UNITED STATES DISTRICT COURT
NORTH DISTRICT OF TEXAS
FORT WORTH DIVISION

German Lopez Martinez, on behalf of himself and all others similarly situated, Plaintiff, v. Tyson Prepared Foods, Inc. Defendant.	Case No. 4:20-cv-00528 COLLECTIVE ACTION JURY TRIAL DEMANDED

PLAINTIFF'S EXPEDITED MOTION FOR CONDITIONAL CERTIFICATION AND NOTICE PURSUANT TO 29 U.S.C. § 216(b)

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I. SUMMARY

German Lopez Martinez filed this Fair Labor Standards Act ("FLSA") collective action to recover unpaid overtime wages and related damages owed to current and former employees of Tyson Prepared Foods, Inc. (hereinafter, "Tyson" or "Defendant"). Formal discovery has only just commenced[1] and presently two additional individuals have filed a consent to join this lawsuit. *See* ECF. No. 13, 27.[2] So that other Production Supervisors may be informed of their rights and given the opportunity to join the suit, Plaintiffs move for conditional certification of the following class under 29 U.S.C. § 216(b):

> All production supervisors employed by Tyson during the last three years who were paid with a salary and who did not receive overtime pay (hereinafter "Production Supervisors" or "the Class").

Conditional certification and notice are appropriate because the Class Members are similarly situated in terms of the type of work they performed, their job duties, their salaried pay, and Defendant's uniform classification of their positions as exempt. The Class Members were denied overtime pay as a result of this corporate policy regardless of any individualized factor such as experience, age, job duties, geographic locations, or hours worked.

Since Plaintiffs meet more than the lenient standard for conditional certification, notice should be issued to all Class Members in order to promote the FLSA's broad remedial purpose. *See Tennessee Coal, Inc. & R. Co. v. Muscoda Local No. 123*, 312 U.S. 590, 597 (1944) (the FLSA is "remedial and humanitarian in purpose"). Plaintiffs thus respectfully request the Court grant their Motion.

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[1] Defendants served their first set of written discovery to Plaintiff.
[2] Named Plaintiff and the opt-in Plaintiffs will be referred to collectively as "Plaintiffs."

II. FACTS

A. Overview of Tyson's Business.

Established in 1935, Tyson is one of largest meat processing and packaging companies in the world and in the United States. The specific defendant named in this lawsuit – Tyson Prepared Foods, Inc. – is a wholly owned subsidiary of Tyson Foods, Inc., a publicly traded company currently trading under the NYSE symbol "TSN." *See* ECF. No. 22 (Certificate of Interested Parties). According to Tyson Food's investors relations website, the company provides "approximately 20% of the beef, pork and chicken in the United States."[3]

In order to meet this demand, Tyson lists on its website owning and operating 12 beef facilities, 6 pork facilities, 183 chicken facilities, and 40 prepared foods facilities.[4] These facilities are located in states such as Texas, Alabama, Arizona, Arkansas, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, and Wisconsin.[5] Tyson admits to being covered by the FLSA, as it admits that it does business of more than $500,000 and that its employees engage in the production of goods for commerce to be considered an enterprise for the FLSA. *See* Defendants' Answer, ECF. No. 21("Answer"), at ¶¶ 18, 19, 39.

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[3] Tyson Food Facts, Tyson Foods Investor website (*available at* https://ir.tyson.com/about-tyson/facts/default.aspx (last accessed September 30, 2020).

[4] *Id.*

[5] Investor Fact Book, Tyson (*available at* https://s22.q4cdn.com/104708849/files/doc_factbook/2020/FactBookFY19_SinglePage-(Final).pdf) (last accessed September 30, 2020).

B. All the Class Members are Similarly Situated.

Plaintiffs performed work as salaried Production Supervisors for Tyson at various facilities in the states of Texas, Oklahoma, and Arkansas.[6] Their specific employment information outlined in their declarations is summarized as follows:

Name	Position	Dates of Employment	States In Which Plaintiffs Performed Work for Tyson
German Lopez Martinez (**Ex. A**) (App.6)	Production Supervisor ¶ 5 (App. 6-7)	1988 to January 2020 ¶ 3 (App. 6)	Texas ¶ 4 (App. 6)
Leopoldo Dominguez (**Ex. B**) (App. 12)	Production Supervisor ¶ 6 (App. 13)	Approximately 2014 to March 2015; September 2015 to May 2018; September 2018 to May 2019 ¶ 4 (App. 12-13)	Arkansas, Oklahoma, Texas ¶ 4 (App. 12-13)

Martinez and Dominguez worked at Tyson's processing plant located at 6350 Browning Ct, North Richman Hills, Texas 76180.[7] Dominguez also worked for Tyson at the processing plants located in Hope, Arkansas; Broken Bow, Oklahoma; and 4114 Mint Way, Dallas, Texas 75237.[8] Opt-in Plaintiff Manuel Retana likewise worked as a Productive Supervisor at the North Richman Hills, Texas processing plant.

