IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

Tillis et al. **PLAINTIFFS**

v. **3:16-CV-287-HTW-LRA**

Southern Floor Covering, Inc., et al. **DEFENDANTS**

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION
AND TO SEND RELEVANT NOTICES TO THE PROPOSED FLSA CLASS

Introduction

Plaintiffs and their co-workers are blue-collar carpet installers who have been paid a $500 weekly "salary" and required to work beyond the maximum hours without overtime in violation of the Fair Labor Standards Act. 29 U.S.C. §§ 206, 207.

The present motion seeks conditional certification solely for the purpose of an initial, Court-supervised notice to the group of potential "opt-in" Plaintiffs. The inquiry under the FLSA at this stage is "fairly lenient," requiring only "substantial allegations" of some significant common issue. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214, n.8 (5th Cir. 1995); *see Harris v. Hinds County*, 3:12-cv-542, (S.D. Miss. February 4, 2014) *available at* https://scholar.google.com/scholar_case?case=8936344778663610955. *See generally* 2 Kearns, Kaufmann & McClelland, *The Fair Labor Standards Act* § 17.III.A, 17-19 et seq. (3d Ed. 2015). There is good reason for such leniency. In contrast to Rule 23, FLSA conditional certification has no impact on the rights of others: "The sole

consequence of conditional certification is the sending of court-approved written notice to employees." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013). And the "wisdom and necessity" of supervised notice to the class "early" is well established. *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170-171 (1989).

The standard is amply met. All of the potential Plaintiffs worked for the same managers under the same unlawful wage and hour policies, as shown in the relevant declarations and exhibits. Thus, as explained herein, the motion should be granted.

Facts

The facts described herein are attested by Melvin Tillis (Exhibit 1) and Teona Rockingham (Exhibit 2), as well as by financial documents relating to all three plaintiffs (Combined Exhibit 3), an opt-in signed by an additional co-worker who wishes to participate (Exhibit 4), as well as the Complaint itself.

Defendant Southern Floor Covering, Inc., is part of an integrated enterprise run primarily by Jeff Matthews, Timmy Keith, and their families (including Steven Keith). The enterprise includes approximately 15-20 employees responsible for installing carpets. Tillis ¶ 26; Rockingham ¶ 23. Plaintiffs worked installing carpets. Tillis ¶ 5; Rockingham ¶ 2.

Carpet installation does not require any special skill or licensing. Installers are hired from temp services, or are hired without any prior training or experience. Tillis ¶ 4-6; Rockingham ¶ 4-5. They are paired with another installer, and both do the same

work, with one assigned as lead and the other as apprentice. Complaint ¶ 23.

Defendants provide all of the tools and materials needed to do the work. This includes investments in vehicles, gasoline, forklifts, warehousing space, and inventory of flooring materials. Plaintiffs make no capital investment. Complaint ¶ 25; Rockingham ¶ 8.

Defendants paid a "salary" of $500-$700 per week to the employees, and issued W-2s to them. Exhibit 3; Tillis ¶ 8, 23; Rockingham ¶ 19-20. Time was not tracked nor time records kept. Tillis ¶ 26; Rockingham ¶ 23. Employees routinely worked lengthy overtime, between 50 and 80+ hours per week. Tillis ¶ 19-22; Rockingham ¶ 14-18. They were not paid time-and-one-half for overtime: their "salary" was irrespective of hours worked. Tillis ¶ 23, 28; Rockingham ¶ 19.

All employees in the prospective class were paid in the same manner - with a "salary" irrespective of hours - and other employees have expressed an interest in joining the suit. Tillis ¶ 31; Exhibit 4 (opt-ins of others).

Discussion

The FLSA sets minimum wages and maximum hours of work. 29 U.S.C. §§ 206, 207. Covered employers must pay covered employees according to these rules, including paying "at a rate not less than one and one-half times the regular rate at which he is employed" for any work "longer than forty hours" in a "workweek." *Id.* If unlawfully denied such pay, Section 16(b) of the FLSA permits an employee to bring

suit against an employer "for and in behalf of himself . . . and other employees similarly situated." 29 U.S.C. § 216(b).

