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

DANIEL SCHEVE,	§	
Individually and on Behalf of All Others	§	
Similarly Situated,	§	
Plaintiff,	§	
	§	
v.	§	**MO:19-CV-00248-DC-RCG**
	§	
TEXAS PRIDE FUELS, LTD.,	§	
Defendants.	§	

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION AND JUDICIALLY SUPERVISED NOTICE

BEFORE THE COURT is Plaintiff Daniel Scheve's ("Plaintiff") Opposed Motion for Certification of Collective Action and Judicially Supervised Notice Under FLSA Section 216(b) ("Motion for Conditional Certification"). (Doc. 17). This case is before the undersigned through an Order pursuant to 28 U.S.C. § 636 and Appendix C of the Local Court Rules for the Assignment of Duties to United States Magistrate Judges. (Doc. 7). The undersigned has authority to enter this order pursuant to 28 U.S.C. § 636(b)(1)(A). *See, e.g.*, *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 v. Vaughn Energy Servs., LLC*, No 2:15–CV–93, 2015 WL 5920034, at *1 (S.D. Tex. Oct. 6, 2015) (same). After reviewing the record and relevant law, the Court **GRANTS IN PART** Plaintiff's Motion for Conditional Certification. (Doc. 17).

I. BACKGROUND

On October 23, 2019, Plaintiff filed his Original Complaint against Defendant Texas Pride Fuels, Ltd. ("Defendant"). (Doc. 1). Plaintiff sues for unpaid wages pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et. seq.*, and the New Mexico Minimum Wage

Act ("NMMWA"), NMSA § 50–4–19, *et. seq*. *Id*. at 1. Defendant is a fuel distribution company that provides on-site fueling services for oil-and-gas fracturing operations in Texas, New Mexico, Louisiana, and Oklahoma. *Id*. at 5. Plaintiff claims he works for Defendant as an Automated Fuel System Operator. (Doc. 17-1 at 1). Plaintiff alleges that Defendant violated the FLSA and the NMMWA by failing to pay its automated fuel systems operators (or "fuel technicians") for their preparatory and concluding work. (Doc. 1 at 2). Additionally, Plaintiff asserts that Defendant pays its employees non-discretionary safety and performance bonuses that are improperly excluded from the calculation of overtime payment calculations. *Id*.

On January 28, 2020, Plaintiff filed the instant Motion for Conditional Certification. (Doc. 17). Plaintiff seeks conditional certification of the following class:

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

Id. at 5. Additionally, Plaintiff seeks court approval of his preferred method and form of notice. *Id*. at 9. Finally, Plaintiff requests that the Court toll the statute of limitations from the date the instant Motion was filed until the notice and opt-in period concludes. *Id*. Defendant filed a response on February 17, 2020. (Doc. 19). On February 20, 2020, Plaintiff filed a reply. (Doc. 20). Accordingly, this matter is now ready for disposition.

II. LEGAL STANDARD

An employee may bring an action for violations of the minimum wage and overtime provisions of the FLSA either individually or as a collective action on behalf of himself and "other employees similarly situated." 29 U.S.C. § 216(b). Unlike a class action filed under Federal Rule of Civil Procedure 23(c), a collective action under § 216(b) provides a procedure for plaintiffs to "opt-in," i.e., affirmatively notify the court of their intention to become parties to the collective action. *Roussell v. Brinker Int'l, Inc.*, 441 F. App'x 222, 225 (5th Cir. 2011) (citing

Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 916 (5th Cir. 2008)). Although the Fifth Circuit has declined to adopt a specific test to determine when a court should conditionally certify a class or grant notice in a case brought under the FLSA, the majority of courts within the Fifth Circuit have adopted the *Lusardi* two-stage approach, after *Lusardi v. Xerox Corp*., 118 F.R.D. 351 (D.N.J. 1987).[1]

The two stages of the *Lusardi* approach are the "notice stage" and the "decertification stage." *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995), *overruled on other grounds, Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). At the notice stage, the district court "determines whether the putative class members' claims are sufficiently similar to merit sending notice of the action to possible members of the class." *Acevedo v. Allsup's Convenience Stores, Inc*., 600 F.3d 516, 519 (5th Cir. 2010). "Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in 'conditional certification' of a representative class." *Mooney*, 54 F.3d at 1214. If the court finds that the putative class members are similarly situated, then conditional certification is warranted and the plaintiff will be given the opportunity to send notice to potential class members. *Id*. After the class members have opted in and discovery is complete, the defendant may then file a decertification motion—the second stage of the *Lusardi* approach—asking the court to reassess whether the class members are similarly situated. *Id*. At that point, the court will fully evaluate the merits of the class certification. *Id*.

