IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BELL, ET AL., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

No. 2:17-cv-00796-KG-CG
CLASS ACTION
JURY DEMANDED

TRI-STATE CAREFLIGHT, LLC, and BLAKE A. STAMPER, Individually,

Defendants.

PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION OF COLLECTIVE ACTION PURSUANT TO NEW MEXICO MINIMUM WAGE ACT

Plaintiffs move for conditional certification of their overtime claims as a collective action pursuant to the provisions of the New Mexico Minimum Wage Act, NMSA 1978 § 50-4-19 *et seq.* (2015) ("NMMWA"). Concurrence of Defendants has been sought, but counsel has not yet indicated Defendants' position on this motion. The collective action provision of the NMMWA, § 50-4-26(D), permits one or more employees to bring an action for unpaid overtime on his/her or their behalf and also on behalf of "similarly situated" employees. This standard, rather than the standard of Fed. R. Civ. P. 23, should be applied to Plaintiffs' overtime claim in this case under the principles set forth in Justice Stevens' concurring and controlling opinion in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010).

Federal courts generally apply federal procedural rules to state law claims before them, pursuant to their diversity jurisdiction. However, there is an exception to this rule when what would ordinarily be considered a "procedural" standard is so intertwined with the state substantive law that creates the right being sued upon that declining to apply the state law standard would deny Plaintiffs their substantive rights. *Id.* That exception applies here. The Court should apply the state standard of § 50-4-26(D) to Plaintiffs' overtime claims. The standards established by the NMMWA and New Mexico decisional law are met. The Court

should therefore conditionally certify a collective action for the overtime claims asserted in this case.

I. THE PROPOSED CLASS

Plaintiffs seek certification of the following class pursuant to the NMMWA:

1. A class consisting of all persons employed as flight crew members (Flight Paramedics, Flight Nurses and Pilots) by Tri-State in New Mexico who: (a) worked more than forty (40) hours per week at any time from June 19, 2009 to the present; and (b) did not receive compensation at one and one-half times his/her regular hourly rate for all the hours worked over forty (40) per week.

Should the Court determine that sufficient differences exist between Flight Paramedics and Flight Nurses on the one hand and Pilots on the other hand, Plaintiffs suggest that the Pilots be split off in a separate class, with the classes being described as follows:

1. **Flight Paramedic & Flight Nurse Class:** A class consisting of all persons employed as Flight Paramedics or Flight Nurses by Tri-State in New Mexico who: (a) worked more than forty (40) hours per week at any time from June 19, 2009 to the present; and (b) did not receive compensation at one and one-half times his/her regular hourly rate for all the hours worked over forty (40) per week; and

2. **Pilot Class:** A class consisting of all persons employed as Pilots (both Rotary and Fixed Wing) by Tri-State in New Mexico who: (a) worked more than forty (40) hours per week at any time from June 19, 2009 to the present; and (b) did not receive compensation at one and one-half times his/her regular hourly rate for all the hours worked over forty (40) per week.

II. CASE BACKGROUND

This is a wage and hour case asserting claims for unpaid overtime compensation pursuant to the NMMWA and common law unjust enrichment. The current Plaintiffs were flight crew members formerly employed by Defendant Tri-State CareFlight, LLC ("Tri-State") in New Mexico. Flight crews consist of Flight Paramedics, Flight Nurses and Pilots. This case was originally filed by former Plaintiffs David and Nicole Payne on September 11, 2014, on behalf of

themselves and all similarly situated current and former employees of Tri-State. *See Complaint* in *Payne, et al. v. Tri-State CareFlight, LLC, et al.*, Case No. 1:14-cv-01044-JB-KBM [doc. 1-1, filed September 11, 2014]. Dr. Stamper, the owner of Tri-State, was named as a Defendant along with Tri-State because he meets the statutory definition of "employer" under the NMMWA, specifically NMSA 1978, § 50-4-21(B) (2015), and because, as the owner of Tri-State, he was unjustly enriched by the allegedly unlawful conduct complained of here. Following discovery directed to class certification issues, the Paynes settled their claims on an individual basis in November 2015 after their motion for class certification was filed and briefed, but before any ruling on it.

In January 2016, five new plaintiffs were permitted to intervene and they filed a Second Amended Complaint. *See* Second Amended Complaint [doc. 100, filed January 28, 2016]. Following some discovery, Defendants extended Fed. R. Civ. P. 68 offers of judgment to all five of the plaintiffs, who accepted the offers. *See Notice & Offer* [docs. 149 & 149-1, filed 11.17.16]. At the time the offers were accepted, Plaintiffs' May 16, 2016, Motion for and Brief in Support of Class Certification [doc. 126] had been fully briefed, but remained undecided. *See Notice of Completion of Briefing* [doc. 137, filed 07.08.16]. Final Judgment in favor of the five plaintiffs in the amounts reflected in the offers of judgment was entered by the Court on November 23, 2016. *See* Final Judgment [doc. 150, filed Nov. 23, 2016]. Following entry of judgment, counsel filed a motion to intervene on behalf of seventeen (17) new plaintiffs, who sought to pursue the same claims as originally brought by the Paynes and then the five (5) plaintiffs who followed them. *See Opposed Fed. R. Civ. P. 24(B) Motion and Supporting Memorandum to Intervene as Parties Plaintiff and Class Representatives* [doc. 151, filed November 29, 2016]. On June 27, 2017, counsel filed a Supplement to the Motion to Intervene, proposing to add fifty-two (52) additional plaintiffs [doc. 166, filed June 27, 2017]. The intervention motion has not yet been ruled on and is currently pending before the Court in Case No. 1:14-01044-JB-KBM.