1. *Production Supervisors were uniformly paid with a salary and did not receive overtime pay.*

All Production Supervisors who have worked for Tyson company-wide are similarly situated in their pay structures. Specifically, Production Supervisors were paid a salary and were

[6] All exhibits ("Ex.") are enclosed in the Appendix ("App."). Pursuant to the Court's Individual Practices, underlines in red in the Appendix have been added by counsel. The declaration of German Lopez Martinez is comprised of his signed Spanish declaration, followed by an English translation, and a translator's certification.
[7] **Ex. A**, Declaration of German Lopez Martinez ("Martinez Decl.") ¶ 4 (App. 6); **Ex. B**, Declaration of Leopoldo Dominguez ("Dominguez Decl.") ¶ 4 (App. 12-13).
[8] **Ex. B**, Dominguez Decl. ¶ 4 (App. 12-13).

uniformly denied overtime compensation for hours worked over 40 in a workweek.[9] Plaintiffs' paystubs also show that they were paid with a salary and did not receive overtime compensation. *See* **Ex. C**, Paystub Samples (App. 17-22). Plaintiffs are aware that other Production Supervisors similarly received a salary and were not paid overtime compensation.[10]

Tyson in its answer admits that Plaintiffs are not unique in this pay structure – other Production Supervisors were similarly salaried employees. *See* Answer ¶ 6 ("Defendant admits that it paid certain supervisors on a salary basis."). In addition, in defending this lawsuit, Defendants are arguing a uniform exemption defense to Plaintiffs' and Class Members' claims for owed overtime. *See* Answer, Affirmative Defense No. 8.

2. Production Supervisors uniformly worked well over 40 hours per week without overtime pay.

Tyson requires all Class Member to work overtime on a regular basis. Specifically, Plaintiffs testify that they are generally assigned to work between five to seven days per week, with shifts lasting anywhere from 10 to 12 hours in length.[11] Based on their personal observations, other Production Supervisors work similar hours well beyond 40 hours in a workweek.[12] A review of online posts regarding the Production Supervisor position across the country likewise demonstrates the long hours these individuals work.[13]

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[9] *See* **Ex. A**, Martinez Dec. ¶ 8 (App. 7); **Ex. B**, Dominguez Decl. ¶ 9 (App. 13); *see also* Answer ¶ 5 (admitting that named Plaintiff was paid a salary basis).
[10] *See* **Ex. A**, Martinez Dec. ¶ 17 (App. 8); **Ex. B**, Dominguez Decl. ¶ 18 (App. 14).
[11] *See* **Ex. A**, Martinez Dec. ¶ 7 (App. 7); **Ex. B**, Dominguez Decl. ¶ 8 (App. 13).
[12] *See* **Ex. A**, Martinez Dec. ¶ 17 (App. 8); **Ex. B**, Dominguez Decl. ¶ 18 (App. 14).
[13] *See* **Ex. D**, Glassdoor.com Reviews (App. 23-29).

3. Production Supervisors share common non-exempt job duties regardless of locations worked.

Production Supervisors have non-exempt primary job duties because they perform routine, technical, physical, and manual job duties related to the meat processing services that are at the core of Tyson's business. Specifically, Production Supervisors spend the great majority their time performing the same or similar manual work as hourly production workers, such as setting up production line workstations, restocking supplies, cutting and processing meat products, operating grinding/cutting machines, operating cooking machines, sorting meat products, packing meat products, moving meat products throughout the processing plants, and stacking boxes.[14] Production Supervisors do not hire, fire, or interview.[15] Based on their personal observations, other Production Supervisors have similar job duties consisting of non-exempt work related to production line work.[16]

Regardless of the processing plants or divisions within a plant to which they are assigned, the Production Supervisor job duties do not change.[17] Production Supervisors are also not required to hold an advanced degree.[18] Plaintiffs have identified other Production Supervisors who they believe would be interested in learning about their rights and their ability to join this case.[19]

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[14] *See* **Ex. A**, Martinez Dec. ¶ 11 (App. 7); **Ex. B**, Dominguez Decl. ¶ 12(App. 13-14).
[15] *See* **Ex. A**, Martinez Dec. ¶ 14 (App. 8); **Ex. B**, Dominguez Decl. ¶ 15 (App. 14).
[16] *See* **Ex. A**, Martinez Dec. ¶ 15 (App. 8); **Ex. B**, Dominguez Decl. ¶ 16 (App. 14).
[17] *See* **Ex. A**, Martinez Dec. ¶ 15 (App. 8); **Ex. B**, Dominguez Decl. ¶ 15 (App. 14).
[18] *See* **Ex. A**, Martinez Dec. ¶ 6 (App. 7); **Ex. B**, Dominguez Decl. ¶ 7 (App. 13).
[19] *See* **Ex. A**, Martinez Dec. ¶ 18-19 (App. 8); **Ex. B**, Dominguez Decl. ¶¶ 19-20 (App. 15).