"A suit brought on behalf of other employees is known as a 'collective action.'" *Genesis*, 133 S. Ct. 1523, 1527 (2013). "Collective actions typically proceed in two stages." *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, n.5 (5th Cir. 2008). These are "(1) the notice stage, and (2) the 'opt-in,' 'merits,' or decertification stage." *Harris v. Hinds County*, 3:12-cv-542, (S.D. Miss. February 4, 2014) *available at* https://scholar.google.com/scholar_case?case=8936344778663610955.

The present motion is a request to begin the "notice stage." At the notice stage, a "fairly lenient standard" is applied, requiring only substantial allegations that putative class members share some similarities of situation. *Id.* (quoting *Mooney*, *infra*).

I. The Legal Standard for Conditional Certification

The essential function of this motion is to obtain Court supervision of the notices to be sent to potential "opt-in" Plaintiffs. As the Supreme Court as observed, there is "propriety, if not the necessity, for court intervention in the notice process" which is to be both "accurate and *timely*" such that "it lies within the discretion of a district court to begin its involvement *early*." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170-171 (1989) (emphasis added). "Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." *Id.* at 172.

Such "notice stage" or "conditional" certification is subject to a far less searching inquiry than certification under Rule 23. This is because "Plaintiffs who desire to join in a 'collective action' must 'opt in' to the case and be bound by a judgment, unlike plaintiffs in a Rule 23 class action who must essentially 'opt out.'" *Harris v. Hinds County*, 3:12-cv-542, (S.D. Miss. February 4, 2014). Cases under the FLSA are virtually unique in this regard.[1] Thus, as the Supreme Court recently explained: "Under the FLSA, by contrast, 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action. *The sole consequence of conditional certification is the sending of court-approved written notice to employees*, who in turn become parties to a collective action only by filing written consent with the court." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013) (citations omitted, emphasis added).

The FLSA "notice stage" is, unlike Rule 23 certification, an unqualified good for the absent class members, all parties, and judicial economy. It only gives notice, it does not truly create any class, join any party, or extinguish or absorb the rights of any potential plaintiff. It simply facilitates the orderly joinder of persons with shared claims. This avoids both Defendants and Plaintiffs wasting resources in an unnecessary multiplicity of suits, without harming the procedural rights of anyone.

In this way, "Rule 23 actions are fundamentally different from collective actions

1 The Age Discrimination in Employment Act, discussed in *Hoffman-La Roche v. Sperling*, 493 U.S. 165, 169, 70 (1989), is one of the only other statutes which incorporates the unique procedures and standards of the Section 16(b) collective action.

under the FLSA." *Id.* at 1529. The "opt in" procedure is "a fundamental, irreconcilable difference between the class action described by [Rule 23] and that provided for by [Section 216(b)]," *LaChapelle v. Owens-Ill., Inc.*, 513 F.2d 286, 288 (5th Cir. 1975), such that "[t]he FLSA procedure, in effect, constitutes a congressionally developed alternative to the [Rule 23] procedures." *Donovan v. Univ. of Tex. at El Paso*, 643 F.2d 1201, 1206 (5th Cir. 1981). As such, "the rules and policies underlying 'opt out' class actions might not apply when construing the FLSA, as the statute treats the representative plaintiff and opt in plaintiffs differently." *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 916-17 (5th Cir. 2008).[2] Indeed, the standard for conditional certification "is considerably less stringent than the proof required pursuant to [Rule 20] for joinder or [Rule 23] for class certification." *Ryan v. Staff Care Inc.*, 497 F. Supp. 2D 820, 824 (N.D. Tex. 2007).