Plaintiffs believe that the statute of limitations on their claims was tolled pursuant to *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 38 L.Ed.2d 713, 94 S.Ct. 756 (1974) by the filing of the complaint in the *Payne* case on September 11, 2014 and remains tolled. However, at a hearing before the Court in Case No. 1:14-01044-JB-KBM on August 2, 2017, defense counsel advised the Court that they intended to take the position that the pendency of the motion to intervene did not toll the statute of limitations and that the tolling ceased with entry of the final judgment in that case on November 23, 2016. Although Plaintiffs believe this position is erroneous, to protect against the possible loss of claims by some Plaintiffs and/or putative class members, should the Court disagree with Plaintiffs on the tolling issue, Plaintiffs filed their complaint in this matter on August 3, 2017. The allegations in the Complaint mirror the allegations in the Second Amended Complaint in Case No. 1:14-cv-01044-JB-KBM. The Complaint contains two counts: (1) in Count I Plaintiffs assert claims on behalf of themselves and all "similarly situated" employees employed by Tri-State in New Mexico as flight crew members (Flight Paramedics, Flight Nurses and Pilots) for overtime compensation at the rate of one and one-half times their regular hourly rate for all hours worked in excess of forty (40) per week pursuant to the NMMWA; and (2) in Count II the Plaintiffs who were employed as Pilots assert a New Mexico common law claim for unjust enrichment on behalf of themselves and all persons employed by Tri-State in New Mexico during the relevant time period as Pilots seeking compensation for unpaid work hours incurred when they were required to continue working beyond the end of their regular twelve (12) hour shift without receiving any additional compensation. *See Complaint*, ¶¶ 100-103 and 112-115 [Doc. 1, filed August 3, 2017].

At this time Plaintiffs seek conditional certification of their overtime claims pursuant to the collective action provisions of the NMMWA, specifically NMSA 1978 § 50-4-26(D) (2015). The Pilot Plaintiffs do not at this time seek certification of their unjust enrichment claim, although they plan to do so at an appropriate time. As explained below, applicable legal authority compels the conclusion that the state law collective action provision in § 50-4-26(D), rather than Fed. R. Civ. P. 23, controls conditional certification of the overtime class. Because the standard

for conditional certification of the overtime claim can be easily satisfied without the need for discovery from Plaintiffs or additional discovery from Defendants, Plaintiffs believe that the issue of conditional certification is ripe for decision by the Court.

III. ARGUMENT

A. The state law collective standard in the NMMWA is so intertwined with Plaintiffs' right to sue for overtime pursuant to that statute that it is in effect a part of the substantive right and should therefore be applied to Plaintiffs' overtime claims.

The NMMWA provides for premium pay of one and one-half times an employee's regular rate of pay for all hours worked in excess of forty (40) in a workweek. NMSA 1978 § 50-4-22(C). To remedy violations of this overtime provision, the NMMWA provides aggrieved employees with a private right of action for recovery of the unpaid overtime plus an additional amount equal to twice the unpaid overtime. NMSA 1978 § 50-4-26(C). In the very same section of the statute that creates this private right of action for overtime compensation, the NMMWA states that "[a]n action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and on behalf of the employee or employees and for other employees similarly situated . . . ." NMSA 1978 § 50-4-26(D).

This statutory provision does not contain any explanation of what precisely "similarly situated" means or how this standard is to be applied. These questions were answered by the New Mexico Court of Appeals in *Armijo v. Wal-Mart Stores, Inc.*, 2007-NMCA-120, PP48-53, 142 N.M. 557, 168 P.3d 129. There the court adopted the two-stage analysis initially outlined by the Tenth Circuit Court of Appeals in *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001), for use in determining collective action certification in Fair Labor Standards Act cases. In that analysis, "similarly situated" at the first stage of the analysis means that the plaintiffs have made "substantial allegations that the putative class members were together the victims of a single decision, policy or plan." 2007-NMCA-120 at P48 (quoting *Vaszvalik v. Storage Tech Corp.*, 175 F.R.D. 672, 678 (D. Colo. 1997))(internal quotation marks and citation omitted). According to the *Armijo* Court, the standard at this stage "is a lenient one that typically

results in class certification." 2007-NMCA-120 at P53 (quoting *Brown v. Money Tree Mortgage, Inc.*, 222 F.R.D. 676, 679 (D. Kan. 2004)). This is obviously a far cry from the rigorous standards for class certification pursuant to Fed. R. Civ. P. 23 or its state analogue, Rule 1-023 NMRA.