III. ARGUMENT

A. The FLSA Collective Action Process.

The FLSA's "collective action" provision allows one or more employees to bring an action for overtime compensation on "behalf of himself or themselves and other employees similarly situated." 29 U.S.C. §216(b). District courts have broad discretion to allow a party asserting FLSA claims on behalf of others to notify potential Plaintiffs that they may choose to "opt-in" or bring a claim on their own behalf. *See Hoffman-La Roche, Inc. v. Sperling,* 493 U.S. 165, 169 (1989). Court- authorized notice protects against "misleading communications" by the parties, resolves the parties' disputes regarding the content of any notice, prevents the proliferation of multiple individual lawsuits, assures joinder of additional parties is accomplished properly and efficiently, and expedites resolution of the dispute. *Id*. at 170-172.

B. This Court Should Apply the *Lusardi* Approach to Conditional Certification.

The Fifth Circuit has not yet set a definite standard for conditional certification but has described two approaches district courts utilize – the two-step *Lusardi* approach[20] and another that tracks Federal Rule of Civil Procedure 23 ("Rule 23"), which requires showings of numerosity, commonality, typicality, and adequacy. *See Portillo v. Permanent Workers, LLC*, 662 F. App'x 277, 280 (5th Cir. 2016).

The *Lusardi* approach is the correct approach, and the approach this Court should use in analyzing Plaintiffs' Motion. Unlike class actions brought under Rule 23, "classes under Section 216(b) are opt-in classes, requiring any employee wishing to become a party to the action to 'opt in' (rather than 'opt out') by filing his consent with the court in which the action is sought."

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[20] *See Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987).

Cervantez v. TDT Consulting LLC, No. 3:18-cv-2547-S-BN, 2019 WL 3948355, at *2 (N.D. Tex. July 22, 2019).

For these reasons, the vast majority of courts within the Fifth Circuit, including in the Northern District of Texas, utilize the two-step *Lusardi* approach in lieu of a Rule 23 analysis. *See, e.g.*, *Jorge v. Atlantinc Housing Foundation, Inc.,* No. 3:20-CV-02782-N, 2020 WL 5801413, at *1 (N.D. Tex. Sept. 29, 2020) (applying *Lusardi* approach); *Kalenga v. Irving Holdings, Inc.*, No. 3:19-CV-1969-S, 2020 WL 2841396, at *2 (N.D. Tex. June 1, 2020) (applying the two-stage *Lusardi* approach and noting that it "is followed by a majority of federal courts, including this district"); *Long v. Wehner Multifamily, LLC*, 303 F. Supp. 3d 509, 512 (N.D. Tex. 2017) (discussing approaches and stating "[l]ike most courts, however, the Northern District of Texas more commonly adheres to the two-step *Lusardi* method . . . [t]he Court sees no reason to deviate from that practice in this case"); *Viveros v. Flexxray LLC*, No. 4:15-CV-343-O, 2015 WL 12916414, at *2 (N.D. Tex. May 8, 2015) ("A majority of federal courts, including this District, have applied the *Lusardi* approach."); *Lee v. Metrocare Services*, 980 F. Supp. 2d 754, 758 (N.D. Tex. 2013) (same).

C. *Lusardi* Method and Conditional Certification.

The *Lusardi* approach has two stages, the first being the "notice" stage. In the notice stage:

> The plaintiff moves for conditional certification of his or her collective action. The district court then decides, usually based on the pleadings and affidavits of the parties, whether to provide notice to fellow employees who may be similarly situated to the named plaintiff, thereby conditionally certifying a collective action.

Portillo, 662 F. App'x at 280. As explained by the Fifth Circuit, "[b]ecause plaintiffs seeking conditional certification need not identify other hypothetical collective action members, the stage one standard is considered to be 'fairly lenient.'" *Id.* "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." *Long*, 303 F. Supp. 3d at 511 (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995)).