A. *Lusardi*'s "Fairly Lenient Standard" and the Appropriate Factors Considered

The test, therefore, is a "fairly lenient standard" requiring only "substantial allegations" suggesting that proposed class members may turn out to be "similarly situated." *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214, n.8 (5th Cir. 1995) *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

This standard arises out of the landmark case of *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). The *Lusardi* method is recognized as "the favored approach by courts

2 It must be noted that other portions of the analysis in *Sandoz* are no longer valid. The analysis of "relation back" of FLSA certification in *Sandoz* was, at the very least, called into serious doubt by *Genesis*, *supra*. In addition, the Supreme Court has explicitly overruled and rejected the line of Fifth Circuit caselaw – including *Sandoz* – which found that a *rejected* Rule 68 offer of judgment is capable of "mooting" a lawsuit. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016).

in the Fifth Circuit." *Harris v. Hinds County*, 3:12-cv-542, (S.D. Miss. February 4, 2014) *available at* https://scholar.google.com/scholar_case?case=8936344778663610955 (quotations and citations omitted). Thus, although the Fifth Circuit itself has technically reserved judgment on *Lusardi* to date, the method carries the implicit support of the Supreme Court and the Fifth Circuit, and has been formally embraced by the overwhelming majority of courts to address it.[3] Decisions from these courts are strong persuasive authority for the proper application of the *Lusardi* standard.

At this initial "notice stage" under *Lusardi*, the court "makes a decision—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members." *Mooney v. Aramco Svcs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995).

> 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. If the district court 'conditionally certifies' the class, putative class members are given notice and the opportunity to 'opt-in.' The action proceeds as a representative action throughout discovery.

Id. at 1214. Indeed, even affidavits may not be necessary, and the bare allegations of the Complaint itself may be sufficient to justify conditional certification. In *Neagly v. Atascosa County EMS*, for example, the district court, *sua sponte*, conditionally certified the plaintiff's FLSA case as a collective action on the basis of *solely* the allegations in the Complaint. No. Civ.A. SA04CA0893XR, 2005 WL 354085, at *3 (W.D.Tex. Jan. 7, 2005).

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3 *Harris v. Hinds County, supra,* at n.4; *See generally* 2 Kearns, Kaufmann & McClelland, *The Fair Labor Standards Act* § 17.III.A, 17-19 et seq. (3d Ed. 2015).

The Complaint, while "at the outer bounds of what should be presented to the Court when initiating a collective action," sufficiently stated a claim against the defendant as to all similarly-situated employees. *Id.* The Fifth Circuit in *Sandoz* noted this decision with approval, strongly suggesting that it was within the discretion of district courts. 553 F.3d at n.4.

The analysis does not depend on considering any finite list of elements, but on considering open-ended *ad hoc* factors.

> *Lusardi* and its progeny are remarkable in that they do not set out a definition of "similarly situated," but rather they define the requirement by virtue of the factors considered in the "similarly situated" analysis. In other words, this line of cases, by its nature, does not give a recognizable form to an [FLSA or] ADEA representative class, but lends itself to ad hoc analysis on a case-by-case basis.

Id. at 1213. The objective is to reach a general sense of whether the other employees at issue appear to have enough in common with the representative plaintiffs to justify notifying the employees of the lawsuit.

To that end, the following factors are frequently and appropriately considered: (1) the similarity of the relevant wage and hour practices or policies; (2) similarity of job duties; and (3) geographical and temporal similarities. We will now discuss each of these matters in turn. The required showing has been amply made in this case.

1. Similarity of Wage & Hour Practices or Policies

The first factor is the most important, and in many cases, it is enough to carry the burden of conditional certification by itself: “At the notice stage, '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 n.8 (quoting *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. At 407). Though perhaps not strictly necessary, *see Behnken v. Luminant Min. Co., LLC*, 997 F. Supp. 2D 511, 518 n.4 (N.D. Tex. 2014), where there are substantial allegations that the complained of policy was common to the class, this is generally sufficient to justify notice to that class. The court should authorize certification if it finds "some factual nexus which binds the named plaintiffs and the potential class members together as victims of a particularly alleged policy or practice." *Salinas-Rodriguez v. Alpha Svcs.*, L.L.C., No. 3:05-CV-44-WHB-AGN, 2005 WL 3557178, at *3 (S.D. Miss. Dec. 27, 2005) (citations omitted).