At the second stage, a somewhat stricter standard is applied and the court looks to: (1) the similarity of the class members' employment settings; (2) whether the defenses available are individual or common; and (3) any other relevant fairness or procedural considerations. Although stricter than the initial stage analysis, this is still far less rigorous than the Fed. R. Civ. P. 23 standards. *Armijo*, 2007-NMCA-120, PP 48-50. The fact that the standard for pursuing a collective action under the NMMWA is more lenient than the standard for certification of a class pursuant to Fed. R. Civ. P. 23 is reflective of the fact that the NMMWA is a remedial statute. *See New Mexico Dep't of Labor v. A. C. Elec., Inc.*, 1998-NMCA-141, P10, 125 N.M. 779, 965 P.2d 363 (state policy is to establish and safeguard "minimum wage and overtime compensation standards . . . ."). Because of the broad remedial purpose of the NMMWA, the New Mexico Legislature determined that it was important that an enforcement mechanism more easily satisfied by employees than the demanding standards applicable to traditional class actions be available.

The question of whether a state law provision that serves a generally procedural purpose is applicable when state law claims are litigated in federal court is frequently a thorny one. In *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S.Ct. 1431, 1452, 176 L.Ed.2d 311, 333 (2010) the Supreme Court was presented with just such an issue. The issue was whether a state "procedural rule that is not part of New York's substantive law" and that prohibited use of the class action device in cases in which a penalty was sought applied to bar a case filed as a class action in federal court. *Id.* at 416. The plaintiffs contended that Fed. R. Civ. P. 23 applied and permitted them to proceed on a class basis, assuming they were able to meet the requirements of the rule. The defendants argued for application of the New York law, which would have precluded a class action in that case. A split Supreme Court held that Fed. R. Civ. P.

23 applied to the case rather than the state law and that the case could proceed as a putative class action in federal court notwithstanding the state law that barred class actions in the type of case presented. *Id.*

The Tenth Circuit has held that Justice Stevens' concurring opinion in *Shady Grove* is the controlling opinion. *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1217 (10th Cir. 2011); *Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 983 & n. 6 (10th Cir. 2010).[1] According to Justice Stevens' concurrence, "federal rules cannot displace a State's definition of its own rights or remedies." *Shady Grove*, 559 U.S. at 418. Furthermore, "[a] federal rule . . . cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Id.* at 423. "[I]f a federal rule displaces a state rule that is ''procedural' in the ordinary sense of the term,' . . . but sufficiently interwoven with the scope of a substantive right or remedy, there would be an Enabling Act problem, and the federal rule would have to give way." *Id.* at 429 (quoting *S. A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995). In the case of a direct conflict between a federal procedural rule and a state law standard in a diversity case, the state law standard is applicable if it is in essence substantive even if nominally procedural. The New York statute at issue in *Shady Grove* was purely procedural because it applied not only to claims based on New York law, but also to claims based on federal law or the law of another state. This made it "hard to see how [the New York law] could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies." *Id.* at 432.

Underpinning the Supreme Court's holding in *Shady Grove* is the fact that federal procedural rules are adopted pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, which authorizes the promulgation of the Federal Rules of Civil Procedure and mandates their use in all civil suits in the federal courts unless application of a rule would "abridge, enlarge or modify any

[1] *See also Jones v. UPS*, 674 F.3d1187, 1206 (10th Cir. 2012)(Fed. R. Civ. P. 38, rather than state law requiring court rather than jury to determine punitive damages, applied because Rule was valid exercise of authority under Rules Enabling Act).

substantive right." *Id.* at 422; *see* 28 U.S.C. § 2072(b)("Such rules shall not abridge, enlarge or modify any substantive right."). Application of a federal procedural rule which would abridge or modify a state law intimately tied to the state-created right would therefore violate the Rules Enabling Act and could not be applied by a federal court sitting in diversity. This is precisely the case presented here, namely that application of Fed. R. Civ. P. 23 would abridge and modify the specific substantive rights afforded by the NMMWA to aggrieved employees, namely the right to sue not only for oneself but also "for other employees similarly situated" under the standards set forth by New Mexico law.

In *Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, the Tenth Circuit Court applied *Shady Grove* to hold that a Wyoming state law requirement that a complaint against the state allege that the plaintiff had complied with requirements that the claim had been presented to the state and certified to under penalty of perjury applied in a diversity case. The plaintiff claimed that these requirements conflicted with the pleading requirements of Fed. R. Civ. P. 8, but the court found that "[p]ermitting the federal rules to trump substantive Wyoming law would 'abridge, enlarge, or modify' the litigants' rights in violation of the Rules Enabling Act." *Id.* at 985. Thus, a seemingly procedural requirement in state law was applied in a diversity case because the procedural rule was so tied up with the substantive right being asserted that failing to apply it would have changed the substantive law rights of the plaintiff. *See also Upky v. Lindsey*, No. CIV 13-0553 JB/GBW, 2015 U.S. Dist. LEXIS 55167, *72-*73 (D.N.M. Apr. 7, 2015)(state statute barring introduction into evidence of results of medical review panel in medical malpractice trial conflicted with Federal Rules of Evidence; purpose of statute was substantive because designed to regulate and affect parties' conduct rather than being focused on reaching accurate result at trial).