In applying this lenient standard, the Court inquires as to whether plaintiffs have provided sufficient evidence that the class member representatives are "similarly situated" with regards to their job requirements and with regard to their pay provisions. *See, e.g.*, *Ryan v. Staff Care, Inc.*, 497 F.Supp.2d 820, 824-25 (N.D. Tex. 2007). Generally, courts "require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." *Long*, 303 F. Supp. 3d at 511 (quoting *Mooney*, 54 F.3d at 1214, n. 8). Doing otherwise would unnecessarily hinder the development of collective actions and would undermine the "broad remedial goals" of the FLSA. *Garner v. G.D. Searle*, 802 F. Supp. 418, 422 (M.D. Ala. 1991). If the case is conditionally certified, the putative class members are given notice and the opportunity to 'opt-in' to the case. *Long*, 303 F. 3d at 511. It is not until the second stage where discovery is largely complete that a defendant may move to "decertify" the conditionally certified class, and the court then makes a factual determination on the similarly situated question. *Id.* at 512.

At this first stage, the Court *does not* perform an analysis of merits. *See, e.g.*, *Jackson v. Superior Healthplan, Inc.*, No. 3:15-CV-3215-L, 2016 WL 7971332, at *5 (N.D. Tex. Nov. 7, 2016) ("[Defendants] are effectively asking for an analysis of the underlying merits and consideration of the potential defenses of the FLSA claims. It is improper for a court to make such a determination at the notice stage."). Once the Court determines that the employees are similarly situated, notice is sent and new plaintiffs may "opt in" or file their own claim. *Acevedo*, 600 F.3d at 519. Ultimately, allowing early notice and full participation by the Putative Class Members "assures that the full 'similarly situated' decision is informed, efficiently reached, and conclusive."

Sperling v. Hoffmann-La Roche, Inc., 118 F.R.D. 392, 406 (1988). Once the notice period is complete, the Court will have the benefit of knowing the actual makeup of the collective action. Thus, early notice helps courts to manage the case because it can "ascertain the contours of the action at the outset." *Hoffmann-La Roche,* 493 U.S. at 172.

D. Company-Wide Notice is Appropriate Because the Class Members Are Similarly Situated as to Pay Provisions and Job Requirements.

1. Production Managers are similarly situated with regards to pay provisions – that they receive a salary without overtime compensation.

Beyond Defendant's universal exemption affirmative defense, Plaintiffs have independently established that they and the potential Class Members are "similarly situated in terms of payment provisions." *Ryan*, 497 F. Supp. 2d at 824-25. As set forth above, Plaintiffs and other Production Supervisors receive a salary and do not receive overtime pay for hours over 40 that they work. *See supra* section II(B)(1). Plaintiffs' knowledge of other Production Supervisors' pay provisions comes from personal knowledge from conversations and their observations, which is sufficient evidence at this juncture. *See, e.g.*, *Cervantez*, 2019 WL 3948355, at *4-5 (overruling any hearsay objections and stating "[c]ourts admit such hearsay evidence at the conditional certification stage and have found affiants to have personal knowledge of information they obtained from observations and conversations with their colleagues"). Moreover, online evidence shows that other Production Supervisors are likewise paid a salary, as a Production Supervisor from Portland, Indiana described a con of the job as "6 days a week, as saliery [sic] 10 hour days. Long days." *See* **Ex. D**, Glassdoor Reviews (App. 28). Paystubs also demonstrate that Plaintiffs are salaried workers who do not receive overtime. *See* **Ex. C**, Paystub Samples (App. 16-22).

As a result, it cannot be questioned that Class Members are similarly situated as to their pay provisions because they are paid pursuant to Defendant's uniform classification of them as

exempt employees.

2. *All Production Managers are similarly situated with regards to job requirements and hours worked.*

Plaintiffs have established that Production Supervisors are "similarly situated in terms of job requirements." *Ryan*, 497 F. Supp. 2d at 824-25. Plaintiffs' declarations provide similar descriptions of the job functions they performed while at Tyson, which are primarily non-exempt job duties that do not depend on the processing plant to which they are assigned. *See supra* section II(B)(2)-(3). These declarations, based on their personal knowledge, describe that other Production Supervisors performed similar job duties while at Tyson. While at the notice stage plaintiffs "are not required to show that their job duties were identical" and "arguments comparing job duties are premature," the above demonstrates how the Production Supervisors are similarly situated in terms of job duties. *See Swartz v. D-J Engineering, Inc.*, No. 12-cv-1029-JAR, 2013 WL 534585, at *6 (D. Kan. Sept. 24, 2013); *see also Long*, 303 F. Supp. 3d at 513 ("But at most, [plaintiff] must only demonstrate that she and the proposed class are similarly situated with respect to job requirements and with regard to their pay provisions. The positions need not be identical, but similar.").

