IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JONATHAN ARCHER,

Plaintiff,

v. **No. 16-cv-02610-JTF-tmp**

NABORS TRUCK SERVICE, INC.; JAMES SMITH; and MEMPHIS TRUCK & TRAILER, INC.,

Defendants.

REPORT AND RECOMMENDATION

Before the court is plaintiff Jonathan Archer's Motion for Expedited Approval of 29 U.S.C. § 216(b) Court-Supervised Notice and Consent Forms and to Order Disclosure of Current and Former Employees. (ECF No. 37.) Archer filed the motion on May 12, 2017, and defendants Nabors Truck Service Inc., James Smith, and Memphis Truck & Trailer, Inc. (collectively "Nabors") responded (ECF No. 39) on May 27, 2017. The motion was referred to the undersigned Magistrate Judge on October 2, 2018. (ECF No. 47.)

For the reasons below, it is recommended that the motion be granted in part and denied in part.

I. PROPOSED FINDINGS OF FACT

In this lawsuit, Archer alleges that Nabors violated the Fair Labor Standards Act ("FLSA") and related state laws. (ECF No. 12.) Nabors, a trucking service company located in Memphis, Tennessee,

employed Archer as a mechanic from November 2013 to around May 2014.[1] (Id. at 3, 5 ¶¶ 5,18.) As a mechanic, "Archer was required to complete work orders pertaining to mechanical issues with Nabors' trucks." (Id. at 5 ¶ 18.) In addition, Archer alleges that Nabors employed other individuals as mechanics and service technicians who "perform[] the same or similar job duties as one another in that they provided repair, maintenance, mechanic and/or service technician services, and other labor duties, etc., for Nabors." (Id. at 7 ¶ 33.) Archer brings this lawsuit as a collective action on behalf of himself and:

> All current and former "mechanics" and "service technicians" (or similar title) employed in the United States who work or, have worked, for Defendant Nabors at any time during the applicable limitations period covered by this Complaint (i.e., two years for FLSA violations and, three years for willful FLSA violations) up to and including the date of final judgment in this matter, who were not paid overtime compensation at time-and-one-half their regular rate of pay for all hours worked in excess of forty (40) hours within a workweek and who are named as Plaintiff or elect to opt-in to this action pursuant to FLSA, 29 U.S.C. § 216(b) ("the class").

(Id. at 5 ¶ 16.) In the Amended Complaint, filed on October 25, 2016, Archer alleges that he and the other putative class members "were only paid for the work they completed, even if that work crossed the forty-hour threshold for overtime pay." (Id. at 5 ¶ 17.) Archer also alleges that he and other putative class members' "paychecks were reduced without their written authorization." (Id.)

[1]In response to Archer's motion for conditional certification, Nabors contends that it employed Archer between February 12, 2014,

This is not the first time that Archer has sought to litigate his individual claims against Nabors. In March of 2015, Archer filed a Civil Warrant in Shelby County General Session Court against Nabors and another named defendant. (ECF No. 32-1 at 1.) The state court ultimately entered judgment in favor of Nabors. (Id. at 4.) In the present lawsuit, Nabors filed a motion for summary judgment and argued that the state court's judgment bars Archer from bringing this lawsuit. (ECF No. 29-5.) The presiding district judge granted the summary judgment motion in part and denied it in part. (ECF No. 43.) The court concluded that Archer's unjust enrichment and Tennessee Wage Regulation Act claims are precluded because they were previously litigated in the state court case. (Id. at 15.) However, it concluded that Archer's FLSA and breach of contract claims are not precluded and denied Nabors's summary judgment motion as to those claims. (Id.)