A number of courts have applied *Shady Grove* to state law wage and hour law claims. In *Driscoll v. George Washington Univ.*, 42. F.Supp.3d 52 (D.D.C. 2012), for example, the court was faced with an issue similar to the issue presented here: whether Fed. R. Civ. P. 23's opt out class action standard applied to a District of Columbia Minimum Wage Act claim where that

statute permitted only an opt in collective action.[2] The court found the two provisions in direct conflict so the court looked to whether applying Rule 23 would abridge, enlarge or modify the state law substantive right. The court concluded that the opt in provision "confers substantive rights such that application of Rule 23 in these circumstances would violate the Rules Enabling Act." *Id.* at 61.[3] Of significance to the court's holding was the fact that the District of Columbia opt in provision was in the same paragraph of the same statute that created the substantive right, rather than in a generally applicable procedural rule like the New York provision considered by the Supreme Court in *Shady Grove. Id.*

In *Harris v. Reliable Reports Inc.*, 2014 U.S. Dist. LEXIS 31223 (N.D.Ind. Mar. 10, 2014), the court, like the *Driscoll* Court, held that opt in provisions in Indiana and Ohio wage and hour laws were applicable in a diversity action because opt in provisions of both state statutes were part of statutes that created the underlying substantive rights and were therefore so intertwined with rights created by state statutes that they defined the scope of those rights. Other decisions in wage and hour cases are to similar effect. *See, e.g., Williams v. King Bee Delivery, LLC*, 199 F.Supp.3d 1175, 1186 (E.D.Ky. 2016)(*Shady Grove* required court to apply state law it construed as prohibiting class actions in wage cases brought under Kentucky wage statute rather than the federal class action rule because allowing Fed. R. Civ. P. 23 to override the state statute "would 'abridge, enlarge or modify' a substantive state right in violation of the Rules Enabling Act.")*Green v. Platinum Rests. Mid-America LLC*, 2015 U.S. Dist. LEXIS 171647 (W.D.Ky. Feb. 24, 2015)(same);*Davenport v. Charter Communs., LLC*, 35 F.Supp.3d 1040, 1051 (E.D.Mo. 2014)(class action restriction found in Kentucky statute that authorizes private right of action for

[2] The NMMWA does not contain an opt in standard, but the issue in *Driscoll* is comparable because here the NMMWA applies to establish a procedural framework for collective actions that is different than the requirements of Fed. R. Civ. P. 23.

[3] Numerous courts that have considered the issue have concluded that the analogous opt in procedure in the Fair Labor Standards Act, 29 U.S.C. § 216(b), is substantive. *See, e.g., Monahan v. Smyth Auto., Inc.*, No. 1:10-cv-048, 2011 U.S.Dist. LEXIs 9877 (S.D. Ohio Feb. 2, 2011); *Dillworth v. Case Farms Processing. Inc.*, No. 5:08-cv-1694, 2009 U.S. Dist. LEXIS 76947 (N.D. Ohio Aug. 27, 2009)(opt in requirement substantive because generally reduced number of plaintiffs); *Ellis v. Edward D. Jones & Co., L.P.*, 527 F.Supp.2d 439, 456 & n. 18 (W.D.Pa. 2007); *Zelinsky v. Staples, Inc.*, No. 08-cv-684, 2008 U.S.Dist. LEXIS 75051, *12 (W.D.Pa. Sept. 29, 2008)("decision to authorize an opt-in versus opt-out class represents substantive policy").

overtime compensation functions to define scope of substantive rights under state law and is applicable in diversity case); *but see McCann v. The Sullivan University System*, Case No. 2015-SC-000144-DG (Ky. Aug. 24, 2017)(Kentucky Supreme Court held wage statute did not prohibit class actions).

Outside of the wage and hour context, a number of federal courts have considered diversity claims under various state consumer protection acts or other statutes that contain specific provisions relating to the rights created by the statutes. Almost without exception, the courts have applied the specific provisions in the statutes that create the rights under state law rather than otherwise applicable federal procedural standards. On the other hand, state law provisions that are generally applicable to a broad range of cases have been held inapplicable in federal court in a diversity action.

In *In re MyFord Touch Consumer Litig.*, 2016 U.S. Dist. LEXIS 179487 (N.D.Cal. Sept. 14, 2016), for example, the court held that a Colorado state law limitation on class actions in the state's Consumer Protection Act applied because the limitation was in the specific consumer protection law, indeed in the very section that created the private right of action under the statute, and only applied to claims under the Consumer Protection Act, thus reflecting "a substantive policy judgment as to the area of the law by the legislature, not a rule of general procedure." *Id.* at *79. By contrast, a Virginia state law class action bar was not contained in the state's consumer protection law and applied outside the context of consumer protection cases, leading to the conclusion that it was procedural and therefore precluded by Fed. R. Civ. P. 23 under the standards set forth in *Shady Grove*. *Id.; see also Ipock v. Manor Care of Tulsa, OK, LLC*, 2017 U.S. Dist. LEXIS 51134, *9-*10 (N.D.Okla. April 4, 2017)(Oklahoma affidavit of merit requirement not applicable because it "does not alter the rights and remedies of the parties" and only requires plaintiffs to present more detailed set of allegations supported by expert testimony earlier in case); *Fejzulai v. Sam's West, Inc.*, 205 F.Supp.3d 723, 727 (D.S.C. 2016)(statutory bar against representative actions contained in South Carolina consumer protection statute applied in federal court); *In re Target Corp. Customer Data Sec. Breach Litig.*, 66 F.Supp.3d 1154