III. DISCUSSION

1. *See, e.g.*, *Vanzzini v. Action Meat Distribs., Inc.*, 995 F. Supp. 2d 703, 719 (S.D. Tex. 2014) (applying *Lusardi*); *Mateos v. Select Energy Servs., LLC*, 977 F. Supp. 2d 640, 643 (W.D. Tex. 2013); *Tice v. AOC Senior Home Health Corp*., 826 F. Supp. 2d 990, 994 (E.D. Tex. 2011); *Marshall v. Eyemasters of Tex., Ltd*., 272 F.R.D. 447, 449 (N.D. Tex. 2011).

The Court's analysis here need only address the first stage of the *Lusardi* inquiry. 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." *Tolentino v. C & J Spec–Rent Servs., Inc.*, 716 F. Supp. 2d 642, 647 (S.D. Tex. 2010). During the notice stage, the court makes its decision "usually based only on the pleadings and any affidavits which have been submitted[.]" *Id*. 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." *Mooney*, 54 F.3d at 1214 n. 8. "FLSA collective actions are generally favored because such actions reduce litigation costs for the individual plaintiffs and create judicial efficiency by resolving in one proceeding common issues of law and fact arising from the same alleged activity." *Tolentino*, 716 F. Supp. 2d at 646.

Defendant argues that the proposed class should not be conditionally certified because Plaintiff's claims against Defendant are "simply without merit[] and there is no reason for the Court to certify a class of similarly flawed claims." (Doc. 19 at 1). Additionally, Defendant argues that the proposed class members are not similarly situated to one another because they worked at various locations, on different shifts, had different duties, and were paid in various ways. *Id*. Further, Defendant argues that an individualized inquiry would be necessary regarding the number of hours worked and the class members' duties, such that a collective action would be inefficient. *Id*. at 9–10.

A. Merits-Based Arguments Are Irrelevant at the Conditional Certification Stage

First, Defendant argues that Plaintiff's Motion for Conditional Certification should fail because Plaintiff's claims are "simply without merit . . . ." (Doc. 19 at 1). Defendant asserts that

Plaintiff's claims are untenable based on the Portal-to-Portal Act and because employers are not required to include discretionary bonuses in the calculation of overtime. *Id*. The Court finds that these argument go directly to the merits of Plaintiff's claims and are therefore irrelevant to the question of collective treatment. Accordingly, the Court finds that any disputes regarding the application of the Portal-to-Portal Act or the inclusion of bonuses in overtime pay do not preclude conditional certification.

B. Existence of Aggrieved Co-Workers

In Support of the Motion for Conditional Certification, Plaintiff submits his own declaration and the declarations of opt-in plaintiffs Ronald D. Ezell, Abram Terry, and Andrew Kirschbaum. (Docs. 17-1, 17-2, 17-3, 17-4). Plaintiff attests he is a current employee of Defendant and has been employed by Defendant for the majority of time between December 2014 and the present. (Doc. 17-1 at 1). Plaintiff asserts he works for Defendant as an Automated Fuel Systems Operator (formerly called a "Fuel Technician") in the Permian Basin, "primarily around Carlsbad, New Mexico and Pecos, Texas." *Id*. Plaintiff claims Defendant pay him and other Automated Fuel Systems Operators on an hourly basis and pay "time and a half of [their] hourly rate for some, but not all, of those hours worked over forty." *Id*. at 2. However, Plaintiff asserts that Defendant pays their Automated Fuel Systems Operators performance and safety bonuses which are improperly excluded from the calculation of overtime pay. *Id*.