Here, every member of the class was subject to the same unlawful policy: namely, they were non-exempt employees who were paid a fixed salary, regardless of overtime, in violation of Section 7 of the FLSA. Essentially everything complained of in the Complaint is common with the class. This reason alone should be adequate to justify conditional class certification.

It is true that some employees had slightly higher or lower "salaries" than others - perhaps $700 or $300 rather than $500 – but this is not an essential feature of the case here. The case concerns primarily overtime violations, not minimum wages. Overtime accrues according to the same basic formula no matter what the "regular rate" may

happen to be.

It is also true that the employees did not work the same hours. They traveled in pairs, but each pair was separate and worked a slightly different "work day." Nonetheless, the affidavits and available evidence reflects a fairly consistent pattern of working hours. Tillis ¶ 19-22; Rockingham ¶ 14-18. Both of the affidavits show workdays of approximately 10 to 18 hours, and work weeks of 50 to 80 hours. As Tillis attests: "We didn't all work exactly the same hours but we were all working really long hard hours. My hours were pretty typical for what most all of us were doing." This is, in other words, likely to be fair and representative evidence of the hours worked. As recently held by the Supreme Court in *Tyson Foods, Inc. v. Bouaphakeo*, 2016 WL 1092414 (SCOTUS March 22, 2016), under *Mt. Clemens*, it is perfectly fair "to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records." (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, 686-688 (1946)).

2. Similarity of Job Duties

The positions compared "need not be identical" for conditional certification. *Mateos v. Select Energy Servs., LLC*, 977 F. Supp. 2D 640, 645 (W.D. Tex. 2013). In *Mateos*, the class was certified where "two overarching themes" were common in the job duties of the class. They were all "performing safety observations and investigating accidents."

> It is understandable that, among the more than fifty Safety Coordinators Select Energy employs and the fifteen to twenty Safety Coordinators Select

> Energy formerly employed, there would be some slight difference in the tasks performed among the various regions and the various HSE Regional Managers. However, slight differences in job duties or functions do not run afoul of the similarly situated requirement.

Id. (citations and quotations omitted).

In the present case, all of the employees in the prospective class were installing carpets. Although some were called "lead" and some "apprentice," it does not appear that their actual duties in taking out and putting in the carpet varied to any significant extent. Either or both might drive the van, either or both might remove the furniture, either or both might rip out the old carpet and padding, either or both might install the new. It matters not whether the "lead" had some limited supervisory duties; it is clear that the primary duty was driving to work sites and installing carpets for the entire class of plaintiffs. There is no variation in job duties that could possibly be sufficient to undermine the class at this stage.

3**. Geographic and Temporal Similarities**

A far flung class, such as one encompassing workers throughout the nation, may sometimes be difficult to administer. In addition, geographic scope may suggest differences in treatment that could preclude representative evidence. Nonetheless, "[w]hen the employers' actions or policies were effectuated on a companywide basis, notice may be sent to all similarly situated persons on a companywide basis." *See Ryan v. Staff Care, Inc.*, 497 F. Supp. 2d 820, 824-25 (N.D. Tex. 2007). In addition, defendants sometimes argue that policies have changed within the 2-3 year statute of limitations,

such that notice would be inappropriate to portions of the class which are not temporally represented by the named plaintiff. *See Walker v. Honghua*, 870 F.Supp.2d 462, 472-73 (S.D. Tex. 2012) (temporally limiting class based on change in employer policies on a certain date).