(D.Minn. 2014)(consumer protection statutes of Alabama, Georgia, Kentucky, Louisiana, Mississippi, Montana, South Carolina, Tennessee, and Utah precluded class actions; court applied state laws rather than Fed. R. Civ. P. 23); *In re Trilegiant Corp.*, 11 F.Supp.3d 82, 118-19 (D.Conn. 2014)(Connecticut consumer protection law that barred class actions by non-Connecticut residents, rather than Fed. R. Civ. P. 23, applicable because class action restriction applied only to claims under statute, restriction was in same section of statute that created right of action and restriction appeared to reflect purposeful policy decision); *Lisk v. Lumber One Wood Preserving, LLC*, 993 F.Supp.2d 1376 (N.D.Ala. 2014)(Alabama consumer protection statute's prohibition against private class actions rather than Fed. R. Civ. P. 23 applicable); *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F.Supp.2d 367 (D.Mass. 2013)(Illinois antitrust statute indirect purchaser requirement and Utah antitrust statute requiring residency to sue under statute applicable rather than Fed. R. Civ. P. 23); *Phillips v. Phillip Morris Cos., Inc.*, 290 F.R.D. 476, 481 (provision in Ohio consumer protection statute prohibiting class actions in certain circumstances applicable); *Williams v. Chesapeake La., Inc.*, No. 10-1906, 2013 U.S. Dist. LEXIS 34778 (W.D.La. Mar. 11, 2013)(Louisiana state statute barring class actions in suits for mineral royalties applicable); *In re Digital Music Antitrust Litig.*, 812 F.Supp.2d 390, 416 (S.D.N.Y. 2011)(Illinois antitrust statute restrictions applicable); *Tait v. BSH Home Appliances Corp.*, No. SACV 10-711 DPC (ANx), 2011 U.S. Dist. LEXIS 54456 (C.D.Cal. May 12, 2011)(provision in Tennessee consumer protection statute barring class actions under statute applicable in federal court).

The common thread running through all of these cases is the express recognition that when an ostensibly procedural provision of state law is located in the same statute creating the private right of action sued on and is applicable only to claims under that same statute, rather than to cases generally, it will be found to define the scope of the state law right. Such a provision is substantive and must be applied by a federal court sitting in diversity under *Shady Grove*. A failure to do so will abridge, enlarge or modify a substantive right in violation of the Rules Enabling Act.

The standard applied by these courts is applicable here and results in the conclusion that the Court must apply the "similarly situated" standard in the NMMWA rather than each of the elemental standards set forth in Fed. R. Civ. P. 23. The wage and hour cases cited above are directly analogous. They involve either an outright prohibition on a class/collective action for overtime compensation or they restrict that right by specifying an opt in requirement. These requirements apply only to claims under the state wage statutes at issue and they place conditions on the exercise of the statutory rights in question. That the provisions in these cases are restrictive of the exercise of the statutory right rather than expansive, like the "similarly situated" standard in the NMMWA, is not material. The key point is that when the respective state legislatures created the statutory rights to sue for overtime compensation, in the very same statutes they expressed their legislative judgment as to how those rights could be exercised. The cases involving statutes other than wage and hour statutes apply the exact same analysis and come to comparable conclusions: restrictions in the state statute creating the right sued on and applicable only to those statutes are substantive and must be applied by the federal court.

The collective action provision in the NMMWA is in the very same section of the statute that creates the right sued on here in the overtime claim, in fact in the very same sentence. *See* NMSA 1978 § 50-4-26. It is applicable only to claims brought under the NMMWA: "An action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and on behalf of the employee or employees **and for other employees similarly situated** . . . ." NMSA 1978 § 50-4-26(D)(emphasis added). Furthermore, this provision reflects a policy choice by the New Mexico legislature to make it relatively easy for employees bringing claims for unpaid overtime compensation or minimum wages to do so on behalf of themselves and others, given the importance of upholding wage standards in New Mexico. The standard for representative actions under the NMMWA is similar, but not identical, to the analogous provision in the Fair Labor Standards Act. With respect to that provision, which also represents a substantially more lenient standard for representative actions than Fed. R. Civ. P.23, the Supreme Court has observed: "Congress has stated its policy [under the Fair Labor

Standards Act] that . . . plaintiffs should have the opportunity to proceed collectively. A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170, (1989). Here, the New Mexico State Legislature made a similar determination. Had the legislature not intended to make it easier to pursue such claims, it need not have included any language regarding representative actions in the statute at all, in which case the more stringent standards set forth in Rule 1-023 NMRA would apply to overtime claims brought in state court.

Applying the more stringent requirements of Fed. R. Civ. P. 23 to the overtime claims in this case would "abridge" and "modify" the state substantive right created by the NMMWA. This Court must therefore apply the NMMWA's "similarly situated" standard, rather than Fed. R. Civ. P. 23, to class certification in this case.