Presently before the court is Archer's motion for conditional certification. (ECF No. 37.) In the motion, Archer initially requests a court order:

> (1) authorizing Plaintiff to proceed as a collective action for minimum wage and overtime compensation violations under the FLSA on behalf of Plaintiff and other similarly situated hourly-paid employees of Defendants in Memphis, Tennessee who were denied proper compensation as required by the FLSA and for wages (and damages) due under Tennessee law (including through theories of unjust enrichment and breach of contract)

(ECF No. 37-1 at 2.) Archer argues that conditional certification is appropriate because "he readily meets the liberal standard for

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and August 18, 2014. (ECF No. 39 at 3.)

court facilitation of an FLSA collective action and court-supervised notice as to Defendants' facility." (Id. at 10.) In making this argument, Archer contends that he and other current and former mechanics and service technicians who worked at Nabors's Memphis facility (for the past three years for the FLSA claims and six years for the breach of contract claim) are similarly situated. (Id.) Archer further asserts that he and other employees were required to work for more than forty hours per week without being paid minimum wage or overtime rates and that they were not paid the appropriate compensation for all hours worked. (Id. at 11.)

Archer believes these contentions are adequately established by the allegations in his Amended Complaint (ECF No. 12) and declaration (ECF No. 37-4), which is attached to his motion. The declaration provides:

> 1. I worked for Nabors Truck Service, Inc. and Memphis Truck & Trailer, Inc. (hereinafter "Nabors") as an (non-salaried) employee (mechanic and/or service technician) in Memphis, Tennessee from on or about November 2013 to May 2014.
>
> 2. During the time I worked for Nabors, James Smith was the President of Nabors and controlled how Nabors conducted its business, directly supervised me and other mechanics/service technicians, and set our pay and work hours.
>
> 3. I was paid for work orders completed during my employment with Nabors, instead of being paid on an hourly basis.
>
> 4. My regular job duties as a mechanic and/or service technician while employed with Nabors consisted of truck and trailer repairs, maintenance, part installations, and tire repair and replacement, among other duties.

5. I observed other employees with my job title (mechanic and/or service technician) who performed similar duties.

6. While employed at Nabors, I observed that the work I performed for the business was essentially the same work that other Nabors mechanics and/or service technicians were required to perform with regard to job duties.

7. During my employment with Nabors, there were times where I would work in excess of 40 hours per week, but I was only paid for work performed, which was less than my regular hourly rate of pay, or even minimum wage on some weeks, instead of 1.5 times my hourly rate (i.e., overtime rate).

8. During my employment with Nabors, I observed or was told by other similarly-situated employees who were mechanics and/or service technicians who also worked for Nabors that they were also only paid for work order[s] completed instead of their regularly hourly rate of pay, or even minimum wage, and were not paid 1.5 times their hourly rate, when they worked in excess of 40 hours per week.

9. Nabors instructed me and other mechanics/service technicians to perform work in excess of forty (40) hours a week but still did not compensate me and others adequately at the 1.5 times hourly rate.

10. Additionally, while employed at Nabors, I was not paid the agreed to rate for all my hours worked and/or minimum wage for all hours worked.

11. For example, although I was required to clock in and out every day, was assigned an employee number and had state, federal and unemployment taxes taken out every day, I was only paid by the job and work orders I turned in, even if I worked for more than forty (40) hours per week.

12. Additionally, my pay was docked for an alleged "error" in my work, i.e., replacing two sills on a doorframe instead of one. I was told that due to a hydraulic part that I installed correctly failed, my packed would be docked $500.00 and the time I charged to install that part.

13. I also observed and/or was told that other mechanics and service technicians did not receive their agreed pay rate for all hours that they worked due to similar

> circumstances that I recounted above, including being docked for "errors," and being paid only for the "job" and "work orders" turned in even if they worked more than forty (40) hours in a particular week.
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> 14. Based on my observations above, I believe that other mechanics/service technicians would also join this lawsuit to recover the pay they are owed if they were made aware that they can do so.

(ECF No. 37-4.) In response to Archer's motion, Nabors argues that Archer has "fail[ed] to provide the court with a minimal showing that aggrieved individuals exist." (ECF No. 39 at 7.) According to Nabors, the statements made in Archer's declaration are "vague and conclusory, as [they] fail[] to provide sufficient detail or specifics regarding Defendants' utilization of the commission workweek method, or how Defendants failed to pay [the employees] overtime during the relevant period."[2] (Id.)

