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UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

JAVIER SILVA, individually and  
on behalf of all others  
similarly situated,

Plaintiff,

v.

AGAVE TRANSPORTATION SERVICES,  
INC.,

Defendant.

Case No. 2:21-cv-01117-GJF-GBW

Albuquerque, New Mexico

January 31, 2023

10:00 a.m.

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE GREGORY J. FOURATT  
UNITED STATES CHIEF MAGISTRATE JUDGE

APPEARANCES:

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1 (Call to order at 10:00 a.m.)

2 THE COURT: Okay. Good morning to you, Mr. Prieto,  
3 I've met Mr. Blanco before. Believe it or not, he testified as  
4 a witness in a bench trial. Seems like a long time ago. I  
5 think it was last year sometime.

6 And, gentlemen, we're obviously now on the record in  
7 Javier Silva individually and on behalf of others similarly  
8 situated against Agave Transportation Services, 21 civil 1117.

9 And so my clerk and I were working on this motion.  
10 And I realized that the briefing was helpful, but it left me  
11 with a lot of questions.

12 And so, I thought I would take some of your time  
13 today. I promise this will last less than an hour, but I just  
14 need to get some questions answered.

15 And I don't want you to think I'm brand new to wage  
16 and hour litigation. This is my 47th case in the 7 years that  
17 I've been doing this job. And I think I understand it really  
18 well. And so, I'm not a complete neophyte.

19 Mr. Prieto, let me start with you. It's your motion.  
20 And let me ask a basic question. This is not a got you  
21 question, but I just kind of want to know.

22 Did you do the briefing or did somebody else do the  
23 briefing?

24 MR. PRIETO: This is the brief that we worked on.  
25 It's combination of, you know, briefing that we've done, a

1 combination of the briefing that others (indiscernible) that we  
2 know worked on. We share our work-product on the Plaintiff's  
3 side, yes, Your Honor.

4 THE COURT: Okay. I fully understand the relatively  
5 low threshold that gets us past step 1 or phase 1 under the  
6 FLSA. I got that point.

7 I will tell you. And I believe in transparency. I'm  
8 going to put my cards on the table and have you guys address  
9 them.

10 This is the finished factual submission that I've  
11 seen in any of the cases assigned to me. And I'm worried about  
12 it. And I'm going to ask you some questions about it.

13 You know it's the defense -- it's the Defendant, the  
14 employer's position as well. I mean, it's essentially their  
15 sole objection.

16 And I expected and honestly hoped to see some  
17 additional factual support in the Reply once the Defendant  
18 committed itself to this litigation position, but instead, you  
19 doubled down and said this is enough.

20 And one of the benefits of having really skilled law  
21 clerks and energetic and ambitious law clerks is they don't  
22 mind when I give them additional research assignments to  
23 include researching the other cases in which the same counsel  
24 have appeared in this district.

25 And Mr. Prieto, I'll tell you that our review of your

1 other cases as well as Ms. Arbuckle's, I didn't see  
2 anything -- I didn't see anything like this. I saw different,  
3 stronger factual submissions and some cases where the employer  
4 didn't even contest the conditional certification.

5 So this case at least in my assessment of your work  
6 in this district is kind of leading -- it's on the edge of  
7 where you've been before, but let me stop.

8 Maybe I didn't read the cases carefully or maybe we  
9 missed one. Have you taken a position that is as ambitious as  
10 you've taken in this case in terms of relying on only one  
11 declaration when you have a collective action case in which  
12 there has been only one plaintiff who has consented since the  
13 case was filed about 14 months ago?

14 MR. PRIETO: Yes, Your Honor. We've certainly done  
15 that in the past, but Your Honor's correct. That's not  
16 normally the situation that we have, the conditional  
17 (indiscernible).

18 Generally, in these sorts of cases, what we do is,  
19 you know, we'll change -- if there's a number -- a large number  
20 of options, we'll submit those declarations (indiscernible)  
21 would be enough.

22 But we have this one option, our general practice is  
23 to request some documents (indiscernible) to Your Honor. Now I  
24 can -- I've been -- and it may have been in this case, it may  
25 have been another, but I -- it may actually have been this

1 case.

2           When we asked for the opportunity to conduct some  
3 limited discovery, we were told that it's not the general  
4 practice of this district to allow that for a phase 1 motion.  
5 So we were limited to what we have from our client.