Here the evidence is quite clear that everyone was working out of the same warehouse location, even though the worked in many far flung sites during the work day. The supervisory structure and work rules were the same for every employee wherever they went. There is also no indication that the relevant policies changed at any time in the last three year. As such, there is no reason to think that there is any geographical or temporal diversity which would undermine certification.

B. Merits, Defenses, and Outside Interest are Not Considered at this Stage.

Employers opposing motions for conditional certification have sometimes raised arguments going either (1) to the merits or credibility of the claim, or (2) to individual defenses, or (3) to claiming that no other employee will be interested in the suit. Such arguments have been justly rejected by the weight of well-reasoned authority as having no bearing whatsoever at the preliminary "notice stage" of the FLSA action. Nonetheless, even if this court should choose to join the minority view, and give some consideration to such arguments at this stage, the available evidence is quite clear that conditional certification remains appropriate. Indeed, it appears likely that Defendants will have no meaningful defense on the merits, no individual defenses, and no colorable

grounds for denying the widespread interest of others in joining the suit. We will address these points in turn.

1. Merits and credibility of Plaintiffs case are not relevant at this stage

As the leading treatise on this area of law states: "Courts generally do not evaluate the merits of the claims, or make credibility determinations at the conditional certification stage." 2 Kearns, Kaufman & McClelland, at 17-25.

For example, in *Beall v. Tyler Technologies, Inc.*, the class sought included employees in a variety of divisions. Although difference in job duties between the divisions might be relevant, the defendant attempted to expand this point to argue that "the exemption status of employees varies from division to division" and, therefore, the employees were not similarly situated. The court correctly rejected this argument. "As for the differences between exempt and non-exempt employees, plaintiffs argue that this argument fails because exemptions are merits-based defenses to an FLSA claim, not relevant at notice stage. The Court agrees." 2:08-CV-422 (E.D. Tex. June 23, 2009) *available at* https://scholar.google.com/scholar_case?case=12913367523114006471 (quotation marks and citations omitted).

And in a prior case out of this Court, *Salinas-Rodriguez v. Alpha Services, LLC*, the defendant attempted to defeat conditional certification by pointing to inconsistencies in the evidence – including inconsistencies in the named-plaintiff's statements at deposition – in order to argue that the Plaintiff's statements about the commonality of

the class should not be credited. The Court rejected this argument, and correctly refused to weigh the conflicting evidence or assess the credibility of witnesses not present. The class was conditionally certified. No. 3:05-CV-44, 2005 WL 3557178 (S.D. Miss. Dec. 27, 2005).

In the present case, the affidavits are quite consistent with each other. There appears to be little ground for genuinely disputing the facts in this case. There does not appear to be any colorable grounds for maintaining that plaintiffs are independent contractors under the "economic realities" test, since they are utterly dependent on the work given to them by the employer. Nor does there appear to be any basis for claiming any exemption, since the employees are text-book "blue collar" workers. There may be some grounds for a legal dispute on the merits of certain narrow, portal-to-portal issues, but that appears to be the extent of it at this point.

Ultimately, at least partial summary judgment in favor of the Plaintiff may be appropriate in this case. But whether this proves to be so in the final analysis or not, it is evident that "substantial allegations" are made by Plaintiffs on the merits as to the class, and that is the outer limit of what can be fairly expected at this stage.

2. Individualized defenses do not undermine conditional certification.

Defendants may also raise defenses they claim are "individualized," such as exemption or independent contractor status, to try to defeat conditional certification. These arguments are simply not considered at the "notice stage," because discovery is

necessary to assess just how "individualized" these arguments will prove to be.

For example, in *Akins v. Worley Catastrophe Response, LLC*, the defendant argued that "the potential class members were executive, administrative and/or highly compensated employees who were exempt from payment of overtime under the FLSA." The defendant claimed that evaluation of this question "will be so fact-insensive and individualized that collective action certification is not possible." The court gave absolutely no consideration to this claim. "Courts in this [the Fifth] and other circuits have rejected such arguments at the initial notice stage. Whether an employee or category of employees is exempt is more appropriately determined *at the second stage of the analysis after discovery has revealed more of the specific evidence*." 12-CV-2401 (E.D. La., April 8, 2013) (citations omitted) *available at* https://scholar.google.com/scholar_case?case=16044978960429656724.

