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 REPLY IN SUPPORT OF HIS MOTION FOR CONDITIONAL CERTIFICATION OF COLLECTIVE ACTION AND JUDICIALLY-SUPERVISED NOTICE UNDER FLSA SECTION 216(b)

1. **The bulk of Defendant's opposition is merits-based and therefore irrelevant.**

Defendant presents a declaration of its Operations Manager to argue that "Plaintiff's claims are simply without merit, and there is no reason for the Court to certify a class of similarly flawed claims." Dkt. 19 at 1. But, as this Court has held, an "argument against conditional certification [that] goes to the merits of Plaintiff's claims . . . is . . . irrelevant to the question of collective treatment." *Mendoza v. AFO Boss, LLC*, 402 F. Supp. 3d 355, 360 (W.D. Tex. 2019); *Harris v. Pel-State Bulk Plant, LLC*, MO:17–CV–00096–RAJ, 2018 WL 2432963, *3 (W.D. Tex., January 5, 2018).

Rather, the inquiry is solely whether Plaintiff has presented "substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination." *Burton v. Agility Energy, Inc.*, MO:17-CV-00204-DC, 2018 WL 2996909, at *2 (W.D. Tex. May 4, 2018) (*citing Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995). Plaintiff has presented more than "substantial allegations" through his Complaint and

declaration testimony. Dkt. 1, Dkts. 17-1, 17-2, 17-3, 17-4.[1] Even assuming, *arguendo*, that Defendant's merits-based arguments are appropriate, Plaintiff's claims are meritorious.

a. Plaintiff's substantial allegations support an off-the-clock claim.

As for Plaintiff's off-the-clock claims, it is well settled under the "continuous workday," or "whistle to whistle," rule, that compensable time begins when an employee performs his first principal activity or activities of the day, and continues through the performance of the day's last principal activity or activities. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29 (2005); 29 C.F.R. §790.6; *Johnson v. RGIS Inventory Specialists*, 554 F. Supp. 2d 693, 703-704 (E.D. Tex. 2007). "Principal activity or activities" under the FLSA are activities which are an "integral and indispensable part of the principal activities for which the employee is employed." *IBP, Inc*. 546 U.S. at 29-30. The Fifth Circuit has long taken a broad view of an employee's principal activities: they include all of an employee's predominant job responsibilities and any tasks incidental to these responsibilities. *See, e.g., Dunlop v. City Elec., Inc.*, 527 F.2d 394, 399-401(5th Cir. 1976), *citing Mitchell v. Mitchell Truck Line, Inc.*, 286 F.2d 721 (5th Cir. 1961).

On this issue, *Cantu v. Milberger Landscaping, Inc.*, is instructive. 12 F. Supp. 3d 918, 921-22 (W.D. Tex. 2014). In *Cantu*, the plaintiffs—landscape workers—were required to perform safety checks on their company trucks and then load lawnmowers, tools, water, ice, and other equipment onto the vehicle before they left the yard for the day's work. In addition, in the evenings, they would fuel the vehicle and unload refuse, equipment, and other materials from the company vehicle. *Cantu*, 12 F.Supp.3d at 922-23. The *Cantu* court held that the plaintiffs there performed compensable work before and after their shifts, and granted the plaintiffs' motion for

[1] Of course, Defendant may raise this issue at an appropriate point in this case, either at summary judgment or in a motion to decertify the class; and, after the benefit of discovery, Plaintiffs will fully respond at that time. *See, e.g., Pedigo, v. 3003 S. Lamar, LLP*, 666 F. Supp. 2nd 693, 700 (W.D. Tex. 2009).

partial summary judgment (and denied the defendant's motion for summary judgment) on the issue of the compensability of their post-shift travel and work time. *Id.*, 922-23, 924.