In the event the court grants his motion, Archer seeks a court order:

> (2) directing Defendants to immediately provide Plaintiff's counsel a computer-readable file containing the names (last names first), last known physical addresses, last known email addresses, social security numbers, dates of employment and last known telephone numbers of all putative class members during the last three years; (3) providing that Court-approved notice be posted at Defendants' facilities in Memphis, Tennessee, enclosed with all of Defendants' currently employed putative class members' next regularly-scheduled paycheck/stub, and be mailed and emailed to Defendants' mechanics and service technicians whom they have employed during the past three years or currently employs at their Memphis, Tennessee facility so that they can assert their

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[2]In the alternative, Nabors argues that the court should not decide Archer's conditional certification motion until it rules on Nabors's pending summary judgment motion. (ECF No. 39 at 9.) This argument is no longer relevant as the presiding district judge has since ruled on the summary judgment motion. (ECF No. 43.)

> claims on a timely basis as part of this litigation; (4) tolling the statute of limitations for the putative Class as of the date this Motion is granted (except for those who have already Opted-In to this action); and (5) requiring that the Opt-In Plaintiffs' Consent Forms be deemed "filed" on the date they are postmarked (excluding Opt-in Plaintiffs who opted in prior to the Court-supervised Notice being sent).

(ECF No. 37-1 at 2.) Nabors raises objections to three of those requests. First, Nabors asserts that the notice period should be sixty days. (Id. at 11.) Next, Nabors argues that the court should utilize FLSA's two-year statute of limitations when determining which of Nabors's employees (current and former) should receive the notice. In making this argument, Nabors contends that FLSA's three-year statute of limitation requires the employee to show that the employer violated the FLSA with "reckless disregard," and Archer has failed to plead such "reckless disregard." (Id. at 10.) Finally, Nabors argues that notice should only be sent via first-class mail. (Id. at 11.)

II. PROPOSED CONCLUSIONS OF LAW

A. Conditional Certification Standard

"Section 216(b) of the FLSA permits employees to recover unpaid compensation by collectively suing an employer under certain circumstances." Motley v. W.M. Barr & Co., Inc., No. 12-cv-2447, 2013 WL 1966444, at *3 (W.D. Tenn. Mar. 7, 2013) (Pham, M.J.), adopted in part, rejected in part, 2013 WL 1966442 (W.D. Tenn. May 10, 2013) (Breen, J.). Any employer who violates the minimum wage provisions or overtime provisions of the FLSA "shall be liable to

the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). "An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." Id. However, a wronged employee only becomes a party to one of these collective actions if "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." Id.

Thus, "to proceed collectively, the named plaintiff must demonstrate that: 1) he is 'similarly situated' to the opt-in plaintiffs — the employees he seeks to notify and represent; and 2) all plaintiffs must signal in writing their affirmative consent to participate in the action." Kutzback v. LMS Intellibound, LLC, 301 F. Supp. 3d 807, 816 (W.D. Tenn. 2018) (citing Wilks v. Pep Boys, No. 3:02-0837, 2006 WL 2821700, at *1 (M.D. Tenn. Sep. 26, 2006)). "Similarly situated persons are permitted to opt into the . . . collective action." Comer v. Walmart Stores, Inc., 454 F.3d 544, 547 (6th Cir. 2006). This opt-in feature "is distinguished from the opt-out approach utilized in class actions under Fed. R. Civ. P. 23." Id. In addition, "[a] plaintiff can have FLSA claims as

well as supplemental state law claims as part of the collective action." Motley, 2013 WL 1966444, at *4.

"Courts in the Sixth Circuit follow a two-step process to determine whether plaintiffs are similarly situated." Id.; see also In re HCR ManorCare, No. 11-3866, 2011 WL 7461073, at *1 (6th Cir. Sept. 28, 2011) (stating that the Sixth Circuit has "implicitly upheld the two-step procedure in FLSA actions"). "The first takes place at the beginning of discovery [and] the second occurs after 'all of the opt-in forms have been received and discovery has concluded.'" Comer, 454 F.3d at 546 (quoting Goldman v. RadioShack Corp., No. Civ.A. 2:03-cv-0032, 2003 WL 21250571, at *6 (E.D. Pa. Apr. 17, 2003)). "The first stage is a conditional certification step, which typically occurs at the beginning of discovery and is often referred to as the notice stage." Saddler v. Memphis City Sch., No. 12-cv-2232, 2013 WL 12100720, at *3 (W.D. Tenn. Feb. 4, 2013) (Pham, M.J.), adopted by, 2013 WL 12100721 (W.D. Tenn. Mar. 7, 2013) (Fowlkes, J.). Upon a plaintiff's motion for conditional certification, "[t]he district court may use its discretion to authorize notification of similarly situated employees to allow them to opt into the lawsuit." Comer, 454 F.3d at 546.