B. All Plaintiffs are similarly situated; conditional certification of the overtime class is therefore appropriate.

The NMMWA "requires the payment of time and a half for work in excess of a forty-hour workweek" for all non-exempt employees. *N. M. Dep't of Labor v. Echostar Comm. Corp.*, 2006-NMCA-047, P1. The NMMWA also allows employees and former employees to bring an action for unpaid compensation on a representative basis on their own behalf and on behalf of all other employees "similarly situated." NMSA 1978 § 50-4-26(D). In applying this provision this Court is to apply the two-step procedure adopted by the New Mexico Court of Appeals in *Armijo v. Wal-Mart Stores, Inc.*, 2007-NMCA-120, 142 N.M. 557, 168 P.3d 129, which the *Armijo* Court adopted from cases applying the similar provision in the FLSA.[4] Under this approach,

[4] While the collective action provisions in the Fair Labor Standards Act and the NMMWA are similar, in the NMMWA the New Mexico Legislature did not adopt all of the Fair Labor Standards Act's provisions. The Fair Labor Standards Act explicitly provides for a consent procedure, where every member of a putative collective action must file a written consent with the court in order to be a part of the collective action. *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."). The NMMWA conspicuously omits this formal consent language from the representative action provision of the NMMWA and provides instead that one or more employees may bring a suit on behalf of themselves and "other employees similarly situated . . . ." *See* NMSA 1978 § 50-4-26(D). Thus, contrary to the Fair Labor Standards Act, there is no legal basis to insert a consent or opt-in requirement into the NMMWA.

"[a]t this initial stage, all that is required are 'substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.'" *Armijo*, 2007-NMCA-120, P 48 (quoting *Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 678 (D.Colo. 1997)); *see also Schwed v. General Elec. Co.*, 159 F.R.D. 373, 375-76 (N.D.N.Y. January 13, 1995)(at initial stage "plaintiffs need only describe the potential class within reasonable limits and provide some factual basis from which the court can determine if similarly situated potential plaintiffs exist"; FLSA case). Class members are generally found to be similarly situated when they have the same employer and are subject to the same employer practices with regard to overtime practices. *Hasken v. City of Louisville*, 213 F.R.D. 280, 282 (W.D.K.Y. February 11, 2003)(FLSA case). Following merits discovery and/or a motion to decertify, the court applies a stricter standard of "similarly situated" and considers the following factors: "(1) whether the class members have disparate factual and employment settings, (2) whether the available defenses to the claims are individual to each class member, and (3) whether there are any fairness or procedural considerations relevant to the action." *Id.*

Discovery directed to class certification has occurred, but merits discovery has not. Therefore, this Court should apply the initial stage analysis from *Armijo*. Under this standard, the sole issue for the Court is whether there are substantial allegations of a single "decision, policy, or plan" to which class members were subjected. *Armijo*, 2007-NMCA-120, P 48. Not only are there substantial allegations of a single unlawful policy, there exists substantial evidence of a single unlawful policy that Defendants promulgated and administered in violation of the NMMWA.

1. The Pay Practices at Issue

The overtime pay practice of Tri-State at issue in this motion is straight-forward. Tri-State's policy and practice was not to pay flight crew members overtime compensation at one and one-half times their regular hourly rates for all hours worked in excess of forty (40) per work

week.[5] That is the illegal overtime pay practice at issue in the claim asserted in Count I, as to which conditional certification is sought here. Although the details of Tri-State's policy vary between Flight Paramedics and Flight nurses on the one hand and Pilots on the other, the end result is the same: a failure to pay overtime compensation for all hours worked over forty (40) in a workweek.

a. Flight Paramedics and Flight Nurses

With regard to Flight Paramedics and Flight Nurses, Tri-State's policy and practice was to establish an hourly rate for the Flight Paramedics and Flight Nurses and to pay them one and one-half times that regular hourly rate only for hours worked in excess of ninety-six (96) in each two-week pay period.[6] For example, Flight Paramedics and Flight Nurses were often scheduled to work two twenty-four (24) hour shifts, usually back to back, per week.[7] This practice resulted in ninety-six (96) hours worked in a two-week pay period.[8] Tri-State compensated Flight Paramedics and Flight Nurses at straight time for all of these hours, thus all or virtually all Flight Paramedics and Flight Nurses worked hours in excess of forty (40) in a workweek without receiving premium overtime compensation.[9] If a Flight Paramedic or Flight Nurse worked additional shifts, to the extent those extra work hours push the total hours worked in the two-week pay period beyond ninety-six (96), then they were compensated at one and one-half times their regular rate for the hours in excess of ninety-six (96) in the pay period. If, however, a Flight Paramedic or Flight Nurse worked three (3) twenty-four (24) hour shifts in a single week and had the next week off, the result was a workweek of seventy-two (72) hours with no overtime compensation, which is in direct violation of the NMMWA.

b. Pilots

[5] Ex. 1, *Defendants' Answers to Plaintiff's First Set of Interrogatories ("Defs' Ans. to Ptfs' 1st Rogs")*, #3, p. 4.
[6] Ex. 2, *Rule 30(b)(6) Deposition of Tri-State CareFlight: Dayna Blake ("Depo. of Tri-State*"), p. 37:20-25; *see also Complaint* [Doc. 1, filed August 3, 2017], ¶ 88; *Answer* [Doc. 7, filed August 30, 2017], ¶ 88.
[7] Ex. 2, *Depo. of Tri-State*, p.11:6-11.
[8] Ex. 2, *Depo. of Tri-State*, p. 15:14-21.
[9] Ex. 2, *Depo. of Tri-State*, p. 44:7-25.