6           Now I'll tell you, Your Honor, we've been in lengthy  
7 discussions with opposing counsel. Our hope was to try to get  
8 this case settled. We were initially provided with class data.  
9 We submitted a settlement demand based on that class data.

10           Then we were told that that class data was incorrect.  
11 We were provided with additional class data, the revised class  
12 data.

13           We then submitted a revised, you know, demand and  
14 basically didn't hear anything from them.

15           So, you know, the information that we've been  
16 provided is what we have with the limitation of course as to  
17 any information provided subject to FR 408. We did not submit  
18 that in support of our motion, of course.

19           But this is looking out. And you know, I agree, Your  
20 Honor, I would love to have more, but you know, for a class  
21 that's limited like this, I mean, this is -- my understanding  
22 is so like one location per driver.

23           You know, roughly our understanding is the class is,  
24 you know, under 100 individuals, maybe 70 or so is we  
25 understand it to be.

1           And these are intrastate New Mexico only drivers.  
2           And it's a straight time of case. I think it's, you know,  
3           fairly straightforward.

4           And I'm comfortable with the pleadings that we had  
5           filed, but I want to recognize, Your Honor, that I understand  
6           your concerns.

7           And certainly, I'd love to have another one or two  
8           options to submit, you know, their declaration, whatever  
9           documentation that they have.

10          But I do believe that we have submitted enough. But  
11          for this sort of a case, if this were definitely a contractor  
12          case or an exemption case, then I think the -- what we would  
13          have done in that circumstance is we would have urged the Court  
14          to allow us an opportunity to conduct the phase 1 discovery.

15          But on a straight time case, Your Honor, I normally  
16          felt that this was probably enough that it leads for  
17          conditional certification to get the ball rolling. And we  
18          certainly didn't want to delay the case, Your Honor.

19          THE COURT: So let me ask you, the -- you just told  
20          me that your belief now is that there are fewer than 100 New  
21          Mexico-based drivers who might be similarly situated to Mr.  
22          Silva.

23          The complaint, albeit this was filed with much less  
24          information and 14 months ago, alleges in paragraph 76 that the  
25          number exceeded 40. So how -- and I know there's been an

1 exchange of information since then. Why don't you know how  
2 many there are?

3 MR. PRIETO: We haven't -- so we originally were  
4 provided with some class data, Your Honor. And that number  
5 changed. It's been a -- the gold post that's moving in this  
6 case unfortunately. And I just can't get a clear answer from  
7 the Defendant.

8 I'd love to know that what that number is, Your  
9 Honor. That's certainly questionable and I'm the first one  
10 (indiscernible) have the opposing counsel in these cases.

11 THE COURT: So, in their response, in their  
12 opposition, near the end, I forget exactly where it is, well,  
13 now I remember because I wrote it down, pages 11 and 12 of  
14 their response, they essentially invite me to either defer a  
15 decision on this motion pending some discovery or to deny it  
16 without prejudice to re-filing after some discovery has been  
17 conducted.

18 If I were to grant that, Mr. Prieto, do you have a  
19 sense about what you would do? Would it be documentary  
20 discovery only? Would there be a deposition involved? Have  
21 you thought that far ahead?

22 MR. PRIETO: I haven't, Your Honor, but if Your Honor  
23 were inclined to go in that direction, I think if the -- and  
24 it'll really depend on what the concerns of the Court are.

25 If the concern is, you know, we -- you know, the

1 number of individuals that were subject to this pay practice, I  
2 think some basic written discovery would address that.

3 If the Court wants to take that a step further and  
4 maybe dip in some. There is base discovery, which clearly we  
5 have some objection to that. But if the Court was inclined to  
6 go in that direction, then I believe depositions would be  
7 necessary. So it'll really depend on what additional  
8 information Your Honor wants.

9 THE COURT: I'm not interested in -- I'm not going to  
10 reach the merits at all in this decision. And so, I'll be  
11 really disciplined about that.

12 In your informal exchange of information, did you  
13 learn whether vacuum truck drivers like Mr. Silva are paid the  
14 same as the folks who drive trucks that have a different  
15 mission, but still with Agave and still in New Mexico?

16 MR. PRIETO: Yes, Your Honor, we were told that there  
17 were other truck drivers that were paid straight time wages,  
18 just like (indiscernible).

19 THE COURT: Okay. Was there an agreement between  
20 counsel that anything you learned in the informal exchange of  
21 information would not be used in a motion or in a declaration?  
22 Is that why I didn't see it?