In order for Archer's motion to be granted, he must establish "that potential class members are similarly situated." Castillo v. Morales, Inc., 302 F.R.D. 480, 483 (S.D. Ohio 2014). "District courts use a fairly lenient standard that typically results in

conditional certification of a representative class when determining whether plaintiffs are similarly situated during the first stage of the class certification process." White v. Baptist Mem'l Health Care Corp., 699 F.3d 869, 877 (6th Cir. 2012) (internal citation and quotation omitted). "The court's decision to conditionally certify a class need only be based on a modest factual showing by the plaintiff[.]" Saddler, 2013 WL 12100720, at *3 (internal citation and quotation omitted). This requires the plaintiff to initially "show only that 'his position is similar, not identical, to the positions held by the putative class members.'" Id. at *4 (quoting Comer, 454 F.3d at 546-57).

The Sixth Circuit has provided additional guidance as to what criteria a court should consider when conducting the similarly situated analysis. See O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 585 (6th Cir. 2009), abrogated on other grounds by Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016). "Although the Sixth Circuit has declined to 'create comprehensive criteria for informing the similarly situated analysis,' it has held that FLSA plaintiffs may proceed collectively in cases where 'their claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct.'" Castillo, 302 F.R.D. at 483-84 (quoting O'Brien, 575 F.3d at 585) (alteration in original). Additionally, at the notice stage, "the court does not resolve factual disputes or evaluate the weight the evidence, merits of the

claims, or the credibility of the plaintiffs." Motley, 2013 WL 1966444, at *4.

B. Conditional Certification is Warranted

Archer argues that Nabors violated the FLSA as to himself and other similarly situated employees in two ways. First, Archer argues that "he and other employees who were similarly situated were required, forced, encouraged, induced and/or suffered and permitted to perform work over forty (40) hours per week without being paid the applicable FLSA minimum wage or overtime." (ECF No. 37-1 at 10-11.) Second, Archer argues that he and other similarly situated employees were not paid the appropriate compensation, as required by the FLSA and Tennessee law, for all hours they worked. (Id. at 11.) Archer supports these contentions with the allegations in his Amended Complaint (ECF No. 12) and his declaration (ECF No. 37-4). In response, Nabors argues that Archer has "fail[ed] to provide the court with a minimal showing that aggrieved individuals exist." (ECF No. 39 at 7.) According to Nabors, the statements made in Archer's declaration are "vague and conclusory, as [they] fail[] to provide sufficient detail or specifics regarding Defendants' utilization of the commission workweek method, or how Defendants failed to pay [the employees] overtime during the relevant period." (Id.)

At this notice stage, the court does not consider the merits of the FLSA and related state law claims. Rather, the court must determine whether Archer has made a "modest factual showing" that

similarly situated employees exist who were wrongfully denied overtime or were not paid their agreed upon pay rate. In arguing that Archer has failed to meet his burden, Nabors cites Songer v. Dillon Res., Inc., 569 F. Supp. 2d 703 (N.D. Tex. 2008) and other fifth circuit cases in which courts have denied conditional certification. (ECF No. 39 at 6.) However, this court is bound by Sixth Circuit law, and district courts applying the law of this circuit have granted plaintiffs' motions for conditional certification where those plaintiffs supported their motions only with complaints and supporting declarations. See, e.g., Thomas v. Acopia, LLC, No. 3:14-cv-0974, 2015 WL 13667053, at *2 (M.D. Tenn. Mar. 23, 2015) ("Courts recently confronted with this issue found that a plaintiff's declaration and complaint may adequately establish that the opt-in plaintiffs are similarly situated to the named plaintiff."); see also Ivy v. Amerigas, Propane, L.P., No. 13-1095, 2014 WL 3591797, at * 3-4 (W.D. Tenn. July 21, 2014); Dawson v. Emergency Med. Care Facilities, P.C., No. 14-1105, 2014 WL 4660804, at *3 (W.D. Tenn. Sept. 17, 2014); Henry v. Dish Network, L.L.C., No. 1:11-cv-1376, 2012 WL 4509812, at *2 (W.D. Tenn. July 26, 2012) (Bryant, M.J.), adopted by, 2012 WL 4507806 (W.D. Tenn. Sep. 28, 2012) (Breen, J.).[3]