Plaintiffs have also established that Production Supervisors generally work over 40 hours per workweek. The declarations attached outline work schedules well beyond 40 hours per week for Plaintiffs and their colleagues with whom they worked. *See supra* section (II)(B)(2). Moreover, the online job reviews submitted also demonstrate that Production Supervisors similarly complain about working very long hours across various geographic locations, from Tyson plants in North Carolina, Kansas, Illinois, Indiana, Arkansas, and Texas. *See* **Ex. D**, Glassdoor Reviews (App. 24-29). At the notice stage, this online evidence may be readily considered by the Court. *See Santinac v. Worldwide Labor Support of Illinois, Inc.*, 107 F. Supp. 3d 610, 616 (S.D. Miss. 2015) (considering Facebook and Twitter postings in granting conditional certification); *Fairfax v.*

Hogan Transportation Equipment, Inc., No. 2:16-cv-680, 2017 WL 4349035, at *4 (S.D. Ohio Sept. 29, 2017) (granting conditional certification and rejecting defendants' argument to disregard job postings of similar positions nationwide and alleged similarly situated individual's LinkedIn profiles); *Moody v. Associated Wholesale Grocers Inc.*, No. 17-10290, 2019 WL 175305, at *1 (E.D. La. Jan. 11, 2019) ("At the conditional class certification stage, many courts have held that plaintiffs need not present evidence in a form admissible at trial.").

As a result, Plaintiffs have established that they are similarly situated to other Production Supervisors at Tyson because they share similar pay provisions, job duties, and hours worked, all of which demonstrate evidence of a company-wide misclassification policy. *See Cervantez*, 2019 WL 3948355, at *8 (certifying class where misclassified technicians were "victims of a single decision, policy, or plan"); *Bewley v. Accel Logistics, Inc.*, No. 3:17-CV-0676-S-BK, 2018 WL 2422043, at *3 (N.D. Tex. May 7, 2018) (certifying class and stating that "[p]laintiffs clearly connect their injury to a generally applicable policy or practice that violates the FLSA, namely, [d]efendant's alleged policy of misclassifying Dispatchers as exempt employees and failing to pay them overtime wages"); *Long*, 303 F. Supp. 3d at 513-14 (certifying class where substantial allegations existed that defendant misclassified hourly workers as salaried to avoid paying overtime); *Jackson*, 2016 WL 7971332, at *5 (noting that a unified plan or policy need not be proved at conditional certification and certifying class where plaintiff alleged defendant uniformly classified her position as exempt regardless of job duties performed); *Trietsch v. Caliber Home Loans Inc.*, No. 3:16-CV-00483-N, 2016 WL 11474171, at *4 (N.D. Tex. Dec. 1, 2016) (certifying class where plaintiffs alleged misclassification and/or commission only employees); *Altiep v. Food Safety Net Services, Ltd.*, No. 3:14-CV-00642-K, 2014 WL 4081213, at *4 (N.D. Tex. Aug. 18, 2014) (certifying class and stating that plaintiffs "are not required to prove that a plan or policy

existed; rather, existence of a plan or policy is probative evidence that similarly situated plaintiffs exist"); *see also Warren v. MBI Energy Services, Inc.*, No. 19-cv-00800-RM-STV, 2020 WL 937420, at *9 (D. Colo. Feb. 25, 2020) (certifying class where allegations stated plaintiffs routinely worked over 40 hours per week and did not receive overtime due to their classification as salaried employees); *Olivas v. C&S Oilfield Services, LLC*, 349 F. Supp. 3d 1092, 1110-111 (D.N.M. Apr. 27, 2018) (finding substantial allegations that defendant misclassified its salaried field personnel as exempt); *Coldwell v. RiteCorp Environment Property Solutions*, No. 16-621-JB/LF, 2017 WL 4856861, at *4 (D. Colo. July 20, 2017) (inferring company-wide policy of misclassification based solely on plaintiffs' affidavits and granting notice); *Landry v. Swire Oilfield Services, LLC*, 252 F. Supp. 3d 1079, 1121-22 (D.N.M. May 2, 2017) (conditionally certifying class of misclassified salaried workers nationwide).

3. Plaintiffs have also established that other interested individuals exist.

Although the Fifth Circuit has not yet ruled on whether a plaintiff must show that other interested individuals exist, the courts in this district are generally split on the issue. *See Cervantez*, 2019 WL 3948355, at *6-7 (describing split as to whether a plaintiff must show aggrieved individuals want to opt in to the lawsuit"). Even courts that require a showing of interest "liberally construe" the element "because of the infancy of the claim and the ability to revisit the issue at a later stage." *Id.* Moreover, "Plaintiffs are only required to show a 'reasonable basis' to believe that other aggrieved individuals exist" should this element be required. *Altiep*, 2014 WL 4081213, at *4.