23 MR. PRIETO: Yes, Your Honor. The conversations I've  
24 had with Mr. Blanco have all been subject to FR 408. So I've  
25 agreed to respect that and follow that rule.



1 THE COURT: All right. So let me turn to Mr. Silva's  
2 affidavit. Correction, his declaration. And my primary  
3 concern is that his affidavit is conclusory. And it is so  
4 conclusory as to be impermissibly so. And so, do you have it  
5 in front of you, Mr. Prieto?

6 MR. PRIETO: Yes, Your Honor.

7 THE COURT: Okay, so paragraph 2 tells me that he  
8 worked for Agave for two and a half years. I'm assuming,  
9 although it doesn't say that that was his full-time job for the  
10 entire two and a half years. Is that a safe assumption?

11 MR. PRIETO: Yes, Your Honor.

12 THE COURT: Okay. And then, we go -- then my concern  
13 takes me to -- and so, I want to credit the two and a half  
14 years. 30 months is a, you know, is -- leads in the direction  
15 of a substantial foundation.

16 We go to paragraph 9. And remember, my concern is  
17 that it's conclusory. And there, Mr. Silva swore, based on my  
18 personal knowledge drawn from my experience and observations  
19 working for Agave, conversations with other truck drivers  
20 employed by Agave in New Mexico, and my familiarity with  
21 Agave's payroll practices and policies, I know that other New  
22 Mexico drivers were subject or subjected to the same straight  
23 time for overtime pay practices. I'll stop it there. How many  
24 other drivers?

25 MR. PRIETO: I don't have an answer to that specific

1 number, Your Honor.

2 THE COURT: Does it make a difference in wage and  
3 hour cases if he had a conversation with one other driver  
4 versus let's say 10?

5 MR. PRIETO: I haven't seen cases that discuss that,  
6 Your Honor. So I can't say one way or the other. I can tell  
7 you from my personal experience, I haven't had a conditional  
8 certification decision come down on that sort of an analysis.

9 We -- you know, I think what the cases say at this  
10 point is that, you know, and the Rules of Evidence are relaxed  
11 at this stage, Your Honor. I think courts are pretty  
12 consistent on that.

13 The requirement at this stage is simply that, you  
14 know, the statements are made based on first-hand personal  
15 knowledge, which these statements are, Your Honor.

16 I've personally spoken to my client about each one of  
17 these paragraphs before we signed. But we certainly  
18 appreciate, you know, what it means to sign stuff like this and  
19 submit to Your Honor, but I can not tell you that number  
20 specifically.

21 I'm happy to get any information that Your Honor  
22 would want. I can supplement it if you'd like and answer your  
23 questions like that, but at this point, I just don't want to  
24 say something that I don't have particular knowledge over.

25 THE COURT: Let me keep going with the declaration

1 left open as many doors as it closed to the reader. It's at  
2 least the -- at least me as the reader.

3 So, for example, paragraph 9 says nothing about how  
4 many other drivers he talked to. It says nothing about when in  
5 this two and a half year period he talked to other drivers.

6 I don't know whether these conversations began at the  
7 beginning of his employment, and they continued throughout the  
8 30 months or maybe they were, you know, clustered near the end  
9 of the 30 months. I don't know anything about that.

10 I don't have a single other name in the case.  
11 Obviously, there's been no other consent nor did Mr. Silva  
12 share any other name.

13 I don't know whether this was a company that had a  
14 yard to which the drivers showed up each morning. You know,  
15 and then, they went out into the oil field to do their thing or  
16 did they take the trucks home with them.

17 Let's see. You know, I don't know if everybody  
18 worked the same schedule or they worked, you know, different  
19 schedules depending on the mission that they were performing  
20 and perhaps the part of the oil field where they were doing all  
21 of their stuff.

22 I don't know -- Mr. Silva doesn't tell me how he  
23 knows what truck drivers, who drove trucks that were not vacuum  
24 trucks. So whatever else they did, they hold gravel or caliche  
25 or something, how he knows what they're paid.

1           You agree that there's a whole lot of information  
2 that could have been in this declaration that would have  
3 strengthened his foundation and undercut a claim that it was  
4 conclusory?