Plaintiff further attests that Defendant pays him and other Automated Fuel Systems Operators for time driving from its yard in Springtown, Texas to Midland, Texas for the "start of his hitch." *Id*. at 3. However, Plaintiff claims Defendant does not compensate the Automated Fuel Systems Operators for work performed preparing for a shift, such as refueling, inspecting, and performing maintenance on the company vehicles. *Id*. at 4. Plaintiff also states Defendant

does not compensate Automated Fuel Systems Operators for time spent driving to the individual job locations. *Id*. Finally, Plaintiff asserts that Defendant fails to compensate its Automated Fuel Systems Operators for conference calls that occur after the night shift and often times as the Automated Fuel Systems Operator is on his or her way home from work. *Id*. The other declarants allege they were subject to the same policies Plaintiff describes. (*See* Docs. 17-2, 17-3, 17-4).

At the notice stage, a district court may credit a plaintiff's assertion that aggrieved individuals exist where "there is a factual nexus that binds the named plaintiffs and potential class members as victims of a particular alleged policy or practice." *Pruneda v. Xtreme Drilling & Coil Servs., Inc.*, No. 5:16-CV-91-DAE, 2016 WL 8673853, at *8 (W.D. Tex. April 14, 2016) (quoting *Black v. Settlepou, P.C.*, No. 3:10–CV–1418–K, 2011 WL 609884, at *3 (N.D. Tex. Feb. 14, 2011)). Further, "allegations in pleadings and affidavits are generally sufficient to support a claim for conditional certification" and to establish a sufficient factual nexus to allow notice to potential opt-in plaintiffs. *Id*. (quoting *Pacheo v. Aldeeb*, No. 5:14–CV–121–DAE, 2015 WL 1509570, at *3 (W.D. Tex. Mar. 31, 2015)). The undersigned finds that the declarations provide the necessary factual showing that other aggrieved individuals exist.

C. Aggrieved Co-Workers Similarly Situated to Plaintiff

The declarations of Plaintiff, Mr. Ezell, Mr. Terry, and Mr. Kirschbaum all assert that the declarants either work or worked for Defendant as Automated Fuel System Operators. (Docs. 17-1, 17-2, 17-3, 17-4). The declarants claim that the Automated Fuel System Operators' job is to supply fuel to oilfield fracturing operations across the Permian Basin. *Id*. All of the declarants allege they were paid by the hour and were paid overtime wages for some but not all of those hours worked over forty. *Id*. Additionally, the declarants state that Defendant does not include performance and safety bonuses in the calculation of their overtime pay. *Id*. Finally, the

declarants attest that although they commonly stop and perform work at service stations while traveling to and from location, Defendant fails to compensate them for this time. *Id*.

At the notice-stage under *Lusardi*, a plaintiff need only provide substantial allegations that class members were victims of a single decision, policy, or plan. *Pedigo v. 3003 S. Lamar, LLP*, 666 F. Supp. 2d 693, 698 (W.D. Tex. 2009). A plaintiff is not required to show that class members are identical. *Walker*, 870 F. Supp. 2d at 468. Rather, plaintiffs must show that class members are "similarly situated . . . in relevant respects given the claims and defenses asserted." *Id.* at 466.

Defendant argues that the Court should not conditionally certify the proposed class because the class members are not similarly situated and determining liability and damages would require an individualized analysis of each plaintiff's situation. (Doc. 19 at 1–2). Defendant asserts that each plaintiff would need to show how much he or she actually worked, and the amounts would vary between each plaintiff. For example, Defendant points out that only one crew member on the night shift participated in the daily conference call. *Id*. at 9.

The Court finds these arguments insufficient to defeat Plaintiff's Motion for Conditional Certification. It is likely that proof of Plaintiff's FLSA allegations will require some individualized analysis of each class member's time records and the tasks performed. However, Plaintiff has provided sufficient evidence, at this stage, that the proposed class members shared largely similar job duties and were victims of the same pay policy. As Plaintiff correctly points out in his reply, "the need to determine class members' damages on an individualized basis should not bar conditional certification if the proposed class is otherwise similarly situated." (Doc. 20 at 4) (citing *Miller v. MV Transp., Inc.*, 331 F.R.D. 104, 111 (W.D. Tex. 2019)). At this

stage, Plaintiff has made the "modest factual showing" required to demonstrate that he and other potential plaintiffs are similiarly situated. *See Pedigo*, 666 F. Supp. at 698.

