UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

JONATHAN FELPS, Individually and
On Behalf of All Others Similarly Situated,

Plaintiffs,

v. No. CV 18-811 MV/GJF

MEWBOURNE OIL COMPANY, INC.

Defendant.

ORDER

THIS MATTER comes before the Court on Plaintiff's Motion to Approve Rule 23 Notice Plan [Doc. 140] and Defendants' Motion to Approve Class Notice [Doc. 141]. With their respective motions, the parties have submitted different versions of a "Notice Regarding Release" to be sent to individuals who signed a Settlement Agreement and Release (the "Release") with Mewbourne Oil Company ("MOC"). For the reasons set forth herein, the Court will approve Plaintiff's version of the Release Notice.

In a Memorandum Opinion and Order entered on July 15, 2020, the Court held that, "in the event that this Court grants certification of a class for purposes of Plaintiff's NMMWA claims, any individual who signs a Release will be notified of the right to invalidate that Release and to participate in this action for purposes of pursuing NMMWA claims against Defendants." Doc. 121 at 16-17. Thereafter, in a Memorandum Opinion and Order entered on November 16, 2020, the Court granted Plaintiff's request for class certification, and certified the following class: "all of Defendants' current and former Lease Operators who, in at least one workweek between June 19, 2009 and June 21, 2017, were paid a salary with no overtime and who worked for Defendants in New Mexico." Doc. 134 at 33. The Court further ordered Defendants to

"notify any individual who signed a Release of the right to invalidate that Release and participate in this action for purposes of pursuing NMMWA claims against Defendants." *Id.*

The parties agree that the Class Action Administrator should send both the Rule 23 Notice and the Release Notice and agree as to the content of the Rule 23 Notice. Doc. 140 at 3-4, Doc. 141 at 3. In their respective motions, the parties request that the Court approve the Rule 23 Notice attached as Exhibit A to Plaintiff's Motion. Doc. 140-1. The parties, however, disagree as to the timing of the Release Notice and as to the content of that Release Notice. Doc. 140 at 6-7, Doc. 141 at 1-3. Specifically, the questions before the Court are whether, as Defendants contend, the Release Notice should be sent to individuals who signed a Release *before* the Rule 23 Notice is sent, and whether the Release Notice should advise individuals who signed a Release that they must (1) advise defense counsel whether they wish to challenge the enforceability of the Release, (2) prove to this Court that the Release is invalid, and (3) if their challenge to the Release is successful, return to Defendants the payment that they received in exchange for signing the Release. Doc. 140-2. As set forth herein, the Court agrees with Plaintiffs that neither the Court's previous orders nor relevant case law requires that these questions be answered in the affirmative.

I. Timing of the Release Notice

Defendants argue that the Release Notice should be sent to individuals who signed a Release first (before the Rule 23 Notice is sent to anyone), and that these individuals be given "a time certain by which they must apply to the Court for relief from the Release." Doc. 141 at 7. Defendants further argue that, only once that time has expired and the Court has determined whether any individuals are eligible to become part of the class, should the Rule 23 Notice then be "sent out to all potential class members, including those Releasors who successfully

invalidated their Release." *Id.* Defendants thus seek to delay the distribution of the Rule 23 Notice to any class member until the Court has determined "the proper standing of each Releasor." *Id.*

The Court does not agree that delaying notice to class members of their rights regarding this action is necessary to "prevent" individuals who do not seek to invalidate their releases from "litigat[ing] claims specifically encompassed by" their Releases. *Id.* at 6 (quoting *Wagner Equip. Co. v. Wood*, 938 F. Supp. 2d 1203, 1210 (D.N.M. 2013)). As Defendants concede in their Motion, in support of its Order directing Defendants to notify individuals of their right to invalidate their Releases, this Court cited to cases holding "that the appropriate solution is to . . . include a statement *in the class-action notice* stating that the court will entertain applications to void any releases previously signed." Doc. 121 at 16 (quoting *Tolmasoff v. Gen. Motors, LLC*, No. 16-cv-11747, 2016 WL 3548219, at *15 (E.D. Mich. June 30, 2016) (emphasis added)). The Court specifically "adopted this approach here." Doc. 121 at 16. Defendants have not asked the Court to reconsider its ruling and have provided no basis for the Court to effectively do so now by ordering the two-step notice process advanced by Defendants. As Plaintiff contends, this "stratified notice procedure . . . effectively relegates the Release Class Members to an opt-in sub-class of employees," which "violates the basic tenet of Rule 23 class certification," and has the potential of confusing individuals who, without the benefit of the information in the Rule 23 Notice, would be forced to "navigate the invalidation process with the Court without the benefit of representation by Class Counsel." Doc. 142 at 2-3.

The Court thus declines to adopt Defendants' proposal for a two-phase notice procedure and instead will adopt Plaintiffs' proposal that the Release Notice be provided simultaneously

with the Rule 23 Notice to "any Class Members who signed a Settlement Agreement and Release in 2019." Doc. 140-5.

II. Content of the Release Notice

Defendants argue that the Release Notice should contain language notifying the individuals who signed a Release that they must "take the affirmative step of expressing a desire to invalidate the Release before that Release can be invalidated." Doc. 141 at 4. Defendants further argue that, because Plaintiff's proposed Release language advises that "you are not required to opt-out of this class merely because you signed the Release," it "erroneously implies that a Releasor who takes no action will in fact participate in this action." *Id*. While the Court agrees that an individual who elects not to invalidate the Release will still be subject thereto and ultimately unable to participate in this lawsuit, the Court does not equally agree that to be accurate, the Release Notice must include the language proposed by Defendants.