5           MR. PRIETO: Well, Your Honor, you know, and I want  
6 to get to that question two ways if I may?

7           THE COURT: Please.

8           MR. PRIETO: I mean, certainly, we could have added  
9 more information, detailed information.

10           Now whether or not that additional information is  
11 relevant at this stage, well, that's another issue. You know,  
12 we had -- we're alleging a straight-time violation. We're not  
13 alleging an off-the-clock claiming for what happened pre-shift  
14 or post-shift or any sort of a, you know, I just, I'm assuming  
15 here whether or not they drive the trucks home. Maybe that's  
16 related to any expense reimbursement, things like that. That's  
17 where I see a relevant for per diem cases for example.

18           None of those things are really, you know, relevant  
19 to the question of whether or not there's a group of truck  
20 drivers that were paid straight time. So we didn't include  
21 that additional information.

22           If the question -- if the issue is, you know, could  
23 we have excluded more facts to bolster -- to make it more of a  
24 Plaintiff had first-hand personal knowledge, sure, absolutely,  
25 Your Honor.

1 I just don't think a lot of those things are really  
2 relevant to the straightforward question here of whether or not  
3 people were paid straight time. We know they were.

4 THE COURT: And I accept the representation that they  
5 were. I'm just trying to figure out whether Mr. Silva proceeds  
6 on this claim by himself or he gets to invite others similarly  
7 situated to participate in the case with him.

8 In paragraph 10, he swears that his personal  
9 knowledge permits him to say that he knows that other truck  
10 drivers, who were hourly paid like me, regularly worked more  
11 than 40 hours, but were paid straight time for the hours  
12 between 40 and 50.

13 Again, he doesn't tell us -- he doesn't tell us how  
14 many other drivers. He doesn't say whether it's his best  
15 friend at the company.

16 And he doesn't know about anybody else or that he's  
17 had conversations with a sufficient number of other drivers, a  
18 sufficient number of times.

19 So I don't know about that either. And then,  
20 paragraph 11, this is particularly curious because of how old  
21 this case is now.

22 He says that he knows that Agave's other New Mexico  
23 drivers, who were paid like him, would be interested to learn  
24 about their rights and their opportunity to join this lawsuit.

25 You and I know this isn't a secret. You and I know

1 that he's had carte blanche to tell as many of his former  
2 fellow drivers as he wanted that he was seeking to vindicate  
3 his own rights in this case and would do so on their behalf if  
4 they were interested.

5 And yet, despite the passage of 14 or 15 months, he  
6 still is rowing this boat by himself. How much do I read into  
7 that?

8 MR. PRIETO: So, Your Honor, that's a good question.  
9 And the -- one of the point of biggest focuses that we have in  
10 drafting these notices is letting the putative class members  
11 know that there isn't going to be any retaliation.

12 In fact, their notices usually have that language in  
13 bold. You know, it really does mean a lot.

14 And I can tell you from speaking to putative class  
15 members in this case, and I've been dealing almost exclusively  
16 FLSA cases for 15 years now, it goes a very long way when  
17 someone receives a letter from a federal judge that says it's  
18 okay to participate in this case. There isn't going to be  
19 retaliation.

20 A lot of folks actually tell us they want to join,  
21 but they want to wait to hear about that. One, because they're  
22 afraid of retaliation. And two, because frankly, they want to  
23 make sure that this isn't just some, you know, thing they're  
24 hearing from a lawyer.

25 They want to know that it's been at least looked at

1 by a court and a court has made, you know, its determination  
2 that this is a lawsuit, you know, should continue as a  
3 collective.

4 So, you know, a lot of these folks -- generally  
5 that's what happened here is they're afraid of retaliation.  
6 We're seeing that letter goes a long way, Your Honor.

7 THE COURT: Well more than half, and it's got to be  
8 up to two-thirds of the 47 cases that I've dealt with, come  
9 from the oil field.

10 And I'm guessing that this retaliation concern is  
11 shared by everybody who's ever joined or thought about joining  
12 a case like this.

13 I can not remember a case that was 15 months old  
14 before the collective certification motion was filed that had  
15 exactly one plaintiff when there were anywhere between 40 and  
16 100.

17 So this case is unusual at least on my docket.  
18 You're the specialist. I just do this part time, but this case  
19 is unusual in that respect. So do you have anything --

20 MR. PRIETO: Your Honor, could I --

21 THE COURT: Go ahead.

22 MR. PRIETO: Excuse me, I'm sorry. I just wanted to  
23 add the key for the records here is the employer. Generally,  
24 when I file these motions, this is my first time that I've ever  
25 filed a motion for conditional cert. and I've seen a response

1 from you. Absolutely not one single declaration or records  
2 showing the opposite or anything. I've never seen that before.