As stated in *Smith v. Manhattan Management Co.,* the "individualized claims and defenses of the parties [are] considerations not properly before the court at a 'stage one' inquiry." The court cited and quoted with approval from the Kearns treatise, *supra:*

> Employers commonly argue that the employees' claims or that the employer's defenses are too individualized for conditional certification. Courts generally do not deny conditional certification at the notice stage based on such allegations and instead hold that these issues are better raised in a motion to decertify a class after discovery has been conducted.

Smith v. Manhattan Mgmt. Co. LLC, 14-CV-2623, (E.D. La, July 6, 2015) *available at* https://scholar.google.com/scholar_case?case=506587961959611213

Indeed, very often the classification issues raised by defendants wind up providing *further support* for conditional certification. For example, in *Walker v. Honghua*, 870 F.Supp.2d 462, 470-72 (S.D. Tex. 2012), the court noted that this "argument borders on specious — members of the proposed classes all hold the same job title, have the same job responsibilities, work at the same locations . . ." (quotations and citations omitted). The court held that "the economic factors test is likely not appropriate for determination at the first stage of FLSA class certification." *Id.*

Even if such an argument were to be considered in this case, it would not defeat certification. In the present case, as previously noted, there does not appear to be any colorable grounds for supposing that the proposed class includes independent contractors or exempt employees. Nonetheless, to the extent any such argument may be tendered, it will depend on the facts about the class as a whole. The whole class shares the same job duties, the same relationship to the employer and control of the work, the same skill and initiative, the same relative investment, and the same opportunity for profit and loss. These issues simply are not "individualized" in this case.

3. Interest of potential class members in joining the action

From time to time defendants argue that there is no reason for notice because there is no evidence anyone else wants to join. A minority of courts have accepted this view, such as the Eleventh Circuit in *Dybach v. State of Florida Department of Corrections*, 942 F.2d 1562, 1567-68 (11th Cir. 1991).

But this Court, in a well reasoned decision in *Harris v. Hinds County*, has considered and rejected this view – and rightly so. As this Court stated: "The best way to determine whether a party is interested in joining a lawsuit is to send her notice and allow her to opt in. Indeed, requiring that multiple potential class members affirm their intention to join the suit before notice is issued would require plaintiffs or their counsel to solicit opt-in plaintiffs without the benefit of court-approved notice — which defeats the purpose of this stage of the litigation." 3:12-cv-542, (S.D. Miss. February 4, 2014) available at https://scholar.google.com/scholar_case?case=8936344778663610955. Nor is this court alone in so holding: numerous Courts in this circuit and others have rejected the approach of the Eleventh Circuit.[4]

In this context, it is significant to note that, "unlike under Rule 23, there is no numerosity requirement in an FLSA class action lawsuit." *Villarreal v. St. Luke's Episcopal Hosp.*, 751 F. Supp. 2d 902, 915-16 (S.D. Tex 2010); *accord Page v. Nova Healthcare Management, LLP*, Civ. No. H-12-2093, (S.D. Tex. September 6, 2013) (adopting magistrate's recommended decision of August 14, 2013). It simply does not matter how many people want to join the suit: all that matters is that the people who would