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[3] For example, in Dawson, the defendant employed the plaintiff as a physician assistant. Dawson, 2014 WL 4660804, at *1. The plaintiff filed an FLSA collective action lawsuit alleging that the defendant failed to pay him overtime even though he usually worked more than forty hours per week. Id. at *2. The plaintiff moved for conditional certification and filed a declaration in which he indicated that, based on conversations with his colleagues, other

Based on Archer's Amended Complaint and declaration, Nabors employed Archer "as a mechanic and/or service technician," and his duties "consisted of truck and trailer repairs, maintenance, part installations, and tire repair and replacement, among other duties." (ECF No. 37-4 at ¶ 4.) While employed by Nabors, Archer contends that he was "only paid for work performed, which was less than [his] regularly hourly rate of pay, or even minimum wage on some weeks, instead of 1.5 times [his] hourly rate[.]" (Id. at ¶ 6.) Additionally, Archer contends that his pay was wrongfully docked for alleged errors in his work. (Id. at ¶ 12.) Finally, Archer asserts that "[d]uring [his] employment with Nabors, [he] observed or was told by other . . . mechanics and/or service technicians who also worked for Nabors" that they were not paid overtime rates when they worked over forty hours per week and they did not receive their agreed upon compensation because of errors similar to the one Archer discussed. (Id. at ¶¶ 8, 12.) The court submits that Archer has made the required modest factual showing that he and other mechanics and service technicians are similarly situated.

C. Notice

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physician assistants and nurse practitioners were also wrongfully denied overtime pay. Id. The magistrate judge recommended to conditionally certify the class in the collective action and the district judge adopted the recommendation. Id. The magistrate judge reasoned that the plaintiff's allegations in his complaint and declaration "adequately established that [the plaintiff], the Nurse Practitioners, and other Physician's Assistants are similarly situated." Id. at *4.

"Courts have authority to supervise the issuance of notice in FLSA collective actions, with the objective of 'manag[ing] the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure.'" Watson v. Advanced Distrib. Servs., LLC, 298 F.R.D. 558, 565 (M.D. Tenn. 2014) (quoting Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989)) (alteration in original). Nabors takes issue with Archer's proposed notice to the class members. The court will address each of Nabors's objections below.

1. Length of the Opt-in Period

First, Archer argues that putative class members should be allowed to file their notice within ninety days of the notices being sent. (ECF No. 37-1 at 16.) Nabors responds that this period should not exceed sixty days. (ECF No. 39 at 11.) "There is no hard and fast rule controlling the length of FLSA notice periods." Ganci v. MBF Inspection Servs., Inc., No. 2:15-cv-2959, 2016 WL 5104891, at *2 (S.D. Ohio Sep. 20, 2016). While "[s]ome courts have used sixty (60) days as the standard, . . . [others] have utilized ninety (90) days." Davis v. Colonial Freight Sys., Inc., No. 3:16-cv-674, 2018 WL 2014548, at *4 (E.D. Tenn. Apr. 30, 2018). The record presently before the court supports the shorter sixty-day opt-in period. Archer's class is limited to mechanics and service technicians who were employed at Nabors's Memphis facility during the class period. According to Archer, "the Class

is located within a relatively small geographic area[.]" (ECF No. 37-1 at 16.) Therefore, the court recommends that the opt-in period be limited to sixty days.