3 And I think, Your Honor, I think that's telling here.  
4 You know, if this really is a case of one, if I'm defending the  
5 case in all respect to Mr. Blanco, I think he's a great lawyer.  
6 We've got a good relationship in this case.

7 But if I'm defending this case, Your Honor, I am  
8 waving that before Your Honor like crazy. That's great  
9 evidence if there's only one, but you're not seeing that here.  
10 You haven't seen a single declaration. And that's because it's  
11 a straight time case. There's no defense.

12 This is not an exemption case. These are interstate  
13 truck drivers that know more (indiscernible) exemption in  
14 Mexico. It's as clean of a case as you can get.

15 You've got a class here, Your Honor, really. And if  
16 Your Honor wants to see some additional evidence of that, then  
17 absolutely, we'll put a pause on this and we'll conduct some  
18 discovery.

19 We're more than happy to do that, Your Honor. But  
20 there is a class here and I'd hate to see folks who have been  
21 paid straight time who entitled to overtime not get that  
22 notice.

23 THE COURT: Got it.

24 And another point about paragraph 11, he says he  
25 knows that other drivers would be interested and there's no --



1 and that's a conclusion. That's a -- I mean, it is a  
2 conclusory statement that he knows because he doesn't tell us  
3 how he knows.

4 So he doesn't tell us, you know, when we had  
5 conversations with how many people, how he was able to deduce  
6 their interest in joining something like this. So, I mean,  
7 paragraph 11 is a single sentence paragraph that at least to me  
8 is conclusory.

9 And I don't know whether he's told any of them, any  
10 of the other 40 to 100 about the pendency of this lawsuit, how  
11 recently. I don't know any of that. So let me --

12 MR. PRIETO: Your Honor, if I may just add just one  
13 quick note? Generally, and I understand and I agree with Your  
14 Honor's concerns, but generally in these cases, interest is not  
15 a requirement to any the additional certification. There's no  
16 mention of interest in 216(d).

17 I understand that there's a minority of courts out  
18 there that require out that. Just wanted to remind, Your  
19 Honor. And I know Your Honor's aware of that, but just --

20 THE COURT: I wouldn't have brought it up except Mr.  
21 Silva put it in its own paragraph. So -- or whoever drafted it  
22 for him put it in his own paragraph.

23 Let me ask you this. On this particular part of the  
24 skirmish between the parties, the conclusory allegations issue,  
25 you cited a total of six cases.

1           Four of them are from outside the 10th Circuit. You  
2 can find those on page 6 in the first full paragraph. And  
3 then, on page 7, you did cite two New Mexico -- at least  
4 District of New Mexico cases.

5           Which is the strongest of the six cases that you say  
6 I should rely on to grant your motion without any additional  
7 factual showing?

8           MR. PRIETO: Your Honor, this is -- I'm sorry, which  
9 page of the motion?

10          THE COURT: It's on two different pages. You have  
11 total of six cases cited, four on page 6 and two on page 7,  
12 that speak to this issue about how conclusory can the  
13 allegations be?

14          MR. PRIETO: Yeah, I'm looking at the brief now, Your  
15 Honor.

16          THE COURT: Okay.

17          MR. PRIETO: I'm looking at it now. And I see that  
18 we've got the -- we've got attention to Hale v. Galeano, Your  
19 Honor. I haven't read that opinion in a while. So I don't  
20 want to take a hard position on one case versus the other.

21          THE COURT: Okay, that's fair enough. And that  
22 question might not have been fair. I'm not sure I would have  
23 liked it if you were -- if it was Judge Prieto and Lawyer  
24 Fouratt, I might not have liked it either.

25          Let me ask you a couple questions about the

1 additional relief that your motion seeks, which is to declare  
2 right now that we're talking about a 2 versus 3 or a 3 versus 2  
3 year statute of limitation and also to decide right now that  
4 opt-ins are entitled -- potential opt-ins are entitled to  
5 equitable tolling.

6 My first question is do I really have to decide that  
7 now? Are those questions ripe or are they questions for down  
8 the road?

9 MR. PRIETO: So they're questions for down the road,  
10 Your Honor, which is why we've asked that the class encompass  
11 the third year.

12 Mr. Blanco at some point, if he believes that  
13 willfulness is not present in this case, he'll file a motion  
14 for summary judgment and that'll be a time to consider that.