Like the plaintiffs in *Cantu*, Plaintiff and the Class Members were similarly not paid for the integral and indispensable pre- and post-shift duties—for the time that they spent working at the service stations (fueling, inspecting, and performing routine maintenance on their company vehicles and loading water and other items necessary to their work), for any of the drive time between the service station and the job sites, or for all of their time participating in the conference calls. *See* Dkt. 17 at p. 4-5. Further, the operators drive one another to and from the jobsites—this alone has been held to constitute compensable time for the driver. *See, e.g., Thacker v. Halter Vegetation Management, Inc.*, No. 2:13–cv–00378–JMS–WGH, 2015 WL 417713, *10 (S.D. Ind., Jan. 30, 2015) (*citing Bleichner v. Spies Painting & Decorating, Inc.*, No. 08–cv–057–bbc, 2009 WL 281145 (W.D. Wis., Feb. 3, 2009)). In short, Plaintiff has made "substantial allegations" of a classwide off-the-clock overtime violation.

b. Plaintiff's substantial allegations support a claim for failure to include bonus payments in calculating the Class Members' regular rates of pay.

Defendant also argues that Plaintiff "has not, and cannot, point to a document describing a bonus program or setting forth criteria for earning a bonus." Dkt. 19 at p. 8. But Defendant has not pointed to any caselaw or other legal authority providing that "a document describing a bonus program" is a prerequisite for including the bonus in the regular rate of pay. No such requirement exists. Rather, the FLSA presumptively includes all employment compensation in the regular rate calculation. *See* 29 U.S.C. § 207(e) (defining "regular rate" as "*all remuneration for employment* paid to, or on behalf of, the employee" (emphasis added)). Bonus pay may be excluded from the regular rate of pay but only if the employer proves "*both* the fact that payment is to be made *and* the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee

to expect such payments regularly..." 29 U.S.C. § 207(e)(3)(a) (emphasis added). Here, Plaintiff has produced "substantial allegations" that both the fact of and the amount of the bonuses were non-discretionary insofar as they were (1) paid every other week; and (2) were for a set amount of $100. Dkt. 1 ¶¶ 41-43; Dkt. 17-1 ¶ 4; Dkt. 17-2 ¶ 4; Dkt. 17-3 ¶ 4; Dkt. 17-4 ¶ 4.

And although irrelevant, Defendant argues only that the fact of payment was discretionary, stating "[t]he company exercises its discretion as to whether to pay a bonus." Dkt. 19-1. Defendant does not contend that the *amount* of the bonus is discretionary. Regardless, Plaintiff has met his lenient burden for class certification on this claim. *See Minyard v. Double D Tong, Inc.*, NO. MO:16-CV-00313-RAJ, 2017 WL 5640818, at *3 (W.D. Tex. Mar. 22, 2017) (conditionally certifying class of workers who received non-discretionary bonuses not included in regular rate).

2. Plaintiffs are similarly situated even if they suffered different *amounts* of damage.

Defendant's sole relevant *Lusardi*-based objection to Plaintiff's Motion is that the Class Members are not similarly situated to one another because "each plaintiff would have to introduce separate, unique evidence to demonstrate how much he worked in order to prove his case." Dkt. 19 at p 9.[2] However, "the need to determine class members' damages on an individualized basis should not bar conditional certification if the proposed class is otherwise similarly situated." *Miller v. MV Transportation, Inc.*, 331 F.R.D. 104, 111 (W.D. Tex., 2019).

3. Text notice—and disclosure of phone numbers for that purpose—is appropriate.

In spite of Defendant's objection, text message notice is an appropriate form of notice, and ordering production of personal phone numbers to achieve text notice is appropriate, as this Court has recognized. *Mendoza*, 402 F. Supp. 3d at 360. One court in this District has observed "in 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 using email and texts to notify potential class

[2] This is factually inaccurate for the bonus claims—damages for those amounts can be determined classwide by application of a simple formula to the class members' pay records.