Regardless, Plaintiffs have demonstrated that interested individuals exist in both their declarations and in that there is more than one plaintiff in this action. So far before any notice, two additional individuals have filed an opt-in forms to join the case. *See* ECF. No. 13, 27. In addition,

Plaintiffs have identified many other putative Class Members and, in their experience, believe that interested individuals exist and are afraid of retaliation. See **Ex. A**, Martinez Decl. ¶ 18 (App. 8); **Ex. B**, Dominguez Decl. ¶ 19 (App. 15). As a result, Plaintiffs easily meet their burden in showing that other interested individuals exist. *See, e.g.*, *Cervantez*, 2019 WL 3948355, at *9 (element met with one additional opt-in); *Long*, 303 F. Supp. 3d at 513 (certifying class where plaintiff identified four other individuals by name "who worked under the same conditions and pay provisions"); *Reid v. Timeless Rest Inc.*, No. 3:09-cv-2481-L, 2010 WL 4627873, at *3 (N.D. Tex. Nov. 5, 2010) (element met with one additional opt-in and description of others who would be interested); *Wilson v. Etech Global Services LLC*, No. 3:18-CV-0787-B, 2019 WL 2471753, at *4 (N.D. Tex. June 13, 2019) (element met with two opt-ins stating "[c]ourts have held that the third factor is satisfied when as few as two individuals have opted-in").

4. Company-wide notice is appropriate.

This Court has jurisdiction to certify a company-wide class of Production Supervisors because they are similarly situated as required by the FLSA, which was designed to allow such company-wide collective actions. As explained above, Defendant instituted a company-wide policy of misclassifying Production Supervisors as exempt, notwithstanding their job locations or states in which they worked. *See supra* section II(B)(1). Moreover, as explained by Plaintiffs, they have performed work for Tyson across various processing plants spanning various states. *See supra* section II.B. Therefore, Plaintiffs have provided preliminary evidence demonstrating the existence of similarly situated individuals all throughout Tyson's operations, and not just their specific processing plants. As a result, company-wide notice of this action is appropriate under the FLSA.

E. Merit Issues Are Not Relevant to a Decision on Conditional Certification.

A disagreement about the merits of Plaintiffs' claims is not grounds for denying conditional certification. It is well-established that "courts are not to engage in merits-based analysis at the notice stage of a collective action." *Jones v. JGC Dallas LLC*, 2012 WL 6928101 (N.D. Tex. Nov. 29, 2012) *adopted*, 2013 WL 271665 (N.D. Tex. Jan. 23, 2013); *see also Jackson*, 2016 WL 7971332, at *5 ("it is improper for a court to make such a [merit] determination at the notice stage."); *Heeg v. Adams Harris, Inc.*, 907 F. Supp. 2d 856, 861 (S.D. Tex. 2012) ("courts do not review the underlying merits of the action in determining whether to conditionally certify").

Any merits-based issues raised by Defendant's Answer can be resolved on a class-wide basis. For example, Defendant pleads that the Plaintiffs were all exempt from the overtime provisions of the FLSA. *See* Answer, Affirmative Defense No. 8. Defendant, by pleading this defense as to all Plaintiffs and putative class members, essentially admits that this issue can be determined as an issue common to the class.

F. Misclassification Cases Like This are Appropriate and Well-Suited for Conditional Certification.

We anticipate that Tyson may argue that FLSA misclassification cases cannot be conditionally certified by suggesting the exemption inquiry is inherently "individualized" or "fact-intensive." This argument fails because that is a merits-based determination not relevant here. Moreover, courts routinely grant conditional certification where, as here, a plaintiff makes a "minimal showing" that notice is appropriate in misclassification matters. *See, e.g.*, *Facundo v. Almeda-Genoa Construction*, No. H-19-2721, 2020 WL 2596822, at *3-4 (S.D. Tex. April 27, 2020) (certifying class of misclassified working foremen); *Warren*, 2020 WL 937420, at *9 (certifying misclassified oil workers); *Cervantez*, 2019 WL 3948355, at *8 (certifying misclassified technicians); *Landry*, 252 F. Supp. 3d at 1121-22 (order certifying nationwide class