2. FLSA's Statute of Limitations at the Notice Period

The next contested issue is whether the court should apply a two or three-year statute of limitations in determining members of the putative class (at the notice stage). While Archer argues that three years is appropriate, Nabors disagrees and believes two years is appropriate. "The FLSA establishes a general two-year statute of limitations, but a cause of action arising out of a 'willful' violation of the act increases the statute of limitations to three years." Smith v. Generations Healthcare Servs. LLC, No. 2:16-cv-807, 2017 WL 2957741, at *6 (S.D. Ohio July 11, 2017) (citing 29 U.S.C. § 255(a)). An employer willfully violates the FLSA when it acts with knowledge or reckless disregard. Id. At the notice stage, courts often apply the three-year period in ascertaining the putative class members and find that it is premature to determine whether a defendant's alleged violation of the FLSA was willful. Id. ("Whether Defendants' alleged FLSA violations are 'willful' is a question better suited for a later stage of the litigation."); Young v. Hobbs Trucking Co., No. 3:15-cv-991, 2016 WL 3079027, at *3 (M.D. Tenn. June 1, 2016) (allowing notice to be issued to putative class members for the last three years after noting that determining whether the defendant's conduct was willful was premature). Other courts have asserted "[i]t is appropriate to

allow a three-year look-back period in the notice where '[t]he absence of willful conduct is not established as a matter of law by the pleadings.'" Benion v. Lecom, Inc., No. 15-14367, 2016 WL 2801562, at *11 (E.D. Mich. May 13, 2016) (quoting Colley v. Scherzinger Corp., 176 F. Supp. 3d 730, 735 (S.D. Ohio 2016)). In the Amended Complaint, Archer alleges that Nabors "knowingly, willfully, or with reckless disregard carried out its illegal pattern or practice of failing to pay overtime compensation with respect to Plaintiff and class members." (ECF No. 12 at 9 ¶ 42.) Therefore, at this time, the court recommends that the three-year period be utilized.

3. Methods of Notification

"With respect to FLSA actions, there is 'no one-size-fits all approach to notifying putative class members in lawsuits.'" Davis, 2018 WL 2014548, at *3 (quoting Fenley v. Wood Grp. Mustang, Inc., 170 F. Supp. 3d 1063, 1074 (S.D. Ohio 2016)). Archer asks for the proposed notice to be mailed and emailed, by Archer's counsel, to the putative class members. (ECF No. 37-1 at 16.) Nabors requests that notice be sent only via first-class mail. (ECF No. 39 at 11.) The court agrees with Archer that first-class mail and email is appropriate and therefore recommends that notice be sent in that manner. See id. at *4 ("Consistent with this Court's past practice, the Court finds first-class mail and email are appropriate."). While first-class mail has often been referred to as the "best notice practicable," recent cases have held that email

notification is also appropriate. Compare Smith, 2017 WL 2957741, at *6 ("[E]-mail notice appears to be in line with the current nationwide trend and advances the remedial purpose of the FLSA, because service of the notice by two separate methods increases the likelihood that all potential opt-in plaintiffs will receive notice of the lawsuit." (internal citation and quotation omitted)), and Phipps v. Chariots of Hire, Inc., No. 3:17-cv-97, 2017 WL 4228028, at *4 (E.D. Tenn. Aug. 29, 2017) (same), with Lindberg v. UHS of Lakeside, LLC, 761 F. Supp. 2d 752, 765 (W.D. Tenn. 2011) ("In FLSA cases, first-class mail is generally considered to be the 'best notice practicable' to ensure that proper notice is received by potential class members.").

In addition to notice via mail and email, Archer requests that Nabors post the notice "prominently on any time clock or timekeeping apparatus used by [Nabors] at their facility," and that Nabors attach the notice to the putative class members' next paycheck or paystub. (Id. at 17.) Archer believes that these additional forms of notice are necessary because "the statute of limitations is daily destroying putative class members' abilities to collect unpaid overtime compensation." (Id. at 16.) However, he fails to articulate why notice via first-class mail and email would be insufficient. This case does not present circumstances that would justify these additional forms of notice. Other courts have rejected identical requests under similar circumstances. See, e.g., Phipps, 2017 WL 4228028, at *5 (rejecting the identical

request made by Archer and stating "[t]he Court [found] first-class mail and email notifications sufficient to advise the putative plaintiffs of their rights without encouraging potential opt-ins to join the suit or giving the impression that the Court approves the suit on its merits"); Lindberg, 761 F. Supp. 2d at 765 (rejecting the plaintiffs' request for defendant to place the proposed notice at the defendant's facility and to enclose the notice with the putative class members next paycheck). Therefore, the court recommends that notice be provided by first-class mail and email only.