15 In any tolling, any statute of limitations issue as  
16 well, once the opt-in period closes, if there's an individual  
17 that Mr. Blanco believes -- I'm sorry, if the Defendant  
18 believes should not be in the case, I'm sure Mr. Blanco will  
19 file a motion for summary judgment. So those are all issues to  
20 be considered with summary judgment, Your Honor.

21 THE COURT: Okay, I promise that I won't decide that  
22 prematurely, but I do have this question. When I'm thinking  
23 about equitable tolling, if that legal issue presents itself in  
24 this case or elsewhere, and I note that this motion wasn't  
25 filed until 11 months after the complaint itself was filed.

1 How relevant to an equitable tolling analysis is that delay and  
2 the reasons for that delay?

3 MR. PRIETO: Yes, Your Honor. So if it were just a  
4 simple delay, where we just waited for no reason, then  
5 absolutely, I would agree that equitable tolling is not  
6 justified.

7 However, in this case, we have made every effort  
8 possible to try to sell this class. And Mr. Blanco and I have  
9 had phone calls and emails and have exchanged data.

10 Unfortunately, we had breakdown at (indiscernible)  
11 communications. And that the effort by counsel to try to reach  
12 a resolution, I don't think, should be held against class  
13 members.

14 It's -- there was no delay on filing this motion  
15 simply because we just weren't doing our job. We were working  
16 hard to (indiscernible) issues up.

17 THE COURT: Okay. Mr. Prieto, those were the  
18 questions I had for you. I'll come back to you since it's your  
19 motion when I'm done talking with Mr. Blanco.

20 MR. PRIETO: Thank you, Your Honor.

21 THE COURT: So, Mr. Blanco, same first question to  
22 start. Did you do the briefing or did somebody else?

23 MR. BLANCO: Our office did, yes.

24 THE COURT: Okay.

25 MR. BLANCO: Myself and an associate Robert

1 (indiscernible).

2 THE COURT: Okay. Your sole objection as I read your  
3 response is what I've hit upon about whether there is a  
4 sufficient factual submission in Mr. Silva's affidavit and his  
5 pay records to get us past the relatively low threshold that we  
6 all understand. That's your sole objection?

7 MR. BLANCO: Yes.

8 THE COURT: Okay, Mr. Prieto just mentioned and I was  
9 going to ask you anyway, it -- although it's not your burden,  
10 you certainly had the right to introduce evidence of your own  
11 or Agave's evidence.

12 And there wasn't any. And I found it curious. And I  
13 just want to give you a chance to address that.

14 MR. BLANCO: Sure. Good question. So we are aware  
15 of that point. Obviously, we've read the cases and we  
16 researched the issues and we're familiar with -- based on what  
17 was submitted, we chose not to present (indiscernible) person  
18 or the dispatch person.

19 Instead, we just made the client's decision to rely  
20 on the briefing is pretty direct, although it's now  
21 (indiscernible) District Courts in New Mexico that  
22 (indiscernible) cases is now pending -- decided.

23 If the Court would follow them to the (indiscernible)  
24 direct would be the Blan Cart (phonetic) and the Stubbs case,  
25 both U.S. District Courts in Kansas.

1           They both followed the 10th Circuit precedent  
2           (indiscernible), Your Honor. So they're I think instructive  
3           and relevant.

4           And when we were going through this with Mr. Siego's  
5           (phonetic) affidavit in this case, he makes (indiscernible), I  
6           think, those statements that were made in affidavits in Blan  
7           Carte and Stubbs case were those courts.

8           And it's -- I completely understand. It's a  
9           discretionary ruling by the loner. Those courts and those  
10          judges found those things to be insufficient (indiscernible)  
11          tasks that we're proving with right now.

12          So we made the decision not to. I did and I have  
13          enjoyed working with Mr. Prieto. We've gotten along well. I  
14          really hear them on the tolling issue. That's something that  
15          he and I talked about. He and I asked before Plaintiffs  
16          (indiscernible) the delays because we tried to lay this out.

17          It fell apart. Part of the reason it fell apart was  
18          because we started gathering information and sharing it, we  
19          realized that the number of people involved, it's lengthy.

20          And there was an area missing in the calculation of  
21          the individuals that could possibly have been affected. We're  
22          not conceding that the pay practice violates the law for every  
23          single (indiscernible) affected employee.