of misclassified salaried oilfield workers); *Davis v. Capital One Home Loans, LLC*, No. 3:17-CV-3236-G, 2018 WL 3659066, at *6 (N.D. Tex. Aug. 2, 2018) (certifying salaried mortgage loan officers; *Bewley*, 2018 WL 2422043, at *3 (certifying misclassified dispatchers); *Long*, 303 F. Supp. 3d at 513-14 (certifying misclassified property management employees); *Burton v. Agility Energy, Inc.*, No. 17-cv-00204-DC, 2018 WL 2996909, at *4 (W.D. Tex. May 4, 2018) (order certifying misclassified sand coordinators); *Shaw v. Jaguar Hydrostatic Testing, LLC*, No. 2:15-cv-363, 2017 WL 3866424, at *9 (S.D. Tex. Sept. 5, 2017) (order certifying class of four different positions each paid by salary who claimed misclassification); *Jackson*, 2016 WL 7971332, at *5 (certifying misclassified healthcare field service coordinators); *Trietsch*, 2016 WL 11474171, at *4 (certifying class of misclassified and/or commissioned employees); *Page v. Crescent Directional Drilling, L.P.*, 5:15- CV-193-RP, 2015 WL 12660425, at *3 (W.D. Tex. Dec. 10, 2015) (order certifying a nationwide class of all levels of salaried workers); *McPherson v. LEAM Drilling Systems, LLC*, Civ. A. No. 4:14-cv-02361, 2015 WL 1470554, at *14-*15 (S.D. Tex. Mar. 30, 2015) (order granting certification of a nationwide class of salaried oilfield workers); *Altiep*, 2014 WL 4081213, at *5 (order granting certification of company-wide class of salaried lab technicians).

G. The Statute of Limitations is Running on the Class Members' Claims.

An action for overtime compensation under the FLSA must be commenced within two years, unless the employer acted willfully, which enhances the limitations period to three years. 29 U.S.C. § 255(a).[21] The statute of limitations under the FLSA continues to run on each individual's claim until they file their written consent to join the action or bring their own claim.

[21] Plaintiffs specifically allege that Tyson acted willfully in violating the FLSA in their Complaint. *See* Complaint ¶¶ 63, 64. As such, at this stage, Plaintiffs' allegations of a willful violation are sufficient to authorize the notice to be sent to all Production Supervisors within the last three years. *See, e.g.*, *Lee,* 980 F. Supp. 2d at 768.

See 29 U.S.C. § 216(b) ("No employee shall be a party Plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). Although the notice process does not stop the statute of limitations, it at a minimum notifies the Class Members of the case and that the statute of limitations is running on their claims. *See, e.g.*, *Stranksy v. HealthOne of Denver, Inc.*, 868 F. Supp. 2d 1178, 1181-82 (D. Colo. 2012) (noting the statute of limitations for FLSA claim is not tolled until the opt-in files their consent form, and stating that "allowing [o]pt-in [p]laintiffs' claims to diminish or expire due to circumstances beyond their direct control would be particularly unjust"). Therefore, Plaintiffs respectfully request expedited treatment of this Motion, as prompt judicial notice will give potential class members the opportunity to participate in this lawsuit while they still have claims that are not time-barred. *Id.*

IV. RELIEF SOUGHT

Plaintiffs seek the issuance of notice to the putative Class Members and the disclosure of the names, contact information (including mailing addresses, email addresses, and telephone numbers) and dates of employment of the Class Members. Plaintiffs attach their proposed Notice and Consent Forms to be approved by the Court, which are based on documents previously approved by North District of Texas District Courts, though they are modified slightly for this particular case. *See* **Exhibits E** (App. 30-36), **F** (App. 37-38), **G** (App. 39-40)**.**

Moreover, Plaintiffs seek permission to send Spanish translations of the Notice documents, given that many Tyson employees, like Named Plaintiff, consider Spanish as their primary language. ***See*** **Ex. A**, Martinez Decl. ¶ 19 (App. 8); **Ex. B**, Dominguez Decl. ¶ 20 (App. 15) (explaining that many of his colleagues at Tyson primarily spoke Spanish). Spanish notice has been routinely approved in FLSA collective actions in the Fifth Circuit where part of the workforce

uses Spanish as its primary language. *See, e.g.*, *Murillo v. Berry Bros. General Contractors Inc.*, No. 6:18-cv-1434, 2019 WL 4640010, at *5 (W.D. La. Sept. 23, 2019) (allowing Spanish notice to accompany English notice); *Gonzalez v. CNL Wings VII, Inc.*, No. SA-14-CA-886, 2015 WL 10818674, at *7 (W.D. Tex. Mar. 24, 2015) (granting certification and ordering parties to confer on Spanish language version of notice). Plaintiffs' proposed Spanish Notice documents are attached as **Exhibits H** (App. 41-48), **I** (App. 49-51), and **J** (App. 52-53).

Plaintiffs seek an Order adopting the following notice schedule:

DEADLINE	DESCRIPTION OF DEADLINE
15 Days From Order Approving Notice to Potential Prospective Class Members	Defendant to disclose the names, last known addresses, email addresses, telephone numbers, and dates of employment of the Prospective Class Members in a usable electronic format.
35 Days From Order Approving Notice to Potential Prospective Class Members	Plaintiffs' Counsel shall send the approved notice and consent via mail, email, and text message. *See* **Exs. E** (App. 30-36)**, F** (App. 37-38)**, G** (App. 39-40); **H** (App. 41-48); **I** (App. 49-51); and **J** (App. 52-53). Defendant is required to post the Notice and Consent forms in all processing plants for 60 days in an open and obvious location.
60 Days From Date Notice is Mailed to Potential Prospective Class Members	The Prospective Class Members shall have 60 days to return their signed Consents for filing with the Court. Defendant may take down the posted Notice and Consent.
30 Days from Date Notice is Mailed to Potential Prospective Class Members	Plaintiffs' Counsel may send by mail a second identical copy of the Notice and Consent to the Prospective Class Members.