members is entirely appropriate." *Vega v. Point Security, LLC*, 2017 WL 4023289, at *4 (W.D. Tex. Sept. 13, 2017) (Austin, M.J.).[3] This is especially true in situations like those here, where remote oilfield workers are away from home for long periods of time and are unlikely to receive mail in a timely manner. Dkt. 17-1 ¶ 15; Dkt. 17-2 ¶ 15; Dkt. 17-3 ¶ 15; and Dkt. 17-4 ¶ 15; *Hines*, 2019 WL 5027021 at *3; *Peery*, 2019 WL 5027126 at *6. Here, "[m]ost, if not all, of the operators at Texas Pride have smart phone cell phones with the ability to receive text messages and view websites." Dkt. 17-1 ¶ 16; Dkt. 17-2 ¶ 16; Dkt. 17-3 ¶ 16; Dkt. 17-4 ¶ 16. Therefore, "[s]ending notice of any collective action via text message will be a very effective way to advise potential class members of this lawsuit and their ability to join." *Id.*[4]

4. Plaintiff does not oppose insertion of Defendant's position on the merits in the notice.

Plaintiff does not oppose the insertion of Defendant's request to include the following sentence in the notice: "Defendant denies the allegations in the lawsuit and contends that it has not failed to pay its employees any wages they are due." Dkt. 19. p. 15.

5. Plaintiff does not oppose the class consisting of individuals employed in the last three years, subject to his request for equitable tolling.

Defendant requests that the notice refer to a class period beginning on the date that is three years prior to the date the Court approves notice. Dkt. 19 p. 15. Plaintiff does not oppose revising the class period, but reiterates his request for equitable tolling and therefore requests that the start of the class period be three years prior to the date Plaintiff filed his motion to conditionally certify a class, which was January 28, 2020. Dkt. 17, pp. 11-12.

[3] *See also Peery v. Nixon Engineering, LLC*, 6:18-CV-00358-ADA-JCM, 2019 WL 5027126, *6 (W.D. Tex. Aug. 29, 2019); *Hines v. Ironclad Energy, LLC*, No. 5:19-cv-00155-OLG, 2019 WL 5027021, *3 (W.D. Tex. Aug. 23, 2019); *Butler v. TFS Oilfield Servs., LLC*, No. 5:16-CV-1150-FB, 2017 WL 7052879, *7 (W.D. Tex. Sept. 26, 2017).

[4] Defendant suggests that multiple forms are unnecessary because "Plaintiff's counsel has been advertising this case on its website for months." Dkt 19. This is not true. The website does not "advertise" this case, does not include any of the notices that Plaintiff has requested authorization to disseminate, and does not solicit class members to join the case. *See* https://morelandlaw.com/cases/texas-pride-fuels-ltd/. The website is not promoted in any way and simply provides updates to the plaintiffs by providing publicly available case filings.

6. Warning class members about the imposition of costs chills class participation and is inappropriate.

Defendant argues that Plaintiff's proposed notice is deficient because it does not warn potential plaintiffs that they might be saddled with taxable court costs should they not prevail in this litigation. Dkt. 19 at p. 15. Courts have rejected inclusion of such language on the ground that it is confusing and inhibits the FLSA's remedial purpose by discouraging participation. *See, e.g., Snead v. EOG Resources, Inc.*, 5:16-CV-1134-OLG, 2017 WL 6302364, at *1 (W.D. Tex. Mar. 2, 2017) (Garcia, C.J.) ("The Court agrees with Plaintiff that this advisory is unnecessary and potentially confusing given the "remote possibility" that such costs will be more than *de minimis* and the likelihood that the advisory would inhibit the FLSA's remedial purpose by discouraging potential plaintiffs from participating in this case.").[5]

[5] *See also Gronefeld v. Integrated Prod. Services, Inc.*, 5:16-CV-55, 2016 WL 8673851, at *7 (W.D. Tex. Apr. 26, 2016) (Pitman, J.) ("[N]otifying potential plaintiffs that they may [be responsible for costs] puts a thumb on the scale of discouraging opting in."); *Ferguson v. Texas Farm Bureau Bus. Corp.*, 6:17-CV-00111, 2017 WL 7053928, at *10 (W.D. Tex. Dec. 11, 2017) (Manske, M.J.) ("This Court finds that including the court costs language is inappropriate."), report and recommendation adopted, 2018 WL 1392704 (W.D. Tex. Mar. 20, 2018) (Pitman, J.).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this the 20th day of February, 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.