D. Similarly Situated, Aggrieved Individuals Want to Opt-In

Plaintiff attests that "in getting to know other operators . . . I believe there are many current and former operators . . . who would join a collective action to try to recover their unpaid off-the-clock overtime compensation from [Defendant] . . . " (Doc. 17-1 at 5). Further, Plaintiff attaches the declarations of three opt-in plaintiffs who also attest that others are interested in joining this suit. (Docs. 17-2, 17-3, 17-4). Considering the lenient standard at this stage, the Court finds Plaintiff has made a sufficient showing that others wish to join this suit. *See, e.g.*, *Dyson v. Stuart Petroleum Testers, Inc.*, 308 F.R.D. 510, 514 (W.D. Tex. 2015); *Pacheco v. Aldeeb*, 5:14-CV-121-DAE, 2015 WL 1509570, at *8 (W.D. Tex. Mar. 31, 2015) (two declarations attesting "many" current and former employees would join lawsuit found to be a sufficient basis for conditional certification); *Reid v. Timeless Restaurants, Inc.*, 3:09-CV-2481-L, 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); *Tolentino*, 716 F. Supp. 2d at 653 (finding two declarations of similarly situated individuals and complaint sufficient to demonstrate the existence of employees who would opt-in).

In sum, Plaintiff has demonstrated: "(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." *Tolentino*, 716 F. Supp. 2d at 647. Accordingly, the Court conditionally certifies the following class:

> **All hourly paid fuel technicians and automated fuel system operators employed by Defendant in the three years preceding the issuance of the Order conditionally certifying this class.**

E. Equitable Tolling

Plaintiff seeks equitable tolling of the statute of limitations from the date of the filing of the instant Motion for Conditional Certification and the Court's ruling on said Motion. (Doc. 20 at 12–13). Plaintiff argues equitable tolling is warranted because he has diligently pursued his claims and because he did not oppose Defendant's request for a fourteen-day extension to respond to the instant Motion. *Id*. Defendant argues Plaintiff has failed to meet his burden of showing that extraordinary circumstances exist justifying equitable tolling. (Doc. 19 at 10–11).

A district court has discretion regarding whether to equitably toll the statute of limitations in an FLSA case when the plaintiffs demonstrates that "he has been pursuing his rights diligently, . . . and . . . some extraordinary circumstance [applies]." *Sandoz v. Cingular Wireless, L.L.C.*, 700 F. App'x 317, 320 (5th Cir. 2017). "[T]he Fifth Circuit takes a strict view of the FLSA's provision that statute of limitations run from the opt-in date, and the court cannot change the terms of the statute unless warranted by extraordinary circumstances." *Mejia v. Bros. Petroleum, LLC*, No. CIV.A 12-2842, 2014 WL 3853580, at *1 (E.D. La. Aug. 4, 2014). Because Plaintiff is unable to articulate any extraordinary circumstance warranting equitable tolling, the Court shall **DENY** Plaintiff's request for equitable tolling.

F. Method of Notice

Plaintiff requests the Court approve the proposed notice and consent forms attached to the Motion for Conditional Certification. (Docs. 17-5, 17-6, 17-7). Defendant objects to

Plaintiff's proposed method of notice on several grounds. The Court finds that the parties should confer in an attempt to agree upon the content and form of notice as well as an appropriate manner for distributing it.

IV. CONCLUSION

For the foregoing reasons, the undersigned **GRANTS IN PART** and **DENIES IN PART** Plaintiff's Motion for Conditional Certification. (Doc. 17).

Further, the parties are **ORDERED** to confer in an attempt to agree upon the content and form of notice as well as an appropriate manner for distributing it. (Doc. 17).

If the parties cannot agree on the content, form, and distribution of notice, Defendant is **ORDERED** to file any remaining objections to Plaintiff's proposed notice on or before **June 12, 2020**.

It is further **ORDERED** that Plaintiff's request for equitable tolling is **DENIED**. (Doc. 20).

Finally, the parties are **ORDERED** to submit scheduling recommendations regarding the remaining proceedings at the conclusion of the notice period or no later than **October 16, 2020**.

It is so **ORDERED**.

SIGNED this 4th day of June, 2020.

RONALD C. GRIFFIN
UNITED STATES MAGISTRATE JUDGE