Tri-State paid pilots a "daily rate" for a regular shift consisting of twelve (12) hours.[10] ("All duty shifts are 12 hours in length with the maximum of the FAA 14-hour duty limit."). A "daily rate" is a fixed amount for the scheduled work day, which is reduced to an hourly rate by dividing the rate by the number of hours the employee is scheduled to work.[11] Helicopter Pilots were generally scheduled to work twelve (12) hour shifts[12] and they typically worked seven (7) days on and seven (7) days off. Based on the available discovery, it appears that one hundred and thirty-eight (138) pilots worked[13], or would have been scheduled to work, this seven on/seven off schedule from June 19, 2009, to the present. Fixed wing pilots were generally scheduled to work fourteen (14) days on followed by fourteen (14) days off.[14] Fourteen (14) fixed wing pilots worked a fourteen on/fourteen off schedule from June 19, 2009, to the present.[15]

The policy and practice of Tri-State was not to pay Pilots for hours worked over twelve (12) in a day and to not pay any overtime pay for their regularly scheduled work time. *Id.* Thus, if a Pilot had to work two (2) additional hours beyond the regularly scheduled twelve (12) hour shift he or she received no additional compensation regardless of whether the extra hours of work pushed the Pilot beyond forty (40) hours in a given week.[16] Based on the available discovery, it appears that one hundred and thirty-five (135) pilots "worked at least one shift longer than 12 hours in a single work day during their employment at Tri-State," but were not paid for the additional work performed.[17]

Tri-State paid pilots overtime compensation only if the Pilots worked an additional shift in addition to their regularly scheduled shifts.[18] *Id.* Depending on the day the seven (7) or fourteen (14) day work schedule starts, Pilots could work substantial numbers of hours in excess

[10] Ex. 2, *Depo. of Tri-State*, p. 24:3-21.
[11] Ex. 2, *Depo. of Tri-State*, pp. 33:17-34:5.
[12] Ex. 2, *Depo. of Tri-State*, pp.11:25-12:8.
[13] Ex. 3, *Defendants' Answers to Plaintiff's Second Set of Interrogatories ("Defs' Ans. to Ptfs' 2nd Rogs")*, #17, p. 3.
[14] Ex. 3, *Defs' Ans. to Ptfs' 2nd Rogs*, #13, p. 1.
[15] Ex. 3, *Defs' Ans. to Ptfs' 2nd Rogs*, #18, p. 3.
[16] Ex. 2, *Depo. of Tri-State*, pp. 34:6-18 and 47:7-17.
[17] Ex. 3, *Defs' Answers to Ptfs' 2nd Rogs*, #16, p. 3.
[18] Ex. 2, *Depo. of Tri-State*, pp. 45:1-23, 47:18-24 and 55:22-56:21.

of forty (40) in a work week. At Tri-State, the workweek starts on Saturday and runs through Friday.[19] If, for example, a Pilot starts his or her work schedule on Wednesday and works for fourteen (14) consecutive days, the number of hours worked by work week may be: thirty-six (36) hours in the first workweek (Wednesday through Friday); eighty-four (84) hours in the following workweek (Saturday through Friday); and forty-eight (48) hours in the workweek following that (Saturday through Tuesday). Pilots may, therefore, work substantial overtime hours for which they were not paid premium overtime compensation in direct violation of the NMMWA.

2. Plaintiffs have submitted allegations that all Flight Paramedics, Flight Nurses and Pilots were subjected to a single unlawful decision, policy or plan.

The class Plaintiffs seek to certify under the NMMWA meets the conditional certification requirement set forth in *Armijo*. All class members were subject to a common unlawful policy of Tri-State to deny them premium overtime pay for all hours worked over forty (40) in a workweek. For Flight Paramedics and Flight Nurses this uniform policy was implemented pursuant to an acknowledged policy of paying overtime pay only for hours in excess of ninety-six (96) in a two-week pay period. For Pilots, the policy was implemented pursuant to a uniform policy or practice paying overtime only when pilots worked shifts in addition to their regularly scheduled shifts, regardless of how many hours Pilots worked during those regularly scheduled shifts. Obviously, Flight Paramedics and Flight Nurses are similarly situated because they were subjected to the exact same, uniform pay policy. The fact that Tri-State got around paying Pilots overtime pay for all hours worked over forty (40) in a workweek by a slightly different means is not material to the "similarly situated" analysis: all were victims of a uniform, company-wide policy whereby they were not compensated for all hours worked over forty (40) in every work week.

In *Armijo*, the New Mexico Court of Appeals held that the plaintiffs had successfully alleged the existence of a single decision, policy or plan by submitting evidence of "Defendants'

[19] Ex. 4, *Deposition of Nicole Payne*, pp. 70:20-71:13.

alleged pattern and practice of forcing or coercing off-the-clock work and missed rest breaks in an attempt to minimize labor costs." 2007-NMCA-120, P 54. The case involved approximately 10,000 employees employed in a large number of stores around New Mexico. Obviously, in such a scenario evidence of a "pattern and practice of forcing or coercing off-the-clock work and missed rest breaks" will take many forms, but it was not significant that specific employees may have been subjected to different conduct designed to coerce the off-the-clock work and missed rest breaks than other employees. What was significant was the overarching intent of the conduct: forcing or coercing off-the-clock work and missed rest breaks as part of an overall, uniform policy under which the employees were similarly placed. The same principle is true here. Tri-State may have utilized different pay policies and practices as between Flight Paramedics/Flight Nurses and Pilots in furtherance of its common decision, policy and plan of avoiding paying employees for all hours worked over forty (40) in a work week, but it was all in furtherance of its decision and plan to avoid its overtime obligations under the NMMWA.