V. PRODUCTION OF NAMES, ADDRESSES, E-MAIL ADDRESSES, AND PHONE NUMBERS.

Plaintiffs request the Court to order Defendant to provide the names, current/last known home addresses, email addresses, and phone numbers of the Class Members. Plaintiffs request notice to be sent by mail, email, text messages, and job postings because "the purpose of notice is to inform potential class members of a pending lawsuit and provide the opportunity to join the case." *LeJeune v. Cobra Acquisitions, LLC*, No. 5:19-cv-00286-JKP-ESC, ECF. No. 108 at 3 (W.D. Tex. Aug. 14, 2020); *Murillo*, 2019 WL 4640010, at *6 ("Posting Notices at the warehouses is a cost-efficient way to notify potential opt-in plaintiffs of the action and places no burden on Defendants.") (citations omitted).

For instance, email communications "is not the wave of the future; email is the wave of the last decade and a half. Many people use their email addresses as their primary point of contact, and in almost every situation, more opt-in plaintiffs will be on notice of a pending collective action if the potential class members are also notified via email." *Rodriguez v. Stage 3 Separation, LLC*, 5:14-cv-603-RP, 2015 WL 12866212, at fn. 1 (W.D. Tex. Mar. 16, 2015). Likewise, courts have recently recognized that text notice is highly effective:

> The purpose of class notice is to ensure that potential plaintiffs receive accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate . . . [a]s a judicial officer, it is my view that I should exercise my power to encourage delivery methods that will make it more likely that putative class members receive notice. **The reality of modern-day life is that some people never open their first-class mail and others routinely ignore their emails. Most folks, however, check their text messages regularly (or constantly). Since I am convinced that text messaging will increase the likelihood that class members will learn about the lawsuit, I approve the use of text message notice in this case.**

Lawrence v. A-1 Cleaning & Septic Sys., LLC, No. 4:19-CV-03526, 2020 WL 2042323, at *5 (S.D. Tex. Apr. 28, 2020) (emphasis added); *see also* LeJeune, ECF. No. 108 at 3 (allowing text notice

and stating that "Federal courts have already begun to recognize that our 'primary methods of communication have evolved' to include 'text messages and phone calls to cellular telephones.'"); *Vega v. Point Sec., LLC*, No. A-17-CV-049-LY, 2017 WL 4023289, at *4 (W.D. Tex. Sept. 13, 2017), *approved*, 2017 WL 8774233 (W.D. Tex. Oct. 12, 2017) ("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 text to notify potential class members is entirely appropriate"). Moreover, text message notice also ensures "notice to class members who may have changed addresses before the opt-in period." *Escobar v. Ramelli Group, LLC*, No. 16-15848, 2017 WL 3024741, at *2 (E.D. La. July 17, 2017).

VI. CONCLUSION

Plaintiffs have met their minimal burden to show that they are similarly situated to Tyson's Production Supervisors company-wide. In order to facilitate the purposes of the FLSA's collective action provisions, Plaintiffs respectfully request that the Court: 1) conditionally certify the action for notice and discovery; 2) approve the form and content of Plaintiffs' proposed judicial notice; 3) order that a judicially approved notice be sent to all putative Class Members by mail, email, and text message; 4) order Tyson to produce to Plaintiffs' Counsel the names, last known address, email address, and telephone number, and dates of employment for each of the Class Members in an useable electronic format; and 5) authorize a 60-day notice period for the Class Members to join this case.[22]

[22] Plaintiffs have attached a proposed Order for the Court's convenience.

Dated: October 23, 2020
Houston, Texas

Respectfully submitted,

/s/ Ricardo J. Prieto
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CERTIFICATE OF CONFERENCE

I hereby affirm that I conferred with Counsel for Defendant, Kim Rives Miers, regarding whether an agreement as to conditional certification could be reached on October 13, 2020. Counsel for Defendant indicated that they oppose certification in this case, which necessitated the filing of this Motion. Defendant's Counsel explained that their opposition is due to their pending Motion to Dismiss.

/s/ Ricardo J. Prieto
Ricardo J. Prieto

CERTIFICATE OF SERVICE

On October 23, 2020, I served this document on all parties of record via the Court's ECF system.

/s/ Ricardo J. Prieto
Ricardo J. Prieto