffs' description of lawsuit that failed to note that defendants denied wrongdoing).

5. The date in the notice should be three years prior to the approval date.

Defendant objects to the class period requested by Plaintiff. The notice documents proposed by Plaintiff refer to a class period beginning on "October 23, 2016." Consistent with numerous decisions from this Court, the notice should refer to a class period covering the three years before the date the Court approves the notice. *See, e.g. Hobbs v. Petroplex Pipe & Construction, Inc.*, 2017 WL 10676595, at *4 (W.D. Tex. March 31, 2017).

6. The notice should advise of potential liability for costs.

Defendant requests that the notice advise potential plaintiffs that they may be liable for costs if judgment is rendered in favor of the company. Defendant proposes the following language: "If judgment is rendered in favor of Texas Pride, the Court may tax certain statutory costs against the unsuccessful workers." *Hobbs*, 2017 WL 10676595, at *4-5.

IV. CONCLUSION

For the foregoing reasons, Defendant requests that the Court deny Plaintiff's Motion. If the Court grants the Motion in whole or in part, Defendant requests that that the Court modify Plaintiff's proposed notice and notice procedure as described above. Finally, Defendant requests any and all other and further relief, at law or in equity, to which it is justly entitled.

Respectfully submitted,

/s/ John B. Brown

John B. Brown
Texas Bar No. 00793412
john.brown@ogletreedeakins.com
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Preston Commons, Suite 500
8117 Preston Road
Dallas, Texas 75225
Telephone: 214-987-3800
Facsimile: 214-987-3926

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2020, I electronically filed the foregoing with the Clerk of the Court using the Court's CM/ECF system, which will send notification of the filing to all counsel of record.

/s/ John B. Brown
John B. Brown

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