Although the policies may have been somewhat different between Flight Paramedics/Flight Nurses and Pilots, all class members were subject to uniform pay policies and practices of Tri-State that failed to pay them premium overtime compensation for all hours worked over forty (40) per week.[20] The payment methods differ between Flight Paramedics and Flight Nurses on the one hand and Pilots on the other hand, but both resulted in class members being paid overtime compensation only for the time for which Tri-State determined the employees should be paid overtime compensation—not for all hours worked over forty (40) per week as required by the NMMWA[21]. This establishes that all flight crew members are similarly situated for purposes of the overtime claim under the NMMWA. *See e.g. Bustillos v. Bd. of County Comm'rs*, 310 F.R.D. 631, 663-666, 2015 U.S. Dist. LEXIS 143522, (D.N.M. September 16, 2015)(conditional certification warranted because the employees were similarly situated as they were all injured by the county's practice of requiring them to perform uncompensated pre-

[20] Ex. 2, *Depo. of Tri-State*, pp. 44:7-25, 46:24-47:17.
[21] Ex. 2, *Depo. of Tri-State*, pp. 38:1-6, 39:24-40:9, 44:7-45:23 and 46:24-47:24.

shift, post-shift, or on-call work, they worked for the same employer, they operated under the same employment policies, and they asserted injuries arising from the same alleged FLSA violations); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 585 (6th Cir. 2009)(plaintiffs are similarly situated "when they suffer from a single FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs," and holding conditional certification warranted.)

A number of other factors reinforce the argument that the employees in the proposed class are similarly situated. Tri-State's Flight Paramedics, Flight Nurses and Pilots all worked for the same employer. They worked in close proximity on bases established by Tri-State. They worked as a team in providing the service that Tri-State exists to provide—emergency flight services—and they all worked together to transport medically acute patients to a major medical center where the patients can receive the appropriate level of care.[22] The fact that Flight Paramedics, Flight Nurses and Pilots have different training, different certification and different duties does not undermine conditional class certification. *See Bustillos*, 301 F.R.D. at 665 ("Small differences between plaintiffs and proposed class members will not prevent the court from finding them similarly situated."); *Renfro v. Spartan Computer Servs., Inc.*, 243 F.R.D. 431, 434 (D. Kan. June 20, 2007)(declaring the potential plaintiffs similarly situated with the named plaintiffs despite variation in the job duties, so long as they all shared responsibility in maintaining point-of-sale systems); *Pivonka v. Bd. Of Cnty. Comm'rs of Johnson Cnty.*, Kan., No. 04-2598-JWL, 2005 U.S. Dist. LEXIS 17553, 2005 WL 1799208, at *4 (D. Kan. July 27, 2005)(finding that variations in job duties did not destroy the initial class certification where all employees shared general duties and their injuries all arose from the employer's failure to pay overtime). All flight crew members are similarly situated with respect to Tri-State's unlawful pay practices and a class of all flight crew members should be certified.[23]

[22] Ex. 2, *Depo. of Tri-State*, pp. 30:5-19 and 39:24-40:9.
[23] Ex. 1, *Defs' Answers to Pls' 1st Rogs*, #9, p.7.

If the Court determines that Pilots, for example, are not sufficiently similarly situated to Flight Paramedics and Flight Nurses because of the overtime practices applicable to their work schedules (seven on/seven off or fourteen on/fourteen off) and/or their job duties, Plaintiffs request the Court conditionally certify two classes under the NMMWA: one class of Flight Paramedics and Flight Nurses and a separate class of Pilots. There is no question but that all Flight Paramedics and Flight Nurses are similarly situated. They work the same schedules and are subject to exactly the same pay practice—overtime pay only when their work hours exceed ninety-six (96) hours in a two (2) week pay period.[24]

Similarly, there is no question but that all Pilots are similarly situated. They work generally the same schedules and are subject to payment on a daily rate[25], they receive no additional pay for extra hours worked beyond the conclusion of their regularly scheduled twelve (12) hour shifts[26], and they receive no overtime compensation at all no matter how many hours they work in a workweek unless they work additional shifts.[27]

To effectuate notice to the class and in furtherance of the development of merits based discovery, in the event the Court conditionally certifies a class or classes, Plaintiffs request that the Court order Defendants to produce an updated class list within ten (10) days of the date of the Court's Order. Plaintiffs have attached, as **Exhibit 5**, a proposed Notice to Class Members of Pendency of Class Action which they request the Court approve for transmittal to all class members.

IV. CONCLUSION

Substantial case law supports the argument that the collective action provision in the NMMWA is so intertwined with the legal rights created in the statute that it is a part of those substantive rights. For that reason, the certification standard applicable under the NMMWA must

[24] Ex. 2, *Depo. of Tri-State*, p. 37:20-25.
[25] Ex. 2, *Depo. of Tri-State*, pp. 33:25-34:16.
[26] Ex. 2, *Depo. of Tri-State*, pp. 46:24-47:17.
[27] Ex. 2, *Depo. of Tri-State*, p. 55:22-56:21.

be applied to the NMMWA claim in this case. When that standard is applied, it is clear that Plaintiffs are entitled to conditional certification of an overtime class under the NMMWA.

Respectfully submitted,

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