24          In fact, that's one of the issues that we raised in  
25          the motion. We're not capable of identifying the people that

1 they want to identify as all being similarly situated.

2 Mr. Silva can't do that in his affidavit and he  
3 didn't do that. They didn't bring forth 100 people. They've  
4 had names of these employees. We provided that to them.

5 Mr. Silva knows who his co-workers are.

6 (Indiscernible) rate unfortunately reflecting those three and  
7 (indiscernible) it's the same, it's huge.

8 Drivers come and go. They rarely stay around  
9 (indiscernible) six months to a year.

10 So a lot of those folks have left Agave.

11 (Indiscernible) the older the company. Somebody else agreed to  
12 come forward and said, yes, this happened and yes. Obviously,  
13 (indiscernible) same pay facts, gave a little bit more of an  
14 interest supported class, but that didn't happen.

15 And I think it's because in reality what we have here  
16 is a single individual who was (indiscernible) highly aware and  
17 enterprising as they are, the lawyer is caught (indiscernible)  
18 between its class. And we don't think it's appropriate because  
19 they haven't established that.

20 Now I do concede in our response that we've got or  
21 the point that if your discovery in a seemingly individual  
22 plaintiff case, they could establish that it would be  
23 appropriate to have a directed action or a cause action. We  
24 could be petitioning the Court for the (indiscernible).

25 Where we are now, I don't see it. And so, we relied

1 on those cases in lieu of your decision not to support my  
2 response to the additional group.

3 THE COURT: One of the points that you made in the  
4 opposition was that Mr. Silva drove a vacuum truck and other  
5 drivers drove trucks that had a different mission. And  
6 therefore, he can not be similar situated to them.

7 You guys have exchanged a lot of information and Mr.  
8 Blanco, you've got a lot more information obviously because you  
9 represent the company.

10 Is discovery going to show that the -- that the  
11 drivers, no matter the mission of the vehicle they were  
12 driving, had the same pay practice?

13 MR. BLANCO: No. There is a -- again, I don't want  
14 to say something that sounds like I'm conceding, but in every  
15 instance, the individual employee made inappropriate  
16 (indiscernible). There are going to be employees who did not  
17 work 40 hours, yet they paid 50 hours.

18 And some of that is differentiated between the jobs  
19 they can do based on the routes that they are assigned. So the  
20 discovery would show that.

21 It's not the case (indiscernible) both  
22 (indiscernible) assigns schedules in excess of 40 hours.

23 Now will there be a few that would have potentially?  
24 Our view there would be, but there's not going to be a  
25 predominant (indiscernible) that. They're assigned jobs



1 (indiscernible). And some people get paid 50 hours when they  
2 actually only physically worked hours 30 hours in a week.

3 THE COURT: So one concern I had about this motion is  
4 you've essentially invited me to permit Mr. Prieto to engage in  
5 discovery, class or collective discovery to figure out whether  
6 that's the way this case should proceed.

7 And so, I'm wondering whether we're delaying the  
8 inevitable. I mean, if I give them a key to Agave's door, how  
9 long is it going to take for them to file a new motion or  
10 submit additional proof while this one remains pending?

11 MR. BLANCO: Your Honor, I don't know, but my  
12 suggestion in our brief is that the request for conditional  
13 class certification be denied, just proceed with a single claim  
14 to a case.

15 Again, without prejudice to Mr. Silva's  
16 (indiscernible) to ask the Court that written discovery  
17 (indiscernible).

18 We actually do have single pay practice. It affects  
19 a large number of people, so if the Court has to be  
20 appropriate, we could make petition the Court to do that.  
21 There wouldn't be any need for them to do that (indiscernible)  
22 if they can't prove it.

23 Now I'll leave that Mr. Prieto to decide whether he  
24 thinks (indiscernible) gather and to do that in discovery.  
25 They do not object to (indiscernible).

1           The Court believes that it would be effective to deny  
2 the conditional certification now without prejudice to each  
3 (indiscernible), we (indiscernible) single claim payers with  
4 what you consider.

5           If they can meet their burden to show the class would  
6 be appropriate, they can bring it back to the Court and take it  
7 up at that time. I don't know how long that they would want  
8 for that.

9           THE COURT: So the -- if that's the route I chose,  
10 denial without prejudice, I wouldn't be real patient with an  
11 objection to discovery that is targeted at figuring out whether  
12 there's a class.