The Court ordered that individuals who signed a Release be notified "of the right to invalidate the Release and participate in this action." Doc. 134 at 33. The Court did not equally order that these individuals must decide whether to exercise the right to invalidate the Release immediately upon receipt of the Release Notice or advise Defendants immediately of that decision. The language proposed by Plaintiffs, namely, that "the Court ruled that you have the right to invalidate the Release and participate in this action," Doc. 140-3, comports with the Court's previous Orders. The use of this language does not lead to the inexorable (and faulty) conclusion that an individual who elects not to seek to invalidate the Release will be able to participate in this lawsuit. Rather, for those individuals who elect to stay in the class, Plaintiff's Counsel may move this Court to invalidate the Releases signed by all such individuals or, in the absence of such motion, Defendants may move to dismiss such individuals from this lawsuit.

Defendants further argue that the Release Notice should include language advising individuals who signed a Release that, if they successfully challenge the validity of their Release, they must return the consideration they received in exchange for their signature. Doc. 141 at 5. According to Defendants, New Mexico law requires that a party "tender back the consideration received pursuant to a settlement agreement" to effectively repudiate it. *Id.* at 5 (quoting *Wagner*, 938 F. Supp. 2d at 1210). The Court agrees with Plaintiff that the "tender back" requirement is not appropriate in this context, and that, under New Mexico law, "the rule is not inflexible, and such tender or restoration will not be required where it clearly appears that the equities between the parties can be fully adjusted in the final decree." Doc. 142 at 4 (quoting *Woods v. City of Hobbs*, 408 P.2d 508, 510-11 (N.M. 1965)). "[T]he consideration here is 'money paid' and the amount can be 'credited in partial cancellation of the [Release Class Members' claim].'" Doc. 142 at 4 (quoting *Woods*, 408 P.2d at 511). Further, as Plaintiff contends, any individuals who lack the means to return the payment they received will be prohibited from participating in this action if the Court requires them to return to Defendants any money received. The Court finds that the better course is to offset, "in the final decree," the consideration paid by Defendants against any liability owed to individuals who signed a Release but choose to remain part of the class. *Woods*, 408 P.2d at 511. Accordingly, the Release Notice should advise individuals who signed a Release that "any money recovery you might receive from the Lawsuit may be offset by the amount of money you received for signing the Release." Doc. 140-3.

For these reasons, the Court declines to adopt Defendants' proposed Release Notice, set forth at Doc. 140-2, and instead will adopt Plaintiff's proposed Release Notice, set forth at Doc. 140-3.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Approve Rule 23 Notice Plan [Doc. 140] is **GRANTED** and Defendants' Motion to Approve Class Notice [Doc. 141] is **GRANTED IN PART and DENIED IN PART**, as follows:

1. The Court directs notice to be distributed pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure to members of the Class, which has been certified pursuant to Rule 23(b)(3) as follows:

> All of Defendants' current and former Lease Operators who, in at least one workweek between June 19, 2009 and June 21, 2017, were paid a salary with no overtime and who worked for Defendants in New Mexico.

2. The Court appoints ILYM Group, Inc. to serve as the Class Action Administrator and execute the notice plan set forth in this Order. The Court finds that ILYM has the experience, qualifications, and capabilities to serve as the Class Action Administrator in this case.

3. The Court finds that the notice plan proposed by Plaintiff and described in this Order complies with Rule 23(c)(2)(B) and due process as it constitutes "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Rule 23(c)(2)(B).

4. The Notice complies with Rule 23(c)(2)(B) and due process because the notices and forms are clear and concise and reasonably calculated to adequately apprise the Class of (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

5. Within 14 days of this Order, Defendants shall provide the available email and mailing addresses for Class Members to the Class Action Administrator. Defendants shall clearly designate the Class Members who signed a Settlement Agreement and Release in 2019.

6. On a date no later than 40 days after entry of this Order ("Notice Date"), the Class Action administrator will send the Notice (Exhibit A to Plaintiff's Motion, Doc. 140-1) to all members of the Class ("Class Members") via (1) email to all Class Members for whom Defendants provide an email address and (2) U.S. First Class Mail to all Class Members for whom Defendants provide a valid mailing address. For any Class Members who signed a Settlement Agreement and Release in 2019, the Class Action Administrator shall include with the Notice Plaintiff's proposed Release Notice (Exhibit C to Plaintiff's Motion, Doc. 140-3). The Class Action Administrator shall run the mailing addresses through the United States Postal Service National Change of Address database. The Class Action Administrator shall also track all Notices returned undeliverable and attempt to remail the notice using available forwarding addresses and other reasonable means to reach the Class Members by mail.

7. Within five business days of the Notice Date, Plaintiff shall advise the Court of the Notice Date. Class Members shall have 60 days after the Notice Date to opt-out or exclude themselves from the Class.

8. On or before the Notice Date, Plaintiff shall post the Notice to MewbourneOvertimeLawsuit.com.

9. Non-substantive changes to the notice documents, such as typographical errors, can be made to the notice documents by agreement of the parties without leave of the Court.

DATED this 14th day of October 2021.

MARTHA VÁZQUEZ
United States District Judge