4 See, e.g, Heckler v. DK Funding, LLC, 502 F. Supp. 2d 777, 780 (N.D. Ill. 2007); Delgado v. Ortho-McNeil, Inc., 2007 WL 2847238, at *2 (C.D. Cal. Aug. 7, 2007) (declining to apply interest requirement because the notice stage is designed to provide notice to potential opt-in plaintiffs who are unaware of the case); Lima v. Int'l Catastrophe Solutions, Inc., 493 F. Supp. 2d 793, 799 (E.D. La. 2007) (finding that affidavits from additional employees were not required at the early stage because the court could "revisit the question later after some discovery"); Prater v. Commerce Equities Mgmt. Co., Inc., CIV.A. H-07-2349, 2007 WL 4146714, at *8 (S.D. Tex. Nov. 19, 2007) (finding that issuance of notice was warranted where additional plaintiffs joined initial legal action and the allegation that there were at least twenty potential plaintiffs showed "that at least a few similarly situated individuals seek to join the lawsuit") (citation omitted); Dreyer v. Baker Hughes Oilfield Operations, Inc., No. H-08-1212, 2008 WL 5204149, at *3 (S.D. Tex. Dec. 11, 2008).

potentially join share something essentially in common. If there are people who could potentially share in that, they should be given notice.

Nonetheless, even in those courts that consider this factor, it isn't a rigorous one. As noted by the court in *Simmons* – which considered this factor – only the demonstrated interest of "a few" people is necessary, and the form of evidence need not be unduly formal: "[a]ffidavits per se are not required and a named plaintiff may submit some other form of evidence that the additional aggrieved persons exist and want to join the suit." *Simmons v. T-Mobile USA, Inc.*, No. H-06-1820, 2007 WL 210008, at *9 (S.D. Tex. Jan. 24, 2007). And having even just a handful of interested potential plaintiffs is enough to benefit from the efficiencies of a collective action.

In *Mateos*, for example, the court conditionally certified the class where two named plaintiffs asserted "that they know of at least three additional Safety Coordinators who perform similar duties as Safety Coordinators and are also subject to Select Energy's compensation policy for Safety Coordinators." On the strength of this, and the opt-in notice of only one other employee, the court found sufficient evidence that "a putative class does exist." *Mateos v. Select Energy Servs., LLC*, 977 F. Supp. 2D 640, 644-45 (W.D. Tex. 2013).

In the present case, the affidavits and opt-in notices filed provide an adequate showing of interest of the potential class. For this reason, regardless of whether this factor is considered necessary or not, it has been met here.

* * *

In short, Plaintiffs and their co-workers all worked pursuant to the same policies, doing the same job duties with the same pay and terms. For this reason, notice to the class is appropriate under the "fairly lenient standard" applicable here.

II. Contents and Distribution of the Notice

The sample notice and opt in form attached to this motion as EXHIBIT 5 should be approved. The notice meets the requirements generally imposed by the courts. *See generally* Kearns *et al.*, *supra*; *Hoffman-La Roche*, *supra*. It fairly and neutrally describes its purpose, the nature of the suit, relief sought, legal effect of notice, that the Court is neutral, how to join, that joining is voluntary, legal effect of not joining, contact information, and that employer retaliation is prohibited. *See* listing in Kearns, *et al.*, *supra.*

To accomplish notice to the prospective class, the Court should enter an Order requiring Defendants to disclose the names, addresses, email addresses, social media handles/identifiers, phone numbers, and the last four digits of the social security number[5] of all members of the prospective class. Plaintiff's request that this information be provided within ten (10) days of the entry of the court's Order in a usable electronic form to reduce delays in sending out notices.

5 Phone numbers may be used to obtain updated mailing addresses where necessary. The last four digits of the SSN are also necessary for "skip tracing" individuals with bad addresses and phone numbers. These partial SSNs will not be disclosed, filed with the court, or used for any purpose other than skip tracing.

CONCLUSION

Affidavits, declarations, and opt-in notices demonstrate that a class of potential plaintiffs exist who have been subjected to the same unlawful employment terms as the named Plaintiffs. This Court should promptly order notice of this suit to the potential plaintiffs.

Respectfully submitted,

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Certificate of Service

I hereby certify that the foregoing was filed by ECF and served on counsel for all Defendants, Mike Farrell, at mike@farrell-law.net.

s/Joel Dillard Date: June 9, 2016
Joel Dillard