13           And I would hope that that we wouldn't be seeing  
14 those objections. And you're nodding. So --

15           MR. BLANCO: I understand.

16           THE COURT: Okay, all right. Do you agree with Mr.  
17 Prieto that the questions about 3 versus 2 on the statute of  
18 limitations and equitable tolling are not ripe?

19           MR. BLANCO: Yes, I agree.

20           THE COURT: Okay. All right, Mr. Blanco, thank you.

21           So, Mr. Prieto, I don't have any new questions for  
22 you. I have not made a decision. I'm going to -- one of the  
23 things I do after oral argument is I go back and I listen to  
24 it, because right now, I have to be thinking about my next  
25 question. And so, I'm not completely focused to the exclusion

1 of everything else on your answer.

2 And I often hear things the second time that I did  
3 not hear the first time, but I want to give you a chance to  
4 respond to the conversation I just had with Mr. Blanco.

5 MR. PRIETO: Thank you, Your Honor. Just briefly,  
6 one thing that I would be worried to stipulate to at this point  
7 is that there are truck drivers who did not work overtime.

8 I agree with Mr. Blanco, those individuals do not  
9 have a claim. We're fine with excluding those folks for  
10 purposes of receiving notice. There's no point in sending  
11 notice.

12 If Mr. Blanco's able to put together a class list of  
13 folks that worked more than 40 hours and were paid straight  
14 time, I think that would be fine. And the after conditional  
15 certification, he and I at phase 2 could hash out some of the  
16 merits based (indiscernible) that he's mentioned.

17 But I just wanted to make clear we certainly have no  
18 intention of setting up notice for the folks who did not work  
19 overtime.

20 So if that's the main issue here, I think we need to  
21 take care of that rather quickly.

22 THE COURT: And did any of that information get  
23 exchanged already?

24 MR. PRIETO: Not -- no, Your Honor, no. We just had  
25 --

1 MR. BLANCO: No.

2 MR. PRIETO: -- we just had a number of individuals.  
3 And I don't recall receiving names. And had we received names,  
4 Your Honor, so the ethics rules here in Texas, and I'm assuming  
5 probably the same as New Mexico, prevent me from contacting  
6 folks and then asking them to join litigation. That's a huge  
7 no-no and that's not something that I would ever do.

8 So even if we did have a name, it's not something we  
9 do (indiscernible).

10 THE COURT: Understood. Is -- I went to school in  
11 Texas. Is that back then, 100 years ago, that was called  
12 barratry. Is it still?

13 MR. BLANCO: Still is.

14 THE COURT: Still, okay.

15 MR. PRIETO: Yes, actually the rules have become even  
16 stricter here recently. They're cracking down on that quite a  
17 bit here in Texas, so.

18 THE COURT: Okay, all right. So, gentlemen, this is  
19 what I'm going to do. I'm going to try to get a decision out.  
20 I don't want to promise -- I guess I could promise Friday. I'm  
21 just not going to promise this Friday, in case I don't meet  
22 that time line.

23 But this has helped me -- this has helped me a lot  
24 and so, I don't need to take a lot more time, because we had  
25 already front loaded a bunch of the work.

1           And Mr. Prieto, I'm going to re-evaluate my worries  
2 about whether this single declaration is sufficient. You're --  
3 I mean, I defer oftentimes to the experience of lawyers, since  
4 you guys specialize in this.

5           But after reading the cases, I still had these  
6 concerns. And so, oral argument at least from my perspective  
7 was worth it. And I hope it wasn't a total waste of your time.

8           On behalf of Mr. Silva, is there anything else we  
9 should talk about before we close?

10          MR. PRIETO: No, Your Honor, thank you.

11          THE COURT: All right, thank you.

12          Mr. Blanco, on behalf of Agave, anything else?

13          MR. BLANCO: No, Judge, thank you.

14          THE COURT: All right, you can take that tie off and  
15 hang it next to the other 20 that you have on the rack behind  
16 you. I'm taking mine off, too, and I wish you guys a good day  
17 and a good week.

18          MR. BLANCO: Thank you, Judge.

19          MR. PRIETO: Thank you, Judge.

20          THE COURT: All right, take care.

21          MR. BLANCO: Have a good day.

22          THE COURT: You, too.

23          (Proceedings concluded at 10:40 a.m.)

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**CERTIFICATE**

I, Chris Hwang, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

CH

February 17, 2023

Chris Hwang

Date

Court Reporter