4. Disclosure of a Mailing List

Archer also seeks a court order requiring Nabors "to disclose a mailing list of all prospective plaintiffs employed within the last three years." (ECF No. 37-1 at 18.) Specifically, Archer requests a list "containing the names (last names first), last known physical addresses, last known email addresses, social security numbers, dates of employment and last known telephone numbers of all putative class members during the last three years." (Id. at 2.) Archer correctly notes that, in collective action lawsuits, district courts can require employers to release mailing lists. See, e.g., Hoffmann-La Roche, 493 U.S. at 170 ("The District Court was correct to permit discovery of the names and addresses of the discharged employees."). However, at this point, Archer has not established his need for the telephone and social security numbers of the putative class members. See Bradford v.

Logan's Roadhouse, Inc., 137 F. Supp. 3d 1064, 1080 (M.D. Tenn. 2015) ("The court finds that the plaintiffs have not demonstrated, either by a factual showing or through citation to legal precedent, that it is appropriate or necessary, at this time, to order the disclosure of email addresses, social security numbers, or telephone numbers."). The court recommends that Nabors should be required to disclose the putative class members' names, last known physical address, last known email address, and dates of employment. If Archer later finds this list to be inadequate, he may renew his request for telephone and social security numbers. See Hardesty v. Kroger Co., No. 1:16-cv-298, 2016 WL 3906236, at *3 (S.D. Ohio July 19, 2016) ("In accordance with the case law, social security numbers and telephone numbers shall only be produced in the event that Plaintiffs can evidence that both mailing addresses and email have not been successful.").

5. Equitable Tolling

"The FLSA's statute of limitations is subject to equitable tolling." Davis v. Kohler Co., No. 2:15-cv-01263, 2017 WL 3865656, at *7 (W.D. Tenn. Aug. 30, 2017). "[D]elays during the collective-action certification process constitute 'extraordinary circumstances' beyond plaintiffs' control, making them appropriate for the application of equitable tolling." Kutzback v. LMS Intellibound, LLC, 233 F. Supp. 3d 623, 631 (W.D. Tenn. 2017). Archer argues that the doctrine of equitable tolling should apply, and the court agrees. Under the circumstances of this case, the

court recommends tolling the statute of limitation for putative class members as of the date Archer's motion was fully briefed. See Penley v. NPC Int'l, Inc., 206 F. Supp. 3d 1341, 1351 (W.D. Tenn. 2016) ("[T]he Plaintiffs' claims will be tolled as of the date that the first motion for conditional certification could have been fully briefed under the scheduling order in place at the time[.]"); Thompson v. Direct Gen. Consumer Prods., Inc., No. 3:12-cv-1093, 2014 WL 884494, at *8 (M.D. Tenn. Mar. 5, 2014) (tolling the statute of limitations as of the date the plaintiffs replied to the defendant's response in opposition of plaintiffs' motion for conditional certification). In addition, the court recommends that each opt-in plaintiffs' consent form be deemed filed on the date it is postmarked. See David, 2017 WL 3865656, at *7 ("[E]ach opt-in Plaintiff's consent form shall be deemed 'filed' on the date the form is postmarked.").[4]

III. RECOMMENDATION

For the reasons above, the undersigned recommends that Archer's motion be granted in part and denied in part.

Respectfully submitted,

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

October 12, 2018
Date

[4]In its response, Nabors argues that the court "should address cost before certification." (ECF No. 39 at 12.) Nabors does not provide any further argument on this issue and therefore the court

NOTICE

WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THIS REPORT AND RECOMMENDED DISPOSITION, ANY PARTY MAY SERVE AND FILE SPECIFIC WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. ANY PARTY MAY RESPOND TO ANOTHER PARTY'S OBJECTIONS WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(2); LR 72.1(g)(2). FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.

declines to address it.